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TABLE OF CONTENTS

THE INTERNATIONAL CONTEXT OF THE GERMAN CONSTITUTIONAL JURISDICTION – SOME ASPECTS OF THE RELATION WITH EU AND ECHR. **Rainer ARNOLD**	**9**
THE AUSTRIAN PRESIDENCY OF THE COUNCIL OF THE EU: ACCOMPLICHMENTS AND CHALLENGES **Herbert SCHAMBECK**	**20**
THE INTERNATIONAL ARBITRATION PROCESS. THE ROMANIAN CIVIL PROCEDURE CODE VERSUS INTERNATIONAL CONVENTIONS **Sevastian CERCEL, Ștefan SCURTU**	**27**
THE LEGAL REGIME OF THE LAND ON WHICH CONSTRUCTIONS OWNED BY CONSUMER AND CRAFT COOPERATIVES ARE LOCATED **Eugen CHELARU**	**58**
THE CORE PROBLEM OF EUROPE`S MIGRATION POLICY **Heribert Franz KOECK**	**72**
THE PROTECTION OF ROMANIAN CITIZENS FUNDAMENTAL RIGHTS THROUGH THE OMBUDSMAN INTERVENTION **Mircea CRISTE, Miruna TUDORAȘCU**	**93**
THE IMPORTANCE OF NON-GOVERNMENTAL ORGANIZATONS OF ACHIEVING THE SUSTAINABLE DEVELOPMENT GOALS: THE FIGHT AGAINST RACIAL DISCRIMINATION OF ROMA IN EUROPE **Cristina HERMIDA DEL LLANO**	**107**
PROFESSIONAL STATUS OF POLITICINS HOLDING THE HIGHEST STATE POSITIONS **Jakub STELINA**	**124**
A VIDEO-TESTAMENT. ON THE POSSIBILITIES OF *AUDIOVIDEO* FORMAT FOR DISPOSITION OF PROPERTY UPON DEATH **Mariusz ZAŁUCKI**	**131**
THE ROLE OF JURISTS IN THE JUSTIFICATION OF THE IDEA OF POLITICAL POWER IN EUROPE IN THE MODERN AGE **Rafael SANCHEZ-DOMINGO**	**143**
EUROPEAN CENTRAL BANK **Andrzej SZMYT**	**153**

INSOLVENCY "AROUND THE WORLD". A NEW "DESIGN" ON THE GLOBAL GEOGRAPHICAL MAP **Ionel DIDEA, Diana Maria ILIE**	**162**
CONDITIONS FOR CIVIL LIABILITY UNDER TORT LAW IN THE EVENT OF THE UNILATERAL TERMINATION OF THE ENGEGEMENT **Nora Andreea DAGHIE**	**184**
FORCE MAJEURE-A CONTRACT CLAUSE EXEMPTING PARTIES FROM CONTRACTUAL LIABILITY **Viorel TERZEA**	**194**
SOME ASPECTS OF INTEREST FOR THE NOTARIAL SUCCESSORIAL PROCEDURE **Ilioara GENOIU**	**211**
ASPECTS RELATED TO PATRIMONIAL EFFECTS OF DIVORCE IN RELATION TO COMPENSATION AND COMPENSATORY PROVISION **Carmen Oana MIHĂILĂ**	**221**
EMPLOYMENT CONTRACT. NORMATIVE REGULATION AND CONSTITUTIONALITY IN ROMANIA **Carmen Constantina NENU**	**234**
UNIFICATION OF THE PRIVATE LAW. ABSORPTION OF THE COMMERCIAL LAW **Mihai Marian ICU**	**244**
REVIEW IN ADMINISTRATIVE CONTENTIOUS **Andreea TABACU, Amelia SINGH**	**255**
COMPLIANCE WITH THE PRINCIPLES OF THE STATE OF LAW IN THE REPUBLIC OF MOLDOVA **Maria ORLOV, Marina GROSU**	**267**
THE FORCED PAYMENT OF BUDGET RELATED DEBTS ACCORDING TO THE REGULATIONS OF THE FISCAL PROCEDURE CODE **Rada POSTOLACHE, Steluța IONESCU**	**277**
THE TRANSNATIONAL IDEA AND PERCEPTION OF RULE OF LAW **Marius VĂCĂRELU**	**293**
THE WAY FROM OHRID TO PRESPA **Mihaela STĂNCIULESCU**	**302**

EXAMINING THE ORIGINALITY OF DISPUTED WORKS **Gheorghe GHEORGHIU**	**313**
CONCEPTONS ABOUT THE ENTREPENEUR IN ECONOMIC SCENCE **Cezar VASILESCU**	**328**
THE FUNCTIONING OF THE FAMILY COUNCIL **Mihai-Adrian DAMIAN**	**335**
BENEFITS OF CITIZEN'S FREE ACCESS TO PUBLIC INFORMATION, FOR PUBLIC ADMINISTRATION **Maria URECHE**	**349**
"STREET CHILDREN" PHENOMENON IN THE ROMANIAN SOCIETY **Maria PESCARU, Cristina Maria PESCARU**	**357**
THE REASONING OF JUDICIAL DECISIONS – EXPRESSION FOR THE JUDGES' INDEPENDENCE **Florina MITROFAN**	**369**
THE PRINCIPLE OF PRIORITY OF THE EUROPEAN UNION LAW COMPARED TO THE NATIONAL LAW IN THE TAX FIELD **Adriana PÎRVU, Daniela IANCU**	**377**
EUROPEAN UNION – POLICIES IN THE AREA OF EDUCATION **Viorica POPESCU, Ancuța-Elena POPESCU**	**385**
THE CONCEPT OF ENVIRONMENTAL DAMAGE **Florin Octavian BARBU**	**392**
CONSIDERATIONS OF SETTLEMENT OF THE EXEMPTION OF NON-CONFIDENTIALITY RELATING TO ARBITRATION JUDGMENTS **Daniela LAMEȘ**	**398**
THE TERRITORIAL CHANGES OF THE EUROPEAN COUNTRIES REGARDED AS A DIMENSION OF CONSTITUTIONAL LAW AFTER ROMANIA´S INTEGRATION INTO THE EUROPEAN UNION **Daniela LAMEȘ**	**415**
AGAIN, ABOUT THE CONSULTATIVE REFERENDUM. PROS AND CONS **Ramona DUMINICĂ, Andra Nicoleta PURAN**	**429**
THE BIRTH OF THE CRIMINAL ACT FOR SERIAL KILLERS **Cătălin BUCUR**	**440**

THE ORIGINS OF THE SCIENCE OF ROMAN LAW AND TRADITIONAL RELIGIOUS PRACTICES **Andreea RÎPEANU**	**454**
DISPOSAL OF MEDICAL SAFETY MEASURES AND INSURANCE MEASURES BY THE PRELIMINARY CHAMBER **Denisa BARBU**	**464**
CONSIDERATIONS REGARDING THE WAY THE CONSTITUTIONAL COURT'S DECISIONS APPLY IN DIFFERENT STAGES OF THE TRIAL **Iustina Elena OȚELEA**	**473**
CONSIDERATIONS ABOUT HUMAN DIGNITY IN THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT **Izabela BRATILOVEANU**	**482**
CONSIDERATIONS ON STATE POWER AND THE MODE OF ITS IMPLEMENTATION **Oleg TĂNASE**	**500**
CONSIDERATIONS ON THE SUMMONING OF THE GENERAL MEETING OF SHAREHOLDERS **Dragoș-Mihail DAGHIE**	**508**
NEW CHANGES IN CONTRAVENTIONAL MATTERS IN THE ROAD CODE **Amelia SINGH, Andreea TABACU, Andrei SOARE**	**515**
ABOUT THE LAW APPLICABLE FOR THE PARENTAL AUTHORITY **Ramona DUMINICĂ, Andreea DRĂGHICI**	**522**
CONSIDERATIONS ABOUT THE INTERDICTION OF ACTS ON AN UNOPENED INHERITANCE LEGAL SUCCESSION PROCEDURE **EMILIA MATEESCU**	**532**

THE INTERNATIONAL CONTEXT OF THE GERMAN CONSTITUTIONAL JURISDICTION – SOME ASPECTS OF THE RELATION WITH EU AND ECHR.

Rainer ARNOLD [1]

Abstract:

National Constitutions regulate the relation of the State with international as well as with supranational law. The State of today is an "open State"; Rule of Law comprises the respect of internal, national and of external law. This legitimizes national constitutional justice to review the legal consequences of the introduction of international law and the admittance of supranational law into the inner legal sphere of the State. The German Federal Constitutional Court (FCC) has accepted the specificities of the supranational (EC) EU law as defined in particular by the Costa/ENEL jurisprudence but has developed limits to integration such as its ultra vires and constitutional identity concept. The European Convention of human rights (ECHR), internally with the rank of ordinary federal legislation, has been constitutionalized by the FCC stating that the German fundamental rights have to be interpreted, as far as possible, in the light of the ECHR. These concepts are also reflected by the procedural mechanisms which correspond to the interconnection between the national, international and supranational orders.

Keywords: *Constitutional Justice ; supranational law ; constitutional identity ; ultra vires actions ; preliminary question ; European Convention of human rights ; adaptation of values.*

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1. FROM CLOSED TO OPEN THE STATE

National constitutional courts protect the national Constitution. They have also the task to consider the relation of the internal legal order with external law, international as well as supranational law. This

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relation is determined by the Constitution, either in the traditional, relatively weak way of introducing international law into the internal legal order or in the particular, strong way of opening[1]the up to this moment closed national order and giving direct entrance to the specific type of law which is normally called supranational. It is evident that this last mentioned case is characteristic for the law of the European Union.

The fact that the Constitution determines the relation between external and internal law legitimizes the national constitutional court to control even international or supranational law matters insofar as they get into touch with the national legal order. The control object is regularly the national consent on the admittance of international law to the inner space of the State or, what is even much more, the direct entrance of supranational law into the national legal order. This consent is regularly expressed by the national parliament and is therefore under the control of constitutional courts. It is, insofar as international law is concerned, either the Act of approval to the international treaty, which transforms in dualist systems the international treaty into national law, as it is the case in Germany[2], or the parliamentary declaration that the international treaty is valid and applicable within the State, as it is the case for example in France[3] or in Romania[4]. The difference is that in the first case the treaty as the international legal source is converted into a national legal source, a sign for a dualist, closed order which does not accept external legal sources in the internal sphere of the State. In the second case the international legal source is incorporated, received as such by the State, a process which corresponds to the monist perspective. The Constitution or at least the constitutional jurisprudence often attributes to such directly incorporated international treaties the rank superior to legislation but inferior to the Constitution. This is a strong sign for the modern, open State.

However, also in many dualist oriented countries there is a monist approach for general principles of international law which are, as a rule, directly introduced into the legal order (such as in Germany, article 25

[1] This is a formulation used by the German Federal constitutional court (FCC) which explains the legal consequence of the transfer of sovereign powers, FCC (vol. 37), 271, 280.
[2] See article 59.2 BL
[3] See art. 55 of the French constitution
[4] See art. 11.2 of the Romanian constitution

BL). The rank of the general principles of international law is, at least according to the German doctrine, an intermediate one, between formal legislation and Constitution. It shall be noted in this context that the mechanisms institutionalized by the Constitution for introducing international law into the internal order are regularly not modified by constitutional reform (a rare exception is article 117 of the Italian constitution, modified in 2001[1]) but adapted to a modern perspective by judicial interpretation. As the provisions of the Constitution are flexible and general, such adaptation is rather easily available. Constitutional jurisprudence has developed a presumption in favor of international law which has been extended to supranational law also. The concept of open statehood as confirmed by the FCC has legitimized the methodological tool to interpret the national Constitution in favor of international as well as of supranational law. On the one hand this new approach has helped to avoid conflicts between the jurisdictions and has contributed, on the other hand, to the internationalization of the internal matters. This is not only a German phenomenon but visible also in other countries, for example in Czech Republic and Poland[2]. The idea of such an adaptation or convergence by interpretation is to avoid the clash between the existing international obligation and the internally limited obedience to international law resulting from these introduction mechanisms. Judicial interpretation sometimes goes beyond the institutional design foreseen by the Constitution. The German constitutional jurisprudence has made a step forward in internationalizing the internal legal order, even the constitutional order. The most significant expression of the internationalization process was the Gorgülü decision in 2004 expressing the obligation of the German authorities as well as tribunals to interpret the German fundamental rights in the light of the European Convention of human rights as interpreted by the Strasbourg court[3]. What is expressly foreseen by article 10.1 of the Spanish Constitution, has been developed by German jurisprudence. The impact on the understanding of the basic values in Germany is seriously influenced by the International concepts of fundamental and human rights. The FCC draws its

[1] Legge cost. n.3/2001
[2] See K 15704, in K. Budzilo (red.), Selected rulings of the Polish constitutional Tribunal concerning the law of the EU (2003-2014), 29 http://trybunal.gov.pl/uploads/media/SiM_LI_EN_calosc.pdf
[3] FCC vol. 113, p. 307; see also vol. 131, p.286

legitimation to internationalize values from article 1.2 BL which declares the attachment of Germans to the international human rights system.

Open statehood within the member states of the European Union is quite more advanced: the transfer of sovereign powers (in some countries the Constitution only speaks of the transfer of national competences, of some national competences or even only of the transfer of the exercise of competences) has opened the formerly closed door of the member State's legal order so that the regime of external, supranational law side-by-side to national law is admitted. The national legal order is therefore composed of two main bodies, the national law as well as the supranational law of the European Union. Supranational law can directly enter the member States order without any complementary act. This is a consequence of the door opened by the transfer of sovereign powers. In case of conflict between the two bodies of law within the legal order of the member State supranational law enjoys primacy.

It can be stated that the relation between international or supranational law and internal State law is determined by the national Constitution which is the "legal reason" for open statehood both with respect to international and supranational law[1]. While this is manifest for the area of traditional international law, it is disputed for supranational law. The German Federal Constitutional Court (FCC) has clearly stated that the integration norm, article 23 (formerly article 24) BL, is a legal basis and legal reason for this transfer of sovereignty and as a consequence also for the opening of the state legal order for supranational law. The FCC draws from this fact the conclusion that the direct validity and applicability of supranational law within the legal order of the member State as well as the primacy of supranational law is finally based on the constitutional provision on European integration.

From this point of view it is understandable that the German Acts of approval to the integration treaties enjoy a decisive role. They express the "integration program" and are the foundation for the "integration responsibility", as this is called by the FCC[2]. These unusual terms mean that the German Act of approval defines the competences transferred to the supranational institutions. This legitimizes the German authorities, in the view of the FCC, to interpret these competences from the German perspective, and in case this interpretation would reveal that a

[1] Expressed by the FCC in various decisions, see vol. 37: 271 or vol. 73:. 375.
[2] See in particular the Lisbon decision, FCC vol. 123: 267

supranational legal act is not covered by the competence as understood by the German interpreter to declare such an act not applicable within the German territory.[1] A preliminary question to the European Court of Justice should be made, however the German interpretation is regarded by the FCC to be the final word. The FCC has developed these principles in particular in its decision on the Maastricht Treaty[2] (in which the prohibition of supranational ultra vires actions was confirmed) and has specified it in the Mangold decision[3].

This perspective is of quite a recent importance. The decision of the European Court of Justice of 2019 on labor discrimination for employees in clerical institutions has been strongly criticized by a part of German lawyers who want to address the FCC with the demand to declare this decision inapplicable for reason of ultra-vires. [4]

2) THE APPROACH OF THE GERMAN FEDERAL CONSTITUTIONAL COURT

The jurisprudence of the FCC in integration matters can be divided into two major phases: in the first phase the FCC accepted the specificities of the supranational system, in a respectful orientation to the Costa/ENEL concept[5], affirming the primacy of community law[6], even following particular developments such as the recognition of the direct applicability of directives[7]. It can be said that in this first phase the jurisprudential foundations of the community constitutional system have been welcomed by the FCC.

In the second phase, however, the FCC confirms the acceptance of these foundations but establishes precautions and limits. It starts with the famous Solange I (1974) [8]and Solange II (1986)[9] jurisprudence

[1] Explained with distinctness by the FCC in the Maastricht Treaty decision (vol. 89), 155
[2] See not 10
[3] FCC (vol. 126), 286
[4] See https://www.zeit.de/arbeit/2019-02/bundesarbeitsgericht-kuendigung-von-katholischem-chefarzt-unwirksam
[5] ECJ 1964, 1251 et sequ.
[6] FCC (vol.73), 339
[7] FCC (vol. 75), 223
[8] FCC (vol. 37), 271
[9] FCC (vol. 73), 339

qualifying the fundamental rights protection as an indispensable element of the German order, indispensable both for the German and the community legal order. The original lack of protection on the community side was compensated later by community jurisprudence developing fundamental rights in form of unwritten general principles. It seems very probable that the position of the FCC, strictly in favor of the constitutional protection of the individual, has inspired the development of fundamental rights by community jurisprudence. This first conflict between community and member State Germany has also stimulated the introduction of a new integration norm, article 23, into the Basic Law (BL) in 1993 which requires, as a condition for membership in the European Union, that fundamental rights are adequately protected and other constitutional values are respected.

The jurisprudence of the FCC focused first, as already mentioned, on ultra vires and culminated in the invention of "constitutional identity" derived from the intangibility clause, also called eternity clause, laid down in article 79.3 BL and foreseen as a limit for constitutional reform.[1] Article 1 and the principles of article 20 BL are exempt, under this provision, from formal constitutional reform. The FCC used the existence of this clause to establish also a limit for European integration. Indeed, article 23 BL, the new integration norm, refers to this clause of the intangibility. This seems to be legitimized also in view of the fact that a transfer of sovereign powers to supranational institutions as happened by both integration treaties is not a formal but a substantial constitutional reform. The FCC has elaborated, in its decision on the Lisbon Treaty, the concept of constitutional identity qualifying it as a core substance of the constitutional order which cannot be abandoned or transferred by the State for reasons of State sovereignty.

Indeed, this concept is now frequently used by the FCC and covers broad areas of constitutional law which are connected with human dignity and democracy in particular. The jurisprudence on the monetary support during the EU financial crisis focused on democracy as budgetary freedom of the State which could be endangered by the high financial obligations as a basic requisite for politics and therefore also for democracy.[2] Extradition to Italy, though based on the European arrest warrant, was denied by the FCC for incompatibility with human dignity,

[1] FCC (vol. 133), 277
[2] FCC (vol. 129), 124

element of constitutional identity, as the person to be extradited could not have a full re-examination of his/her culpability in the Italian court.[1] Culpability however is seen as an important element of human dignity according to the confirmed jurisprudence of the FCC.

The contents of constitutional identity in a member State is different from national identity as guaranteed by article 4 TEU. National identity in this sense covers also constitutional identity as it includes the basic constitutional structures of a member State. However, constitutional identity of a member State is defined from the national perspective while national identity in the sense of article 4 TEU must be defined from the supranational perspective. This notion is larger and not identical with the national one. The supranational perspective in this sense is larger and not limited in the same way as the German identity notion. The conflict between these two notions arises in the moment when the German Constitutional Court wants to declare a legal act of the EU to be not applicable in Germany. This is what the FCC has expressly stated, in a manifest contradiction to the position of the ECJ which attributes the power to decide on the validity or applicability of a legal act exclusively to the supranational authorities and finally to the supranational court.[2]

This conflict possibility is not yet resolved. It seems that the supranational jurisprudence has to elaborate European principles which define the framework for national constitutional identity. These principles are the criteria for the ECJ to accept or refuse the national argumentation on constitutional identity in a concrete case. The ECJ has to examine whether the supranational legal act in question corresponds with the criteria elaborated by is the jurisprudence in the context of article 4 TEU.[3]

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[1] http://www.bverfg.de/e/rs20151215_2bvr273514.html
[2] ECLI:EU:C:1987:452
[3] See Rainer Arnold, *La Cour de Justice de l'Union européenne comme gardienne de l'identité constitutionnelles des États membres, Long Cours, Mélanges en l'honneur de Pierre Bon* (Dalloz, 49 – 56).

3) NATIONAL CONSTITUTIONAL JUSTICE IN THE CONTEXT OF EXTERNAL JURISDICTION

The areas of jurisdictions of the three courts FCC, ECJ and European Court of Human Rights are separated but also interconnected. The cooperation of these courts is institutionalized to some extent. Of particular importance is the preliminary question mechanism which obliges the national last instance court to address the ECJ for the interpretation of EU law which has to be applied by the national court. The CILFIT rules as established by the ECJ clarify under which conditions national last instance courts can autonomously interpret EU law without addressing the ECJ. [1]These rules permit last instance courts of the member States not to involve the ECJ for interpretation if there is *objectively* no doubt about the interpretation. It is not sufficient if the interpretation is only *subjectively* without any doubt. This *acte clair* approach has been relatively often used by last instance courts, in part also in Germany, but it cannot be regarded as conform to EU law.

Preliminary questions are dialogues in an institutionalized form between national courts and the ECJ. It seems that a dialogue between the FCC and ECJ is rather similar to a monologue. The fact that the FCC shall have the final word, at least in ultra vires or identity issues, and the it accepts the interpretation by the ECJ only if it is conform to its own opinion,[2] is no real dialogue.

A further problem is the application of the EU Fundamental Rights Charter. The interpretation of Art. 51 of the Charter by the ECJ and the FCC is different: The German perspective as exposed in the decision on Antiterrordatei[3] is that the Charter is applicable instead of the fundamental rights catalogue of the BL if the German law in question is "determined" by EU law. It seems that the approach of the EU is more comprehensive as the *Akerberg Franssen* decision of the ECJ[4] demonstrates. The relation between Charter and national Constitution is alternative, not cumulative as the relation with the ECHR is. It seems that primacy of EU law also implies to recognize the ECJ interpretation of article 51 of the Charter as the decisive one.

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[1] ECLI:EU:C:1982:335
[2] See FCC (vol. 134), 366
[3] FCC (vol.133), 277
[4] ECLI:EU:C:2013:105

Besides the diverging interpretation of the Charter application clause the FCC's concept of constitutional identity supersedes the Charter's application mechanism as it is understood by the ECJ. The German jurisprudence clearly shows that the FCC denies primacy of EU law in the reach of the identity reservation. The interpretation of article 51 does not matter for the FCC if the identity concept comes into effect.
It can be said in a summary that the relation of the FCC jurisdiction to EU law is characterized by the acceptance of EU law primacy which extends also to constitutional law on the one hand, but also by the reservation concerning the core elements of the constitutional order, the constitutional identity. This is relevant for the substantive law but has impact also on procedural law. The FCC reclaims also the interpretation competence for this reservation. This is valid also for the *ultra vires* argumentation. The EU law dimension is procedurally concerned by the preliminary question mechanism and by all procedures on EU related national actions such as the Acts of approval to the integration treaties, the implementation of directives, the application of EU law through national institutions as well as the alleged *ultra vires* actions of the EU.

The relation of the FCC jurisdiction to the Strasbourg court is less dramatic. The significant interpretation influence of the Convention has already been mentioned. This fact relativizes also the problem how to understand the binding effect of the Strasbourg decisions, only limited to the concrete case or with general interpretative influence. Besides that, the margin of appreciation issue raises questions but seems to be absorbed, at least partially, by the constitutional identity approach of the FCC. However, the debate on this is much less vehement as it is for the field of European Union.

As the relation EU and ECHR is concerned, the *Bosphorus* concept[1] seems to be still valid after the access of the EU to the Convention has failed. This question cannot be further developed in his context. It depends strongly from the new attempts to be made in this direction, according to article 6.2 EU Treaty.

[1] Judgment June 30, 2005; application no. 45036/98, 155/156.

CONCLUSIONS

As a conclusion it has to be stated that international and supranational law have become, to a growing degree, a matter of national constitutional jurisdiction. Rule of Law has clearly obtained an international (extra-State) dimension. This means respect of law, of binding internal and external law; this corresponds to the multiplicity of legal sources within the national order of today.

Open statehood is a consequence of the globalization process: the transnational interconnection of *substantial* tasks necessarily leads also to *legal* interconnection, to common institutional structures and to the approximation of values.

The adaptation of national fundamental rights to the international standards is a sign of confidence in the international community's wisdom on what values are. However, national traditions and specific orientations of the societies are a certain limit to internationalization.

The tendency to safeguard the national or regional particularities, the *identity*, is commonly visible and seems to be legitimate. Globalization cannot mean destruction and elimination of the singular bases from which the various "cultural inputs" come. Identity is upheld either as a space of reservation or as a functionally corresponding concept.

Legal concepts are in their national as well as international dimension connected with institutions (law is institutionalized), with procedural mechanisms, competence attributions, transformation or reception clauses, and many others.

It seems that the substantive processes go beyond the institutional patterns (in Germany: the transformation of international treaties is superseded and "updated" by interpretation). Old institutional limits are overruled by interpretation, "bypassed" by flexible processes, with a certain focus on values.

Open statehood is indispensable in the globalized world. However it requires the observance legitimate particularity: Unity through pluralism.

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THE AUSTRIAN PRESIDENCY OF THE COUNCIL OF THE EU: ACCOMPLICHMENTS AND CHALLENGES

Herbert SCHAMBECK[1]

Abstract:

During the second half of 2019, Austria exercised the Presidency of the Council of the European Union. It was preceded, during the first half of 2019, by Bulgaria, and is succeeded, during the second half of 2019, by Romania.

Responding to a generally felt need, the Austrian chose for its Presidency in the Council the motto "A Europe that protects". The Austrian Presidency focused on the following areas: security and the fight against illegal migration, securing prosperity and competitiveness through digitalisation, stability in the neighbourhood and the strengthening of the principle of subsidiarity. In most areas, progress was made; if it was limited in the reinforcement of FRONTEX and a speedy improvement of its mandate, this was due to the reluctance of just those Member States which would have profited most from this development to hand over additional parts of what they believed to be their sovereignty. This was a wrong approach from the point of subsidiarity, because the protection of the outer borders of the European Union is not of secondary but of primary importance.

Key words: *Council of the European Union; Austrian Presidency 2018; FRONTEX; digitalisation; EU neighbourhood; subsidiarity.*

Austria took over the presidency in the Council of the European Union for six month on 1 July 2018. Presidency of the Council was in substantive and in organisational matters a special European task which moreover coincided with a stage of great challenges and changes for the European Union.

"A Europe that protects" - that was the motto chosen by Austria for its presidency of the Council of the European Union in the second half of 2018. In line with its pro-European government programme, it was important to the Federal Government to help

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shape the EU in a positive way. The Austrian Presidency focused on the following areas: security and the fight against illegal migration, securing prosperity and competitiveness through digitalisation, stability in the neighbourhood and the strengthening of the principle of subsidiarity.

SECURITY AND FIGHT AGAINST ILLEGAL MIGRATION

The turnaround in migration policy decided upon by the European Council in June was affirmed. Since October 2015, the number of illegal arrivals has fallen by some 95 percent. The number of people dying in the Mediterranean has also decreased. Federal Chancellor Sebastian Kurz was pleased to note that "we have managed to achieve a turnaround regarding migration", with the focus having shifted to the protection of external borders and cooperation with third countries. The Central Mediterranean route had de facto been closed, with hardly any more arrivals. "We are on the right path here." In addition, an agreement was reached under the Austrian Presidency to strengthen the Frontex mandate regarding the protection of external borders and cooperation with third countries, whether countries of origin or countries of transit, including the question of the return of migrants.

The Austrian Presidency worked intensively in all three dimensions: Protection of external borders, internal dimension (reform of the asylum system) and external aspects (co-operation with African countries). As concerns cooperation with countries in the Maghreb and North Africa promising ways were opened especially as regards Egypt.

A NEW PARTNERSHIP WITH AFRICA

Under the heading of "Takig cooperation to the digital age", the High-Level Forum Africa-Europe on 17 and 18 December brought together almost 1 000 companies as well as heads of state or government from both continents. lt served to strengthen the two continents' long-term partnership with a focus on digitalisation and innovation. The Austrian Presidency wanted to support positive

economic development in Africa and help to invest in jobs and training opportunities.

SECURITY

In the course of the Austrian Presidency, important progress was made with regard to security: Union-wide rules against the distribution of terrorist contents and for securing electronic evidence in the Internet, strengthening of European networks of liaison officers for immigration questions in third countries, improving of the secureness of identity documents and of titles for staying, better access of authorities to financial information for the purpose of prosecution in order to make fight against terrorism and heavy criminality, the European Criminal Records Information System (ECRIS), strengthening of the European Civil protection mechanism and improving of cyber security within the EU.

FIGHT AGAINST ANTI-SEMITISM AND ANTI-ZIONISM

The Austrian Presidency regarded the fight against anti-Semitism and anti-Zionism an important issue.

At the High Level Conference "Europe beyond anti-Semitism and anti-Zionism - securing Jewish life in Europe" that took place on 21 November in Vienna, participants discussed the security of the Jewish community, awareness-raising, and how to address the topic of anti-Semitism. Under the Austrian Presidency, the home affairs ministers adopted a declaration on the fight against anti-Semitism and for a common security concept fr a better protection of Jewish communities and institutions, which was also explicitly welcomed by the last European Council of 13/4 December 2018.

SECURING WELFARE AND COMPETITIVENESS INTERNAL MARKET

Additional topics of the Austrian Presidency were digitalisation, robotic and artificial intelligence. About 80 percent of tabled proposals in the area of then digital internal market could be adopted. This regards

rules for the mutual recognition of goods, the registration and administration of "eu"-websites, the creation of new rules between online-platforms and enterprises (P2B) as well as an improved accessibility of information from the public sector for the promotion of innovations and start-ups. Moreover, under Austrian chairmanship Member States agreed on the screening of foreign direct investments in the European Union (FDI Screening) and on new rules for online-platforms. Several measures to fight fraud in the area of added value tax were also adopted. As regards the taxation of digital contents, a change of mind among Member States and a solid basis for further negotiations were reached.

ENVIRONMENT AND CLIMATE PROTECTION

The last Council meeting to be chaired by Austria and the last Presidency event took place on 20 December. Ministers discussed the reduction of C02 emissions from trucks and buses and agreed on reducing emissions by around 30 percent by 2030. According to estimates, this new rule will lead to cuts of some 54 million tonnes of C02 between 2020 and 2030. lt was also agreed that heavy-duty vehicle manufacturers who do not comply with the emission targets will have to pay a fine. The Austrian Presidency also reached an agreement to lower C02 emissions for passenger cars and vans by 37.5 percent. In addition, the internal market in electricity directive was adopted and a reduction of single-use plastics was set in motion. The UN climate change conference in Katowice also saw the adoption of binding climate protection rules.

PROTECTION OF EMPLOYEES

Protection of employees at work was substantially improved by establishing new thresholds for eight carcinogenic substances. As regards five more carcinogenic substances, the way was paved for lower thresholds.

In addition, Member States agreed on the creation of a new European Labour Agency which will support them in the better application of EU rules in the field of labour law.

REFORM OF THE ROAD TRAFFIC SECTOR

With the breakthrough to establishing a mobility pact, fairer rules for truck drivers and transport companies and for a more efficient control by national authorities could be reached. This comprises, *inter alia*, better social protection for EU-wide long distance truck drivers through improving their labour and resting conditions, the introduction of new digital tachographs as of 2025, as well as rules for the cabotage, i.e. the transport of goods within another EU Member State. This is an important step towards the realisation of the internal market for road freight transport.

STABILITY IN THE NEIGHBOURHOOD AND EU PRE-ACCESSION PROCESS FOR THE WESTERN BALKANS AND SOUTH-EASTERN EUROPE

WESTERN BALKANS / SOUTH-EAST EUROPA

This reason is traditionally one of high priority in Austria's foreign and European policy.

During the Austrian Presidency, the EU succeeded in once again placing greater focus on the Western Balkans and initiating a new dynamic in the process of rapprochement for all countries with an EU accession perspective, namely North Macedonia, Montenegro, Serbia and Kosovo. This resulted in the opening of two new negotiation chapters with Serbia and one with Montenegro. The European Union believes it is important to guarantee stability and security in the Western Balkans. Another positive aspect worth mentioning is that the decades-long name issue between Macedonia and Greece could be resolved.

Countries of this region were intensively involved in meetings, conferences and other events by the Austrian Presidency. An intensive visitors exchange took place on all levels of the region. At the summit of the Austrian Federal Chancellor and all Heads of Government of the region which took place in Vienna on 19 November 2018 sent out clear signals for dialogue and regional cooperation.

EASTERN PARTNERSHIP

Further development of the Eastern Partnership was a focus of the Austrian Presidency. By leading the region to the standards and the values of the European Union, a stable and economically successful neighbourhood shall be promoted.

MULTIANNUAL FINANCIAL FRAMEWORK OF THE EU FOR THE YEARS 2021-2027

Good and substantial progress was achieved on the next Multiannual Financial Framework of the EU budget for 2021-2027. Austria was able to present a complete negotiating box and has thus provided a solid foundation for Romania, the country that will take over the Council presidency from Austria.

In addition, a basic agreement on almost fifty percent of the sectorial programmes could be achieved, including, *inter alia*, Erasmus, Horizon Europe, Internal Market Programme, Digital Europe, European Solidarity Corps, as well on the future cohesion policy.

EXIT OF THE UNITED KINGDOM FROM THE EUROPEAN UNION (BREXIT)

Brexit was among the greatest challenges of the Austrian Presidency. Austria did everything possible to maintain unity among the EU 27 vis-à-vis the United Kingdom and supported EU Chief Negotiator Michel Barnier.

The Exit-Treaty as well as a Political Declaration on the future relationship with the UK were adopted by the Heads of States and Governments on 25 November 2018. In addition, important accompanying decisions for an orderly exit were taken, concerning, *inter alia*, the transfer of two EU Agencies, namely the European Medicines Agency (EMA) and the European Banking Authority (EBA) from London to Amsterdam and Paris.

SUBSIDIARITY AND CITIZENS CONSULTATION

Subsidiarity was also a priority of the Austrian Presidency. On 15 and 16 November the conference "Subsidiarity as a building principle of the European Union" took place in Bregenz. A Declaration on the Strengthening and Better Application of the Principle of Subsidiarity within the European Union was adopted which will be considered in the course of the Debate on the Future at the EU Summit envisaged for May 2019.

Instead of a Europe that overregulates on small details what is needed is a Europe that assumes responsibility for the big questions and increasingly leaves the small questions to the Member States or regions.

In the context of the discussion about the future of the European Union, consultation of citizens took place in Austria as well in most other Member States. Results of this consultation were presented to the European Council in December 2018 in a common report by the Austrian and the forthcoming Romanian Presidency.

THE AUSTRIAN PRESIDENCY IN FIGURES

128 dossiers were successfully negotiated. The Austrian Presidency reached 53 political agreements with the European Parliament and 75 agreements in the Council. In addition, 56 conclusions and recommendations were adopted, 52 legal acts were adopted by the Parliament and the Council, and the Council made in total 509 additional decisions.

In total, 2,722 meetings were held in the framework of the Austrian Presidency, including meetings in different bodies in Brussels, Luxembourg and Strasbourg.

The Austrian Presidency in the second half of 2018 endeavoured to combine the responsibility of the state with the expectations of the European Union in a path-breaking manner.

THE INTERNATIONAL ARBITRATION PROCESS. THE ROMANIAN CIVIL PROCEDURE CODE VERSUS INTERNATIONAL CONVENTIONS

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Abstract:

The Romanian legislature regulated the international arbitration process in Book VII ("The International Arbitration Process"), Title IV ("International Arbitration and the Effects of Foreign Arbitral Awards"), on the assumption that the international arbitration litigation is a variant of the international civil trial. Chapter I of Title IV, referred to above, was exclusively devoted to the international arbitration process. In the chapter entitled "The International Arbitration Process", the Romanian legislature regulated issues such as: the classification of the international arbitration litigation; the scope of the Romanian law; the arbitrability of the dispute; the formal and substantive conditions of the validity of the arbitration agreement; the establishment of the arbitral court; the establishment of the arbitration procedure; provisional and conservative measures; the jurisdiction of the arbitral court; the law applicable to the dispute; the arbitral award. Most of the rules that the legislature set in the international arbitration process are found in international arbitration conventions, conventions to which Romania is a party and which have the merit of promoting the settlement of disputes through arbitration and of facilitating the implementation of arbitral awards.

Key-words: *international arbitration process; international conventions; settlement of disputes; arbitral court; arbitration procedure; arbitral award; arbitration agreement.*

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1. THE REGULATORY FRAMEWORK OF THE INTERNATIONAL ARBITRATION PROCESS IN ROMANIAN LAW.

The Romanian legislature did not regulate the international arbitration process in Book IV ("On Arbitration") of the Civil Procedure Code, but in Book VII ("The International Arbitration Process"), Title IV ("International Arbitration and the Effects of Foreign Arbitral Awards"); Chapter I of Title IV was exclusively devoted to the international arbitration process. As noted in the doctrine, this option of the Romanian legislature, from the point of view of legislative systematization, had as a premise the idea that "the international arbitration litigation is a variant of the international civil trial" [1].

2. THE REGULATION OF INTERNATIONAL ARBITRATION UNDER INTERNATIONAL CONVENTIONS

In matters of international arbitration, several international conventions have been adopted laying down uniform legal rules meant to promote international arbitration and to facilitate the enforcement of arbitral awards.

The following international conventions have received incidence in the activity of international arbitration in Romania[2]:

-The 1923 Geneva Protocol on Arbitration Clauses;

- The 1927 Geneva Convention on the Execution of Foreign Arbitral Awards;

- The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (referred to in the arbitral doctrine as the New York Convention);

- The European Convention on International Commercial Arbitration, concluded in Geneva on 21 April 1961(referred to in the arbitral doctrine as the Geneva Convention);

- The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, adopted in Washington on 18

[1] R.B. Bobei, *Arbitrajul intern și international. Texte. Comentarii. Mentalități* (Bucharest: C.H. Beck, 2013), 235.

[2] *Dicționar diplomatic, lucrare colectivă*, coordonators P. Bărbulescu ș.a. (Bucharest: Politică, 1979), 280; Br. Ștefănescu, I. Rucăreanu, *Dreptul comerțului internațional* (Bucharest: Didactică și Pedagogică, 1983), 130-132; *Dicționar de relații economice internaționale, lucrare colectivă*, coordonators Gh. Marin and Al. Puiu (Bucharest: Științifică și Enciclopedică, 1993), 201

March 1965 (referred to in the arbitral doctrine as the Washington Convention).

3. RULES OF INTERNATIONAL CONVENTIONS ADOPTED IN ROMANIAN LAW

The Romanian Civil Procedure Code, in the chapter entitled "The International Arbitration Process", regulates the following aspects of international arbitration: the qualification of the international arbitration process, the scope of application, the arbitrability of the dispute, the arbitration agreement, the arbitral tribunal, arbitral proceedings, the language of arbitration, provisional and conservative measures which the arbitral tribunal may order at the request of either party, the administration of evidence, the jurisdiction of the arbitral tribunal, the law applicable to the dispute, the arbitral award, arbitration costs, subsidiary enforcement rules.

Observing the provisions of international conventions on arbitration, we find that those provisions of principle have been transposed into Romanian law.

A. Qualification of the international arbitration process

Pursuant to art. 1111 of the Civil Procedure Code, "an arbitration dispute in Romania is considered international if it arose out of a private law relation with a foreign element".

This provision of the Romanian law is consistent with that contained in the Geneva Convention, which states that its provisions apply to arbitration agreements concluded for the settlement of disputes that arose or will arise out of international trade operations between natural or legal persons having, at the time of the conclusion of the arbitration agreement, their habitual residence or their seat in different contracting states (art. I par. 1 letter a).

The doctrine also recognizes the foreign element as the criterion according to which a distinction is made between private international law relations and other legal relations of private law.

Neither in the Civil Code, nor in the Civil Procedure Code, did the legislature define in terminis the foreign element, as it did in the case of private international law relations [pursuant to art. 2557(2) of the Civil Code "(...) private international law relations are civil, commercial relations, as well as other private law relations with a foreign element"].

The doctrine defined the foreign element, and those definitions are similar.

Thus, in a definition, it was said that "the foreign element is that part of the legal relation which is abroad or under the influence of a foreign law"[1].

In another definition, the foreign element is considered to be "the factual circumstance of a legal relation, due to which this relation is connected with several systems of law (or laws belonging to different countries)"[2]; or "a factual circumstance regarding one of the elements of the legal relation and thus making it connect with one or even more systems of law"[3]; or "a factual circumstance of a diverse nature, which is connected with a legal relation of private law, a circumstance which gives the legal relation a character of internationality"[4].

In the same way, T.R. Popescu argues that, when an element of the legal relation or a fact relating to the birth, modification or termination of a legal relation lies abroad or under the rule of a foreign law, that element is of "extraneity" or "foreign" and the respective legal relation is called a "private international law" relation. The legal relations of private international law have the same structure as the domestic law, but they also contain a foreign element, which must be taken into account in determining their legal status[5].

Regardless of the definition given to it, one must retain that the foreign element is not a distinct element of a legal relation (along with subjects, content and object), but is part of it.

In the light of the provisions of the Romanian law, the following elements can be considered foreign elements[6]: a) foreign elements related to the subjects of the legal relation: citizenship, domicile or residence, and in the case of foreign legal persons the nationality, the registered office, the business located abroad, etc.; for example, two foreign persons conclude a loan agreement in Romania; a Romanian person sells goods to a foreign person, etc.; b) foreign elements related to the derived object of

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[1] D.A. Sitaru, *Drept internațional privat. Tratat* (Bucharest: Actami, 1997), 7.
[2] I.P. Filipescu, A.I. Filipescu, *Tratat de drept internațional privat, ed. revăzută și adăugită* (Bucharest: Universul Juridic, 2005), 21.
[3] D.A. Popescu, M. Harosa, *Drept internațional privat. Tratat elementar, vol. I* (Bucharest: Lumina Lex, 1999), 124.
[4] T. Prescure, C.N. Savu, *Drept internațional privat* (Bucharest: Lumina Lex, 2005), 24.
[5] T.R. Popescu, *Drept internațional privat* (Bucharest: Romfel SRL, 1994), 8.
[6] Popescu, *Drept internațional privat*, 7; Sitaru, *Drept internațional privat. Tratat*, 7.

the legal relation: place of the location of the goods (the goods are located abroad or are to be produced abroad); for example, a sales contract is concluded between two Romanian legal entities in respect of goods located abroad; c) foreign elements related to the content of the legal relation; the rights and obligations of the parties may be related to facts which, being placed abroad or subject to a foreign law, are foreign elements: the place where the legal relation was created or where it produces its effects, ie the place where the legal act was concluded or performed, the place where the document of the legal act was concluded; the place of the action generating the damage, the place where the damage occurred, etc.

A legal relation may contain one or more foreign elements; as far as the legal relations of international trade are concerned, only those elements of internationality which are capable of determining the legal relation of two or more national legal systems, ie to give rise to a conflict of laws in space, are of relevance.

For international trade law relations, some foreign elements are not relevant; for example, the Uniform Law on the International Sale of Goods, The Hague, 1964, provides that "the application of the present Law shall not depend on the nationality of the parties" (art. 1, par. 3). The same applies to the provisions of the United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980, according to which the nationality of the parties is not taken into account for the application of the convention (art. 1, point 3). In the light of such provisions, it is considered in international practice that the citizenship of the parties, as a foreign element, is irrelevant to the international character of a legal relation.

Moreover, the classification of a contractual element as having an international character differs according to the nature and specificity of each contract. The same element of internationality may be relevant to international trade law in a particular contract (for example, the conclusion of a sales contract by traders of different nationalities because they are based in different countries) and, in the case of other contracts, it may be irrelevant (for example, the contract for the establishment of a company based in Romania by commercial companies of different nationalities does not have a relevant internationality element because the established company will have Romanian nationality and will be subject only to the Romanian law). In contracts relating to the provision of

services, the element of internationality is related to the performance of the benefit on the territory of another state (transport of persons or goods, performance of works, etc.)[1].

In order to determine the international character of the legal relations of international trade law, some international conventions have enshrined the subjective criterion, others the objective criterion[2].

The subjective criterion is set forth by the following international conventions: (i) the Washington Convention, which refers to persons who have "the nationality of a Contracting State other than the State party to the dispute" (art. 25, par. 2, letter a); (ii) the International Convention on the Limitation Period in the International Sale of Goods, 1974, which provides that "a contract of sale of goods shall be considered international if, at the time of the conclusion of the contract, the buyer and the seller have their places of business in different States" (art. 2, letter a); (iii) the Convention on Contracts for the International Sale of Goods, Vienna, 1980, which specifies that this Convention "applies to contracts of sale of goods between parties whose places of business are in different States" (art. 1) "if a party does not have a place of business, reference is to be made to his habitual residence" (art. 10, letter b); (iv) the Geneva Convention, which refers to physical or legal persons having "their habitual place of residence or their seat in different Contracting States" (art. 1, point 1, letter a).

The objective criterion requires that the goods making the object of the legal relation cross at least one border point. This criterion is provided by the following international conventions: (i) The Uniform Rules concerning the Contract for International Carriage of Goods by Rail, Bern, 1980, provide (art. 1, point 1) that the rules apply to contracts of international carriage of goods by rail, crossing the territories of at least two states; (ii) The Convention for the Unification of Certain Rules for International Carriage by Air, Montreal, 1999, states (art. 1, point 2) that international carriage means any carriage in which the place of departure and that of destination are situated within the territories of two States Parties; (iii) The 1956 Geneva Convention on the Contract for the International Carriage of Goods by Road (art. 1, point 1) provides that its

[1] R. Motica and T. Medeanu, *Dreptul afacerilor, vol. II, Dreptul comerțului internațional* (Alma Mater Timisiensis, 2001), 23.
[2] M. Galanton, *Dreptul comerțului internațional* (Timișoara: Orizonturi Universitare, 2004), 22.

provisions shall apply to any contract for the carriage of goods by road where the place of taking over the goods and the place of delivery are situated in two different countries, irrespective of the place of residence and nationality of the participants in the contract.

The Romanian Civil Code has enshrined the objective criterion of internationality; relevance in this respect is proved by the provisions contained in Book VII, entitled "Provisions of Private International Law"; thus, art. 2638 of the Civil Code, par. 1 stipulates that, in the absence of choice by the parties of the law applicable to the conditions of validity of the concluded contract, the jurisdictional body shall apply the law of the state with which the legal act has the closest links and if this law cannot be identified, it shall apply the law of the place where the legal act was concluded. Pursuant to art. 2638 paragraph 2 of the Civil Code, it is considered that the legal act has "the closest links" with the law of the state where the debtor of the characteristic performance has, at the time of the conclusion of the act, as the case may be, his habitual residence, business activity or registered office; the jurisdictional body is called upon to assess with which of these alternative elements the legal act has the closest links.

In the case of the plurality of "elements of connection with foreigners", only the element which establishes the strongest connection between the legal relation to which it belongs and the applicable national law system is important, because one national law shall apply to that legal relation, namely the law indicated by the conflict rule.

The establishment of foreign elements conferring international character on a legal relation is made either by internal law or by international conventions or uniform rules governing international trade legal relations; many of them define the elements of internationality specific to those relations. For example, the Vienna Convention, 1980, states that its provisions apply to contracts for the sale of goods between parties having their seat in different states. Therefore, the Romanian judge will settle the conflict of laws in the light of the conflict rules contained in the Romanian law or in an international convention to which Romania is a party.

B. The scope of the provisions of the Romanian law on international arbitration

The Romanian Civil Procedure Code specifies that its provisions on international arbitration are applicable if, in addition to the presence of the foreign element in the private law relation, two cumulative conditions are met (art. 1111, par. 2 of the CPC): a) the arbitral tribunal is in Romania [pursuant to art. 1111 (3) CPC, the seat of the arbitral tribunal shall be determined by the parties concerned or by the arbitration institution designated by them and, failing that, by arbitrators]; b) at least one of the parties did not have the domicile or habitual residence, namely the headquarters in Romania at the time of the conclusion of the arbitration agreement.

With regard to this provision in the Romanian law, it was argued that one should not exclude the hypothesis that, in some situations, both parties would have their seat in Romania, the contract concluded by them would be qualified as international, and the dispute arising from such a contract would be settled by international arbitration, if the parties concluded an arbitration agreement and agreed to its taking place in Romania, although it was not covered by art. 1111(2) CPC[1]. These provisions of the Civil Procedure Code are suppletive; as a consequence, the parties may exclude their application by the arbitration agreement or after its conclusion, but only in writing.

Similarly to art. 1111(2) CPC, art. 1 of the Geneva Convention, which has the marginal meaning "Scope of the Convention", provides that this Convention shall apply to: arbitration agreements concluded for the settlement of disputes arising out of international trade operations between natural or legal persons having, at the time of the conclusion of the Convention, their habitual residence or their seat in different Contracting States.

C. Arbitrability of the dispute

Pursuant to art. 1112(1) CPC, any claim of a patrimonial nature may be subject to arbitration if it concerns rights over which the parties may freely dispose and the law of the state where the seat of the arbitral tribunal lies does not reserve exclusive jurisdiction to courts.

[1] I. Deleanu, V. Mitea and S. Deleanu, *Noul Cod de procedură civilă, vol. II, comentariu pe articole* (Bucharest: Universul Juridic, 2013), 579.

For example, the Romanian law provides, in art. 542 CPC, that the litigation between natural and/or legal persons concerning civil status, the capacity of persons, the succession debate, family relations, as well as the rights of which the parties cannot dispose, fall within the exclusive jurisdiction of courts. The state and public authorities may only conclude arbitration agreements if they are authorized by law or by international conventions to which Romania is a party. Legal entities governed by public law performing economic activities have the power to enter into arbitration agreements, unless otherwise provided by law or by their act of establishment or organization.

If one of the parties to the arbitration agreement is a state, a state-owned enterprise or a state-controlled organization, that party may not invoke its own right to challenge the arbitrability of a dispute or its capacity to be a party to arbitral proceedings (art. 1112, par. 2 CPC).

In relation to this provision of the Romanian law, the doctrine has made it clear that the effectiveness of the arbitral award depends on the country where recognition and enforcement will be required, because in some systems of national law the concept is conceived that states and their dismemberments cannot conclude arbitration agreements[1].

It should be noted that the provisions of art. 1112(2) CPC are in line with the Geneva Convention, which in art. II (entitled "Right of legal persons of public law to resort to arbitration") provides that legal persons qualified by the law applicable to them as "legal persons of public law" are entitled to conclude valid arbitration agreements.

D. Form of the arbitration agreement

Article 1113 CPC, which governs the conditions of validity of the arbitration agreement, provides that it shall be validly concluded in written form, in a document, by telegram, telex, telecopier, electronic mail or any other means of communication allowing to provide evidence through a text.

The Geneva Convention admits the oral form of the arbitration agreement. Thus, in art. I(2)(a) it is provided that "arbitration agreement" means either an arbitral clause contained in a contract or an arbitration agreement, the contract or the agreement being signed by the parties, or contained in an exchange of letters, telegrams or communications by

[1] Deleanu, Mitea and Deleanu, *Tratat de procedură civilă, vol. III* (Bucharest: Universul Juridic, 2013), 799; Deleanu, Mitea, Deleanu, *Noul Cod de procedură civilă,* 580.

teleprinter and, in relations between countries whose laws do not impose the written form for the arbitration agreement, any agreement concluded in the forms permitted by these laws.

The countries referred to in this article are those where the parties to the arbitration agreement have their seat or residence at the time of the conclusion of that agreement. Consequently, even if the laws of the states in which the arbitration is conducted, and therefore the arbitration agreement is invoked or in which the recognition and enforcement of the arbitral award is required, stipulate that an arbitration agreement must be concluded in written form, the jurisdictional body may appreciate that an arbitration agreement concluded in oral form is valid if such a form is accepted by the laws of the states where the parties have their residence or seat[1].

The New York Convention provides, in art. II(1)(2) that each of the contracting states recognizes the written agreement by which the parties undertake to submit to arbitration all disputes or certain disputes which have arisen or which may arise between them with regard to a particular contractual or non-contractual legal relation, regarding a matter that may be settled by arbitration. "Agreement in writing" means an arbitral clause inserted in a contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams.

In respect of these provisions of the New York Convention, the following findings were made in the legal literature: (i) in an opinion these provisions do not apply to a written offer containing an arbitral clause, followed by an oral acceptance or immediate performance of the contract[2]; (ii) art. II(2) limits the means of communication to those existing at the time of adopting the convention, and the enumeration does not include, for example, electronic mail; (iii) the provisions of this Convention are without prejudice to the validity of multilateral or bilateral agreements concluded by the contracting states on the recognition and enforcement of arbitral awards, and do not deprive any party concerned of the right which he may have to make use of an arbitral award in the manner and to the extent permitted by the law or treaties of the country where the award is invoked. In other words, the New York Convention allows consideration as to the more favorable

[1] Deleanu, Mitea and Deleanu, *Tratat de procedură civilă, vol. II*I, 800.
[2] V. Babiuc, I. Băcanu and G. Florescu, "Aspecte noi din arbitrajul comercial internațional", *Revista de drept comercial* no. 10 (2002): 32-33.

rules of another treaty or domestic law, including rules on the form of the arbitration agreement. Consequently, the more advantageous provisions of art. 1113 of the Romanian Civil Procedure Code have priority over those of art. II of the New York Convention[1].

E. Substantive conditions of the arbitration agreement. As far as the substantive conditions are concerned, the arbitration agreement is valid if it meets the requirements imposed by one of the following laws: a) the law established by the parties; b) the law governing the object of the dispute; c) the law applicable to the contract containing the arbitral clause; d) the Romanian law (art. 1113, par. 2 CPC).

Both the New York Convention and the Geneva Convention enshrine as the primary criterion for determining the law applicable to the arbitration agreement - the law chosen by the parties (lex voluntatis) and, as a subsidiary criterion, in case the parties have not established the law applicable to the arbitration agreement, the law of the country where the arbitral award must be pronounced.

Thus, pursuant to art. V(1)(a) of the New York Convention, the recognition and enforcement of the award must not be refused, at the request of the party against whom it is invoked, unless he provides proof to the competent authority of the country where recognition and enforcement are required that the parties to the arbitration agreement were, under the law applicable to them, affected by an incapacity or that the said agreement was not valid under the law to which the parties subordinated it or, in the absence of any indication to that effect, under the law of the country where the award was made.

Along the same line, pursuant to art. VI(2)(a)(b) of the Geneva Convention, when they have to rule on the existence or validity of an arbitration agreement, the courts of the contracting states shall decide, as regards the capacity of the parties, under the applicable law, and, as regards the other issues they shall decide: a) under the law to which the parties have subjected the arbitration agreement;
b) or (in the absence of such an indication) under the law of the country where the award has to be made.

For the hypothesis where it is not possible to foresee the country in which the award is to be given, art. VI(2)(c) of the Geneva Convention stipulates that the competent law shall be applied by virtue of the conflict

[1] Deleanu, Mitea and Deleanu, *Tratat de procedură civilă, vol. III*, 801.

rules of the court seized of the dispute (such a provision is not found in the New York Convention).

Observing the provisions of art. 1113(2) CPC and those of the two international arbitration conventions to which Romania is a contracting party, we find that the provisions of the Romanian law regarding the substantive conditions of the arbitration agreement are different from those of the international conventions.

The doctrine has analyzed the inconveniences of the provisions of the Romanian law, which may lead to difficulties of interpretation, highlighting the following aspects[1]: (i) it is unclear whether the order of applying the solutions provided by art. 1113(2) CPC is the one of their enumeration or their enumeration has an alternative character; (ii) where the parties have specified the law applicable to the international contract in which the arbitral clause was included, can it be deemed that it was their will to have that law applicable to the arbitration agreement too? (iii) where the parties have not established the law applicable to the arbitration agreement, in order to determine it, should the determination criteria specific to the arbitration agreement or those of the main contract prevail? (iv) should the Romanian law (the last in the order of enumeration in art. 1113, par. 2 of the Civil Procedure Code) apply as the law of the place of performance of the arbitration agreement, the law of the arbitration headquarters or the law having the general vocation of a subsidiary application (in cases where the content of the foreign law applicable to the case cannot be determined)?

The solutions generally accepted in the arbitral doctrine are the following: a) when the parties have expressly chosen the law applicable to the arbitration agreement, they must take advantage of their choice, in accordance with the provisions of art. 1113(2)(a) CPC; b) if the parties have not determined the law applicable to the arbitral clause, but have determined the law applicable to the main contract, the law chosen by the parties also applies to the arbitration agreement, ie the application of the provisions of 1113(2)(a) CPC, considering that the parties have impliedly established the law applicable to the arbitration agreement (This rule would not apply if the parties were to establish that some of the contractual clauses would be subject to a certain system of law, and others to different national laws[2]); c) if the parties have not chosen either

[1] Deleanu, Mitea and Deleanu, *Noul Cod de procedură civilă,* 582.
[2] Deleanu, Mitea and Deleanu, *Tratat de procedură civilă,* 802.

expressly or impliedly the law applicable to the arbitration agreement, the provisions of art. 1113 (2)(b)(d) CPC must be applied, according to the principle enshrined in the Romanian Civil Code, which sets out that, in the absence of the choice of the applicable law by the parties, the law of the state with which the legal act has the closest links applies[1].

The application of the provisions of art. 1113(2)(d) CPC, in the light of this principle, would be justified by the argument that the Romanian law becomes applicable because it is the law of the arbitration headquarters and the law of the place of performance of the arbitration agreement[2]; the solution would be consistent with the provisions of art. V(1)(a) of the New York Convention and those of art. VI(2)(b) of the Geneva Convention.

F. Autonomy of the arbitral clause

Art. 1113 par. 3 CPC enshrines the principle of autonomy of the arbitral clause by providing that the validity of the arbitration agreement cannot be challenged on the ground that the main international contract in which it was incorporated was invalid or because it concerns a litigation which does not yet exist.

The first thesis of art. 1113(3) CPC refers to the impossibility of challenging the validity of the arbitration agreement, because of the invalidity of the main international contract, which concerns both its forms, so both the arbitral clause and the arbitration agreement. The second thesis of this paragraph refers to the impossibility of challenging the validity of the arbitration agreement in the form of an arbitral clause on the grounds that it concerns a litigation that does not yet exist (the legislature's intention is deduced from the fact that only the arbitral clause has as object "the disputes that will arise"). From the provisions of this article, the doctrine concluded that both the action for a declaration

[1] Pursuant to art. 2637(1) of the Civil Code, the substantive conditions of the legal act are determined by the law chosen by the parties or, as the case may be, by its author, and pursuant to art. 2638 of the Civil Code, in the absence of such a choice, the law of the state with which the legal act has the closest links is applied, and if this law cannot be identified, the law of the place where the legal act was concluded is applied. It is considered that there are such links to the law of the state in which the debtor of the characteristic performance or, as the case may be, the author of the act has, at the time of the conclusion of the act, as the case may be, the habitual residence, business activity or registered office.

[2] Deleanu, Mitea and Deleanu, *Tratat de procedură civilă*, 803.

of absolute nullity and the action for the declaration of relative nullity of the arbitral clause was inadmissible, as there is no dispute over the substance of the main international contract, there is no born and current interest. Through these legal provisions, the Romanian legislature enshrined the theory of inadmissibility of the preventive action in the nullity of the arbitral clause[1].

The autonomy of the arbitral clause towards the main international contract has various consequences[2]: (i) the nullity of the main contract in which the arbitral clause is included does not in itself entail the invalidity of the arbitral clause and therefore the arbitrators referred to will be able to state, and impliedly, will be able to rule on their own competence; and if only some of the clauses of the main contract are contrary to public order and therefore affected by nullity for this reason, the arbitral clause remains valid; some nullities are, however, common to the arbitral clause and the main contract, such as the lack of capacity or defects, because in both contracts the parties are the same; but in such a case the ground for nullity of the arbitral clause is analyzed distinctly from that of the main contract; (ii) the rescission or termination of the main contract has no repercussions on the arbitral clause; (iii) the law applicable to the arbitration agreement (which is also applicable, as a matter of principle, to the arbitration procedure) may be different from the one governing the main contract.

The international arbitration conventions have not enshrined the principle of the autonomy of the arbitral clause; thus: (i) The New York Convention, although enshrining in art. V(1)(a), the right of the parties to choose the law governing the arbitration agreement, distinct from the law of the main international contract (and in the absence of a choice of the parties, the law of the country where the award was given applies), did not enshrine the rule of the autonomy of the arbitral clause. (ii) The Geneva Convention, while providing for the rule that " (...) the arbitrator whose jurisdiction is challenged must not renounce the trial; he has the right to decide on his own competence and on the existence or validity of

[1] T.R. Popescu, *Dreptul comerțului internațional* (Bucharest: Didactică și Pedagogică, București, 1983), 375; Bobei, *Arbitrajul intern și international. Texte. Comentarii. Mentalități*, 269.

[2] Popescu, *Dreptul comerțului internațional*, 375; Bobei, *Arbitrajul intern și international. Texte. Comentarii. Mentalități,* 268; Deleanu, Mitea and Deleanu, *Tratat de procedură civilă,* 806.

the arbitration agreement or of the contract of which that convention is part", has not enshrined in terminis the principle of the autonomy of the arbitral clause; nevertheless, the legal literature has shown that it can be inferred from the aforementioned rule that the question of the validity of the main international contract "does not affect the jurisdiction of the arbitral tribunal to adjudicate, because the grounds on which the jurisdiction of the arbitrators is assessed are different in respect to the elements which are examined in relation to the validity of the main international contract"[1]. (iii) The Washington Convention also provides that the arbitral tribunal is competent to rule on its jurisdiction (art. 41, par. 1), without explicitly regulating the autonomy of the arbitral clause.

Instead, the principle of the autonomy of the arbitral clause is enshrined in several national legal systems (French, Belgian, German, Swiss, North American law, etc.) as well as the procedural rules of national or international arbitration institutions.

Selection of arbitrators constituting the arbitral tribunal

The conditions for the establishment of the arbitral tribunal and the recusal of the arbitrators are regulated by art. 1114(1) CPC, which stipulates that the appointment, revocation and replacement of arbitrators shall be carried out in accordance with the arbitration agreement or those established by the parties after its conclusion, and in the absence thereof, the interested party may request the arbitral tribunal to do so, while applying, by analogy, the legal provisions on internal arbitration.

Therefore, for the selection of arbitrators, the law gives priority to the will of the parties; only in the absence of its expression, the interested party may request the arbitral tribunal to do so (in the case of ad hoc arbitration) or the arbitrators will be appointed by the nominating authority, according to the rules of procedure of the permanent arbitration institution.

The provisions of the Romanian law are in line with those of the New York Convention, which, in art. V(1)(d) provides that the recognition and enforcement of the award may be refused at the request of the party against whom it is invoked if the latter provides proof to the competent authority of the country where recognition and enforcement are required that the composition of the arbitral tribunal or the arbitration

[1] I. Deleanu and S. Deleanu, *Arbitrajul intern și internațional* (Bucharest: Rosetti, 2005), 332-333.

procedure was not in compliance with the agreement of the parties, or, in the absence of an agreement, that it was not in compliance with the law of the country where the arbitration took place.

Pursuant to art. I(2) of the New York Convention, "arbitral awards" mean not only the awards rendered by arbitrators appointed for specific cases, but also those given by the permanent arbitration bodies to which the parties have been subjected; therefore, an arbitrator may be not only a natural person, but also a legal person that has the status of a permanent arbitration institution.

According to the rules established by the Romanian law regarding the selection of arbitrators, there are also uniform material rules of the Geneva Convention, according to which the parties to the arbitration agreement are free to provide: a) that their disputes will be submitted to a permanent arbitration institution (in which case arbitration will be conducted in accordance with the Regulation of the designated institution); b) that their disputes will be submitted to an ad hoc arbitration procedure; in this case, the parties to the arbitration agreement will have the following rights: (i) to designate the arbitrators or to determine the modalities according to which the arbitrators will be appointed in case of litigation; (ii) to determine the place of arbitration; (iii) to establish the rules of procedure to be followed by the arbitrators (in the doctrine it was emphasized that "when the parties to the arbitration agreement choose the law applicable to the arbitration procedure, they must comply with its binding provisions on the constitution of the arbitral tribunal"[1]).

"The Rules of Arbitration of the International Commercial Arbitration Court attached to the Chamber of Commerce and Industry of Romania" (hereinafter referred to as the Arbitration Rules of the CAB), in force on 1 January 2018, are consistent with the provisions of art. 1114(1) CPC. Thus, pursuant to art. 19, if the parties have not agreed on the procedure for the designation of arbitrators or if the arbitral tribunal has not been established within the time limit set by the parties or if the parties have not agreed on a certain time limit, within the time limit set by the President of the Court, the designation or, where appropriate, the appointment of arbitrators will be made in accordance with the following rules: a) Where the arbitral tribunal is to consist of a single arbitrator, the parties will have a period of 30 days to designate the arbitrator jointly. If

[1] Deleanu, Mitea and Deleanu, *Tratat de procedură civilă,* 813.

the parties do not designate the arbitrator within this time limit, he will be appointed by the President of the Court. b) If the arbitral tribunal is to consist of three arbitrators, the claimant and the defendant will each designate one arbitrator, according to the rules of the arbitration procedure of the Court, and the third (the presiding arbitrator) will be selected by the two arbitrators. If either party does not designate the arbitrator within the time limit set by the Court's rules of arbitration, he will be appointed by the President of the Court. If the designated arbitrators do not agree, within a 5-day period, on the presiding arbitrator, he will be appointed by the President of the Court. c) If there are several claimants or, as the case may be, several defendants and the arbitral tribunal is to consist of three arbitrators, the claimants or, as the case may be, the defendants together designate one arbitrator. If none designates the arbitrator within the time limit set by the Court's rules of arbitration, the College of the Court will appoint all arbitrators.

Recusal of arbitrators

Pursuant to art. 1114(2) CPC, the arbitrator may be recused in the following situations: a) when he has no qualification established by the parties; therefore, the parties may impose certain requirements on the qualification of the arbitrators, depending on the particularities of the main contract (for example, to be a lawyer, economist, etc.); b) where there is a cause of recusal of those provided for in the rules of the arbitration procedure adopted by the parties or, failing that, by the arbitrators; c) where circumstances give rise to a legitimate doubt as to his independence and impartiality.

The arbitrator's impartiality is presumed; according to the evidence provided by the party requesting the recusal of an arbitrator, invoking the "legitimate doubt about his independence and impartiality", the tribunal will admit or not the recusal request.

With respect to the legitimate doubt as to the arbitrator's independence and impartiality, we believe that a landmark in the assessment of such a request must be the grounds for incompatibility legally provided for judges (art. 41 and CPC) and for arbitrators, within domestic arbitration (art. 562 CPC).

As for the illustrative or limitative nature of the grounds for recusal in the case of international arbitration, the following remarks should be made: (i) in case of grounds of incompatibility of judges, the

legislature has settled the doctrinal disputes regarding their limitative character[1], art. 47(2) CPC expressly stipulating the inadmissibility of the request invoking reasons other than those referred to in art. 41 and 42 CPC; (ii) for internal arbitration, art. 563(3) CPC stipulates that the provisions on the recusal of judges shall also apply accordingly to arbitrators; (iii) for the international arbitration process, art. 1123 CPC stipulates that any issues concerning the establishment of the arbitral tribunal, not regulated by the parties under the arbitration agreement and not entrusted by them to the arbitral tribunal, shall be settled by the appropriate application of the provisions of the Civil Procedure Code on internal arbitration.

Pursuant to art. 1114(3) CPC, a party can only recuse an arbitrator which he appointed or to whose appointment he contributed, for a reason he became aware of after that appointment. The arbitral tribunal and the other party must be notified without delay of the recusal reason.

We believe that such a provision is justified; the possibility granted by the law to the arbitration agreement party to reassess the arbitrator's partiality for a recusal reason that he knew prior to the designation or appointment of the arbitrator would give that party the opportunity to exercise his procedural rights abusively.

In the doctrine an idea was expressed that impartiality is a fundamental principle, in view of the provisions of art. 124(2) of the Romanian Constitution (which states that "Justice shall be one, impartial, and equal for all.") and a conventional principle, in the light of art. 6 (entitled "Right to a fair trial") par. (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (convention for supranational human rights control), which provides that "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...)", a principle which is subsumed to the notion of public order of Romanian private international law. So, (the author of this opinion thinks), "it cannot be considered that the failure to invoke a reason regarding the partiality of an arbitrator signifies the acceptance of the party concerned to be tried by a court that is not independent and impartial. The judicial control court

[1] As to the illustrative or exhaustive nature of the recusal grounds in various national legal systems, see I. Leş, *Tratat de drept procesual civil. Ediția 5. Cu referiri la Proiectul Codului de procedură civilă* (Bucharest: C.H. Beck, 2010), 308-309.

has the duty to comply with these demands, as they represent a fundamental, inherent dimension of justice"[1]; at the end of these considerations, the author did not reach an unambiguous conclusion about the fairness of the provisions of art. 1114(3) CPC.

Pursuant to art. 1114(4) CPC, if the parties have not established the recusal procedure, the arbitral tribunal will decide on the recusal by a final decision.

International arbitration conventions do not contain provisions on the recusal of arbitrators.

In contrast, the Arbitration Rules of the CAB contain provisions similar to those of the Civil Procedure Code (under art. 23, regarding the arbitrators' recusal, "The parties are entitled to recuse any arbitrator if there are circumstances that give rise to legitimate doubts regarding his impartiality or independence, or if the arbitrator does not hold the qualifications agreed to by the parties").

Citizenship of arbitrators

The new Romanian Civil Procedure Code does not require that, in international arbitration taking place in Romania or under the Romanian law, the arbitrators of the arbitral tribunal should have Romanian citizenship.

The New York Convention does not provide for restrictions on the designation of foreigners as arbitrators. The Geneva Convention, in art. III, on the "Right of foreign nationals to be designated as arbitrators", provides that in arbitration subject to the provisions of the Convention foreign nationals may be designated as arbitrators.

Number of arbitrators

The legal rules directly governing the international arbitration process do not refer to the number of arbitrators constituting the arbitral tribunal; by the reference rule in art. 1123 CPC, the provisions of art. 556 CPC, which refer to the number of arbitrators in the case of internal arbitration, become applicable.

Therefore, as in the domestic arbitration, in the international arbitration taking place in Romania, the arbitral tribunal will always be composed of an odd number of arbitrators. The parties will determine whether the dispute will settled by a single arbitrator or by several

[1] Deleanu, Mitea and Deleanu, *Tratat de procedură civilă*, 814.

arbitrators. If the parties have not established the number of arbitrators, the dispute is settled by three arbitrators, one appointed by each of the parties, and the third, the presiding arbitrator appointed by the two arbitrators. If there are several claimants or defendants, parties with common interests will appoint a single arbitrator.

Neither the New York Convention, nor the Geneva Convention contain provisions on the number of arbitrators, but both provide that the parties have the right to establish, under the arbitration agreement, how to establish the arbitral tribunal. Thus, art. V(1)(d) of the New York Convention provides that the recognition and enforcement of the award may be refused if the party concerned provides proof to the competent authority of the country where recognition and enforcement are required that the constitution of the arbitral tribunal was not in accordance with the parties' agreement; and art. 4(1) of the Geneva Convention provides that the parties to an arbitration agreement are free to provide that their disputes will be subject to an ad hoc arbitration procedure, in which case they will be capable to designate the arbitrators; if disputes are submitted to a permanent arbitration institution, arbitration will be conducted in accordance with the Regulation of the designated institution.

The consequences of the non-observance of the will of the parties with regard to the establishment of the arbitral tribunal may be as follows: a) the arbitral award may be terminated by an action for annulment if the arbitral tribunal has not been constituted in accordance with the arbitration agreement (art. 608, par. 1 of the Criminal Procedure Code); b) the recognition and enforcement of the arbitral award rendered by a tribunal not constituted under the arbitration agreement shall be refused (art. V(1)(d) of the New York Convention); c) the annulment in one contracting states of an arbitral award is a ground for refusal of the recognition or enforcement in another contracting state if such annulment has been pronounced on one of the following grounds: (i) the establishment of the arbitral tribunal was not in accordance with the agreement of the parties; (ii) the party requesting the annulment was not properly informed of the designation of the arbitrator (art. IX(1)(b) and (d) of the Geneva Convention).

Establishment of the arbitration procedure

Article 1115(1) (2) CPC regulates the way in which the arbitration procedure is established, the rules being similar to those of

internal arbitration. Thus: (i) the parties may directly determine the arbitration procedure or by reference to the rules of an arbitration institution, or may subject it to a procedural law of their choice; the rules can be established even under the arbitration agreement or after its conclusion; (ii) if the parties have not established the arbitration procedure, in any of the above-mentioned ways, the arbitral tribunal is called upon to establish the procedure either directly or by reference to the rules of an arbitration institution.

The New York Convention contains explicit provisions on the right of the parties to determine the rules of the arbitration procedure; thus, pursuant to art. V(1)(d) of the Convention, the recognition and enforcement of the award will be refused, at the request of the party against whom it is invoked, if it is proved to the competent authority of the country where recognition and enforcement are requested that the arbitration procedure was not in accordance with the parties' agreement, or , in the absence of a convention, that it did not comply with the law of the country in which the arbitration took place. Therefore, the parties to the arbitration agreement are free to determine the rules of the arbitration procedure, without taking into account the provisions of the law "of a particular state, as a law applicable to arbitration proceedings"; only if the parties have not established the rules of the arbitration procedure, "the provisions of the law of the country where the arbitration is conducted" apply[1]..

Similarly, the Geneva Convention provides in art. IV(1)(b) that the parties to an arbitration agreement are free to stipulate that their disputes will be subject to an ad hoc arbitration procedure; in this case, the parties will also have the right to fix the rules of procedure to be followed by the arbitrators.

Unlike the New York Convention, which provides that where the parties to the arbitration agreement have not established the rules of the arbitration procedure, the law of the country of arbitration is applicable, the Geneva Convention provides that, if the arbitration agreement does not contain indications with the necessary measures for the organization of ad hoc arbitration, these measures will be taken, if the parties do not agree in this regard, by the already appointed arbitrator or arbitrators (art. IV, par. 3 of the Convention).

[1] Deleanu, Mitea and Deleanu, *Noul Cod de procedură civilă,* 595.

If the parties disagree on the designation of the sole arbitrator or the arbitrators' agreement on the measures for the organization of ad hoc arbitration lacks, the Convention regulates two hypotheses: (i) if the parties have decided the place of arbitration, the claimant may address, for taking such measures, at his choice, either the President of the competent Chamber of Commerce of the country where the place chosen by the parties is, or the President of the competent Chamber of Commerce of the country where the defendant has his habitual residence or seat at the time of filing the arbitration request; (ii) if the parties have not agreed on the place of arbitration, the claimant may, for taking such measures, at his choice, address either the President of the competent Chamber of Commerce of the country in which the defendant has his habitual residence or seat at the time of filing the arbitration request, or the Special Committee whose composition and activity are determined by the annex to the Convention. If the claimant does not exercise these rights, they may be exercised by the defendant or arbitrators.

If the parties to the arbitration agreement provided that their disputes would be subject to a permanent arbitration institution, the arbitration would be conducted in accordance with the Rules of the designated institution (art. IV, par. 1 of the Geneva Convention).

In establishing the arbitration procedure, both parties to the arbitration agreement and the arbitral tribunal may have regard to the rules of procedure of a particular legal system or the procedural principles common to several legal systems, or combine the procedural rules of certain legal systems, refer to the arbitration rules of a particular institution, choose as a law applicable to the arbitration proceedings a law other than the law of the litigation etc.[1]

Similarly, "the parties could set only a few fundamental rules to apply to the arbitration procedure, and the arbitral tribunal should regulate the other aspects" of procedure before or during the arbitration process (within the limits of the procedural principles), in order to settle issues that arise (for example, the rules applicable to an expertise that is necessary in order to settle the dispute)[2].

Art. 1115(3) CPC enshrines the principle of the equality of the disputing parties and the contradictory nature of the procedure, providing that whatever arbitration procedure is established, the arbitral tribunal

[1] Deleanu, Mitea and Deleanu, *Tratat de procedură civilă,* 816.
[2] Deleanu, Mitea and Deleanu, *Noul Cod de procedură civilă, vol. II*, 594.

must guarantee the equality of the parties and their right to be heard in a contradictory procedure.

The legal literature has highlighted the fact that alongside these principles, the jurisdictional body must also consider other fundamental procedural safeguards, especially those referred to in art. 6 of the European Convention on Human Rights, such as the right to a fair trial, the right to an independent and impartial court of law, the equality of procedural means, the right to an effective remedy[1].

As regards the establishment of the arbitration procedure, one should take into account the provisions of art. 1123 CPC, which stipulate that any issues regarding the establishment of the arbitral tribunal, procedure, etc. not regulated by the parties under the arbitration agreement and not referred by them to the arbitral tribunal, will be settled by the proper application of the provisions of the Romanian law on internal arbitration.

However, if the parties have chosen the law of a state as a law applicable to arbitration, they must comply with the binding provisions of this law[2].

As regards the duration of the time limits in the international arbitration process, the legislature has set as landmarks the time limits set for internal arbitration; in international arbitration, the duration of the time limits set for internal arbitration shall be doubled (art. 1115, par. 4, CPC).

Various aspects governed by the arbitration procedure

The rules of the arbitration procedure apply to such aspects as: the language of the proceedings; provisional and conservative measures; administration of evidence.

a) As to the language in which the arbitration proceedings are conducted, art. 1116 CPC provides that the dispute before the arbitral tribunal is in the language established under the arbitration agreement or, if nothing has been stipulated in this respect or a subsequent agreement has not been concluded, in the language of the contract in which the dispute arose or in an international language established by the arbitral tribunal.

[1] Deleanu, Mitea and Deleanu, *Tratat de procedură civilă, vol. III,* 817.
[2] Ibidem Deleanu, Mitea and Deleanu, *Tratat de procedură civilă, vol. III,* 816.

If a party does not know the language of the debate, at his request and at his expense, the arbitral tribunal ensures the services of a translator. Parties may participate in debates with their translator.

b) Provisional and conservative measures. Pursuant to art. 1117(1) CPC, the arbitral tribunal may order provisional or conservative measures at the request of one of the parties, unless otherwise stipulated in the arbitration agreement.

The inconvenience of provisional or conservative measures ordered by the arbitral tribunal is due to the fact that if the party concerned does not voluntarily observe the respective measures, the arbitral tribunal cannot resort to coercion, since arbitration is private justice [only the arbitral award is enforceable and enforced just like a court judgment (art. 615 CPC), not the arbitral tribunal's decisions, regardless of their character]; in such a situation, the arbitral tribunal may request the support of the competent court, which applies its own law (art. 1117, par. 2 of the Civil Procedure Code).

Provisional or conservative measures may be subordinated by the arbitrator or judge to the ordering of appropriate bail.

In the legal doctrine it was argued that, having the right to determine the applicable procedural rules, the parties to the arbitration agreement may decide that the arbitral tribunal may not take certain provisional or conservative measures; instead, the parties to the arbitration agreement could not agree to refrain from resorting to the courts to request such measures because the court that would consider the prohibition established by the parties would be guilty of denial of justice[1].

The New York Convention does not contain provisions on provisional or conservative measures that the jurisdictional body may order.

In contrast, the Geneva Convention provides, in art. VI par. 4 that the request for provisional or conservative measures by one of the parties, before the competent judicial authority, should not be considered incompatible with the arbitration agreement or as a submission of the dispute, with respect to its substance, to the court.

The Arbitration Rules of the CAB in art. 40, which concerns provisional or precautionary measures, provide for the following rules: (i) the arbitral tribunal may, at the request of one of the parties, by way of

[1] Deleanu, Mitea and Deleanu, *Noul Cod de procedură civilă, vol. II*, 597.

an emergency decision, order any provisional or precautionary measures which it considers appropriate; (ii) the arbitral tribunal may oblige the party requesting a provisional or precautionary measure to provide the necessary safeguards in relation to the requested measure; (iii) the requests for provisional or precautionary measures lodged before the commencement of the arbitration procedure or before the case file was referred to the arbitral tribunal shall be settled by an Emergency Judge, in accordance with the procedure set out in Annex no. 2 of the Arbitration Rules of the CAB.

An application for provisional or precautionary measures by a party before a court is not contrary to the arbitration agreement or the Arbitration Rules of the CAB.

c) Administration of evidence. Pursuant to art. 1118 CPC, the arbitral tribunal shall administer the evidence. If, for the administration of justice, the cooperation of courts is necessary, the arbitral tribunal or the parties, in agreement with the arbitral tribunal, may request the support of the tribunal from the arbitration office, which applies its own law.

Considering that evidence, from a legal point of view is of a procedural nature (because its purpose is to contribute to forming the judge's conviction about the circumstances of the dispute he has to settle), common law systems have usually enshrined, as a rule, the conflict solution of its being governed by the law of the forum. In the legal systems of mainland Europe, considering that evidence is a legal means to establish a disputed right, the solution of its being governed by the law of the merits of the case is enshrined. The rule locus regit actum applies to pre-established evidence[1].

Similarly, the extinctive prescription: in common law systems is characterized as a procedural matter and, consequently, is subject to the law of the notified forum; in the legal systems in continental Europe, the extinctive prescription is analyzed as a legal institution and lex causae is applied to it. In Romanian law, the extinctive prescription of the right to action is subject to the law that applies to the right[2].

With reference to the law applicable to evidence in the international civil trial, art. 1091 of the Civil Procedure Code provides

[1] O. Căpățână and B. Ștefănescu, *Tratat de drept al comerţului internaţional, vol. 1 partea generală* (Bucharest: Academiei R.S.R., 1985), 187.
[2] Deleanu, Mitea and Deleanu, *Tratat de procedură civilă, vol. III*, 819.

for the following rules: (i) The evidence to prove a legal act and the probative force of the document are those provided for by the law agreed to by the parties, when the law of the place of the conclusion of the legal act grants them such freedom. In the absence of this freedom or where the parties did not use it, the law of the place of the conclusion of the legal act shall apply. (ii) The proof of acts is subject to the law of the place where they occurred or were committed. (iii) The Romanian law is applicable, if it admits means of proof other than those provided by the laws established according to the provisions of art. 1091(1)(2) CPC. The Romanian law also applies if it accepts the testimonials of the witnesses and presumptions of the judge, even in cases where such means of proof are not admissible under the applicable foreign law. (iv) The proof of the civil status and the probative force of civil status acts are governed by the law of the place where the invoked document was drawn up. (v) The administration of evidence in the international civil trial is governed by the Romanian law.

As a matter of principle, in the international civil trial, the court applies the Romanian procedural law (art. 1088 CPC).

The qualification of a matter as a procedural or substantive law one is made under the Romanian law, subject to legal institutions without correspondence in Romanian law (art. 1089 CPC).

The procedural status and the qualification of the claim (the object and cause of the action) in the international civil trial are established in accordance with the law governing the legal relation brought to the court (art. 1088 CPC).

As regards the proof of the foreign law, the new Civil Code enshrined the conception that the foreign law should be dealt with by the jurisdictional body as an element of law, not of fact. Thus, pursuant to art. 2562 of the Civil Code, the content of the foreign law shall be established by the jurisdictional body through attestations obtained from the state bodies which have issued it, by an expert's opinion or by any other appropriate means. The party invoking a foreign law may be required to prove its content. If the content of the foreign law cannot be determined within a reasonable time, the Romanian law shall apply.

The proof of foreign law, established by attestations obtained from the state bodies which have issued it, enjoys full probative power,

and other attestations are subject to the appreciation of the jurisdictional body[1].

The foreign law is interpreted and applied according to the rules of interpretation and application existing in the system of law to which it belongs (art. 2563 of the Civil Code).

The burden of proof, ie its apportionment between the claimant and the defendant, is done in accordance with lex causae, but conflicts of law are not common in this matter because the principle of probatio incumbit ei qui dicit, non qui negat is enshrined[2].

The administration of evidence is done in accordance with the law of the court seized, so in the case of arbitration submitted to an arbitral tribunal having its headquarters in Romania, the Romanian law applies[3]. For example, the Romanian law determines which persons cannot be heard as witnesses (art. 315 CPC); which persons are exempt from testifying (art. 317 CPC); in which situations it is allowed to hear relatives and affines as witnesses (art. 316 CPC).

G. Jurisdiction of the arbitral tribunal.

Pursuant to art. 1119 CPC, the arbitral tribunal has the power to decide on its own jurisdiction. The arbitral tribunal rules on its own jurisdiction without taking into consideration a request having the same object, already pending between the same parties before a state or arbitral tribunal, unless there are good reasons to suspend the proceedings. The objection of the lack of jurisdiction must be raised before any defense on the merits.

Observing the provisions of art. 579(2) CPC, on the verification of the jurisdiction of the arbitral tribunal in internal arbitration, which secondarily applies to international arbitration (under art. 1123 CPC, which stipulates that some aspects not regulated by the parties under the arbitration agreement and not referred by them to the arbitral tribunal shall be settled by applying the provisions of the "book" on internal arbitration), we find that the conclusion by which the arbitral tribunal

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[1] Căpățână and Ștefănescu, *Tratat de drept al comerţului internaţional, vol. 1 partea generală,* 190.

[2] Căpățână and Ștefănescu, *Tratat de drept al comerţului internaţional, vol. 1 partea generală,* 189.

[3] R.B. Bobei, *Calificarea și conflictul de calificări în dreptul internațional privat* (Bucharest: All Beck, 2005), 407; Căpățână and Ștefănescu, *Tratat de drept al comerţului internaţional,* 189.

decides that it is competent may be dissolved only in an the action for annulment brought against the arbitral award.

If the arbitral tribunal decides that it is not competent to resolve the dispute brought before it, it declines jurisdiction by a decision against which an action for annulment cannot be brought (art. 579, par. 3 CPC).

In case the arbitral tribunal declines its jurisdiction, the competent court will be established in accordance with the special provisions of international jurisdiction of the Romanian courts (art.1079-1081 CPC).

The New York Convention has no provisions on the verification of one's own jurisdiction by the arbitral tribunal, but the Geneva Convention contains provisions similar to the Romanian law; so art. V(3) of the Convention provides that, subject to the subsequent judicial review provided for by the law of the forum, the arbitrator whose competence is challenged must not renounce the trial; he has the right to decide on his own jurisdiction and on the existence or validity of the arbitration agreement or of the contract to which this Convention belongs.

In line with the provisions of the Romanian law and the Geneva Convention, the Arbitration Rules of the CAB have enshrined the "jurisdiction of jurisdiction" principle, which refers to the power (jurisdiction) of the arbitral tribunal to verify its own jurisdiction in art. 31 par. 7, according to which, at the first arbitration hearing, the arbitral tribunal verifies its own jurisdiction to settle the dispute.

Furthermore, art. VI par. 3 of the Geneva Convention provides that when an arbitration procedure was introduced, before referring the case to a court, the courts of the contracting states which subsequently received an application concerning the same dispute, between the same parties, or an application for a declaration of the non-existence, nullity or caducity of the arbitration agreement, shall suspend the proceedings on the jurisdiction of the arbitrator until the arbitral award is made, unless there are serious grounds justifying the intervention of the court (in the doctrine it was considered to be a serious reason, which would entitle the court to rule on the non-existence, nullity or caducity of the arbitration agreement, in which case, in the absence of the court's intervention, serious and irreparable damage to one of the parties to the dispute could arise by continuing arbitral proceedings[1]).

[1] Deleanu, Mitea and Deleanu, *Noul Cod de procedură civilă, vol. II,* 600.

H. Applicable law

The arbitral tribunal shall apply to the dispute the law established by the parties and, if the parties have not designated the applicable law, the law which it considers appropriate in all situations taking into account professional rules and usage. The arbitral tribunal may only state in equity with the express authorization of the parties (art. 1120 CPC).

As regards the applicable law, the Geneva Convention provides that the parties to the arbitration agreement are free to determine the law that the arbitrators must apply to the merits of the dispute. In the absence of choice by the parties of the applicable law, the arbitrators will apply the law designated by the conflict rule that they will deem appropriate in the case. In both cases, the arbitrators will take into account the provisions of the contract and commercial usage (art. VII).

I. The arbitral award

With regard to the arbitral award, art. 1121 CPC sets the following rules: a) The arbitral award is given by the procedure agreed to by the parties. In the absence of such provisions in the arbitration agreement, the award is pronounced by the majority vote of the arbitrators, and in case of parity of votes, the prevailing solution complies with the vote of the presiding arbitrator. b) The arbitral award is written, motivated, dated and signed by all arbitrators. c) The arbitral award shall be enforceable and binding upon its notification to the parties and may be challenged only with an action for annulment on the grounds and under the conditions established for internal arbitration. d) The arbitral tribunal may render partial awards, unless otherwise stipulated in the arbitration agreement.

The Geneva Convention regulates the issue of motivating the award, establishing the presumption that the parties have agreed that the arbitral award should be motivated except in the following cases: a) when the parties expressly stated that the award should not be motivated; b) when the parties have been subject to an arbitration procedure in which the award is not usually motivated and to the extent that, in this case, the parties or one of them do not expressly request, before the conclusion of the proceedings or, failing that, before the award was drafted, that the award should be motivated (art. VIII).

J. Subsidiary application rules

Any issues concerning the establishment of the arbitral tribunal, the procedure, the arbitral award, its completion, communication and effects, not determined by the parties under the arbitration agreement and not referred by them to the arbitral tribunal shall be settled by applying the provisions on internal arbitration (art. 1123 CPC).

CONCLUSIONS

The role of international conventions applicable to legal relations specific to international trade is to remove legal obstacles from the development of international trade relations. Indirectly, these international conventions also contribute to the uniformity of the legal rules in the legislation of the states of the international community, since, in the process of regulation, the national legislature is inspired by the rules contained in international conventions. In regulating the international arbitration process, the Romanian legislature took into account the rules adopted by the international conventions on arbitration, conventions to which Romania is a party and consequently, as results from the above analysis, most of the Romanian law rules are consistent with the rules contained in international conventions.

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THE LEGAL REGIME OF THE LAND ON WHICH CONSTRUCTIONS OWNED BY CONSUMER AND CRAFT COOPERATIVES ARE LOCATED

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Abstract:

Although the system of property governed by the Communist state law, based on state socialist property, was abolished following the Romanian Revolution of December 1989, it left behind legal situations that the post-December legislator had to take into account. This had to do with the real rights to use land owned by the state in favour of physical persons or cooperative units. On the land in question, the latter constructed buildings over which they acquired ownership.

Agricultural production cooperatives were dissolved, but the units of consumer and craft cooperatives were reorganized as cooperative companies, which led the legislator to adopt legal norms aimed at regulating the latter's rights to use the land owned by state on which they constructed buildings. There has ensued a contradictory regulation that has created significant problems for cooperative units, often put in a position to bear unjustified limitations of their right of ownership on the constructions they built.

The legislation adopted in the field has evolved from the unconditional recognition of those rights to use to conditional recognition. A right of pre-emption was also put in place for the purchase of the land that was transferred to the private property of the state or of the administrative-territorial units, with the cooperative units as holders. Finally, the possibility of establishing ownership of this land has also been created if certain conditions are met.

Key words: *cooperative units; real right to administer; real right to use; right of pre-emption; right of ownership.*

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PRELIMINARY REMARKS

The Communist regime, established in Romania starting with 1948, favoured collective property at the expense of private property. According to the provisions of the Constitution of 1965, the socialist state ownership "on the property belonging to the whole people" was the basis of the property system in Romania, followed by the cooperative property, qualified as a group socialist property. The right of state socialist property was inalienable, so it could not be dismantled by civil law acts. State-owned property could, however, be attributed to other subjects of law, through administrative acts, in purposes that had to do either with administration or with usage.

The real right to administer was held by local administration bodies (the administrative-territorial units were not holders of the right of ownership), public institutions and state-owned economic enterprises.

The putting into use gave rise to the right to use, which was a new right, opposable *erga omnes*, except to the State, which could withdraw it in the cases provided for in the documents of incorporation or if state superior interests claimed it. [1] The beneficiaries of this right could be certain legal entities, especially cooperative organizations, but also certain individuals.

The assignment of land to the use of cooperative organizations was one of the forms by means of which the state supported co-operative organizations, as it was bound by the provisions of Art. 10 paragraph (2) of the Constitution. Secondary legislation, however, drew certain distinctions between agricultural production cooperatives, on the one hand, and consumer cooperatives and craft cooperatives, on the other. Thus, while agricultural production cooperatives could be assigned to use both agricultural land and construction land or even land on which construction sites were located, the consumer cooperative units and the craft cooperative units could only be assigned for use construction land, or land on which buildings had already been erected.

Among the rights to use land, which had natural persons as beneficiaries, we may recall the real right to use throughout the existence of the construction, granted to individuals for the construction of dwellings under Art. 4 paragraphs (2) and (3) of Law no. 4/1973 on the

[1] Please see D. Păunescu, *Drept cooperatist* (Bucharest: University of Bucharest, 1980), 150.

development of housing construction and their sale from the state fund to the population or under Art. 17 of Law no. 58/1974 on the systematization of rural and urban areas and localities and the real right to use the land on which there were private-property dwellings, purchased after the entry into force of Law no. 58/1974 and Law no. 59/1974. Article 30 of Law no. 58/1974 provided that if a personal property construction was alienated by legal act among the living, the respective land was transferred to state ownership and the land to be exploited was given to the acquirer for free throughout the existence of the construction.

1. THE REAL RIGHT TO USE CONSTITUTED IN FAVOUR OF THE COOPERATIVE UNITS.

According to Art. 1 paragraph (1) of Decree no. 244/1955 on the regulation of the transfer of state-owned immovable property to the cooperative units, the land owned by the State and administered by the executive committees of the popular councils that cooperative units needed for construction purposes could be transferred without payment and without delay to the latter's use by means of an administrative decision.

Paragraph (2) of the same legal provision indicates the purpose for which the right to use was established, namely the construction of buildings on which the cooperative unit acquired a right of ownership.

If there were buildings on the land assigned, the cooperative units were given the land in free use and without term, but also the property of the constructions, by decision of the Council of Ministers. Construction ownership was paid for.

Similar provisions regarding the establishment of the real right of use on the land also included Art. 21 point (d) of Law no. 6/1970 on the activity of consumer cooperatives.

The owner of the right to use was given the prerogatives of the use and achievement of fruit from the content of the ownership right (usus and fructus), but also the right of material disposal over the land, which allowed him/her to construct the buildings over which (s)he acquired the right of ownership. The legal content of this right was thus similar to that of the real right to administer, with the distinction that its

holder was not obliged to pay any amount of money to the state budget.[1] The right to administer constituted on State socialist property had an identical content to that of the right to administer the public property regulated by the legislation adopted since 1991.[2]

2. THE EFFECTS OF THE REORGANIZATION OF THE CRAFT AND CONSUMER COOPERATIVE UNITS.

The consumer cooperative and craft cooperative units continued their existence after 1990, being reorganized under Decree-Law no. 66/1990 on the organization and functioning of craft cooperatives and respectively through Law no. 109/1996 on the organization and functioning of the consumer cooperative. Whereas the Decree-Law no. 66/1990 does not contain any provisions regarding the situation of the real right of use on the land related to the constructions that belong to the craft cooperative, Art. 187 paragraph (1) of Law no. 109/1996 ordered that the lands put into use for an indefinite period of time and for free maintain their legal status, with the purpose of building constructions for the activity of consumer cooperatives and credit cooperatives. However, there are no doubts as to the survival of the real rights of use constituted in favour of the craft cooperative units, because no normative act stipulated their discontinuance and no new regulation on the legal status of the constructions built by the beneficiaries was adopted.

Decree no. 255/1955 was repealed by Law no. 7 of January 8, 1998. By the repeal law, however, nothing was stipulated in relation to the real rights of use constituted in favour of the consumer and craft cooperative units.

As repealing represents a legal procedure to remove a normative act, it can only work for the future. It cannot affect the legal situations arising under the normative act thus rendered void. In fact, as we shall see further on, Law no. 1/2005 on the organization and functioning of the cooperative, a normative act that currently regulates this matter, also contains references to this right.

The conclusion is that the previously-generated real rights to use state-owned land survived, but no such new rights could be created.

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[1] Păunescu, *Drept cooperatist*, 150.

[2] For this latter right, please see V. Stoica, *Drept civil. Drepturile reale principale*, 3rd edition (Bucharest: C.H. Beck, 2017), 208-213.

3. THE INCIDENCE OF THE PROVISIONS OF LAW NO. 1/2005.

Decree-Law no. 66/1990 on the organization and functioning of craft cooperatives and Law no. 109/1996 on the organization and functioning of consumer cooperatives were repealed by Law no. 1/2015 on the organization and functioning of the consumer cooperative.

The new normative act also contains a regulation on land use rights. Thus, by Art. 107 paragraph (1) it was ordered that "The land submitted for use, for an indefinite period of time and without payment, in order to construct buildings for the activities of the organizations of the consumer and craft cooperatives, as well as of the cooperative associations, existing until the date of coming into force of this law, which are not claimed and on which buildings were constructed according to the law, maintain this legal regime for the entire life of the respective constructions or until they are transferred, with payment, into the property of the cooperative company."

The manner in which this legal provision was drafted created major problems for the cooperative units that owned the right to use land.

Thus, in a restrictive interpretation of the law cited, the simple formulation of a claim for land would lead to the termination of the right of use, no matter what judgment the court would pass. The solution is all the more bizarre since the rigorous enforcement of the rules governing the writ in replevin would make it difficult, if not impossible, to admit such action. We take into account the fact that by taking over the land during the communist regime, the dispossessed person lost his/her right to property.

However, the courts extended the interpretation of the law text analysed considering that it is also applicable if a request for the reestablishment of the right of ownership under the laws of the land fund has been filed in respect of that land, as those laws contain remedies for the land taken up by the state or other legal entities during the communist regime.

For example, this is the solution adopted by a court of law which had to settle an action by which a consumer cooperative organization, reorganized under the form of a cooperative company, sought the annulment of the acts of reestablishment of the ownership rights issued in favour of a natural person, in application of the provisions of Law no.

18/1991. The object of the re-establishment was the land on which the state had constituted a real right of use in 1960 in favour of the cooperative unit and on which it had constructed a building intended to be a store. Interpreting *per a contrario* the provisions of Art. 107 paragraph (1) of Law no. 1/2005, the court held that by "claiming" land pursuant to Law no. 18/1990, the right of use of the cooperative unit ceased.[1]

The solution is fundamentally flawed, firstly because it marks the sign of equality between the formulation of a writ of replevin, which protects a current ownership right and seeks to regain possession, and the demand for the re-establishment of the ownership right, formulated on the basis of Law no. 18/1991, which belongs to the former owner who wants to regain his/her own lost ownership right.

Secondly, no provision of Law no. 18/1991 allows the restoration of the right of ownership on land that was owned by the state on January 1, 1990 and on which buildings were constructed. Under Art. 36 paragraph (5) of Law no. 18/1991 only the re-establishment of the right of ownership on state-owned land on which buildings can be constructed is allowed. The text cited expressly refers to "land without construction, unaffected by approved investment works, according to the law, from the built-up area of the localities."[2]

Even Law no. 10/2001 regarding the legal regime of buildings abusively taken over from March 6, 1945 to December 22, 1989, which is more permissive, stipulates in Art. 10 paragraph (2) that if new constructions were built on land taken over by the state or by other legal entities, the former owner or their heirs shall be granted only remedies in the equivalent.[3]

Things became more complicated by declaring the unconstitutionality of the provision of Art. 107 paragraph (1) of Law no.

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[1] Pitesti Court of Law, Civil Sentence no. 312 / 18.0.2008, final by Decision no. 1060 / R / 10 June 2008 of the Argeş Tribunal, Civil Division, which rejected the appeal, unpublished.

[2] For the land on which the former owners or their heirs can be restored the ownership under Law no. 18/1991, please see E. Chelaru, *Drept civil. Drepturile reale principale*, în reglementarea noului Cod civil (Bucharest: C.H. Beck, 2013), 149 and 159-160.

[3] For the relations between the provisions of Law no. 18/1991 and those of Law no. 10/2001, please see V. Terzea, *Legile fondului funciar. Comentarii și explicații* (Bucharest: C.H. Beck, 2007), 194-199.

1/2005.[1] Since cooperative units "are private legal entities which, by their object of activity, are not of public utility", the transfer of the free use of the land provided for in Art. 107 paragraph (1) was considered not to be justified. It was noted that the incriminated text, which would violate the right of the local public authorities "to exercise effective, direct and unmediated control, by their own power and for their own benefit, of private immovable property, to use it and to collect the civil fruits" is "contrary to Art. 44 of the Constitution regarding the guarantee and protection of private property, insofar as land use is free of charge."

We also consider that this decision is unfounded because Art. 107 paragraph (1) of Law no. 1/2005 does not oblige local public authorities to constitute real, free-of-charge rights of use in favour of cooperative units, but to maintain those previously established by the state. These rights existed on the adoption of Law no. 18/1991, according to which some land within the localities passed from the state property to the ownership of the administrative-territorial units. The latter have thus acquired ownership of the land in question as it was, i.e. affected by that limitation. However, the legislator may impose limitations on the right of ownership not only in the public interest, but also in the private interest.

In fact, the situation is similar to the usage rights imposed on state-owned land under the normative acts regulating state support to physical persons for the construction of dwellings adopted prior to 1990 or which were related to the dwellings constructed from state funds and bought by natural persons both before 1990 and under Art. 3 paragraph (2) of Decree-Law no. 61/1990 on the sale of dwellings built from state funds to the population. If the owners of the respective apartments did not submit requests for the establishment of the ownership of the respective land, pursuant to Art. 36 paragraph (2) of the Land Fund Law no. 18/1991, the real rights of free use subsist.

4. RIGHT OF PRE-EMPTION WHEN PURCHASING LAND FOR CONSTRUCTION.

According to Art. 107 paragraph (2) of Law no. 1/2005, cooperative units, regardless of their form of organization, benefit from a right of pre-emption when buying real estate that they have in use and

[1] Constitutional Court, Decision no. 913 of June 23, 2009, published in the Official Gazette of Romania, Part I, no. 506 of July 22, 2009.

which are part of the private property of the central public authorities or of the local public authorities. The law cited provides that cooperative units also benefit from a "right of preference in the case of the letting or renting" of those buildings.

The law text cited is characterized by a remarkable inaccuracy. We take into account the fact that according to the applicable legal regulations in the matter, from which we cite Art. 6 of the Land Fund Law no. 18/1991, Art. 4 of Law no. 213/1998 on public property and Art. 121 of the Local Public Administration Law no. 215/2001, the owners of the property right, whether public or private, are the state and the administrative-territorial units. Article 553 paragraph (1) Civ. C. follows the same line. Central or local public authorities are only bodies that act in the interest of the two categories of public law subjects mentioned above. As a result, within the limits of their powers established by law, they decide on the alienation of immovable property belonging to either the private property of the state or that of some administrative-territorial authorities,[1] property on which the cooperative organizations have real right of use.

For example, if the object of the right to use is a private property of a commune, city or municipality, on which a cooperative organization erected a building, the decision approving the sale will be adopted by the local council with a 2/3 vote of the councillors in office (Article 45 paragraph 3 of Law 215/2001).

The right of pre-emption is a variety of the right of preference in that its holder is preferred when concluding a sales contract. The right of pre-emption therefore differs from other preferential rights by the nature of its object. Regardless of its subject matter, the right of preference is exercised on an equal basis, but its beneficiary is preferred to any bidder accepting the contract.

We have defined the right of pre-emption governed by the Civil Code as a temporary, indivisible and inalienable civil subjective right, established by law or by contract, under which its owner, called the pre-emptor, can purchase with priority a movable or immovable property, its exercise having the effects of the conclusion of the sales contract

[1] For the activity of public administration authorities, please see V. Vedinaș, *Drept administrativ* , VIIIth reviewed and updated edition, (Bucharest: Universul Juridic, 2014), 91-98.

between the pre-emptor and the seller and the retroactive cancellation of the contract concluded by the latter with a third party.[1]

However, there are also rights of pre-emption that are governed by special legislation, which have the same features as those listed in the above definition, except for the possibility of their post-sale exercise. The latter category also includes the right of pre-emption when buying the land used by a cooperative organization, which consists in the possibility of concluding the preferential sales contract with other willing persons at a price and under equal conditions and can be exercised only before the conclusion of the contract.

Given its legal nature, the rules governing this right of pre-emption are imperative and have a public order character.[2] The provisions of Art. 107 of Law no. 1/2005, devoted to the right of pre-emption, shall be completed with those of Art. 1730-1740 Civ. C, which regulate the pre-emption right, legal or conventional, upon the purchase of any goods. These latter provisions have a suppressive character, so they will apply only if no other contrary provisions have been stipulated by law or contract and only in case of contracts concluded after the entry into force of the Civil Code.[3]

Thus, unlike Art. 1732 Civil Code, which stipulates that the right of pre-emption shall be exercised after the conclusion of the sales contract and the consequence of its exercise by the pre-emptor under the law is the attainment of the quality of a buyer, Art. 107 paragraph (3) and paragraph (4) of Law no. 1/2005 allow the exercise of this right only prior to the conclusion of the sale-purchase contract. According to paragraph (3), the selling territorial-administrative unit is obliged to inform the pre-emptor of the sale offer and paragraph (4) sets a period of 45 days from the date of receipt of the sale offer for the exercise of the pre-emption right. If this right has not been exercised within the time limit prescribed by law, the land is sold free.

The sanction of non-observance of this right of pre-emption is not the acquisition of the right of ownership by the pre-emptor, as provided

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[1] E. Chelaru, "Dreptul de preempțiune în reglementarea noului Cod civil", in the volume *In honorem Alexandru Bacaci, Ovidiu Ungureanu. Culegere de studii,* (Bucharest: Universul Juridic, 2012), 178-179.

[2] For this feature of legal rights of pre-emption, please see V. Stoica and A.D. Dumitrescu, "Reglementarea dreptului de preempțiune în Codul civil, (Legea nr. 287/2009) ", in *Dreptul* no. 6(2012): 56.

[3] I. Sferdian, *Drept civil. Drepturile reale principale* (Bucharest: Hamagiu, 2013), 214.

by the Civil Code, but the relative nullity of the contract, which is attributable to the violation of a legal provision protecting a private interest.

The provisions governing the right of preference to leasing or renting, contained in Art. 107 paragraph (2) second sentence of Law no. 1/2005 are inapplicable in the case of land on which cooperative units have a real right of use. As its name implies, the real right of use entitles the holder to exercise the use attribute from the property right, as is the case with the real right to concession. However, under the conditions provided for in paragraph (1) of the same law text, the real rights of use of the land on which the cooperative units have erected buildings are maintained, which means that they cannot be concessions.

Mutatis mutandis, the solution is also applicable to hiring.

5. ESTABLISHING THE RIGHT OF OWNERSHIP ON LAND.

Law no. 231/2008 for amending and completing the Land Fund Law no. 18/1991 completed Article 24 of Law no. 18/1991 with paragraph (3), which regulates the establishment of the right of ownership on the lands located in the built-up area of the localities, related to the constructions built by the former cooperatives of production, the former inter-cooperative economic associations and the former consumer cooperatives. Of course, with the lack of rigour that characterizes many of the provisions of Law no. 18/1991, the text of the law cited does not expressly use the phrase "ownership of land shall be established", but refers to the fact that land "shall be recorded under the ownership of the current holders", which could lead to the conclusion that the regulation applies in cases where the aforementioned cooperative units own the land on which the buildings are erected. The way in which the conditions for the "registration of ownership rights" are regulated leads to the conclusion that we are in the presence of a genuine establishment of the right of ownership, similar to that regulated by Art. 36 paragraphs (2) and (3) of the same normative act.[1]

[1] Article 36 paragraphs (2) and (3) of Law no. 18/1991 regulates the creation of the ownership right on land owned by state, on which private dwellings are built, over which the owners of the constructions have a real right of use. To comment on these provisions, please see Chelaru, *Drept civil. Drepturile reale principale*, 164-167.

From the interpretation of the law cited it appears that the beneficiaries of the establishment of the ownership right are the "current holders" of the constructions, respectively the consumer cooperative units that have erected the constructions on land received for use for this purpose or the persons to whom the cooperative units have transferred the right of ownership on buildings, including through sale. The reference to "former consumer cooperatives" by the legislator can only be understood in light of the fact that they were reorganized as cooperative companies.

According to the provisions of Art. 24 paragraph (3) of Law no. 18/1991, the following conditions have to be fulfilled for establishing the right of ownership:

a) the beneficiaries "are holders of constructions from the date of acquisition until the date of the request for registration of the ownership right;"

b) the beneficiaries "prove that the real estate is registered in the agricultural register and also prove the payment of taxes and duties in accordance with the legal provisions;"

c) "for the building-related land the right of ownership was not established or re- established;"

d) "the land is not in the public or private property of the administrative-territorial units."

The regulation is paradoxical!

First, the text of Art. 24 paragraph (3) point (a) refers to "holding", which leads us to the precarious bailees, such as tenants. Nonetheless, through the action of building, the co-operative units became holders of the constructions. The condition governed by the text cited therefore refers only to the current holders of the constructions.

Then it is not clear why the ownership of the building from the date of acquisition to the date of the registration of the ownership right has been mentioned as a condition since it is fulfilled in all cases. Any current owner of the building, whether the cooperative company that is the successor of the consumer cooperative unit which erected the building or a buyer, "owns" the construction "from the date of acquisition until the date of the request for registration of the ownership right." The fees that applicants have to prove that they paid for must be those related to buildings, such as taxes, since land use is free of charge.

The condition foreseen in point (c) is negative. It has the effect of confirming the re-establishment of land ownership in favour of former owners or their beneficiaries, although, as we have seen above, these re-establishments are unlawful. It is a curious solution as the legal norms regulating the matter of the re-establishment of the right of ownership are imperative and their breach attracts the sanction of absolute nullity. As to the creation of the right of ownership, this cannot be the case because there is no prior regulation on which such a measure was adopted either in favour of the cooperative unit or of a third party.

The negative condition under (d) is simply hallucinating, because all the land assigned to the cooperative units for constructing buildings is now privately owned by the administrative-territorial units. Not being of public use or interest, as provided by Art. 554 paragraph (1) Civ. C., this land cannot be part of the public property.

The condition provided by Art. 24 paragraph (3) point (d) of Law no. 18/1991 is therefore simply impossible to carry out, which should lead to the conclusion that under no circumstances may the establishment of the right of ownership on the land referred to in the first paragraph of the same law be made. However, it would be an absurd conclusion, because the interpretation of the legal provisions must be made in such a way that they can be applied, which is why we consider that the provisions governing the condition in question are inapplicable. An urgent intervention by the legislator to correct this text is necessary.

CONCLUSIONS

If in the case of real rights of free use constituted on land owned by the state, on which private-property buildings were erected, the legislator did not question the continuity of their existence and regulated only the possibility and conditions of their transformation into ownership right, in case of the real rights of use constituted in favour of the cooperative units for the construction of a building a much more intricate way was chosen.

Although, in a first stage, the unconditional recognition of the continuity of these rights throughout the existence of the constructions took place, soon the legislator's concept changed and a conditional recognition took place. Apart from the fact that the new regulation is characterized by clumsiness, the conditions imposed by Law no. 1/2005

were not correlated with those governing the establishment of the private domain of the administrative-territorial units and its legal regime, on the one hand, and with the normative acts adopted in the matter of the re-establishment of the ownership right in favour of the persons who have been dispossessed of their land during the communist regime, on the other.

The result was the setting up of conditions that were impossible or fairly difficult to meet in order to maintain the real rights of use. Thus, the imposition of the condition that the land was not claimed, despite the fact that no previous legal provision regulates the restoration of the right of ownership on the occupied land, legitimized land retrocessions that were unlawfully made. This led to the unreasonable legal situation in which the cooperative unit, which is the owner of the construction, has no right, of any kind, on the relevant land.

The regulation of the establishment of the right of ownership in favour of the owner of the building, apparently favourable to the cooperative units, is annihilated by imposing an impossible condition - that the land should not be part of the public property or the private property of the administrative-territorial units. The only reasonable regulation is the one which establishes, in favour of the cooperative owners of constructions, a right of pre-emption on land purchase.

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THE CORE PROBLEM OF EUROPE`S MIGRATION POLICY

Heribert Franz KOECK [1]

Abstract:

Discussion about asylum seekers and other kinds of migrants, also operating under the term of "refugees" (e.g., economic, environmental refugees) and whether they can legitimately expect that we accept them into our European society/ies has so far missed the salient point, namely whether and under which conditions we may justifiably admit them to the European Union and its Member States.

This is not a question of fiscal or economic or even cultural bearability but one of political tolerability. It is evident that politically tollerable are only persons who are ready to accept the principle necessary for a peaceful living together. This principle is pluralism of society and its political forms, the state and supranational communities. Its conseqeunces are the European values that are listed in Article 2 TEU.

So far, the European Union and/or its Member States have neglected the scrutiny of the individual asylum seekers and other migrants necessary for establishing whether they indeed embrace pluralism and the ensuing European values. Those who do not cannot be admitted to the European Union and its Member States.

Key words: *Asylum; European values; migration; pluralism; individual scrutiny of those applying for admittance.*

INTRODUCTORY REMARKS

There is a general uneasiness about the numerical increase of "non-European" ethnicities in Europe or, more specifically, in the European Union.

In this context, the key word is migration, whether legal or illegal, whether based on humanitarian or economic grounds.

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MIGRATION IN GENERAL

Human migration is the movement by people from one place to another with the intentions of settling, permanently or temporarily in a new location.[1] It has been a permanent phenomenon in human history.[2] Migration may cause cultural, economic and consequently social problems.

1. DIFFERENT TRADITIONS WITH MIGRATION

A. IN EUROPE

In the nineteenth and twentieth century, Europe has been a region of emigration rather than immigration. For this reasons, studies on migration, more specifically immigration, have been practically non-existent here.

B. IN THE INDUTRIALISED COUNTRIES OUTSIDE EUROPE

In contrast, the New World, and more specifically the United States, has been a much sought-after destination for migrants. There is, therefore, a solid tradition of research in migration in the United States. Canada, Australia and New Zealand have comparative experience.

C. MIGRATION TO EUROPE

Because of the irregular forms of seeking entry into the European Union *via* one or the other Member States and consequently of what has been called the European refugee and immigration crisis, the whole question of integration, what is meant by it and what are the necessary preconditions for it, has to be reconsidered right from the beginning.

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[1] See Bernadette Hanlon & Thomas J. Vicino, *Global Migration: The Basics*, (New York and London: Routledge, 2014).

[2] Cf. Dirk Hoerder, *Cultures in Contact. World Migrations in the Second Millennium*, (Durham: Duke University Press, 2002); Patrick Manning, *Migration in World History*, (New York and London: Routledge, 2005); Mohammad Chaichian, *Empires and Walls: Globalisation, Migration, and Colonial Control*, (Leiden: Brill, 2014).

2. MIGRATION ABUSED BY POPULISTS

Otherwise, integration in whatever form will meet with the resistance of the people, which is already and will even more be kindled by populist parties which, in turn, will be so successful in general or presidential elections that no government can be formed without them. A most recent – but by no means only – example in the European Union is the new Italian government which is solely composed of two populistic parties.

As a consequence, Member States with like governments will obstruct the endeavors of the European Union to cope with the migration and refugee crisis by cooperation with third states has been demonstrated recently by the Hungarian government in connection with an envisaged agreement with Arab states,[1] out of purely ideological reasons. ("No new refugees or immigrants in our country against our will.") In a second stage, they will generally refuse to accept, transform or implement EU legislation that runs counter to their isolationist policies.

3. POSSIBLE DISINTEGRATION OF THE EUROPEAN UNION

If this development is not stopped in time, it will lead to a disintegration of the European Union, favored by the false impression created and spread by these populistic movements that the European Union is not able to cope with the pervasive crises that increasingly will hamstring it.

In the end, there will be only two alternatives, namely, first, the creation of a new European Union by the *pars sanior*, the more reasonable part, of the Member States, or, second, the falling back to a Europe as it has existed during the time between the two World Wars which was continuously tormented by national and international turmoil.

[1] EU-Eklat mit Ungarn vor Treffen mit Arabischer Liga, *news.ORF.at* of 2 February 2019, https://orf.at/stories/3110079/.

4. WHAT MEASURES HAVE TO BE TAKEN?

It is therefore imperative to prevent things from coming to the worst. And

- since the present refugee and migration crises seems to be the crux of the matter, and
- since it is hinged on an interaction between on the one hand, by populist movements and their populist governments and, on the other, by the people which support them, and
- since it is unlikely that it will be possible to get populist movements and governments back on the right track – characterized, in particular, by adherence to the values of the European Union as laid down in Article 2 TEU and commitment to treaty obligations,

the only solution of the present crisis of the European will be to convince society at large that the populist approach is the wrong way of dealing with the crisis and that, therefore, populist parties should not be voted for, and populist governments not supported, by the people.

Hand in hand with this will have to go a large-scale information campaign regarding the principles that will have to be observed in dealing with refugees and migrants. These principles must be considered as general principles of law endorsed by the UN Charta, by various binding international treaties, and in particular, the law of the European Union.

a. Principles for dealing with refugees and (other) migrants

These principles are:

- the principle that the world and all its resources are a common heritage of mankind;[1]
- the consequent principle that the world and its resources have to be accessible to mankind it its entirety;
- the principle, that such accessibility requires relativizing all ideas connected with the notion of absolute sovereignty (as, e.g. Permanent Sovereignty over Natural Resources[1]).

[1] See Rüdiger Wolfrum, "Common Heritage of Mankind", in: Rudolf Bernhardt, *Encyclopedia of Public International Law*, Vol. I (Amsterdam etc.: North-Holland, 1992), 692 *et seqs.*

i. *Developing priciples from the beginning*

However, the just stated principles have only developed in the course of time. Originally, in the period of hunters and gatherers, when hordes moved constantly on to new hunting grounds, the world provided, because of the then sparse number of population, sufficient access to the resources needed. The transition to the society of farmers and stockbreeders required a demarcation of land, but originally there was enough for everyone. This changed with the increase in population, because it made land a valuable possession which ceased to be accessible to all. With the setting up of states, the same applied to their territories. In this period, states and their resources where considered to be reserved for the particular people living there; and as regards natural resources it was accepted that they were assigned to them by God and taken through peaceful occupation or conquered in armed conflicts, the outcome of which were also related to the will of God(s).

Inequalities in the distribution of natural resources resulting in reciprocal want and abundance were somewhat balanced by trade. Apart from this, the question was not considered a moral one, because until ancient times the notion of an international community with reciprocal rights and duties did not occur to political leaders and philosophers alike which were more given to the idea that an empire had every right to consider itself as universal and to subjugate all foreign peoples and their communities. The Stoa was the first philosophy to view all people and peoples as part of one universal mankind, but this did not result in the any practical claims for political implementation.

Christian philosophy, starting with Augustine and elaborated in more detail by Thomas Aquinas, culminated, as far as the relationship between states was concerned, in the Spanish Scholastic of the sixteenth and seventeenth century, commonly referred to as the School of Salamanca, Vitoria and Suárez being the most prominent of its members.[2]

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[1] See Bengt Broms, "Natural resources, Sovereignty over", in: Rudolf Bernhardt, *Encyclopedia of Public International Law*, Vol. III, (Amsterdam etc.: North-Holland, 1997), 520 *et seqs.*

[2] See Heribert Franz Koeck, "Vitoria", in: *Staatslexikon der Görres-Gesellschaft*, (Freiburg–Basel–Wien: Herder 1989), 764 *et seq*.; Heribert Franz Koeck, "The Impact of Francisco de Vitoria's International Legal Doctrine Upon the "Vienna School of International Law and Legal Philosophy" of the Twentieth Century", in: Jose Maria Beneyto and Carmen Roman Vaca (eds.), *New Perspectives on Francisco de Vitoria.*

ii. *In early modern times*

Even until then, the idea of Christian universalism had blocked the idea of several sovereign states and had entitled the Emperor of the Holy Roman Empire to annex the newly discovered peoples and their political communities. But Vitoria showed that states are based – not on religion, but – on natural law and therefore are endowed with sovereign powers, a concept that was further elaborated by Suárez.[1]

For the next centuries, trade was still considered a sufficient way to balance want and abundance. But for the first time, the roads of trade (especially the sea and the ports, sometimes also rivers) were considered an everyman's or every state's possession, or, rather, a no man's and no state's possession; and in times of peace no state was entitled to interfere with the trade of another.

b. Contemporary development

i. *State perspective*

It was only in the nineteenth and twentieth century, in the time of industrialization, that certain goods became so scarce that access to them required agreements, first contracts between private persons, later on also treaties either between states *inter se* or between states and private persons. Since the buyer often also undertook the cultivation and/or carried out himself the exploitation works (e.g. mining), he came to be termed investor.[2]

These investment agreements were later often considered as unequal treaties, and their validity was challenged. Yet, so far this system of exchanging natural resources between states has sufficed to meet the needs of those that are short of them.

So far, this exchange of goods was carried out on the basis of reciprocal good will. But what, if certain natural resources become so scarce that the demand is greater than the supply? In this case a worldwide system of distribution based on rationing will be required. A

Does International Law lie at the heart of the origin of the modern world?(Madrid: CEU Ediciones, 2014), 53-131.

[1] See Alfred Verdross, *Abendländische Rechtsphilosophie,* 2nd ed. (Vienna: Springer, 1963), 92 et seqs. and 96 et seqs.

[2] See Peter Fischer, *Die internationale Konzession. Theorie und Praxis der Rechtsinstitute in den internationalen Wirtschaftsbeziehungen* (Wien: Springer, 1974).

most prominent, but also controversial example is the distribution of water.

Since the seabed outside already specially regulated zones his been declared a common heritage of mankind and its exploitation is regulated by the UN Convention on the Law of the Sea, no country has the right to annex or occupy any part of it.[1]

To implement the principles mentioned earlier, certain other principles have to be observed.

- A country that is in need of the entire amount of one of its natural resources has a primary right to the use of that resource.
- A country that is not in need of the entire amount of that particular resource can be subjected to a world-wide regime for the distribution of resources but has the right to a fair indemnification.
- If that resource is scarce, the said world-wide regime may also decide on the percentage to which a particular part of the scarce resource shall be allotted to the other countries. Here again, the country concerned has the right to a fair indemnification.

ii. *Migrants' perspective*

So far, we have only dealt with the accessibility of goods for third *countries*. Now we turn to third countries' nationals.

It is only in recent times that the problem of just distribution of people from war-ridden or otherwise desolate countries among well-to-do countries has come up. In this case, there is an abundance of people who want to migrate. There is no – or no dramatic – demand for migrants in the countries of destination envisaged by the emigrants, i.e. by the prospective immigrants.

D. Problems with refugees and other migrants

In this case most migrants – even if they claim to be refugees – are not welcome, and that for several alternative or cumulative reasons.

- First, most of them are true aliens, i.e. they do not share or even do not know, or, even worse, they reject the legal, social, cultural

[1] Cf. Wolfgang Graf Vitzthum, "Sea-Bed and Subsoil", in: Rudolf Bernhardt, *Encyclopedia of Public International Law*, Vol. IV (Amsterdam etc.: North-Holland, 2000), 328 *et seqs.*

and religious values forming the basis of the society in the country of immigration.

- This becomes particularly perceptible if immigrants adhere to a religious system that – according to different interpretations – imposes or at least permits or condones the use of force against so-called unbelievers in order to set up a system according to their own tenets.
- Second, they are a burden for the national social security system.
- Third, if their level of education is low it will be difficult to get them into the labour system of the receiving state.
- Fourth, they, especially also the second and third generation, often refuse to learn, or to use, unless absolutely necessary, the local language.
- Fifth, even if granted citizenship in the receiving country they still have a strong allegiance to their or their family's country. This allegiance might be particularly noticeable if they are permitted also to retain the citizenship of their or their parents' country of origin.
- A well-known example is the case of Mesut Özil in 2018 who tried to maneuver between his family's country of origin (Turkey) and his country of nationality (Germany). The Turkish President Erdoğan called Özil's conduct, who had posed on a photo with him in the Turkish election campaign, "patriotic".[1] Özil did not reject this evaluation by Erdoğan and was considered by German critics for supporting a political leader who had often been criticized for his chauvinistic and authoritarian style as not sufficiently adhering to German and European values. Özil's conduct coincides with the support given to Erdoğan especially by Turks living abroad, with or without the citizenship of their country of residence.
- Sixth, if these people, whether refugees or other kinds of immigrants, and their offspring exceed in number a certain portion of the traditional population, the receiving country is in danger of suffering a political turn and/or disregard of its own values which coincide with the values of the European Union.
- Seventh, apart from that, the population of the receiving state has a right to a sense of home. If the number of immigrants exceeds

[1] Türkischer Präsident Erdoğan telephoniert mit Özil – „Ich küsse seine Augen", *Welt Online*, 24 July 2018 (15. November 2018).

a certain portion of the traditional population, the latter will feel homeless and strangers in their own country.

5. THE ORIGINAL INTERNATIONAL APPROACH TO REFUGEES

The traditional order of refuge seeking and migration has been set up and laid down in international instruments at a time which did not know of the problems that present themselves today.

The Geneva Convention of 1951[1] was mainly influenced by the experiences with the refugee movements during and after World War II. Between 1939 and 1950, about 30 million had to flee or were expelled from their home countries. In Europe, about 12,5 million of them were Germans. Of the remaining 17,5 million, most directly affected were Poles, Hungarians, people from the Baltic and, of course, Jews. The partition of India in 1947 caused about 20 million people to flee. After Israel's independence in 1948, about 700.000 Arabs from Palestine were forced to flee. After the occupation of Tibet by the People's Republic of China in 1950, 150,000 Tibetans fled, mainly to India. In 1960, 1 million people of European origin fled from Algeria after the latter strove successfully for independence.

6. THE ORIGINAL APPROACH GENERALISED

By the New York Protocol relating to the status of refugees of 1967, application of the Geneva Convention became temporally and geographically unlimited. Since then, the numbers of refugees have multiplied. More than a dozen conflicts and a number of natural catastrophes have dislodged millions of people who fled either to a safer part of their own country or to third countries.

Since 2007, the refugee estimates include not only refugees per the narrow 1951 UN definition, but also people in refugee-like situations, so figures prior to 2007 are not fully comparable. The figure also includes internally displaced persons (IDP) within their country and people in IDP-like situations, which is descriptive and includes groups of persons who are inside their country of nationality or habitual residence

[1] Cf. Eberhard Jahn. "Refugees", in: Rudolf Bernhardt, *Encyclopedia of Public International Law*, Vol. IV (Amsterdam etc.: North-Holland, 2000), 692 *et seqs.*

and who face protection risks similar to those of IDPs but who, for practical or other reasons, could not be reported as such and stateless persons.

As of 2017, 65.6 million individuals have been forcibly displaced worldwide because of persecution, conflict, violence, or human rights violations, per the United Nations High Commissioner for Refugees (UNHCR). Of these, 5.4 million were Palestinian refugees, which are not under UNHCR but nder UNRWA's mandate.[1]

The UN Refugee Agency (UNHCR)[2] estimates a total of 65.8 million forcibly displaved persons worldwide today—nearly the same as the population of France. Of them, more than 22 million are registered refugees. Most of them have fled their homes due to conflict, war, and fearing for their lives. Out of concern for their safety, they're unable to return. In some cases, natural disasters have led them to seek refuge elsewhere. According to statistics, the two regions that produce the most refugees are the Arab states and Sub-Saharan Africa.

To say that almost 85 percent of refugees (and displaced person?) live in developing countries may be correct, but this perspective distorts the problem. The fact is that a hundred percent of refugees coming to developed countries come from developing countries. To give some examples: from Syria - 6,3 Million, from Afghanistan - 2,6 Million, from South Sudan - 2,4 Million, from Myanmar - 1,2 Million, and from Somalia – 1 Million.

That means that fifteen percent of refugees have fled to developed countries. But the difference between refugees eligible for recognition and asylum and other displaced persons, be it for economic reasons (economic "refugees", better: economic migrants), environmental reason or, more, general, because their country cannot sufficiently provide for the common good (peace or security, freedom and welfare) is difficult to draw, because most of them apply for asylum, and even if they are not granted asylum they are already inside the country of application, and it

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[1] *United Nations Relief and Works Agency* for Palestine Refugees in the Near East *(UNRWA)*, set up in 1949, supports more than 5 million registered Palestine refugees, and/or their patrilineal descendants, who fled or were expelled from their homes during the 1948 Palestine war as well as during and following the 1967 Six Day war.

[2] Cf. Atle Grahl-Madsen, "Refugees", United Nations Huigh Commissioner, in: Rudolf Bernhardt, *Encyclopedia of Public International Law*, Vol. IV (Amsterdam etc.: North-Holland, 2000), 78 *et seqs.*

is difficult to get rid of them by deportation if they refuse to go or even get violent in the course of any such proceedings.

7. EXCURSUS. INTERNALLY DISPLACED PERSONS

Whereas "refugee" has an authoritative definition under the Geneva Refugee Convention of 1951, there is no universal legal definition of internally displaced persons (IDP); only a regional treaty for African countries (the Kampala Convention[1]). However, a United Nations report, *Guiding Principles on Internal Displacement*, uses the following definition of internally displaced persons:

> "[P]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border."[

8. THE RATIO OF REFUGEES AND MIGRANTS TO THE NATIVE POPULATION.

The number of (officially registered) "refugees" which is given by the office of UNHCR to be more than 22 million does not include internationally displaced persons. Therefore, we have to add, to the total number of refugees, more the half of this number of internationally displaced persons.

That means we have to start from about at least 35 million, taken refugees and internationally displaced persons together. Even if it is correct that only fifteen percent of them stay in developed countries, this amounts to 5 million as a minimum. Taking into account that the term

[1] The Kampala Convention (African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa), concluded in 2009, was signed by 40 states and entered into force in 2012. The Convention addresses internal displacement caused by armed conflict, natural or human made disasters, including climate change and large-scale development projects in in Africa.

"developed" country is misleading because it is only the Western industrialized countries to which the stream of migrants directs itself. And since not all Member States of the EU are considered desirable by refugees, only three quarters of the Member States are affected.

If we add up to affected EU Member States the other Western industrialized countries (Australia, Canada, New Zealand and the United States), then their total population number will not exceed 1 billion. And since 5 million are 0,5 percent of 1 billion, that means that on the average each of the Western industrialized countries have to cope with 1 immigrant per 2,000 native inhabitants. If we add to this number the number of those who are not included in the 5 million because they have come to these countries as migrants from outside of the Western world under whatever title (e.g. labour migrants) but have not returned to their home country and have been permitted to stay, together with their families, and to settle in the host country, you have to add to the 5 million externally displaced persons another 10 million of people with a migration background, the ratio of these persons to those persons with a native background will fall to about 1 person with migration background to about 700 (at the highest) of persons with native background.

9. PROBLEMS FOR INTEGRATION

This creates great problems for integration. In general, there a three dimensions to integration, namely social, economic and identity integration. Social integration is the process during which newcomers or minorities are incorporated into the social structure of the host society. Social integration, together with economic integration and identity integration, are three main dimensions of a newcomers' experiences in the society that is receiving them. A higher extent of social integration contributes to a closer social distance between groups and more consistent values and practices. Social integration is a dynamic and structured process in which all members participate in dialogue to achieve and maintain peaceful social relations. Social integration is focused on the need to move toward a safe, stable and just society by mending conditions of social disintegration, social exclusion, social fragmentation, exclusion and polarization, and by expanding and strengthening conditions of social integration towards peaceful social relations of coexistence, collaboration and cohesion.

a. Pluralism of society

Social integration is a dynamic and structured process in which all members are expected to participate in a dialogue to achieve and maintain peaceful social relations. Such kind of integration, however, does not, as a rule, take place always and everywhere. To have any meaningful dialogue, the conditions for such a dialogue must exist. One condition is that all sides are interested in achieving and maintaining peaceful social relations irrespective of their particular religious and/or philosophical stance (their *Weltanschauung*) and their economic and political convictions.

This requires that all participants accept the pluralism of society.[1] Accepting the pluralism of society means that everyone renounces the right to impose their conviction(s) upon others. The minimum basis of a pluralistic society is that all its members want to live together in peace and/or security, in freedom and in welfare; and that they are prepared to accept the right of others, regardless of their religious affiliation or philosophy of life (Weltanschauung) to the same goods which are subsumed by the notion of the common good.

b. Corresponding values

Pluralism and the corresponding values have been elaborated in principle by European thinkers; but these values do not belong just to European people but to all people in the world, since everyone wants to live in peace and/or security, in freedom and in welfare and must be expected to allow these goods also for everyone else. Should, however, anyone show himself uninterested in these goods and/or would deny them to other, then theses "others" may use their "natural right of self-defense" in order to prevent him from exercising his harmful conduct.

So anyone who is not prepared to accept pluralism of society is not fit for integration. In this context, Article 2 TEU states clearly:

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a

[1] Cf. Heribert Franz Koeck, *Recht in einer pluralistischen Gesellschaft* (Vienna: Manz, 1998).

society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

No one rejecting pluralism and thus defying Article 2 TEU may be admitted to the European Union and its Member States, even if they come as refugees.

c. Secularisation

This especially applies to those whose religious or philosophic beliefs do not permit them to concede the rights of the pluralistic society to others. They reject the idea of a secularized society where distinction is made between matters spiritual and matters temporal. Yet, secularization is a corollary of pluralisms; and everyone who does not accept that religion must not interfere with politics, at least inasmuch as the common good is concerned, is unfit for integration.

i. Refusal to accept pluralism and secularisation for religious reasons

In this regard, today the only practical threat to the pluralistic society in Europe is the political Islam. (If we were in India, a comparable threat would be posed by Hinduism; but this does not directly concern Europe.) In this connection, it is absolutely futile to argue that there is no official form of Islam and that most Muslims, especially in Europe, would not like to join the jihad and wage war against non-believers. The idea of the "real", i.e. peaceful, Islam is contradicted by the fact that in all Islamic States repression and persecution of those who reject the Islamic belief is the order of the day, and every negative remark about Mohammed is regarded blasphemy and incurs capital punishment. Yet, it is difficult to recall any formal and official denouncement of this kind of legal order by representative Muslim groups in Europe. It is therefore unwarranted to distinguish between Muslims and Islamist movements because the former have never drawn a strict line with regard to the latter.[1]

[1] The term can refer to diverse forms of social and political activism advocating that public and political life should be guided by Islamic principles or more specifically to movements which call for full implementation of sharia. It is commonly used interchangeably with the terms political Islam or Islamic fundamentalism. *Cf., inter alia, Anders Strindberg and Mats Wärn*, Islamism, *(Cambridge, Malden MA: Polity*

It is not necessary to engage in a discussion about whether other religions or their followers, and especially Christians, have had their time of intolerance against not only non-believers but also against heretics of any sort. I would not even consider useful, at this moment, to discuss to what extent violence against others was according, or contrary, to Christian tenets, because, at any rate, such acts of violence have indeed been committed. But this cannot be used as an argument for permitting either Christians or followers of other religions, Muslims not excluded, to commit religion based acts of violence today, because such acts are excluded by the legal order of the pluralistic society which is based on the acceptance, by all, of the fact that no one, not even Pope or Emperor or any other spiritual or temporal leader has been given the right to impose their religion or philosophical belief upon anyone.

ii. *Refusal to recognise human rights for religious reasons*

Mankind has advanced during the last centuries and has officially recognized the unalienable right of everyone to live according to the commands of their conscience, as long as they do respect the same right of others. In order to secure unalienable rights for everyone, the international community has adopted not only the Universal Declaration of Human Rights[1] but also the UN Covenant on Personal and Political Rights.[2] Any challenge to the content of these international instruments is incompatible with the fact that society is necessarily pluralistic and that – as already stated – everyone who is not ready to accept this fact and rejects the pluralistic legal basis of society must be regarded an enemy of mankind.

Thus the Cairo Declaration on Human Rights in Islam[3] adopted by the Member States of the Organization of Islamic Cooperation in

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Press, 2011); Andrea Mura, The Symbolic Scenarios of Islamism: A Study in Islamic Political Thought (London: Routledge, 2015).

[1] Cf. Juan Carillo Saocedo, "Human Rights, Universal Declaration" (1948), in: Rudolf Bernhardt, *Encyclopedia of Public International Law*, Vol. II, (Amsterdam etc.: North-Holland, 1995), 922 *et seqs.*

[2] Cf. Gérard Cohen Jonathan, "Human Rights Covenants", in: Rudolf Bernhardt, *Encyclopedia of Public International Law*, Vol. IVI (Amsterdam etc.: North-Holland, 1995), 915 *et seqs.*

[3] The Cairo Declaration on Human Rights in Islam (CDHRI) is a declaration of the member states of the Organization of Islamic Cooperation adopted in Cairo, Egypt, on 5 August 1990. It provides an overview on the Islamic perspective on human rights, and

1990, which subjects the enjoyment of human rights to the Sharia, i.e. to traditional Muslim law, is not a support for, but a challenge to, the Universal Declaration on Human Rights, and a blow in the face of the pluralistic society. This cannot even be excused by a different cultural tradition. There has been a cultural tradition of cannibalism, e.g. on various islands in the region of the South Pacific, but this does not mean that nowadays cultural tradition can be used as an excuse for cannibalism. By the same token, religious as well as any other kind of intolerance cannot be justified by religious or cultural tradition.

iii. *Jihadists*

In the course of the years, terrorist attacks by Islamists who invoke the Koran for justification of their jihadist violence have been sufficient proof of the latent, if not patent, danger Islamists pose to the open and pluralistic society. There is an incomparably higher probability that Muslims will engage in Islamist terrorism than that people coming from a Christian background will engage in Christian terrorism.

If we consider the lamentable fact that Muslims, too, have been victims of terrorist attacks – as happened recently, in March 2019, in two mosques in Christchurch, New Zealand, – it does not seem that the assailants have invoked Christian tenets in order to justify their attacks. Had they done so, then they would have been wrong, because, in the twenty-first century, there is no Christian church that would condone, let alone call for, terrorist attacks on the adherents of any other religion.

At any rate, the terrorist who attacked the Muslim mosques in Christchurch, did not invoke any Christian principles but declared themselves to be Fascists from the right wing part of the (by the way Australian) society who regarded Moslems a threat to Western culture.

Unfortunately, such fascist attacks or other terror from the extreme right of Western societies cannot be excluded for the future and may be also directed to the terrorists' own countrymen, as has happened in Norway when right-wing domestic terrorist Anders Behring Breivik

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affirms Islamic sharia as its sole source. In 1992, the CDHRI was presented to the United Nations Commission on Human Rights, where it was strongly condemned by the International Commission of Jurists. The Arab Charter on Human Rights (ACHR), adopted by the Council of the League of Arab States in 2004, was equally rejected, in 2008, by the then UN High Commissioner for Human Rights, Louise Arbour, stating that it was incompatible with the United Nations' understanding of universal human rights.

attacked governmental institutions, the civilian population and, in particular, a Workers' Youth League summer camp, killing 77 people.[1] Breivik was of the conviction that neither the State nor society at large had done enough to combat social degeneration of all kind, whether in the context of migrants or other.

10. FACING THE CHALLENGE OF RELIGIOUS INTOLERANCE

Incidents of this kind may not obscure the fact that all migrants, whether pretending to be refugees or not, who have a Muslim background have to be thoroughly scrutinized individually in order to establish whether the particular person in question knows of, and subscribes to, the values of the pluralistic society as they are listed in Article 2 of the Treaty on European Union; and those, who do not, cannot be admitted under whatever title including that of asylum, because they who themselves pose a threat to (the society of) the receiving state cannot claim admission by invoking the threat that another regime is constituting for him. This corresponds to the general principle of law known as "to quoque" and is recognized by international law as a valid objection against claims by those who have engaged, engage, or are likely to engage, in comparable illegal acts.

Unfortunately, such scrutiny of admission seeking migrants has hardly been done in the past and is still not seriously done at present. The reason for this was in the past, before Europe was faced with Islamist terrorism, the general belief that everyone who comes to Europe would be happy to enjoy the freedoms of the European society and will adjust their conduct accordingly. This cannot be upheld anymore as a justified belief, let alone as a valid legal presumption.

In a discussion I had on this topic only recently, my vis-à-vis asked my whether I would think that the (proverbial) nice owner of the grocery at the Turkish market was likely to suddenly take up arms against me or us for the purpose of waging jihad. My answer was that I considered it unlikely that he would do so voluntarily. But I reminded my vis-à-vis of Mao Zedong's principle that a freedom fighter has to swim in

[1] Cf., *inter alia*, Unni Turrettinin and Kathleen M. Puckett. *The Mystery of the Lone Wolf Killer: Anders Behring Breivik and the Threat of Terror in Plain Sight*, (New York: Pegasus Crime, 2015).

the population like fish in water; and that, therefore, not only our good Turkish greengrocer but all Muslims living in Europe might be confronted with the choice of whether supporting Islamist terrorists or not, and that this choice may not really be a free one when faced with the possible and nasty consequences for those who would be considered traitors to the Islamist cause.[1]

Under these circumstances we have to take into account that many of the jihadists joining the forces of the Islamic State in Syria and the Iraq who came from the United Kingdom were second or third generation migrants with a Muslim background. In comparison, young converts to Islam from another than Muslim background were only a small, though media effective, minority. Viewed from this perspective, all those in Europe who do not sympathize with the Islamist cause are sitting on a gun powder barrel.

This is understood or, if not really understood, then intuitively felt by many people in Europe, to whom – therefore – any new immigrant of whatever category (refugee or other) who shares a Muslim background and may turn out a potential or actual Islamist terrorist is posing a threat. And as long as the Member States of the European Union are not able to control immigration and secure to all European citizens and other like-minded people staying with us a life in peace free from terrorist threat public opinion will be very reserved against immigration, albeit under the title of asylum.

Even worse: The case of Breivik in Norway, mentioned above, must be regarded a menetekel, *i.e.* a warning sign, for what may happen in our own societies if their members, rightly or wrongly, have the impression that they are left alone by the political community with their

[1] In this context, Syrian born Laila Mirzo, in her book *Nur ein schlechter Muslim ist ein guter Muslim: Über die Unvereinbarkeit des Islam mit unserer Kultur [Only a bad Muslim is a good Muslim: On the incompatibility of Islam with our culture],* (Munich: Riva, 2018), states that Muslims who opt for an orthodox interpretation of the Koran pose a great danger for the liberal society. From intolerance towards non-Muslims to Islamic hostility to Jews, from the religion-motivated honour killing to the persecution of homosexuals, from the suppression of the woman to the Jihadist ideology of violence, Miro analyses the present problems of Islam and traces them back to the very core of its doctrine. And Laila Mirzo warns that there might take place, instead of the necessary secularisation of Muslims, an Islamic cultural revolution in Europe.

fears of migrants who are alien to our system of pluralism and human rights.

Multiculturalism ignores the fact that there exists a common nature of men demonstrated by men's common gifts of reason and free will and thus offers no convincing argument why men should even try to coexist instead of falling back on Hobbes' vision of the *bellum omnium contra omnes*, the war of all against all.

But as long as one side defies the pluralistic basis of society which alone makes possible a peaceful living together, neither multiculturalism nor interculturalism and its goal that different groups should not just live side by side without real regard for the other cannot become reality.

A realistic view of the possibilities for an integration of migrants, whether refugees or other, clearly shows that the European Union and its Member States will have to see to it that we are not joined by people who are not willing, right from the beginning, to accept the arguments in favour of a peaceful living together but consider people with convictions different from their own as legitimate targets for conversion by acts of violence.

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THE PROTECTION OF ROMANIAN CITIZENS FUNDAMENTAL RIGHTS THROUGH THE OMBUDSMAN INTERVENTION

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Abstract:

The Ombudsman is not only an institution without tradition, but even one unknown in Romania until the end of the last century. Although constitutionally consecrated in 1991, the Ombudsman shall begin activity barely over six years, with the adoption of the Law on its organization, No 35 /13 March 1997, amended several time after, last amended by Law No 9 /5 January 2018, published in the Official Gazette No 17 / 8 January 2018, when appeared The Child Ombudsman. We will present in this scientific material the relevant aspects in connection with this institution and how the institution protects the fundamental rights of Romanian citizens.

Key words*: Ombudsman; fundamental rights; citizen; administration; justice.*

INTRODUCTION

The Ombudsman is not only an institution without tradition, but even one unknown in Romania until the end of the last century. The implant occurs on building a democratic society background and also, taking into account the activity of the Ombudsman lately, it proves to be a success, materialized in a modern institution.

In the debates of Constituent meeting from 1991, Stefan Cazimir a Member of Parliament, which was remarked by his ironic observations, stated: „Developing of the Constitution is conceived, sometimes, as a flight of working bees witch will fill the hives with European honey. Maybe tomorrow, a day after tomorrow, we will establish an

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organization entitled «Sans frontières» or, in Romanian language, «Lăptişorul occidental (Western Royal Jelly)»"[1].

As a result, it was normal that Romanian Constitution provisions settled rules in connection with the Ombudsman Institution, in Chapter IV of the Second title (articles 58-60), being named "People Advocate"[2]. The doctrine noted that the adoption of this institution has been determined by the need for alignment of the New Romania to „contemporary constitutionalism standards", next to another new institution for Constitutional Romanian field, called Constitutional Court[3].

In front of the mandatory requirement to have a control of the Legislature over the Executive, specially to protect the citizens by eventual administration abuses, it was created, for the first time in Sweden, the Ombudsman Institution as a special and specialized body, dependent on the legislative framework, responsible for the discovery, the investigation and finding the solutions for the abuses and the flawed activity of administration. The results obtained by the action of this institution in the Scandinavian countries leaded to its quickly export, so its presence in the societies which are promoting the values of democracy, no matter the given name, is currently a reality associated with the concept of a state governed by the rule of law [4].

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[1] *Official Gazette*, II, no. 18 from 16th of May 1991, p. 16.

[2] Vasile Gionea, had a proposal to name this institution the *Tribune of the People* (*Official Gazette*, II, no. 7/1991, p. 17).

[3] Bianca Selejan-Guţan, *Drept constituțional și instituții politice,* 2nd Edition, (Bucharest: Hamangiu, 2008), 108. The Constitutional Court qualified The Ombudsman as an indispensable institution within the constitutional democracy, with a decisive role in the protection of human rights and fundamental freedoms of individuals (DCC no. 41 from 22nd of January 2014, relating to the unconstitutionality call for the Romanian Parliament Decision no. 75/2013 recording to the cessation of the Ombudsman's mandate and taking over the tasks of this function by a deputy of the Ombudsman, published in the *Official Gazette* no. 105 from 12th of February 2014).

[4] The "ombudsman" institution has been taken over by Denmark in 1954, UK in 1967, Northern Ireland in 1970, France in 1973 (under the name of the Mediator; this name was taken over by EU). The Ombudsman's work in France has led, not only to the straightening of many administrative abuses, but also important legislative reforms decided upon following the proposals coming from the Ombudsman. Such was the Law from 17th of July 1978 on access to administrative documents or the Law of 11th of July 1979, which has consecrated the right of persons to be informed apon the reasons which are the bases for the administrative acts that concern them.

I. THE OMBUDSMAN, EUROPEAN INSTITUTION

A. At EU level, there is a solution system for complaints in connection with the mistakes in administration directed against the institutions and bodies of the Union, through the surveys conducted by the European Mediator. The European Mediator is chosen by the European Parliament for a 5 years mandate, which can be renewed. To solve the referred problems, the Mediator will inform the pointed institution or will try to make an agreement. If there is a failure, he will be able to make recommendations to the pointed institution, and if these recommendations are not appropriated, the Mediator can make a Report for European Parliament, which will decide the measures.

Article 228 of the Treaty on the European Union functioning, authorizes the Ombudsman to carry out investigations in cases of faulty conduct in the management of the institutions, bodies, offices and agencies of the Union, with the exception of the European Union Court of Justice. Any citizen or resident of a Member State of the European Union, of an association or undertaking established in the Union may do such complaints, within a period of 2 years reckoned from the date on which the problem is known, but the European Ombudsman may carry out investigations on their own initiative, also.

According to article 41 of the European Union Charter of Fundamental Rights, any person has the right to benefit, in connection with its own problems, by an impartial treatment, fair and within a reasonable time by the institutions, bodies, offices and agencies of the Union. This right shall include the right of a person to be heard before any individual measure should be taken, which could prejudice the person, and to have access to his or her file, while respecting the legitimate interests of confidentiality and professional and commercial secret[1], as well as the obligation of the administration to motivate its decisions.

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[1] *To be seen* Aida Diana Dumitrescu, "The Theoretical and Practical Aspects Determined by the Successive Amendments of Law No. 221/2009 regarding Political Convictions and Their Related Administrative Measures Issued in the Period Comprised between March 6, 1945 – December 22, 1989", *Dreptul* no. 5 (2011) : 58-75; „Theoretical and practical particularities in connection with the application of the Law-Decree provisions No. 118 from 30th of March 1990 regarding the granting of certain rights to persons persecuted on political grounds by the dictatorship instituted with the

Article 41 also recognizes the right of every person that the Union should repair the damages caused by its institutions or by its servants in the performance of their duties, in accordance with the common general principles of the Member States. Any person may address to the institutions of the Union in writing, in one of the Treaties languages and must get an answer in the same language.

According to Article 19 of the European Code of Administrative Good Behaviour, a decision of an European institutions which might adversely affect the rights or interests of individuals will contain an indication for the appealing possibilities against the decision, shall indicate the nature of the appeal ways, bodies before which they can be exercised and the time limits for exercising them, but in particular will relate to the possibility of opening the judicial procedure and the submission of complaints to the Ombudsman.

B. The Ombudsman institution is closely linked to the protection and guaranteeing of fundamental rights and freedoms of the citizen. As a matter of fact, in those countries where the constitutional justice is non-existent, the protection of fundamental rights shall be carried out effectively only by the Ombudsman's person. On the contrary, its importance is lower in the countries with Constitutional justice and decreases pro rata in connection with the opening-up of private persons access to the constitutional courts.

Thus, in Great Britain, the Ombudsman (The Parliamentary and Health Service Ombudsman) meets the Parliamentary Ombudsman's duties and health services Ombudsman's duties, as they are witten in *The Parliamentary Commissioner Act* from 1967 and in *The Health Service Commissioners Act* from 1993, having the role to investigate the complaints of the persons whose rights have been violated by the administration, or health care services. These complaints may be made only after the persons were addressed first to the claimed authority.

The appearance of the Ombudsman institution in Sweden in 1809 should be understood on the constitutional and political conditions in the Swedish society of that time. The beginning of the 19th Century means for most of the western countries the discovery of the parliamentary regime as a substitute for the monarchical absolutism. Sweden does not

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beginning of 6thof March 1945, also to the deported persons in foreign countries or to the persons who were in prison ships", *SUBB Jurisprudentia* no. 4 (2011): 104.

undertake on this path, but finds the solution limiting royal power through the establishment of powerful, bureaucratic and politically independent administration. In order to ensure that this administration is not an abusive one, The Swedish Constitution of 1809 has created the Ombudsman, as a representative, an agent of the Parliament, having as an initial load the supervision of the way in which the administration respects the law, duty which evolved, later on, to the protection of human rights and fundamental freedoms[1].

In present days, The Swedish Parliamentary Ombudsman is named by the Legislative (Riksdag) and has as a mission to ensure that the authorities and the public clerks are respecting the laws being directly responsible in front of the Parliament[2]. If the responsible authority does not take the proper measures, the Ombudsman can formulate a declaration or a recommendation. Fulfilling the role of an extraordinary prosecutor, he can initiate legal procedures against the officials that committed penal issues, by not respecting their attributes. The Swedish Ombudsman ensures also the role of the national mechanism on the basis of the Protocol on 18 December 2002, on the Convention against Torture and other ill-treatment.

Among the countries which have received the institution of the ombudsman, the French version has its importance, for the fact that this country has developed and exported the model of the modern administration, but also for the fact that in 1973 it already settled an internal administrative control, exercised by its own bodies, but also an external one, by Administrative Courts jurisdiction. In France, *Le Défenseur des droits* (The protector of the rights), constitutional established since 2008, and covered in 2011, comes to replace the competent institutions by then, in the protection of fundamental rights field: The Ombudsman of the Republic (Law of 3 January 1973), The defender of children (Law of 6 March 2000), The High Authority of the Fight Against Discrimination and for Equality (Haute Autorité de Lutte contre les Discriminations et pour l'Egalité – HALDE, The law of 30 December 2004) and National Commission of Ethics and Security (Commission Nationale de Déontologie de la Sécurité – CNDS - The

[1] Constantin Brânzan, *Avocatul poporului. O instituţie la dispoziţia cetăţeanului* (Bucharest: Juridical), 2001.

[2] A report shall be submitted to the Parliament in autumn of every year, in which the Omdusman makes a balance of its own activity.

Law of 6 June 2000). The defender of the rights is supervising that the rights and freedoms is respected by the state administration, by territorial collectivities, by public institutions, and by anybody empowered to carry out a public service, or in respect of which the organic law confers powers (art. 71 al. 1 French Constitution). The Ombudsman shall be appointed by the President of the French Republic for a term of six years, which cannot be renewed, based on a public opinion issued by the competent standing committee from each parliamentary chamber. This position is incompatible with that of a member of the Government or of an parliamentary member. The defender of rights is responsible for the work carried out before the President of the Republic, as well as before the Parliament.

In Germany, the functions of the Ombudsman are taken over by a parliamentary petition commission, what reveals the connection which exists among the protection claimed to be granted to the rights proclaimed in a constitutional text and the right of every harmed person by the exercise of such a right, to address an authority for the remedy of the infringement.

In Austria, where citizens have established the right to a transparent and correct administration, this has been controlled for 40 years (1977) by the Advocate of the People College (*Volksanwaltschaft*), an independent institution, guarantor of the right relations between administration and citizens, exercising an official control in the service of the rule of law and democracy (art. 148 letters a-j from Austrian Constitution). The College is examining the complaints of any person[1], controls the legality of administrative decisions and checks for possible malfunctions of the Administration, controls possible inhuman treatment or bad treatments and participates in solving citizens claims and initiatives addressed to the National Council (the lower chamber of the Austrian Parliament). There is also the possibility of an ex officio referral, and beginning with July 2012, the College of the People's Advocate has the power to assure that certain international law treaties are obeyed within the preventive control. However, the control procedure may be exercised only after the end of the administrative procedure and after the rights of appeal have been exhausted. The members of the

[1] In Austria any person can make a complaint to the College of the People's Advocate, irrespective of their citizenship and age. Enterprises, economic operators and associations can also address to the College in connection with Public Administration.

College of the People's Advocate may act to annul a decree or a Regulation and may formulate recommendations. The College is made up of 3 members appointed by the Parliament for a 6 year term, possible to be renewed once and they are taking an oath in front of the Federal President. The College members are independent and cannot be dismissed, removed or revoked from their offices.

In Republic of Moldova, we find an Ombudsman institution similar with the Romanian one, having the same name, The People Advocate. It was created by Law 52/ 3rd of April 2014, It has a precursor in Moldova's Human Rights Centre, Which has been active since 1998 under Law No 1349-XIII of 17 October 1997 regarding parliamentary lawyers. The Moldavian Ombudsman ensures the respect for human rights and freedoms by public authorities, by commercial organizations and companies regardless of the type of the ownership, by non-commercial organizations and individuals with liability functions. He also contributes to the improvement of the legislation related to human rights and freedoms. The Parliament of Moldova shall appoint two Ombudsmen with autonomy one to the other, one of them is specialized in matters concerning the protection of the rights and liberties of the child, for a 7 years mandate which cannot be renewed. The Moldavian Ombudsman can address to the Court with a request to defend the interests of a person whose rights were breached, or he may be involved in trial for this purpose, as he may be involved in disciplinary proceedings, or in criminal proceedings against the person with liability function who committed violations which have generated the injury of human rights and freedoms. An important competence is given to the Moldavian Ombudsman by recognizing the right to appeal to the Constitutional Court to check the constitutionality of laws and Parliament decisions, the presidential decrees, decisions and orders of the Government, and the international treaties to which Republic of Moldova is a party. Until 15th of March of every year, the Ombudsman presents in front of the Parliament the annual report regarding the respect for human rights and freedoms in the Republic of Moldova, which will contain, compulsory, a chapter on respecting the rights and liberties of the child and a chapter on the prevention of torture.

II. THE OMBUDSMAN, DEFENDER OF THE CITIZEN

Although constitutionally consecrated in 1991, the Ombudsman shall begin activity barely over six years, with the adoption of the Law on its organization, No 35 /13 March 1997[1], amended several time after, last amended by Law No 9 /5 January 2018, published in the Official Gazette No 17 / 8 January 2018, when appeared The Child Ombudsman.

According to its organizational law, the Ombudsman institution has as a purpose to safeguard the rights and freedoms of natural persons in their relations with public authorities. It shall be presented reports in the joint session of the two Parliament Chambers, annually or at their request, having at the same time the opportunity to propose legislative changes or other measures for the protection of citizens' rights and freedoms. The Ombudsman is appointed in the session of the two Parliament Chambers, with a simple majority, for a 5 years mandate[2], which can be renewed just once. The Ombudsman can be any Romanian citizen who fulfils the conditions of appointment as a judge with the Constitutional Court. The Ombudsman mandate is exercised beginning with the oath in front of the presidencies of the two Parliamentary Chambers and it lasts until the new Ombudsman will be appointed under the same conditions. The Ombudsman mandate can stop before dead-line if there is a resign[3], a revocation[4], incompatibility with other public or private positions, impossible to perform his/her duties for more than 90 days as established by professional medical examination, or death.

Regarding the dismissal of the Ombudsman, the Constitutional Court, although it has received through its law of organization the right to control the constitutionality of Parliament decisions, it declined its competence of censorship on the Parliament dismissal decision, on the grounds it does not aim, by its juridical nature, constitutional values and principles. Because the liability of the Ombudsman is engaged just in

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[1] Republished in Official Gazette no. 181/27th February 2018.

[2] According to the initial text of the 1991 Constitution (from Article 55 to Article 57), the Romanian Ombudsman (Advocate of the People) was appointed by the Senate for a four years term.

[3] Professor Anastasiu Crisu resigned from the office of the Ombudsman after 1 year. Until Mr. Victor Ciorbea was appointed as an Ombudsman, the Parliament appointed one of the deputies to perform the duties of the Ombudsman.

[4] Mr. Gheorghe Iancu was revoked according to the Government Resolution No. 32 of July 3, 2012, published in the Official Gazette No. 445 of July 4, 2012.

front of the Parliament, this is the only authority to judge whether the activity carried out by the Ombudsman was realized in the frames of the Constitution or law, or opposite, and as a consequence to dispose the legal measures. The Constitutional Court has underlined the fact that it is not allowed to replace the Parliament, to invalidate the evaluations made by the Parliament and replace them with its own evaluations[1].

The Ombudsman is assisted by two deputies named by reunited permanent offices of the two Chambers of the Parliament, at the proposal of the Ombudsman, with the opinion of the legal committees of the two Parliament Chambers, and they are specialized on activity fields[2].

The Constitutional Court stated that in a case of a definitive impossibility to exercise the ombudsman office, no constitutional or legal norm does not regulate what authority will appoint a *pro tempore* substitute. According to the provision that the Parliament has the right - and at the same time the obligation – to name a person as an Ombudsman, the Court further decayed that the legislator has also the full justification to designate the person who can fulfil, on a provisional nature, the duties of the office until the appointment of a new Ombudsman. Considering that for appointing the Deputies there are not the same conditions as for the Ombudsman, the Court considered that the Parliament was not held by any constitutional or legal obligation to appoint exclusively a person who fulfilled these conditions, and more of that, objectively speaking, it is possible that none of the Advocate People's deputies to perform them[3].

The Advocate of the People and his deputies shall not take legal responsibility for the opinions expressed or for the acts which, in observance of the law, carry out their duties. The Advocate of the People

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[1] DCC no. 732 of 10 July 2012, referring to the unconstitutionality of Parliament Decision No 32 of 3 July 2012 for the appointment of Gheorghe Iancu as an Ombudsman, published in "Official Gazette No 480 of 12 July 2012.

[2] These domains are:

a) human rights, equal opportunities for men and women, religious denominations and national minorities;

b) the rights of family, young people, pensioners, disabled persons;

c) defense, protection and promotion of the rights of the child;

d) army, justice, police, prison;

e) property, work, social protection, taxes and fees;

f) prevention of torture and other cruel, inhuman or degrading treatment in prisons through the National Prevention Mechanism.

[3] DCC No. 41 from 22nd of January 2014, *pre-cited*.

and its deputies may not, during their mandates, to be members of a political party, nor may perform any other public or private offices, except for the educational activities and functions in higher education. In the exercise of his powers, the Ombudsman shall not place substituted for the public authorities; he may not be a subject to any imperative or representative mandate and no person may oblige him to obey to his instructions or provisions. As a guarantee of this independence[1], the Ombudsman institution has its own budget, which is a part of the State budget.

To facilitate the access of citizens to the Ombudsman's institution and to improve its activity more effectively, 14 offices of the Advocate of the People are organized at territorial level, in towns with a Court of Appeal. The field to prevent torture in detention is also organized in the territory, the Ombudsman by order establishing the places where the 3 local centres and the counties which entered the area of their competence are located[2].

The Ombudsman will exercise his powers ex officio or at the request of persons aggrieved in their rights and freedoms[3], the public authorities being obliged to give the Ombudsman all necessary support.

In solving the problems to which he is notified, the Ombudsman can make inquiries[4], may hear and make statements from the heads of the public administration authorities or from any other official, and may lay down recommendations to redress an abuse of the administration. He and his deputies have access to the classified information of public authorities, if they consider that information necessary to solve the petitions.

The acts that the Advocate of the People draws up shall be reports and recommendations.

The reports shall be submitted annually by the Ombudsman

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[1] Marieta Safta, *Drept constituțional si instituții politice* vol. I, ed. a 2-a (Bucharest: Hamangiu, 2015), 260.

[2] At present, such zone centers are set up in the towns of Alba Iulia, Bacau and Craiova.

[3] Petitioners can be addressed by any person, even if they are in detention or does carry out the military service, must be signed and exempted from stamp duty. It is also provided a maximum period of one year in which they may be formulated, the time limit within which they are to be taken into account is the date of the infringement or the date on which the person concerned is aware of the facts covered by the complaint.

[4] The public administration authorities shall be obliged to provide any information or documents necessary for the inquiry.

before the Parliament, in which the institution's activity is reported for a calendar year, or that occasionally made (special reports), on its own initiative, or at the request of the Parliament, and submitted to the chairmen of the two Chambers or to the Prime Minister. The reports may cover some aspects of the institution's work, may include recommendations on the modification of the legislation or they may refer to serious cases of corruption or of breaking the laws of the country, found during investigations.

Recommendations are the acts of the Ombudsman, following investigations by the appeal of nationals or of its own motion. Through them, the Romanian Ombudsman is addressing to the public administration authorities to the unlawfulness of their papers or administrative deeds. The recommendations do not have any binding legal force, but they are also not under any Parliamentary or Court control[1]. The Ombudsman has no legislative initiative right[2], but he can

[1] Ștefan Deaconu, *Constitutional Law* (Bucharest: C.H. Beck, 2013), 162. The lack of the mandatory character of the Ombudsman acts made through his attributions, can affect the effectiveness of its activity and the trust in the civil society. Law No. 35/1997 provides penalties to be imposed if the Ombudsman's recommendations are not complied by the authorities or by the clerk, which consists only in the possibility of inform the superior authority, till the Government level. As noted, these sanctions are not of the most effective ones, if we take into account the long terms stipulated by the law and the uncertainty of a favourable resolution (Selejan-Guțan, *Dreot constitutional*, 271-272).

[2] There was an attempt to recognize such a right, it's true that in an indirect way. Article 10 of the law project on the procedure for regulations interpretation stipulates: „ The interpretation of the law may be requested from Parliament, motivated, by deputies and senators, by the Executive, by the Ombudsman, and also by citizens who are exercising their rights to legislative initiative under the terms of article 74 of the Romanian Constitution, republished. The request must indicate, on a compulsory basis, the text in force, that is the article, the number and the title of the law to be interpreted, stating the number and date of the official monitor in which it was published, and will be sent, in an electronic form and also in written form, to the two Parliament Chambers, who will decide in a joint session". The Constitutional Court, by Decision no. 61 of 7th of February 2017, published in the Official Gazette no. 219 of 30 March 2017, declared unconstitutional this provision with the following motivation : „ The normative act adopted by the Parliament is the law, so, no matter the object, the legislative initiative right belong only to the subjects named by art. 74 from Constitution [deputies, senators, Executive and citizens - Parliamentary, governmental and citizenship initiative]. Furthermore, the organization and functioning of the Ombudsman is related to the regulation area of the organic law [Article 58(3) of the Constitution]; but, the law under revision is an ordinary one".

be consulted by the initiators of the legislative projects and ordinances on the citizens' rights and freedoms.

The institution's powers were broadened after the constitutional revision in 2003; as compared to the judicial authority, they are subject to the special status recognized to Justice in a state of law.

An important addition to the prerogatives of the Ombudsman, it was the right to appeal to the Constitutional Court in *a priori* or *a posteriori* control of laws and government ordinances[1].

The possibility recognized only to the Ombudsman to address himself directly to the Constitutional court by an exception, without being conditioned by the completion of a pre-stage in front of a court, comes to compensate the lack of a *actio popularis* in the constitutional contentious in Romania [2].

By Law no. 554/2004 of the administrative procedures, it was made available to the Ombudsman another legal way to guarantee the rights and freedoms of the citizens, through the possibility that it was recognized to inform the administrative court, even without the prior consent of the harmed citizens by a public administration authority or to defend a public interest[3].

After the amendment to Law no. 35/1997 by Law no. 9/2018, the Ombudsman represents in front of the Court the minor who was abused (physical violence, psychic violence, labour exploitation, human traffic, neglecting, and any form of exploitation) by the parents, by the tutor or by the legal representative. These forms of abuse are provided in the internal and international legislation to which Romania is part to (Article 15(n)).

For the Ombudsman was also acknowledged the right to appeal the High Court of Cassation and Justice through an interest of the law

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[1] Article 146 (a) and (d) the final these of the Constitution.

[2] In 2004 - 2018, the Advocate of the People has issued a number of 76 direct unconstitutionality exceptions referring to laws, ordinances and emergency ordinances of the Government. By them, just 27 exceptions were admitted by Constitutional Court.

[3] Article 15(M) of Law No 35/1997 republished and Article 1 of Law No 554 of 2004 regarding the administrative litigation. For details to be seen Ovidiu PODARU, *The Laws of the Public Administration* (Bucharest: Hamangiu, 2015) and *The right to fill the territory, town planning and construction* (Bucharest: Hamangiu, 2015), Anton Trăilescu and Alin Trăilescu, *The Law of Administrative Litigation* (Bucharest: Hamangiu, 2014), Iuliana Râciu, *The Procedure of Administrative Litigation* (Bucharest: Hamangiu, 2009).

recourse, so that it can rule on matters of law on which the courts have had conflicting decisions.

CONCLUSIONS

Retrospectively looking, we can see that the Ombudsman's institution has seen an evolution from a simple supervisor of the administrative action, to a defender involved in the citizens' rights, especially through the competences acquired in the judicial field and the prevention of torture and ill treatments.

Existence and action of the Advocate of the People, Ombudsman type institution, it is closely linked to the control exercised by the legislative over the executive, being the expression of the transposition of the principle of power separation into contemporary democratic states. The Ombudsman action is based on conciliation, the institution enjoying credibility resulting from its stand of autonomous and independent public authority.

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THE IMPORTANCE OF NON-GOVERNMENTAL ORGANIZATONS OF ACHIEVING THE SUSTAINABLE DEVELOPMENT GOALS: THE FIGHT AGAINST RACIAL DISCRIMINATION OF ROMA IN EUROPE

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Abstract:

Here we examine the decisive role that non-governmental organizations play in fulfilling the sustainable development goals, and more specifically, in the sphere of the fight against racial discrimination of Roma in Europe. I will try to show how non-governmental organizations, thanks to the close relationship that they have with Roma communities, constitute key actors in the fight against discrimination of these groups. In fact, by being able to work as partners with other public and private entities, non-governmental organizations become strategic organizations in the development of programmes with Roma communities, above all at the local level, cognizant of the importance local actions have for achieving the sustainable development goals.

Key words: *Sustainable Development Goals; Non-Governmental Organizations; Human Rights; Racial Discrimination; Roma; Europe*

The 17 global goals of the 2030 Agenda for Sustainable Development were promulgated on January 1st, 2016. By 2030, we will see which of these goals of this ambitious international agenda will have been achieved, which center on the eradication of poverty, the reduction of inequalities, and sustainable development as parts of an indivisible whole, for which human rights form an essential pillar. The steps for the universal application of the 17 goals (SDG) must necessarily be adopted "locally", that is, each country, region, or city must incorporate the

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The prohibition of racial discrimination in the european union. (587051-epp-1-2017-1-es-eppjmo-chair). Unesco chair on culture of peace and human rights (ed/pls/hed/17/111). Cátedra naciones unidas de los objetivos de desarrollo sostenible.

agenda goals to its own reality and its own development.[1] Citizens play a decisive role in defining the development that each country, region, or city seeks to follow, without forgetting the indispensable participation of those persons who are more disadvantaged but should not be left behind.

This is the case for the Roma population, which is not only the largest ethnic minority in Europe -between 10 and 12 million people-,[2] but also constitutes one of its most vulnerable groups, victimized by poverty, social exclusion, and discrimination as an ethnic minority.[3] Unfortunately, despite the programs used to date to combat racial discrimination of Roma in Europe, the data show that the measures adopted have not been effective and European society today calls ever more fervently for efforts of prevention, mechanisms of raising social awareness, and the care Roma victims receive who have suffered discrimination, in many cases on multiple fronts.

In view of this desolate panorama, here I will try to show how NGOs,[4] thanks to the close relationship that they have with Roma

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[1] In the words of the former Secretary General of the United Nations, Ban Ki Moon: "The implementation is proof of the new agenda".

[2] Of these, around 6.2 million reside in the European Union (EU), the majority in central and eastern member states. See COM (2011) 173 final, of April 5 2011, «A European framework of national strategies for the inclusion of the Roma until 2020». See also the special report nº14 of the European Court of Auditors of 2016: <<Initiatives and financial aid of the EU for the integration of Roma: despite significant advances in the last decade, nonetheless additional efforts are required in the field>>, which was presented in concert with Article 287, section 4, second paragraph of the Treaty on the Functioning of the European Union. According to this report, about four fifths of the estimated Roma population of the EU live in 8 member states: Romania, Bulgaria, Spain, Hungary, Slovakia, France, Czech Republic, and Greece.

[3] In member States with the highest concentrations of Roma (Bulgaria, Slovakia, Romania and Hungary), the Roma represent between 15 to 20% of students enrolled in school and of those recently entering the work force. Ibidem.

[4] According to the NET-KARD Project "Practical Guide for NGOs to prevent discrimination against the Roma Community ", edited by Berill Baranyai (ACIDI, I.P.), Maria Helena Torres (ACIDI, I.P.), Maria José Vicente (EAPN Portugal), Paula Cruz (EAPN Portugal), Vasco Malta (ACIDI, I.P.), in July 2014, with financial support by the Programme for Fundamental Rights and Citizenship of the European *JUST/2012/FRAC/AG/2848*: "The term "non-governmental organizations" generally refer to any organization that does not belong nor is related to any government institution. NGOs are social groups with a social and political role within the community and society; they have a formal legal structure; they are related and tied to society or community through acts of solidarity; are not for profit; and enjoy a

communities, constitute "key actors in the fight against discrimination of these groups", being able to work as partners with other public and private entities, by converting them into "strategic organizations in the development of programmes with Roma communities, above all at the local level", cognizant of the importance local actions have for fulfilling the SDGs.

The United Nations High Commissioner for Human Rights (UNHCHR) has insisted for decades on the importance of NGOs as guarantors of human rights throughout the world. It is worth reminding ourselves here that the UN Declaration concerning the defenders of human rights began to be elaborated in 1984 and was approved by the General Assembly in 1998, on the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights, highlighting in article 1 that "everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels".[1] The collective efforts of numerous NGOs on human rights and the delegations from some States contributed to the final result of a declaration that is a coherent, useful, and pragmatic text, which is directed not only at States and the defenders of human rights but at everyone because "everyone", without exception, has a role to fulfill as defenders of these rights as stakeholders in a global movement which we cannot escape from. A few years before, in 1993, 841 NGOs attended the World Conference of human rights, known as the Vienna Conference, all

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considerable degree of autonomy. In this sector, a small number of entities is economically independent, while the majority depends on public aid" (p. 34).

To understand the role of NGOs in this area, please see https://www.coe.int/es/web/compass/human-rights-activism-and-the-role-of-ngos. As highlighted here, the NGOs, "in a very direct sense, tools that are available for use by persons and groups around the world. They are administered and coordinated—like many organizations—by individuals, but a large part of their effectiveness derives as well from other community members that volunteer their support for the cause. This fact confers a great importance for persons who wish to contribute to the improvement of human rights in the world".

[1] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedom. A/RES/53/144 8 March 1999. Resolution A/RES/53/144 of the General Assembly by which the Declaration concerning the defenders of human rights was approved.

of which declared a willingness to work on a mission in defense of human rights.[1]

Here we will concern ourselves with the decisive role that NGOs play in fulfilling the goals of the SDG and, more specifically, to combat racial discrimination of the Roma in Europe.[2] To support this thesis, it is enormously relevant to return to the "Practical guide for NGOs to prevent discrimination against the Roma Community"[3] of 2014, which *resulted* from the project NET-KARD,[4] part of the Programme for Fundamental

[1] Although it might come as a surprise, this number is only a small fraction of all NGOs dedicated to human rights in the world. The majority of "human rights organizations" tend to be dedicated to the protection of civil and political rights. Organizations of this kind best known, at least internationally, are Amnesty International, Human Rights Watch, The International Federation for human rights, Human Rights First and Interrights. https://www.coe.int/es/web/compass/human-rights-activism-and-the-role-of-ngos

[2] In Spain, for example, the following NGOs, among others, play a notable role: SOS Racismo or the Fundación Secretariado Gitano. Specifically, the Fundación Secretariado Gitano (FSG) writes annual reports. These reports have a central mission to expose the day-to-day existence of ethnic discrimination with respect to the Roma community using confirmed data, selected from practical experience from the more tan 70 centers of the FSG throughout Spain.

[3] https://www.gitanos.org/upload/72/18/Guia_NetKard_ONG_y_com._gitana.pdf. This guide was edited by Berill Baranyai (ACIDI, I.P.), María Helena Torres (ACIDI, I.P.), María José Vicente (EAPN Portugal), Paula Cruz (EAPN Portugal), Vasco Malta (ACIDI, I.P.). This Guide addresses NGOs and Roma associations with the aim to provide resources for the representatives of these organizations with the goal to prevent discrimination against Roma communities and provide practical tools to promote the creation of networks among other interested parties. The content of the Guide is the result of a constellation of discussion groups and interviews carried out by partners of the Project in Portugal, Spain, Romania, and Italy. The participants are NGOs and representatives of associations/communities of Roma who provided their testimony and experience acquired in the fight against discrimination of Roma communities and tackling their principal difficulties. Moreover, they proposed solutions and recommendations concerning how to improve this work. In addition, the knowledge of the partners of Net-Kard have regarding these topics to generate a help manual for the NGOs and Roma associations, thereby not only having a merely informative character, but also acting as a working tool for planning actions in the field, above all strategic actions to combat discrimination against Roma communities.

[4] The project had the following goal: "Cooperation and networking between the key actors for preventing the discrimination of Roma communities, improving the support for victims through the promotion of cooperation and networking between the principal actors involved in the defense of the right to equality and improve and transfer the

Rights and Citizenship of the European Union involving the following partners: The Fundación Secretariado Gitano (principal partner, Spain); the European Anti-Poverty Network (EAPN Portugal); the High Commission for Immigration and Intercultural Dialogue (ACIDI, IP) (Portugal); Centrul de Resourse Juridice (CRJ) (Romania); Fundatia Secretariatul Romilor (Romania); Ufficio Nazionale Antidiscriminazioni Razziali (Italy); and the Istituto Internazionale Scienze mediche Antropologiche e Sociali (Italy).

As this Guide details, when one asks what the fundamental tasks for NGOs are in this context, certainly the priority is to raise awareness in the majority of society, including amongst the key professionals.[1] We should keep in mind that the NGOs take on a key role in actions to raise social awareness at both the national as well as local levels, and, in collaboration with other public and private organizations, through the dissemination of information about the fight against ethnic discrimination, the promotion of equal treatment and different awareness campaigns, including respect for diversity and the promotion of intercultural dialogue.

From a methodological and practical perspective, one of the key figures is that of the Roma mediator/facilitator, as this figure is responsible for conveying information to Roma communities, not only about their rights and privileges but also about the procedures that need to be followed in reporting incidences of discrimination. Indeed, the Roma mediators/facilitators play an important role in the schools of some European nations.[2] I concur with the Council of Europe in pointing out that raising social awareness in this regard goes hand in hand with education,[3] to the point that this support, or possibilities of support, is

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methodological experience to different countries that are part of the project." See ibidem.

[1] This means that these actions should not only be directed at Roma citizens, but also at non-Roma, including here all citizens and not just key professionals. See ibidem.

[2] One should offer specific training to teachers to prevent and combat any prejudice these professionals may have concerning the Roma population.

[3] Activism in favor of Human Rights and the role of Non-Governmental Organizations, Council of Europe, Compass: Education Manual for Young People on Human Rights https://www.coe.int/es/web/compass/human-rights-activism-and-the-role-of-ngos
Indeed, many NGOs on human rights include, at least as part of their activities, some type of information directed towards the public, or educational work. Conscious of the fact that the essence of their support is to be found in the public, the NGOs often try to achieve a better understanding of human rights with the aim of generating more respect,

where one can find the foundation for the success of the NGO community in improving the human rights situation.[1]

In conjunction with this important role in raising social awareness, the NGOs also fulfill equally important roles:

1) The NGOs play a principal role in monitoring social policies to the extent that they are often intimately involved in their formulation. In some countries this role has been formalized through structures such as "National Strategies for the Integration of the Roma Community" as well as other national and local structures. This participation is important, as they perform lobbying (social action groups) and thus influence decision-making. It is interesting to note that the Council of Europe[2] recognizes that if there is a common fundamental thread underlying the different forms of activism by NGOs, it may lie in trying to "demonstrate" who the perpetrators of injustice are, as it is very often the governments that try to evade the contractual obligations under international treaties and other rules of law.[3]

Among other relevant activities of the NGOs in fulfilling this function, we cite the following: 1) letter campaigns designed to pressure civil servants; 2) protest marches and demonstrations, with media coverage, with the aim of gaining the support of the public and shedding light on specific topics;[4] 3) concerted actions through communication, electronic mail, blogs, social networks and Internet;[5] 4) Shadow reports

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and, in turn, increase the probability of being able to call on support in case the rights are violated.

[1] See ibidem.

[2] See ibidem.

[3] Two of the best-known examples of organizations that produce and present monitoring reports are Amnesty International and the International Committee of the Red Cross. As is well known, these two organizations exude authority not only among the general public, but also at the UN level, since their reports are taken into account as part of the official monitoring process of governments that have accepted the terms of the international treaties. https://www.coe.int/es/web/compass/human-rights-activism-and-the-role-of-ngos

[4] In addition to demonstrations of support or outrage from the public, NGOs can also participate in meetings or private meetings with civil servants. Sometimes, the simple threat of publicly airing issues getting something out of public view may be enough to change a policy or a practice.
https://www.coe.int/es/web/compass/human-rights-activism-and-the-role-of-ngos

[5] NGOs can cooperate with the media to counteract the negative stereotypes of Roma communities that have a disastrous effect on the image of the community and constitute a violation of the principle of equality. The growth of anti-Roma sentiment on the

presented to the United Nations organizations that monitor human rights to give the perspective of the NGOs concerning the true human rights situation in a specific country. A good example of this last activity is the platform Futuro en Común,[1] which has recently developed an analysis and plan of action to achieve the SDG, in parallel and distinct from the plan developed by the Government of Spain,[2] in which is highlighted the

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Internet and on social networks is increasingly worrying and fighting against these stereotypes is very complicated.

[1] Common Future is a meeting ground between organizations, movements, networks and social platforms that is active both in Spain and in other countries of the world, with the aim to end poverty and inequalities, and respect the environmental limits of the planet. See futuroencomun.net/

For the goals of sustainable development, see also the INFORME DE ESPAÑA PARA EL EXAMEN NACIONAL VOLUNTARIO 2018: https://sustainabledevelopment.un.org/content/documents/20113Spain_VNR_Report_Spain_29_de_junio_2018.pdf

[2] Take into account that Spain presented to the UN on July 18, 2018 a voluntary report on the status of the SDGs in the country: https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=893&menu=3170

This should be set in context to the Report of the Government of Spain for the 2018 voluntary national review of the SDGs of June 29, 2018. It states: "Regarding civil society and knowledge, the first steps in relation to the Agenda were taken by the organizations most linked to international cooperation for development; from here there emerged platforms for dialogue and joint work with all sectors, such as the joint Oxfam Intermón-Unicef Spanish-WWF Committee and the Future in Common platform. All of the social action networks and platforms and the unions soon adopted the 2030 Agenda as a frame of reference and began a very dynamic process of interlocution and contributions, publications and public events of all kinds, and a position paper began to be developed, as well as a great event was planned in which Spanish civil society could express its feelings.

In an outstanding exercise of common effort, the most important action of this process, took place on April 9 at the Congress of Deputies, organized by thirteen networks and platforms, three national unions, twenty-five civil society organizations and four institutes university development and study centers. Prominent among them is the Third Sector Platform, which integrates the Volunteer Platform of Spain, the European Network for Combating Poverty and Social Exclusion in Spain, the Social Action NGO Platform, the Spanish Committee of People Representatives with Disability, the Coordinator of Non-Governmental Development Organizations, the Childhood Platform, the Spanish Red Cross, Caritas and the National Organization of the Blind of Spain.

To this we should add the contributions made by civil society organizations. In the report on the Common Future's "*A transforming agenda 2030 for the people and the planet*", a series of proposals were launched to address the four major challenges that, in

fact that Spain is the European Union country with the third-highest rate of students not completing school (18,3% en 2017), with a specially high incidence among foreign students, students of ethnic Roma background and students from low-income households.[1]

2) Educational actions are decisive when it comes to acquiring knowledge about equality, human rights, and discrimination as they contribute to the development of professional knowledge and improve the personal skills of the subjects. This training should directed to the Roma community as it needs to understand better the law (rights and duties) not just concerning discrimination, but also with respect to institutional norms and work procedures, in addition to familiarizing themselves with the implications of intercultural dialogue. This training should also be tailored to other groups, such as the NGOs,[2] those who work in communication media and public services, that is, teachers and school administrators, prison wardens, police, judges, lawyers, and human resources, etc. The participation of Roma interlocutors in this process plays a vital role as they are members of the community and serve as points of reference for both Roma and non-Roma.

Educational actions are complemented by technical assistance, as "the NGOs can offer technical assistance and training to the key actors in the fight against discrimination: primarily the technical staff and heads of

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their view, Spain faces. One of them is precisely "Do not leave anyone behind", addressing the problems of poverty, social exclusion and discrimination. The organization Common Future believes that other key public policies to leave no one behind are quality education, universal health care and an actual right to decent housing.

[1] They add that some residents in the country still do not have access to health services, or have to pay for part of these services. And the right to housing "is not guaranteed". See <<La España de 2030 según las ONG>>, published in the newspaper El País on 11.07.2018.
https://elpais.com/elpais/2018/07/11/planeta_futuro/1531308710_807870.html

[2] According to the practical Guide for NGOs to prevent discrimination against the Roma Community of 2014, resulting from the project NET-KARD: "Regarding NGOs, training should focus on the following aspects: Roma culture and history in the national and European context; the politics of integration at the national and European level; funding and fundraising policies; creation of networks; human rights; strategic planning; strategic monitoring; strategic litigation; defending rights. Participatory and interactive training methodologies related to practical situations (including personal experiences) should be used, and when possible, be combined with field visits. Lastly, it should be stressed that training by itself is not sufficient to achieve change, and is but a support mechanism to put the policies and missions of the NGO into practice". https://www.gitanos.org/upload/72/18/Guia_NetKard_ONG_y_com._gitana.pdf.

administrations and social organizations, legal professionals, lawyers, police and reporters, as well as Roma associations. We should not underestimate the legal counsel offered by NGOs to Roma who are victims of discrimination to the point of aiding them in courts of law to defend their right to equal treatment." The general goal of these actions is to show the Roma population and other citizens the importance of reporting all cases of discrimination.[1] In fact, successful litigation can contribute to encouraging other victims to report discrimination, by showing that it is possible to achieve justice, and, above all, not to feel that they are alone in this fight.

Emblematic in this sense is the decision of the European Court of Human Rights in the "Muñoz Díaz versus Spain", of December 9th, 2009.[2] The plaintiff, María Luisa, was a Spanish woman, of Roma ethnicity, widowed with six children, whom the national authorities had denied a widow's pension because she had not contracted marriage according to the legal form valid in Spain in the year 1971 (according to the Roman Catholic rite), but instead according to the traditions of the Roma community. It was argued not only that a marriage according to Roma rites had no civil effects as would a canonical marriage have, which was true, but that, in addition, it was also not equivalent to a civil union, at least by analogy, which was somewhat more doubtful,[3] as evidenced by the final decision,[4] given that the European Court of

[1] See ibidem. Thus, for example, drawing attention to the phenomenon of discrimination that is often associated with hate crimes will serve to set the justice system in motion and will sensitize all relevant actors (policy makers, the police, the media, lawyers, etc.) to take it seriously and combat this problem.

[2] In this particular case, the plaintiff used the counsel and legal help of the Fundación Secretariado Gitano, which proved decisive for showing that the prohibition of racial discrimination had been violated (art. 14 CEDH) in conjunction with the right to the respect for property rights of the First Additional Protocol. The Spanish government had acted erroneously and the courts, first the Superior Court of Madrid and later the Constitutional Court, had not acted to redress the failings. The Spanish State had to reimburse María Luisa 70.000 € to resolve its obligations as determined by the ECHR.

[3] Specifically, the decision of the Constitutional Court 69/2007, of April 16th, had dismissed the complaint of the plaintiff, refusing to consider the truly particular circumstances of the case in regard to the ethnic aspects, which, on the other hand, certainly had played a role.

[4] In fact, the Court addressed, among other arguments, the ethnic argument in the case, emphasizing, first of all, the belief held by the plaintiff that her marriage was valid was demonstrable also by her belonging to the Roma community, "which has its own value system within Spanish society". The Court returns to the idea of a new "international

Human Rights found that a right recognized in Article 14 in conjunction with Article 1 of Protocol nº 1 had been violated, it being understood that receiving a pension lies indeed within the future assets that enter into property rights according to its own jurisprudence (par. 44). More recent is the decision of the Spanish Supreme Court 58/2018 of January 25th, 2018, in which the NGO support to the plaintiff -Luz- was decisive, even though in this case she did not achieve the same success as María Luisa, at least not up to now.[1]

These two exemplary cases show how NGOs can act as intermediaries to transfer complaints to the bureaus of equality or the police and give aid and comfort to victims. Keep in mind that the majority of Roma are not accustomed to making reports to governmental agencies or the Courts. The Roma NGOs in some way are transformed into organizations of trust, so that Roma feel more comfortable and ready to speak about the situations of discrimination that they suffer, in light of the fact that there is much permissiveness, lack of action, and impunity with respect to racism and discrimination of the Roma community.

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consensus" within the Council of Europe "to recognize the particular needs of minorities and the obligation to protect their security, identity, and way of life, not only to protect the interests of members of said minorities, but to preserve the cultural diversity that benefits all of a society in its totality." It seems clear that it is not a question of applying laws in a manner more favorable to the Roma, which would, moreover, be highly questionable, but, rather, that they should not be treated worse than other persons in comparable situations.

[1] This case also involves a Roma woman (Doña Luz) who married a person named Nicanor according to Roma rites in 1974. Luz asked the Instituto Nacional de la Seguridad Social (INSS) for a widow's pension when Nicanor died in 2014. The INSS denied her application, deeming her marriage to be invalid for not being recorded in the Civil Registry. Luz appealed this decision to the Supreme Court of Andalusia, alleging discrimination for ethnic reasons and citing the ECHR ruling on María Luisa Díaz Muñoz vs. Spain. The Court agreed and obliged the INSS to pay said pension. But the INSS disagreed and appealed to the Supreme Court of Spain. This court upheld the appeal of the INSS, deeming the arguments given by the INSS to deny the widow's pension to be valid. Although there were similarities to the case of María Luisa Muñoz Díaz, the contracting parties in this case were held not to have acted in good faith. Doña Luz and her husband did not have any official documentary evidence to the effect that they were "married", unlike the official documents presented in the case of María Luisa. Due to this lack of documentary evidence, the Supreme Court decided to follow previous constitutional Jurisprudence, since it did not consider it contrary to the ECHR ruling.

If NGOs are of great relevance, it is because, in addition to engaging in measures that promote the recognition of discriminatory practices, they also play a decisive role in holding the government accountable for its implementation of the Directive on racial equality (EU Directive 2000/43/ CE)[1] by remaining vigilant. In accordance with article 7(2) of this Directive, NGOs with a legitimate interest are legally authorized to act in the name of or in support of Roma victims in proceedings.

3) NGOs are an important source of data and knowledge about racial discrimination of Roma, and, for this reason, it is important that they interchange information and technical resources with other organizations, above all with State agencies that have the capacity to incorporate the knowledge base of the NGOs in the system. For this purpose, the annual reports that they publish for the public authorities charged with fighting discrimination are an invaluable resource for legal professionals, communication media, the police,[2] etc. These documents can be used as proof of discrimination and contain specific and useful information for lobbying and support groups. A good example of this can be found in the Fundación Secretariado Gitano,[3] which publishes annual reports with the aim of informing the Spanish government and society in general of the daily discrimination faced by the Roma community by presenting cases testifying to the violation of the fundamental right to equality. This publication is also a means to give voice to the victims of discrimination that need to be defended and supported with the goal to seek solutions to the problems of discrimination that they suffer, thereby contributing to the creation of a more just society.

4) It is essential that NGOs actively collaborate with Roma associations to eradicate racial discrimination, taking into account that the latter provide one of the best means of promoting the social participation of Roma communities, because "1) The associations are

[1] According to this Directive, a new independent organization should be created to promote equal treatment and non-discrimination.

[2] According to the practical Guide for NGOs to prevent discrimination against the Roma Community of 2014, resulting from the project NET-KARD: "NGOs can help security forces to improve the communication channels with Roma citizens, taking into account that the police play a fundamental role in guaranteeing the right to equality". https://www.gitanos.org/upload/72/18/Guia_NetKard_ONG_y_com._gitana.pdf.

[3] Annual report on Discrimination and the Roma Community (Spain) http://www.gitanos.org/centro_documentacion/publicaciones/fichas/100777.html.

often ahead of others in addressing the problems of the Roma people; and 2) they have the capacity to make Roma communities aware of their own needs and ability to resolve problems and promote their own development".[1]

5) One should encourage the participation of Roma communities and give them a voice. As specified in the practical Guide for NGOs to prevent discrimination of the Roma Community of 2014, a result of the Project NET-KARD: "Working "with" and not "for" is essential for n effective social intervention, because the Roma need to be active participants in their own process of social inclusion. The participation of these citizens in defining the measures and social actions, and their posterior application, is a right, ensures that their "voice" is heard, and that "their true interests are protected".[2]

6) The NGOs are key actors in breaking down barriers that Roma communities are still facing regarding access to general services, such as education, health, etc. For this reason, it is important for NGOs to become aware of the need to work jointly and in collaboration with these services during the realization of a project or activity. One example of this type of cooperation is that of the Roma mediator (a post that exists in various member states of the European Union), given that this person is tasked with improving the access of Roma communities to a series of public services, and given this person's role as an intercultural mediator who creates a direct link between Roma communities and the majority of society. Having said that, one should not lose sight of the fact that the mediators are considered to be a temporary solution, as the final goal is for Roma communities gain direct access to services without the need of the mediator's intervention.[3] In summary, the aim is to avoid a paternalistic situation that will wind up strangling the capacity for autonomy and personal initiative.

7) The NGOs should attach great importance to the creation of networks in which different interest groups participate (political officials, professionals, and the communities and associations of Roma) to obtain a better understanding of the needs of these communities, achieve a better

[1] See the practical Guide for NGOs to prevent discrimination against the Roma Community of 2014, resulting from the project NET-KARD. https://www.gitanos.org/upload/72/18/Guia_NetKard_ONG_y_com._gitana.pdf
[2] See ibidem.
[3] See ibidem.

and more efficient use of resources, and find adequate solutions to promote the respect for difference and diversity.

The cooperation between Roma NGOs and the public administration in the intervention with victims of racial discrimination, for example, in the case of Spain is carried out through the creation of a Network of Assistance Centers for Victims of discrimination[1] through the equality organization called Council for the promotion of equal treatment and non-discrimination of persons for reasons of racial or ethnic origin.[2] One of the most important tasks of the Council is to provide independent assistance in the filing of complaints on behalf of victims of direct or indirect discrimination for reasons of racial or ethnic origin.

Working within a network thus becomes an effective strategy when it comes to multidimensional phenomena such as discrimination and is also an important intervention tool to promote the participation of the different interest groups, sharing of responsibilities and resources, and defining clearer solutions to a problem shared by all partners.

8) The cooperation of the NGOs with the communication media plays a key role in projecting an accurate image of Roma communities, eliminating stereotypes and myths that are still prevalent in society, and increasing respect for diversity and intercultural dialogue. One should try to convey a more positive image of Roma communities, by generally highlighting their traditions, practices, activities, etc., giving the Roma communities to express and share the richness of their culture with the rest of society. The Roma NGOs serve as a good intermediary between

[1] In June 2010, the Network of Assistance Centers for Victims of Discrimination based on Racial or Ethnic Origin was created in Spain. This network is made up of different non-governmental organizations, including Roma NGOs, all of which work to achieve equal treatment for vulnerable groups of the population. The network is made up of the Cepaim Foundation, Fundación Secretariado Gitano, Accem, Spanish Red Cross, Red Acoge, CEAR, Movement against Intolerance, and Movement for Peace. The Network of Assistance Centers for Victims of Discrimination on Grounds of Racial or Ethnic Origin was configured to allow its members to develop a common action protocol, based on a service manual. http://cepaim.org/que-hacemos-convivencia-social/igualdad-de-oportunidades/servicio-de-asistencia-a-victimas-de-discriminacion-racial-o-etnica/

[2] https://asistenciavictimasdiscriminacion.org/consejo-para-la-promocion-de-la-igualdad-de-trato-y-no-discriminacion-de-las-personas-por-origen-racial-o-etnico/

journalists and the community, as the journalists already tend to go to the NGOs when they report on problems that affect the Roma people.[1]

A good example of activism through a Roma NGO, which fulfills all the functions we have highlighted, is certainly the European Roma Rights–ERRC-,[2] which works to ensure that questions related to human rights faced by Roma communities are taken into account in the political agenda of Europe and other locations. The ERRC carries out a meticulous investigation, yielding detailed information about the state of human rights of Roma, specifically concerning acts of violence that they face, concerning the forms of discrimination against them, and concerning the negation of access to economic and social rights.[3] Moreover, the ERRC tries to contribute to improving the state of human rights of Roma communities through campaigns to raise awareness, the development of policies, and through strategic legal processes. Their intensive campaigns have revealed the violence and hate against this collective, the segregation in school, the forced evictions, and the coerced sterilizations of their members. Through their intensive educational work on human rights, the ERRC has set its principal goal to help Roma activists in the fight for equality.[4]

CONCLUSIONS

By way of conclusion, it should be reaffirmed that the NGOs should investigate the root causes of the reality for Roma communities (current barriers with proposals to eliminate the same) and research better practices applicable to all of Europe. In relationship to the serious

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[1] See the practical Guide for NGOs to prevent discrimination against the Roma Community of 2014, resulting from the project NET-KARD. https://www.gitanos.org/upload/72/18/Guia_NetKard_ONG_y_com._gitana.pdf

[2] http://www.errc.org

[3] "The investigations of the ERRC in Bulgaria, Hungary, the Czech Republic, Slovakia, and Romania during the early part of 2010, together with the Police, the NGOs, and experts, found that Roma represent 50-80% of the victims of human trafficking in Bulgaria, 40-80% in Hungary, 70% in Slovakia, and up to 70% in some parts of the Czech Republic". See Rights of Roma, a Fact Sheet, EHRR. https://www.coe.int/es/web/compass/human-rights-activism-and-the-role-of-ngos

[4] This is achieved through internships, scholarships, seminars, and publication of educational texts, such as, for example, *Knowing your rights and fighting for them: a guide for Roma activists.*. https://www.coe.int/es/web/compass/human-rights-activism-and-the-role-of-ngos

obstacles that they face, these could be summarized as follows: 1) The stereotyped image held by the majority society and the media have of Roma communities; 2) the lack of political priority given to Roma communities; 3) the lack of economic sustainability;[1] 4) The paternalistic attitude some NGOs adopt;[2] 5) the failure in applying national and European legislation against discrimination; 6) the ignorance of the procedures for reporting cases of discrimination.[3] But alongside these

[1] Unfortunately, in June 2018 Roma NGOs were charged with embezzlement and misappropriation of hundreds of millions of Euros of public funds. The Fundación Secretariado Gitano, the Unión Romaní, Federación Andaluza de Asociaciones de Mujeres Gitanas-Fakali Amuradi, Fagex (Federación de Asociaciones Gitanas de Extremadura) and the Federación Nacional de Asociaciones de Mujeres Gitanas-Kamira collect 90% of the public funding allocated for development of the Roma community. According to the report *Function and Organization of the so-called Roma NGOs*, the Office of Management of Public Funds and the Socio-Economic Situation of the Roma, from the Observatory of the Citizens against Corruption -in which other organizations participate such as the Observatory of Subsidies of Andalusia, the Platform for Democracy and Transparency, Andalusia for Public Education, and the Citizens' Forum for Democratic Participation in Sevilla-, "the NGOs that are active in the Roma population not only do not meet the legal prerequisites to receive subsidies, but the offices of the various administrations charged with distributing these scandalously fail to comply with the requirements imposed by Law to grant such aid and subsidies." Since the period 1989-2000 the Fundación Secretariado Gitano has managed "around 200 million Euros of European funds" destined solely for employment plans, programs of school workshops, offices, the program Acceder and the Formación e Inserción Profesional (FIP) plan… Nevertheless, the EU estimates that 90% of Roma youth neither work nor study. On the other hand, they charge the NGO that authored the report, namely the Fundación Secretariado Gitano, owns vast holdings of real estate in Spain and in other countries even though it is a non-profit organization. The principal culprits named in the report by the Observatory of the Citizens against Corruption are Pedro Puente, a priest and president of the Institute for Roma Culture, and Diego Fernández, its director; Isidro Rodríguez, director of the Fundación Secretariado Gitano; Juan de Dios Ramírez Heredia, president of the Unión Romaní; Beatriz Carrillo de los Reyes, president of the Fakali-Amuradi, and Antonio Vázquez, president of Fagex.

[2] According to the Guide, "In some countries (Portugal, for example), non-governmental organizations sometimes take a protective position towards Roma communities, thus provoking a paternalistic attitude that limits the participation of these communities." See the practical Guide for NGOs to prevent discrimination against the Roma Community of 2014, resulting from the project NET-KARD. https://www.gitanos.org/upload/72/18/Guia_NetKard_ONG_y_com._gitana.pdf

[3] The NGOs and governmental authorities are in a position to provide more information about legislation and procedures to combat discrimination of Roma communities. Moreover, in accordance with article 13(2) of the Directive on racial equality, the agencies governing equality measures should offer independent aid to the victims of

obstacles are other barriers related to global questions, such as the long history of exclusion faced by Roma communities as well as the strategies and political measures directed at these communities.[1] Within the last decades, the projects and actions of NGOs in this area have been carried out in a haphazard manner without a view to encompassing a more integrated and wider-ranging strategy.

In any event, we should place our trust in NGOs as key actors in civil society in the fight against discrimination of the Roma communities in Europe in order to advance the 17 global sustainable development goals without forgetting the existing challenges.[2] It is true that a long road remains before the Agenda 2030 is achieved, but, as the Vicente Ferrer Foundation has pointed out, the organizations of the Third Sector should not only be present but also be active participants in the decision-making about our joint future.[3]

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discrimination when discrimination proceedings begin. The webpage Equinet (European Network of Organizations of Equality) lists all organizations at the European level where the victim can report a case of racial discrimination": http://www.equineteurope.org

[1] The efforts realized by member States of the EU to define and put into practice national strategies for the inclusion of Roma communities are very recent and of little quantifiable impact.

[2] The Vicente Ferrer Foundation lists the following nine challenges that NGOs should take on in 2018 to achieve the SDGs: 1) participate at all levels in the definition of the goals and markers for the government strategies to achieve the SDGs; 2) to reinforce the role of the citizens as protagonists for development, accompanying and supporting the most vulnerable, and for transferring their proposals and demands for their own plans and those of the public authorities; 3) collaborate in defining the baseline information that will enter into the volunteers' report of the SDGs that will be presented at the UN High Level Political Forum this year; 4) monitor and demand compliance with the commitments and obligations of the public authorities with the SDGs, especially those that the reports indicate are more far from being achieved; 5) maintain a productive network in line with SDG 17, for example between NGOs from different sectors, entrepreneurs, the media, public authorities ... seeking "unlikely alliances"; 6) denounce situations of exclusion before the public authorities, leaving aside the discourse of needs and guaranteeing human rights; 7) make the development cooperation policy relevant again; 8) communicate, raise awareness and educate about the SDGs; 9) enhance the role of citizens and organizations in their implementation and follow-up. See 2018: The NGOs facing the Challenge of the SDG. http://fundacionvicenteferrerodsmadrid.org/2018-las-ong-frente-al-reto-de-los-ods/

[3] See ibidem.

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PROFESSIONAL STATUS OF POLITICINS HOLDING THE HIGHEST STATE POSITIONS[1]

Jakub STELINA[2]

Abstract

The paper considers issues of employment on political positions. There are thr ee groups of workers in the public sector – state officials corps, auxiliary employees corps and so-called political corps.

The latter refers to employment of persons who hold political posts (authoritati ve). These persons have a special legal status in many countries (e.g. France, Germany, Russia). Employment relationships of such persons are qualified in Poland as so-called constitutional law employment.

Key words: *employment; clerk law; civil service law; state authority positions*.

1. Employment may take various legal forms[3]. Quite commonly, in many countries two types of relevant legal relationships are applied in that respect – the employment relationships and the relationships of service. Traditionally, it is the nature of the employing entity that provides the criterion of delimitation – employment relationships being established with private employers, the relationships of service taking place in the public sphere, with the state or its organised units acting as the employer. Consequently, within the legal system there exist two separate legal regimes concerning employment – the employment relationships, provided for by the labour law (essentially, a branch of the private law) and the relationships of service, subject to public (administrative) law. As far as the terminology used is concerned, those employed under the labour law regime are referred to as employees,

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while persons remaining in service relationships are called public servants or officers.

The division of the law of employment between the labour law and law of the public servants has a long tradition. It was formed in Western Europe in the latter half of the 19th century and in many countries (e.g. France, Germany or the Netherlands) continues to the present day[1]. Similar legal solutions remained in force in Poland until World War II, but in the post-war period, due to ideological reasons, the scope of the law of public servants, as a branch of public law, was limited. Nowadays, all those employed in administration, education and other public institutions are covered by labour law and, consequently, are employees whose legal status is close to the status of the bulk of the working people, also ones employed in the private sector[2]. As far as the public-law status is concerned, it has been retained in the case of uniformed service officers (policemen, soldiers, special services etc.). As a result, two basic models of legal regulation of employment in the public sphere can be distinguished – the model of service-type employment and the employment of mixed (employee and service) nature. These observations concern persons involved in the performance of the state's substantive tasks, but the public sphere also includes ancillary staff (providing services to the professionals) and those that take the political (executive) positions. As regards the former group, the persons forming the ancillary personnel (e.g. drivers, guards etc.) may – depending on specific adopted solutions – be employees or do service and have the relevant legal status, respectively.

More serious doubts can raise the status of members of the political corps – the persons that hold the most prominent state positions,

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[1] Currently, differences in the legal status of employees and public servants are smaller, even though they are definitely still present. Partial bridging of the status of both professional groups initially concerned the freedom of coalition (public servants being granted the right to form trade unions) and then rights resulting from the law established in connection with the European integration. Under the social law of the European Union the notion of an employee is ever more frequently used in the cross-border meaning (i.e. one covering also public officers). The phenomenon of extension of employee rights onto public servants is referred to as the „labourisation" of the law of public servants.

[2] Certain peculiarities resulting from specific legislation have been retained, though, as regards some of the public sphere employees. The regulations concern, however, so-called branch-specific labour law; in matters not provided for by the latter provisions of the Labour Code apply.

related to the wielding of the public power. A separation of the sphere of administration and politics is nowadays regarded as a standard of the democratic state ruled by law. The politicians taking the state positions are (directly or indirectly) elected, whereas the services-paying (administrative) personnel is usually provided under an open and competitive recruitment scheme. A question has thus to be asked what the professional status of members of the political corps is like and, in particular, whether their holding the offices can be regarded as employment (and if so – what kind of employment that is). Providing an overview of legal solutions existing in the field in selected European countries is a thing well-worth doing.

2. In Germany, the public service in its narrow meaning includes, first of all, public servants (*Beamte)*, in the broader meaning – also judges and professional soldiers employed permanently. Due to the lack of an aspect of stability, those publicly employed without remuneration (councillors or persons doing compulsory military service) are not public servants. The sector of public service does not include the federal president, members of the federal government and governments of individual *Länder*, parliamentary secretaries, members of the federal parliament (*Bundestag*) and parliaments of individual parts of the federation (*Landtage*), either. These do not remain in a relationship of service, but a public-law official relationship provided for by the constitution and special laws. A special legal status, established by a separate statute, is also enjoyed by professional soldiers and judges[1].

A similar system exists in France. Public servants work under a public-law employment scheme, based on acts of appointment, which means that they are not, as a rule, subject to labour law regulations. Generally speaking, civil service is divided into state service, territorial service and the hospital one, each of them having an autonomous statute of public law nature[2]; consequently, civil service members do not constitute a homogenous group[3]. While the civil service includes a wide group of public servants, within its composition do not fall persons elected to political bodies nor ones being part of the state's executive

[1] F. Wagner, *Beamtenrecht* (Heidelberg 2002), 2.
[2] J.-M. Auby et al, *Droit de la fonction publique* (Paryż, 2012), 52 *et seq*.
[3] F. Melleray, *Droit de la fonction publique* (Paryż 2013), p. 125 *et seq*.

authorities (e.g. President of the Republic, members of the government). Those persons enjoy a special legal status[1].

Also in Spain employment is divided into public and private, although over the last years, under the influence of many factors, the phenomenon of promotion of certain labour law solutions (like those concerning trade unions) in public entities can be observed[2]. In the doctrine of the Spanish law of public servants (*derecho de la función pública*) a few essential groups of natural persons, the state apparatus is composed of, can be distinguished . Besides the most numerous group of public servants (*empleo público*) and members of consultative bodies of various kinds, volunteers and collaborators, there are also persons performing public or executive functions at the national, regional or local level. Those falling within the last group are elected, directly or indirectly, by citizens or are designated by bodies of democratic credentials. The group includes, *inter alia*, deputies to the national legislative assembly (MPs and senators) and to regional parliaments (of autonomous parts of the country, the so-called *Comunidades Autónomas*), members of the central government and of governments of the regions, provincial deputies and members of other local corporations, mayors and councillors, and persons sitting on the bodies provided for by the constitution (e.g. the Constitutional Tribunal, General Council of the Judicial Power, Court of Auditors etc.). As legal scholars stress it, all the above indicated persons have a special legal status. A characteristic feature of their situation, distinguishing them from public servants is the temporary nature of the function they perform, depending on the length of the term of office or the trust placed in the person by the designating body[3].

Also in many other countries holders of state functions have a special legal status. For example, in the Russian Federation a special category of state positions has been established, including those specified by the Constitution of the Russian Federation and federal laws providing for the operation of state bodies of the federal level and state positions established by laws and statutes to perform competences assigned to state agencies of parts of the Russian Federation. Mentioned as examples in that respect can be: President of the Russian Federation, Chairman of the

[1] J.-M. Auby, J.-B. Auby, J.-P. Didier, A. Taillefait, *Droit de la fonction*, 32.
[2] A.M. Valverde et al, *Derecho del trabajo* (Madryt 2014), 51.
[3] M. Sánchez Morón, *Derecho de la función pública* (Madryt, 2013), 17.

Council of Federation of the Federal Assembly, Chairman of the State *Duma* of the Federal Assembly, President of the Government of the Russian Federation, the federal minister, judge of the Constitutional Tribunal of the Russian Federation, judge of the Supreme Court of the Russian Federation, judge of the Supreme Court of Arbitration of the Russian Federation, judge of a federal court, General Public Prosecutor of the Russian Federation and others. Persons holding those positions do not have the status of a public servant[1]. The status of persons holding the most prominent state positions in the Czech Republic has been provided for in a similar way. Matters of employment of public servants are regulated by the Czech Act of 2014 of Civil Service, yet pursuant to its § 2 para. 1, the Act does not concern members of government, the National Council on Radio and TV, heads of the Board of the Office of Competition Protection, the Czech General Inspectorate for Protection of Personal Data and heads of other central agencies; these persons are covered by special regulations, including ones concerning remuneration. They are regarded as employees, though, for the purposes of social security[2].

A distinct separation between the employment of public servants and the political employment has been drawn in the British legal system. Included in the civil service in that country is solely the staff employed by the Crown but not having political nature[3]. Deemed to be public (civil) servants are thus "Crown servants" other than those performing political or judicial functions[4], who form a permanent administrative corps of the central government. Considering the above quoted reasons, members of the government (political ministers) do not have the status of public servants[5]. A special status is enjoyed by judges and military

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[1] V. Maslennikova et al, *Gosudarstvennaya grazhdanskaya služba v Rossiyskoyi Federatsyi* (Id. Os-89 2006), 29.

[2] M. Bělina (in:) M. Bělina and L. Drápal, *Zákoník práce. Komentář* (Praga, 2015), 61 *et seq.*; A. Kottnauer, *Pochybnosti o ústavnosti nového zákona o státní službě* (in:) A. Kottnauer, J. Přib, H. Úlehlová, L. Tomandlová: *Zákon o státní službě* (Ostrawa, 2015), 19 *et seq.*; P. Machálek, *Služební poměry* (in:) M. Galvas i in., *Pracovní právo*, (Brno, 2012), 131 *et seq*.

[3] W. Wade, *Administrative Law* (Oxford, 1988), 54 *et seq*.

[4] S. Fredman, G.S. Morris, *The State as Employer. Labour Law in the Public Services*, London–New York 1989, p. 21.

[5] R. Watt (in:) *The Nature of the* Crown. *A Legal and Political Analysis*, M. Sunkin, S. Payne (eds.) (Oxford 1999), 311.

officials. A similar situation can be observed in Ireland, where judges and persons performing political functions are not included in the corps of civil service[1].

3. A little more complex situation is that existing in Poland. As mentioned earlier, those working for the public sector are either employees or persons remaining in service (administrative) relationships. The employees, within the meaning of labour law, are public servants to whom special regulations apply (the Act on Civil Service and the Municipal Employee Act), it is true, but who, in matters not provided for by the regulations, are covered by provisions of the Labour Code. Those remaining in service relationships are officers of the so-called militarised services, i.e. the uniformed and special bodies of officers (police, armed forces, intelligence and counter-intelligence etc.). The employment of persons taking political positions remains an open issue. The rule is that the persons, save but for certain exclusions, have a special legal status and are thus neither employees within the meaning of labour law nor officers whose situation is provided for by the administrative law. In scholarly writing the concept of a so-called constitutional employment has been developed, meaning that applied to the persons are directly provisions of the Constitution or special statutes, and not labour or administrative (service) law regulations. Examples of persons enjoying such a special legal status under Polish law are: President of the Republic of Poland, Prime Minister, members of the Council of Ministers, Members of Parliament and senators, local councillors, the Ombudsman etc., all the persons remaining in what is termed as organisational legal relationships. The latter include rights and duties related to performance of the tasks of a relevant body (agency) and, to very limited extent, also employment-related rights. Such rights include, for example, the remuneration provided for by the Act on Remuneration of Persons Holding State Executive Positions (and, as regards members of the legislative chambers, benefits determined by the Act on the Performance of the Mandate of Deputy or Senator).

4. It can be thus stated that despite the many differences existing between individual states as regards employment in the public sector, the rule is that the executive (administrative) sphere involving the body (corps) of public servants and the sphere of political employment of persons holding the highest state positions in the country or sitting on the

[1] B. Gallagher, C. Maguire, *Civil Service Regulation* (Dublin, 2011), 10.

legislatives are divided from each other. The latter persons have a special legal status. Should they be recognised as persons being in employment, the legal relationships in which they stay are neither employment of service relationships. The term adopted in Poland to denote them is the notion of „constitutional employment relationships."

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A VIDEO-TESTAMENT. ON THE POSSIBILITIES OF *AUDIOVIDEO* FORMAT FOR DISPOSITION OF PROPERTY UPON DEATH

Mariusz ZAŁUCKI[1]

Abstract:

The inheritance law of European countries is undergoing transformations. One of the main incentives for this is technological progress. Legislators are wondering whether and how to react to changing social needs. The area where the discussion is taking place is, among others, the area of the form of dispositions of property upon death. A will as a formal legal act requires it to be drawn up in the manner prescribed by law. However, traditional instruments do not seem to be sufficient in today's reality. Hence the search for other forms of wills. One of them is a video-testament. A form using audio-video format may be one of the alternatives to solutions dating back to Roman (traditional) times. In his work the author reflects on the possibilities that this format creates for the disposition of property in case of death. He presents the basic advantages and disadvantages of this form of wills and considers the possibility of extending the catalogue of statutory forms of wills with a video-testament.

Key words: *succession; inheritance; will; testament; video-testament.*

1. The inheritance law of individual European countries is undergoing transformation. However, this is not just a European trend, but a much wider, global one. Legislators face the dilemma of adapting current regulations of the inheritance law to contemporary requirements. The time of new technologies, electronic trading, and the transfer of a large part of human activity to electronic media also forces changes in the needs for disposition of property upon death.

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Legislators seeking solutions to the emerging problems of disposition of property upon death must consider, among others, whether the structures of the inheritance law in terms of form of a testament, which to a large extent survived over two thousand years, are still needed and fulfill their role, or there is a need to replace them with new ones. More and more boldly, an electronic testament, a testament made in a partly informal way or a testament made using the audio and video format (Videotestement) is discussed. The latter legal structure, although for a long time proposed in the Anglo-Saxon doctrine, has only recently become the subject of a legislative proposal that has the potential to be incorporated into the law. The Swiss legislator is considering the introduction of a videotestament to ZGB as one of the forms of a special testament. The testament would consist in submitting by the testator a statement of the last will and its registration with the use of any device using audio video technology. This form is admissible in several Anglo-American jurisdictions, where it is not mentioned *expressis verbis*, but the legal regulations that apply there make it possible to maintain in force a testament made in this way. Therefore, the question of whether other legislators should follow a similar path and introduce into their inheritance law systems legal regulations of the videotestament, appears.

Like every legal structure, the videotestament has both advantages and disadvantages. In this paper, the possibilities of this form of testament are explained, so as to answer the question whether the introduction of this legal structure to the inheritance law would solve at least some of the problems of the inheritance law in the world of new technologies.

2. As is well known, the issue of preparing a testament covers not only statements of the testator's last will, but also the accompanying circumstances. The traditional content of a disposition of property upon death is usually limited to identifying the testator's person and presenting his/her last will. Basically, there is no room for the assessment of the testamentary capacity, exploration of the motives of specific dispositions, explanation of specific intricacies of them or interpretative directions, not to mention the description of the act of making a last will itself. Of course, some forms of testament, especially those related to the participation of third parties at the moment of making a last will, using primarily personal sources of evidence, allow a number of such

circumstances to be clarified during the inheritance proceedings. However, it is often much more difficult, if only because the testament was made many months or years before the death of the testator. In this respect, the advantages of the videotestament in relation to other known forms of the testament can be noticed. Its structure allows to recognize that this form of testament may not only be a reliable proof of intentions of making a last will and presenting the last will of the testator, but also other important circumstances of considerable importance for determining the validity of the testament. Therefore, a videotestament may have an additional application, apart from recording the last will of the testator, which is not always the case with other forms of testament.

The main advantage of recording in audio-video format is the possibility of presenting the course of the entire making a last will activity[1]. After the death of the testator there is in principle no other way of re-hearing his/her statement on his/her inner will regarding the destination of his/her property upon death. Recording the moment of making a last will in a format that uses image and sound allows for a closer look at the tester, his/her behavior during making the last will or the place where he/she makes the appropriate statement[2]. Emotions accompanying dispositions upon death, expression of the person making oral statement, his/her mimic reaction to the words he/she speaks, are nowadays traces that, in case of doubts about the testator's motives, may prove extremely helpful to the person interpreting the last will statement[3]. In a situation where the testator makes a testament in a way different than verbally, e.g., by hand or mechanically (e.g. on a computer), the recording of that moment using audio-video technique enables reaching the phases of making testament against which various allegations are raised in practice and therefore allows for their clarification.

Another advantage of recording the moment of making a last will with the audio-video technique is the ability to determine the condition of the tester, which can be helpful to determine if the tester was able to test at a given moment[4]. If the content of the testator's statement indicates

[1] G.W. Beyer, "Video Requiem: Thy Will Be Done", *Trusts & Estates* No 7, (1985): 26.
[2] Idem, "Videotaping the Will Execution Ceremony. Preventing Frustration of the Testator's Final Wishes", *St. Mary's Law Journal* , No. 1, (1983): 5 *et seq.*
[3] M. Niedośpiał, *Testament. Zagadnienia ogólne testamentu w polskim prawie cywilnym* (Kraków–Poznań, 1993), 167 *et seq.*
[4] M.L. Leslie, "Frustration of Intent in the Wealth Transmission Process", *Oñati Socio-Legal Series* no. 2 (2014):283–305.

that he/she understands the circumstances in which he/she is making a last will, explaining the nature of the action he/she is performing, it will increase the probability of the *post factum* assessment that the testator acted consciously at that moment. If there is an indication appearing in his/her statement of the purpose for which he/she makes a recording, i.e. disposition of property upon death and the testator on the occasion explains the structure of that property (which is obviously not necessary when making dispositions upon death), it will rather favor the version that he/she acted consciously, rather than he/she was subjected to certain disturbances of a psychic nature.

Facilitation of determining the tester's *animus testandi* is related to the above. Recording the moment when the testator makes a relevant statement, explains the motives of his/her action, indicates the *mortis causa* objectives, dispels possible doubts as to whether, at the time of that act he/she was willing to dispose of property upon death. An audio-video recording seems to be the most credible proof of that fact[1]. Even in the case of these forms of testament, where the legislator uses the presence of third parties when making the last will statement, there is no such possibility to reconstruct the moment of making a last will, as in the case of a videotestament.

Generally, it can even be assumed that the videotestament eliminates the risk of mistakes regarding the testator's *animus testandi* [2]. Undertaking preparatory activities for the recording of the last will by the testator, preparation of an appropriate device or even a trial recording are circumstances that should be treated equally with the witness's being called by the testator to perform their role during the last will making activity. It is difficult to find more convincing evidence of intentions of the testator making disposition of property upon death.

3. Therefore, recording of the last will without the participation of third parties - so a model videotestament should look like - will make the last will making activity become very personal. The currently available digital technologies that record image and sound allow for the recording

[1] A. Pabin, „Testament jako akt sformalizowany – uwagi w sprawie przyszłego kształtu regulacji dotyczących formy rozrządzeń testamentowych", *Studia Prawnicze* no. 1, (2016): 123.

[2] See J.C. Sonnekus, "Videotestamente naas skriftelike testament", *Tydskrif vir die Suid-Afrikaanse Reg* no.1 (1990): 114 *et seq.*

of the testator's own wording, without their stylization by a third party, such as an official or notary, or a witness preparing a report of the last will making activities. The value of such a last will making seems to be immensely large in the context of a possible assessment of the tester's spontaneity and personal wording[1], using the meaning of words he/she understood and used. This will allow to fully reflect his/her will in the course of interpreting his/her statement. The message included in his/her statement presented by other persons, in the notarial form or other forms using the verbal statement of the testator, leads to a selection of the content provided by the testator, which ultimately is subjective and not always performed in a proper manner. The selection by those people of the testator's statements that are relevant according to them, may turn out to be incorrect and then the carrier of the last will statement may not contain all key data for resolving any inheritance case. This can happen especially if the testament contains negative dispositions that are required to be justified by the testator. Meanwhile, the videotestament and the technological possibilities connected with its recording allow for a full reflection of the testator's *mortis causa* statement. This allows to counteract the selectivity of some other forms of the testament and at the same time allows the widest available presentation of the intentions of the testator.

The above shows that the videotestament can be an important inheritance law tool facilitating the process of interpretation of the last will statement. This method of recording the testator's will seems to be the most versatile instrument serving the presentation of not only the dispositions made, but also their justification, along with an explanation of their meaning. In this way, the testator can show how he/she understands specific words, which in case of possible disputes may serve as a valid proof in inheritance proceedings. Other forms of testament do not foresee this possibility, in principle.

At the same time, the audio-video recording allows to show that the testator's will was not restricted and the testator did not act under the influence of third parties. One of the allegations most frequently raised in relation to some forms of the testament is the allegation concerning the distortion of the testator's last will, whether due to pressure from third parties or inappropriate method of receiving the testator's appropriate statement. It seems that due to the possibilities created by the

[1] See the judgment of the Supreme Court of 21/02/1980, II KR 8/80, Legalis.

videotestament, the risk of defective testaments, based on the testator's distorted will, will decrease. For obvious reasons, it is impossible to avoid a situation in which the testator records an appropriate statement under a specific influence of third parties on him/her, which is to be a reliable proof of his/her intentions in the assessment of the people enforcing the given content of the statement. However, paradoxically such a recording may be just a proof of lack of the testator intentions expressed in it. Techniques of examining people's behavior allow today for such findings[1]. Bearing in mind that such accidents are rather extreme, there are basically no published judgments describing such circumstances, the risk of falsifying the last will in the above-indicated way is low. The videotestament can be an important alternative even for the holographic testament, where the influence of third parties on the testator's statement cannot be ruled out.

4. It should be emphasized that the audio-video recording is already used as evidence and can play a significant role in practice. It is difficult to understand why the evidential value of a video document is used, e.g., in penal law or contract law, but not in the inheritance law[2]. Moreover, the importance of evidence based solely on sound, referred to as phonoscopy, has also a significant place among the means of evidence. The recording of the sound, which makes it possible to reproduce the acoustic trace of an event, has often contributed to clarifying a number of dubious *prima facie* facts. If enriched with an image they can be even more convincing evidence in the case. It needs to be explained that examination of the authenticity of this type of evidence today is an activity relatively uncomplicated for a professional to perform. Essentially, such evidence is examined on two levels, taking into account the technique of recording itself, as well as sound and image. The most important test defining the usefulness of the recording as evidence in the case is to determine the authenticity of the recording[3]. A recording that fully reflects an event is considered to be authentic recording, and it can

[1] A. Koziczak, „Oznaki emocji w testamencie a jego autentyczność", *Problemy Kryminalistyki* no. 3 (2012): 30.
[2] G. Ponath, *Die Beschränkungen der Testierfreiheit durch das Testamentsrecht*, (Frankfurt–Mannheim, 2006), 246.
[3] See U.S. Sethulekshmi et al, "*A Survey on Digital Video Authentication Methods"*, *International Journal of Computer Trends and Technology* no. 1 (2015): 35 *et seq.*

be stated that there was no interference with the material[1]. It must be indicated that a material is authentic when it has not been edited, i.e. no cuts have been made or no foreign fragments have been added thereto after its recording[2]. In the case of magnetic tapes, and thus one of the possibilities of recording a videotestament, the continuity of "recording" is referred to as a synonym of authenticity. Instead, in the context of digital recordings, it is emphasized that the continuity does not determine its authenticity, because there are many other features that indicate the possibility of manipulation in this recording[3]. As it is emphasized, an experienced counterfeiter is able to mask some of them, but some cannot be changed and provide a clear proof of manipulation during recording[4]. The examination also covers the recording parameters such as the recording speed, the frequency band in which the speech signal is recorded, the length of the recording or the interference occurring in the recording.[5]. After examining the recording authenticity, the next to examine is the recorded sound and its synchronization with the picture. Especially the sound of the human voice is important in this respect, as is the recorded background sometimes. As indicated in the doctrine, it is possible to determine the time, or even the place in which a given person speaks, due to characteristic noises or events from the background[6]. Of course, also the pictures serve therefore. Examining the above parameters may turn out to be extremely useful in investigating the intentions of the testator. The authenticity of audio-video materials can be checked reliably[7]. The analysis of voice and image in terms of the recording authenticity is at least as convincing as the graphological opinion regarding the authenticity of a holographic testament.

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[1] See E. Kozłowska, *Identyfikacja sprawcy metodami fonoskopijnymi*, [in:] M. Szostak, I. Dembowska (eds.), *Innowacyjne metody wykrywania sprawców przestępstw*, (Wrocław 2014), 97.

[2] See A. Jedynak and J. Rzeszotarski, „Definicja autentyczności zapisu dźwięku", No. 257, *Problemy Kryminalistyki* (2007): 23 *et seq.*

[3] E. Kozłowska, *Identyfikacja*, 98.

[4] *Ibidem.*

[5] See N.D. Beser et al, *Authentication of Digital Video Evidence*, [in:] *SPIE Applications of Digital Image Processing XXVI*, San Diego, California, 3–8.8. (2003): 1 *et seq.* (conference materials).

[6] *Ibidem.*

[7] G. Ponath, *Die Beschränkungen.* 251.

In the indicated scope, i.e. examination of the testament authenticity, and the awareness of disposition of the last will, against the background of traditional forms of testament, an expert psychiatrist activities also play a role, especially when it comes to doubts regarding the testament validity[1]. While, in this case, the diagnosis cannot be made based on direct examination of the testator, the videotestament showing the condition of the testator during making a last will may also be useful in this respect. As emphasized in the doctrine, possible signs of emotions of the testator may influence the assessment of the testator's mental conditions, and even allow the assessment of the testament's authenticity[2]. Hence, the analysis of the last will making activities performed in this respect could be a complement to the investigations performed classically and provide some additional arguments[3], which is generally difficult to expect from other available forms of testament. While it is highly probable to question the categoricality of expert opinions on the testator's handwriting in the case of testaments based on this last will making method[4], as well as the presentation of *mortis causa* disposition by witnesses to that event[5], in the context of audio-video recording the probability of confirming facts regarding the testator's last will increases. Thus, also in this dimension, the introduction of a videotestament into Polish law could change the image of the *mortis causa* activities.

5. It should also be noted that the preparation of a videotestament using various types of technological tools may create some difficulties related to its reproduction after years, due to the technological progress. Obviously, the history of carriers of materials in the audio-video format

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[1] Cz. Grzeszyk and M. Szklanko, *Kryminalistyczne badania testamentów* (Warszawa 1997) 21.

[2] A. Koziczak, Oznaki emocji w testamencie a jego autentyczność, *Problemy Kryminalistyki* no. 3, (2012): 30.

[3] See A. Feluś, „O dopuszczalności opiniowania testamentów holograficznych bez materiału porównawczego (zagadnienia metodologiczne)“ , *Palestra* no. 9 (1984): 37–49.

[4] See K. Liżyńska, *Badanie autentyczności testamentu holograficznego* (Wrocław, 2008), 103.

[5] See K. Osajda, *Świadek testamentu*, [in:] T. Ereciński, P. Grzegorczyk, K. Weitz (eds.), *Sine ira et studio. Księga jubileuszowa dedykowana Sędziemu Jackowi Gudowskiemu* (Warszawa 2016), 1038–1039.

is full of changes, therefore paradoxically the technological testament can fall into a technology trap due to the lack of devices enabling reading in the technique used during the testament preparation. The constant emergence of new audio and video recording formats, the creation of new software or tools for registering the last will of the testator are specific problems that cannot be overlooked. And although those are technological problems, it must remembered that the practical use of some of the old forms of sound and image recording is limited today, which also probably creates a danger for the future in the context of legal problems related to the replaying the testator's last will. Physical carriers of this type of materials slowly cease to exist in the market, they are being replaced by digital carriers. What will happen in a few decades time? This question is difficult to answer. Although there is no doubt that in practice there are various tools for converting old formats, and so it will most likely be in the future. In this respect, particular attention should be paid to the authenticity of such a converted recording and possible interference in this recording by third parties. However, here it is about the evidence within specific inheritance proceedings rather than a legislative solution necessary to implement. However, those issues are relatively easy to determine by a specialist, and certainly it is easier in the digital than in the analog world [1]. Hence also in this respect the videotestament seems to be a relatively safe solution.

6. Therefore, the use of the videotestament structure can reduce the risk related to the lack of recording of the testator's will and will allow that statement to be replayed after his/her death, will cause the testator to "speak" again. The recorded image and sound, replayed sometime after the death of the testator, will be a testimony of the last will making. The resulting document, an information carrier containing a statement of the last will, meets the standards in this respect encountered in the various inheritance legislations. Nowadays, its significance and its form - usually of a digital document - will allow to realize the evidential function of the testament provisions. In comparison to other forms of testaments, the videotestament may turn out to be one of the most reliable evidences of the last will intentions, and its evidential value will often be crucial to resolving a given inheritance case. The possibility of recording

[1] See R. Korycki, „Badanie autentyczności nagrań cyfrowych z wykorzystaniem analizy wahań częstotliwości prądu sieci energetycznej", *PBW* no. 3 (2010): 39–50.

the testator intentions on a specific carrier and replaying the recording thus created will allow to assess that the given declaration of will is the final statement of the testator. As a relatively modern form, the videotestament can be considered as one of those tools that can encourage potential testators to undertake the last will making activities, enabling their *mortis causa* will be realized. After the possible introduction of the videotestament into the inheritance law, the forms of the testament will be further standardized, with the simultaneous increase in the guarantee of counteracting the distortion of the testator's last will, wider prevention of interference with the freedom of the last will making or simply the modernization of this inheritance law area. Since the most important elements of the last will making include the will and consciousness of the testator, in the typical case, the last will making in this form will eliminate the risk of recognizing in the future, after death of the testator, that he/she had no *animus testandi*, or he/she acted hastily, under the influence of inappropriate stimuli[1]. The mere undertaking of the testator's effort to record his/her last will using the audio-video technique makes him/her aware of the seriousness of the act he/she performs, thereby fulfilling the warning function of the provisions on the testament form. At the same time, the video recording of the last will making will be an important form of protection for the testator and other persons for whom certain benefits from the inheritance are provided for in the Act. Depriving those people of certain benefits will be possible to be duly justified by the testator and subject to assessment as to the legitimacy of the reasons raised by the testator in the case regarding the acquisition of rights to inheritance. Therefore, the protection function of the rules on the testament form will be implemented. The task that could be achieved, as a result of the introduction of videotestament regulations, would be to ensure that the will of the testator will be duly reflected. This, in turn, seems tempting in the times of new technologies.

[1] F. Zoll, *Czy odwołalność testamentu powinna być nieograniczona*, [in:] M. Pecyna, M. Podrecka, J. Pisuliński (eds.), *Rozprawy cywilistyczne. Księga pamiątkowa dedykowana Profesorowi Edwardowi Drozdowi* (Warszawa, 2013), 554 *et seq.*

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THE ROLE OF JURISTS IN THE JUSTIFICATION OF THE IDEA OF POLITICAL POWER IN EUROPE IN THE MODERN AGE

Rafael SÁNCHEZ-DOMINGO [1]

Abstract:

The legitimation of the title of monarch, from ancient times, depended on the divine will. During the medieval period, the movement for the renewal of common law meant that jurists harmonized legal concepts. From the fourteenth century the vision of the legal world was going to be overcome to form a new order. The doctrinal works of the modern era would describe a prince or sovereign who should be a model of virtue, who governed a society that gave his consent. It reaches a moment of maturity of the Hispanic Monarchy. With the arrival of the contemporary era, characterized by rationalism, the Monarchy will have a symbolic character, since the power of the prince was questioned after the French Revolution and the establishment of the constitutional movement.

Key words: *Monarch; Law; Politics; Legitimation; Rationalism*

1. INTRODUCTION

Initially, the legitimation of the title of king did not depend on the popular will, but on the divinity, since "the conception that the king ruled by virtue of divine grace, was due in principle to the influence of Christian thought, to the doctrines of St. Paul: "*but by the grace of God I am what I am*"[2], which immerses us in a theocratic conception that would eventually reach a divine justification, a theocratic government in which the sovereignty of the king over subjects and In this power structure, there were not many connotations that attributed power to the king or the pope, and this led to the integration of the people into a permanent state of "*minority*", in which they had no participation in the creation of the

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[2] 1ª Corintios, 15, 10. Walter Ullmann, *Historia del pensamiento político en la Edad Media* (Barcelona: Ariel, 1983), 125.

law[1], so that when the king disposed of the fullness of power, his government was free *-liberum regime-*, that is, "*free in respect to laws and human powers*"[2]

The renovating movement of the law or the reception of common law, implied that jurists who returned to interpret the study of Roman law, managed to harmonize the large number of legal precepts in terms of principles and general concepts, so that "*the coexistence of Emerging centralized authorities (ecclesiastical and secular) made it imperative to articulate the principles underlying the norms, as well as the concepts underlying the principles*"[3]. The ideology of the universality of the Empire (universal with the Christian West and, therefore, practically in relation to Europe), had no relation of co-responsibility with the political reality, because "*between ideology and reality there was a dialectical tension that gave rise to important reactions especially for the history of law and legal science*"[4].

The political power revolved during centuries around a Monarchy personalized in the figure of the prince, considered like head and motor of the Kingdom, formed by members of different categories, since in the Crown of Castile, taking like legal source in Code of the Seven Parties, it was affirmed that "*from it emanated all jurisdiction and dignity, including that of the lords and cities, according to another image widely spread among jurists and enhanced by those of regalist nature*"[5]. The king considered himself "*anointed*", that is, as a divine attribute "*he was considered immune with respect to ecclesiastical jurisdiction*"[6], and the result of the election-designation-of a monarch had no more novelty than

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[1] *Ibidem*, p. 127

[2] *Ibidem*, p. 128.

[3] Rolando Tamayo Y Salmorán, *Los publicistas medievales y la formación de la tradición política de Occidente* (México: UAM, 2005),156-157.

[4] The universal character of the Empire, even if it was denied, was fearsome. The last act of the history of the Holy Empire constitutes further proof of this and it was when Napoleón I forced Emperor François II to renounce the title of Roman Emperor to retain only that of Emperor of Austria. Carlos Augusto Cannata, *Historia de la Ciencia Jurídica Europea* (Madrid 1996), 134; Rafael Sánchez Domingo, *El Derecho Común en Castilla. Comentario a la Lex Gallus de Alonso de Cartagena* (Burgos 2002), 111.

[5] Salustiano De Dios, "El papel de los juristas castellanos en la conformación del poder político (1480-1650)", en *De Re Publica Hispaniae. Una vindicación de la cultura política en los reinos ibéricos en la primera modernidad* (F. José Aranda Pérez y J. Damiao Rodrigues, eds.) (Madrid: Silex, 2008), 137.

[6] Walter Ullmann, *Historia del pensamiento…,* p. 129.

to occupy an elected position already instituted, charge that was legitimized by the celebration of a ritual called coronation, through which he was anointed.

2. MEDIEVAL LAW AND "RECENTRISM"

As P. Grossi affirms, "*the medieval age is born under the banner of a marked re-nationalism*"[1], which means a longing for a reunion with the objective coordinates of each political model. The individual is formed, during these medieval centuries as a self-sufficient subject and compendium of values of individual character on which the general legal order is built, although this does not stop being a legal abstraction. The scenario that opens implies that the vision of the socio-legal world is not the same, since, from the 14th century it will be overcome and it will focus on individual individualities and in this "*protomodern*" universe, it will be to coin the idea of the subjective Right on which the new legal construction of the new ordo will be based. The persistence towards rationalization will not stop before the contours of the divine law, recognizing a change in what concerns the recognition of the will that orders the designs of humanity and then human law, in its normative aspect, is configured as a rational discovery of the rules, which already existed since the beginning of the centuries, and it is obvious that "*the prince or the monarch of a community is a character with powers limited by the very essence of its declarative function, by the link that derives from its action directed to the unfailing end of the common good*"[2]. The function of the prince, for legal science, is concretized in an interpretation activity, that is, to translate equity into legal form, and "*to identify the contents of equity when they are already individualized, reduced to precepts and once drafted, to force to the subjects to its fulfillment*"[3]. On the legislator in the theory of law, Aquinas asks himself who is the legislator, and if they can all establish for himself a law that governs his conduct, since according to Aristotle, "*the aim that the*

[1] Paolo Grossi, *El orden jurídico medieval* (Madrid: Marcial Pons, 1996), 89.
[2] La *Lex aeterna* es "*ratio gubernationis in supremo gobernante*", Tomás de AQUINO, Summae Theologica, q. 93; art. 3, "*Istae particulares dispositiones adinventae secundum rationem humanam dicuntur leges humanae*", Summae Theologicae, q. 91, art. 3. Cit. Sánchez Domingo, *El Derecho común...*, 117, nota 129.
[3] Rafael Sánchez Domingo, *El Derecho Común en Castilla* , 117-118.

legislator intends is to induce the man to virtue",[1] and in this exercise of introducing men into virtue and organizing the political community within orderly criteria, "*there is a certain confusion between the principle of attribution of sovereignty and what constitutes, in modern, the legislative or normative function, inherent to every political society*"[2].

As P. Grossi says "*and in the middle of the Middle Ages? When the State is a future and the prince, assimilating a collective psychology, is very few producing right?*"[3], Because it states that "*laws are unthinkable, in the modern sense of the term, while laws continue to be thought in the sense that we have tried to clarify*"[4], since the prince, being the creator of law, is recognized "*as the interpreter of the nature of things, where the Law is hidden, but it is also true that it is an inert prince, lacking in vitality for a collective psychology, which liked to have him as an interpreter*"[5]. Later, when the modern era began, several works of political and doctrinal content were published. One of them was entitled "*Mirror of Princes*", published in 1529, which described the life of Marcus Aurelius, which highlights the virtues of the prince who surrounds himself with wise men, with abundance of rules and advice concerning education and exemplary cases of Romans and Greeks,[6] and as Rousseau later affirmed "*in the birth of societies are the heads of the republics who make the institution and it is then the institution that forms the heads of the republics*"[7], but we must bear in mind that despite that the legislator has certain objectives, does not have to coincide his person with that of the sovereign or the prince.

The lex is conformed as a subjectively complex reality, in which there are more participants: a determining subject, the *populus*, who with its own consent has an active function, for whose use it is promulgated and who is obliged to observe it later; a second subject, the scientist-jurist, who gives the law its technical contour and content and a third subject, the prince, who is only attributed the granting of the sanction of his authority. It is not a concession, but a contribution on the part of the

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[1] Manuel Santaella López, *Montesquieu. El legislador y el arte de legislar*, (Madrid: UPCO, 1995), 58.
[2] Manuel Santaella López, *Montesquieu*, 58-59.
[3] Paolo Grossi, *El orden jurídico medieval*, 159.
[4] Grossi, *El orden jurídico medieval*, 159.
[5] Grossi, *El orden jurídico medieval*, 159..
[6] Antonio De Guevara, *Relox de Príncipes* (Madrid: ABL Editor, 1994).
[7] Jean Jaques Rousseau, *Contrato social* (Madrid: Alianza Editorial, 2012) cap. VII.

person in power, whose constant intervention remains alien to the process of formation, a theological-philosophical process, inserted in the change of the community and legal science. The medieval jurists speculated on questions concerning the government and the public power aided in their understanding with the decisions of the jurists and in the epistemological examination they followed the postulates of the *Corpus iuris civilis*.

3. THE CULTURE OF THE MONARCHY EMANATING FROM THE *IUS COMMUNE*

There was a great dependence of the Castilian jurists on the postulates of the Common Law, and as Salustiano de Dios affirms, "*it was in an amazing number from 1480 to the middle of the XVII century or a little more [...] at the end of the day, during During this period, some of them, both foreign and foreign, moved within the framework of the ius commune culture, with a predominantly Latin expression, including those with a regalist sign, with a clear political flavor, for their exaltation of the power of the king, of the law, of the government* ..."[1]. In this moment of maturity of the Spanish monarchy, the jurists of the Crown of Castile doctrinally delimited the idea of political power, both legal scholars and theologians, to outline a new social and legal order that would be integrated into the so-called Modern Age, emphasizing mainly In a category of power, the jurisdictional, and "*placing the emphasis much more on the judges than on the laws, marginal these, in the end, since the monarch would not correspond to the creation of law, of a jurisprudential nature, but only the declaration of the same, that it was coming to him*"[2].

The expression "*quod principi placiui legis habet vogorem*", - what pleases the king has the force of law- meant for centuries the binding force projected by the monarch's decisions to maintain a monarchy with a vocation for stability. Was the prince subject to the law?[3], since the postulates of political theory were subordinated to the texts of Roman law.

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[1] Salustiano De Dios, El papel de los juristas, 129.
[2] Salustiano de Dios, El papel de los juristas. 130-131.
[3] *Codex* 1,14,4 ("*Digna vox maiestate regnnatis legibus alligatum se principem prifiteri: adeo de autoritate iuris nostra pendet auctoritas, et re vera maius imperio est*

For example, in the Castilian court, with the monarchs Enrique III and Juan II, they were aided by doctors in law who advised the Royal Council, such as Juan Alfonso de Madrid, Archdeacon of Briviesca, who composed a work entitled *Repertorium Iuris*[1]. Alonso de Madrigal, a bishop who watched over the interests of power, can also be cited. The state model was taken from the societas, and the theory of the *traditio imperii* assumed an extensive doctrinal corpus in relation to both the origin and the limits of power and one of the novel medieval constructions of the jurists to the political theory of the Middle Ages. focused on the analysis of the nature and function of the State, since "*for the glossators the key lies in the Roman doctrine of the societas*"[2], in this way the *societas* is nourished by those people who allow the pursuit of common ideals -*affectus societatis*-, and becomes a person who operates through its representatives, so that the doctrine of *societas* acquires its justification.

The scientific activity of jurists and theologians is part of the metaphoric schemes that, since the Middle Ages, had supported the idea of the model prince and were integrated into states with a marked absolutist character[3]. Almost all the ius-philosophical work of the sixteenth and seventeenth centuries "inclined to exalt the "*freedom to dispose "of the princes, finds its meaning in the face of a common sentiment still imbued with ontology and medieval values, for which it*

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submitterre legibus principatum"). Cit. Rolando Tamayo Y Salmorán, *Los publicistas.* 179, nota 3.

[1] About his biography, vid. Luis Suárez Fernandez, *Castilla, el Cisma y la crisis conciliar (1378-1440)* (Madrid 1960) 52 y 55. Antonio García García, "La canonística ibérica medieval posterior al decreto de Graciano (III)" en *Repertorio de Historia de las Ciencias Eclesiásticas en España,* 1, (Salamanca, 1967), 351-402. Manuel Nieto Soria, *Iglesia y génesis del Estado Moderno en Castilla (1369-1489)* (Madrid: Editorial Complutense, 1993) 201.

[2] As he says Ronaldo Tamayo, "D*esde el siglo segundo los juristas romanos consideraron a la societas de iure gentium, establecida, en principio, por el simple consentimiento y, por tanto, le era aplicable la doctrina de las obligaciones y contratos*", 180, nota 5. Takeas a source Gayo, *Institutionum Comentarii quattuor,* 3, 154, en Rafael el alli. (Eds). *Textos de Derecho romano,* trad. R. Domingo et alii (Aranzadi Pamplona, 2000).

[3] Luca Mannori y Bernardo Sordi, "Justicia y Administración", en *El Estado Moderno en Europa. Instituciones y Derecho* (Madrid: Trotta, 2004), 68.

resulted Obvious that the right to command could only be conceived as an instrument for the defense of a given order"[1].

One of the characteristics of the Monarchy is its symbolic aspect, and in this regard, Marc Bloch stated that "*political powers must be understood in relation to the ideas on which they are based*"[2], and as O. Villarroel González affirms, "*the resource to the propaganda and the shaping of power by Western monarchies began to be recurrent throughout the late Middle Ages, as a way to establish their power and make it visible and acceptable to the entire population [...] and the Church could to contribute to the Monarchy a whole series of ideological-religious supports that could serve very well as such supporters of the royal institutional [...] building and during this period, the Pontificate collaborated on several occasions to improve and create that image of the king, and deliberately by the pope, no doubt as a way to attract the monarch*"[3], but it should be noted that, by maintaining this policy the pontiff the benefits obtained by the Pope They were of greater importance than the damages, because they were never going to act against the interests of the monarchy. And for the sake of reciprocity, there was also fidelity on the part of the Monarchy to the Papacy.

4. FINAL PATH TO RATIONALISM

One of the most prestigious Hispanic centers in the formation of future jurists was the University of Salamanca, founded in the image of the Bologna University. They obtained their regulations, since the Catholic Monarchs, through Royal Provision dated July 6, 1493, regulated The conditions of the candidates for this title, in addition to being at least twenty-six years of age, must be six years. Pope Alexander VI asked Cardinal Cisneros and the Bishop of Salamanca, Diego de Deza, to influence the reform of university studies by means of a bull dated August 1, 1497, which was also projected on the Universities of Salamanca and Valladolid[4] and subsequently on the granting of other

[1] Mannori y Sordi, "Justicia y Administración", 68.
[2] Marc Bloch, *Les rois thaumaturges. Étude sur le caractère surnaturel attribué à la puissance royale particulèrement en France et Anglaterre* (Paris, 1983), 18.
[3] Óscar Villarroel González, *El rey y el papa. Política y diplomacia en los albores del Renacimiento (el siglo XV en Castilla)* (Madrid: Sílex, 2009), 241.
[4] Beltrán de Heredia, *Bulario de la Universidad de Salamanca (1219-1549)*, vol. 3, Acta Salmanticensia. Historia de la Universidad, 14 (Salamanca 1967), 201.

papal bull de León X, at the end of the 16th century, in 1598, "*the university constitutions arranged by Pope Martín V in 1422 enjoyed full vigor*"[1].

Some time later, during the first modernity, the postulates of rationalism made a dent in the theory of the State, which was conformed as an "*impersonal and abstract*" institution, made up of free citizens before the law - at least apparently - and the idea was being sown rationalist, in the sense of speculating and questioning whether the power of the prince, whether king, pope or emperor, "*as well as the interactions and relationships that could arise between these powers and / or dignities from the dawn of the learned jurisprudence of the ius commune, in comparison with the theologians and scholastic theology*"[2]. Singular tratadistas came to justify the theory of "*tyrannicide*", for Saavedra Fajardo, "*the prince becomes tyrant when he makes use of a power that the people have not granted him; properly, there is a breach of the pact between the subjects and the king and, therefore, the deposition of the tyrant is possible and legitimate*"[3], although he warns of two types of tyranny. For his part, Juan de Mariana, in his book "*De rege et regis institutione*", when dealing with the king and the royal institution, justifies that sometimes it is licit to eliminate the tyrant prince[4].

Already in the era of the Enlightenment not in vain, Father B. Jerónimo Feijóo said that "*he who rules, if not feared, is depreciated. Can he hope that he who despises him loves him?*"[5]. The diligence of the kings who were advised by the jurists during the Modern Era[6], shows that with the opportunity of the reason of State, was able to enter a new stage where legal literature marked new milestones because under the idea of "*good public*", an attempt was made to establish a new legal direction.

One can consider the realization of the Public Law of the Old Regime, since the idea of the modern State made it possible to overcome

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[1] J. A. Cárdenas Bunsin, *Escritura y Derecho Canónico en la obra de fray Bartolomé de las Casas*, Parecos y Australes (Iberoamericana-Vervuert, 2011), 29.
[2] Salustiano de Dios, El papel de los juristas, 137.
[3] Manuel Segura Ortega, *Saavedra Fajardo*, en Historia de la Teoría Política, 2 (F. Vallespín, ed.) (Madrid, 2002), 383.
[4] *Vid*. Juan de Mariana, *De rege et regis institutione* (Toledo, 1599).
[5] Jerónimo Feijjo, "Cartas Eruditas", en *Antología*, t. II, Ediciones Fe (Madrid, 1942), 92.
[6] *Vid*. Friedrich Meinecke, *La idea de la razón de Estado en la Edad Moderna*, (trad. de E. Tierno Galván). (Madrid: Instituto de Estudios Políticos, 1959).

the principle "*Princeps legibus solututus est*" (the monarch is exempt from the rule of law), just as it evolved in the tradition legal, so as García de Enterría "*violate the common law, justify exorbitances, derogations from established laws, especially the basis of a substantive superiority of the King, as commissioner of God for human government, such is the content of this new Law*"[1]. Both the power and the authority of the king, founded until the end of the eighteenth century on theological principles, implied obedience and fidelity of the subjects, but after the French Revolution "*there will be no other rights that enclose the use of that power in peace and in own war of the King*"[2], so it will be essential to educate the prince in parameters of prudence and moral judgment.

The rule of law, framed in a rationalist moment that would lead to the constitutionalist and codifying stage, was going to make it possible for the Nation to replace the monarch and the ownership of power would no longer be held by the king, so that power will be exercised with representative character by virtue of the principle of national sovereignty.

5. Conclusions

The legal studies of the European medieval universities helped to promote the renovating movement of the law (reception of common law) and this implied the opening of a scenario where the vision of the king "*who can do anything*" would be overcome.

The coining of the idea of subjective right will enable the legal construction of a new order, protected by common law, which will tend directly towards epistemology and rationalization, departing from the profiles of the divine law.

The transition from the medieval to the modern era will be based on the theory of the legitimation of the creation of law by the prince, accepted by collective psychology, since that is integral to the nature of things, although society, and In modern times, he will consider the law as a subjective reality.

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[1] Eduardo García De Enterría, *La lengua de los derechos. La formación del derecho Público europeo tras la Revolución Francesa* (Madrid: Alianza Universidad, 1994), 98-99.

[2] García De Enterría, *La lengua de los derechos*, 100-101.

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EUROPEAN CENTRAL BANK

Andrzej SZMYT[1]

Abstract: *The article discusses the legal position, composition and competences of the European Central Bank as the institutions of the European Union, in conjunction with the role of central national banks in the system of the European System of Central Banks. It also presents the role and importance of decision-making bodies - the Governing Council, the Executive Board and the General Council, as well as the principles and instruments of the operation of the Eurosystem.*

Key words: *European Central Bank; central national banks; European Union.*

1. Among the seven "institutions" of the European Union provided for in the Treaty, the "European Central Bank" (ECB) has been also included[2]. It is pointed out (art. 13 sec. 3) that the provisions on the ECB are contained in the Treaty on the Functioning of the European Union[3]. The regulation is included in art. 282-284 TFEU, as well as art. 127-133 and art. 138 which are referred to. The creation of the ECB was provided for in the Maastricht Treaty of 1992, but the predecessor of the ECB was the European Monetary Institute established in 1994 and transformed into the European Central Bank in 1998. The ECB is based in Frankfurt am Main.

The ECB shall enjoy all privileges and immunities necessary for the performance of its tasks within the EU Member States, under the conditions laid down in the Protocol on the privileges and immunities of the European Union.

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[2] Art. 13 sec. 1 of the Treaty on European Union, consolidated version Official Journal of the European Union 2016 C 202, p. 1 (7.06.2016)

[3] consolidated version Official Journal of the European Union 2016 C 202, p. 1 (7.06.2016)

In accordance with the aforementioned art. 282 TFUE, the ECB and national central banks create the European System of Central Banks (ESCB). The ECB and the national central banks of the EU Member States whose currency is the euro form the Eurosystem and conduct the Union's monetary policy. The main objective of the ESCB is to maintain price stability. Without prejudice to this objective, it shall support general economic policies in the Union with a view to contributing to the achievement of the Union's objectives. The ESCB operates in accordance with the principle of an open market economy with free competition, fostering effective resource location. Its activities assume respect for certain guiding principles - stable prices, sound public finances and monetary conditions, as well as a sustainable balance of payments[1]. The basic tasks to be carries out through the ESCB (art. 127 sec. 2) shall be:
- to define and implement the monetary policy of the Union,
- to conduct foreign-exchange operations consistent with the provisions of Article 219,
- to hold and manage the official foreign reserves of the Member States,
- to promote the smooth operation of payment systems.

In order to implement the above objectives and tasks, the ECB performs advisory functions. It is consulted (art. 127 sec. 4):
- on any proposed Union act in its fields of competence,
- by national authorities regarding any draft legislative provision in its fields of competence.

The ECB may, within the limits of its competence, submit opinions to the relevant institutions, bodies or agencies of the Union or national authorities.

According to art. 132 TFEU, in order to perform tasks entrusted to the ESCB, the ECB shall, in accordance with the provisions of the Treaties and under the conditions laid down in the statutes, make regulations, take decisions, make recommendations and deliver opinions. In case of non-compliance with obligations under its regulations and decisions, the ECB is authorized to impose fines and periodic penalty payments on undertakings.

The ECB has the exclusive right to authorize the issue of euro banknotes within the Union (art. 128 sec. 1). It may also receive - pursuant to art. 127 TFEU - specific tasks concerning policies relating to the "prudential supervision" of credit institutions and other insurance

[1] Art. 282 sec. 1 – sec. 2 in connection to art. 127 sec. 1 and art. 119 sec. 1 and 3 TFUE

institutions (art. 127 sec. 6). At the beginning of 2013, the process of implementing the "supervisory" mechanism of the ECB covered banks that received or applied for public aid, but since 2014 this mechanism has been extended to include all banks. Based on art. 127 sec. 6 TFUE the Council issued Council Regulation (EU) No 1024/2013 of 15 October 2013, entrusting the ECB with specific tasks concerning policies relating to the prudential supervision of credit institutions[1]. The regulation entrusted the ECB with specific tasks in the field of micro-prudential supervision, i.e. supervision, which aims to minimize - but not exclude - the possibility of bankruptcy of significant credit institutions. This means for the ECB such tasks as licensing banks (issuance and withdrawal of a permit to set up and start a business), assessment of the effects of purchasing large blocks of shares, assessment of documentation compliance, assessment of compliance with the requirements for own funds, assessment of liquidity, publication of information in the aforementioned materials, assessment of compliance of management principles with the requirements in this respect, conducting reviews (e.g. stress tests). The ECB is accountable to the European Parliament and the Council for implementing this regulation.

In practice, the ECB also acts as a lender of the last resort (Lender of Last Resort), providing emergency financial assistance to an institution (institutions) that became insolvent as a result of the financial crisis, which led to disturbances in the financial system, causing the contagion effect of one financial institution by another. The ECB does not have direct (statutory) basis to perform the above function. The ECB's basic mandate referred to in art. 127 sec. 1 TFEU, concerns maintaining price stability, not financial stability. It is debatable whether the ECB should engage in liquidity support of individual financial institutions or only the entire financial system threatened by destabilization[2].

2. In exercising entrusted powers, tasks and responsibilities, neither the ECB nor the national central bank or any member of their decision-making bodies shall seek or adopt instructions from Union

[1] Official Journal of the European Union 29.10.2013, L 287/63

[2] Knepka, R. „Europejski Bank Centralny jako pożyczkodawca ostatniej instancji" in *Wielka Encyklopedia Prawa, t. III – Prawo Unii Europejskiej,* ed. Z. Brodecki (Warszawa: 2014), 73-74.

institutions, bodies or agencies, the governments of Member States, or any another body. The subjective scope has been outlined broadly. The mentioned entities declare to respect this principle and not seek to influence the members of the decision-making bodies of the ECB or national central banks in the performance of their tasks (Article 130 of the TFEU). The indicated institutional independence strengthens the functional, personal and financial aspects. Functional independence is understood as the ability to independently form and implement monetary policy and to independently make decisions in order to perform statutory tasks. Personal independence is created by a set of procedures regarding the appointment and dismissal of decision-making bodies. The essence of financial independence comes down to the permanent formulation of rules and the distribution of bank funds, as well as to exclude the pressure on the bank's decisions regarding financial issues[1].

3. According to art. 282 sec. 3 TFEU, the ECB has legal personality. It has legal capacity in each of EU Member States (art. 9 sec. 1 of the Statute of the ESCB and the ECB) which has the broadest scope that can be granted by national law to legal persons. The ECB also has legal international capacity and, as a subject of international public law, it is entitled to participate in the work of international institutions and to conclude international agreements in matters within its competence.

ECB actions and omissions can be controlled and interpreted - in cases and under treaty terms - by the Court of Justice of the EU (CJEU). The ECB is authorized by the Treaty to initiate proceedings. The ECB's decision to initiate proceedings before the CJEU is taken by the Governing Council (decision-making body of the ECB).

The ECB operates on the basis of the treaties and the Statute of the ESCB and the ECB, attached as a protocol to the treaties (art. 129 sec. 2), as well as on the basis of internal rules[2]. It should be also stressed

[1] See: Molisz, A. „Europejski Bank Centralny" in *Wielka Encyklopedia Prawa, t. III – Prawo Unii Europejskiej*, ed. Z. Brodecki (Warszawa: 2014), 72.

[2] These are: a) ECB Regulations - Decision of the European Central Bank 2004/257 / WE of February 19, 2004 adopting the Regulations of the European Central Bank (EBC / 2004/2), Official Journal UE L 80, p. 33, with later amendments, supplemented by the regulations of the Supervisory Board of the European Central Bank (Official Journal EU L 182, p. 56 with later amendments), b) Regulations of the ECB Executive Board - decision of the European Central Bank EBC / 1999/7 of October 12, 1999 on the Executive Board of the European Central Bank, Official Journal WE L 314, p. 34, c)

that - in accordance with art. 131 TFEU - each EU Member State ensures that its national legislation including the statutes of its national central bank is compatible with the Treaties and the Statute of the ESS and the ECB. The provisions of the Statute are often identical in substance to the provisions of the Treaty.

Only national central banks are entitled to decide on ECB capital. Each national central bank has a certain percentage of the ECB's capital key.

4. According to art. 129 sec. 1 TFEU, the ESCB is managed by the decision-making bodies of the ECB, which are the Governing Council and the Executive Board.

The Governing Council of the ECB comprises the members of the Executive Board of the ECB and the Governors off the national central banks of the Member States whose currency is the euro (art. 283 sec. 1 TFEU). Therefore, the ECB's Governing Council is not a cadence body, because its composition depends on who is currently the president of the central bank in each of the Member States belonging to the Eurozone and who currently holds the position in the ECB's Management[1]. The Governing Council adopts its rules of procedure which define the internal organization of the ECB and its decision-making bodies.

The Governing Council of the ECB adopts guidelines and takes decisions necessary to ensure the performance of tasks entrusted to the ESCB and sets EU monetary policy including decisions on monetary objectives, key interest rates, the amount of reserves in the ESCB and also adopts guidelines on the implementation of these decisions. The Governing Council has the exclusive right to authorize the issue of euro banknotes in the Union. Such banknotes may be issued by the ECB and national central banks. Banknotes issued by the ECB and national central banks are the only means of payment in the Union.

The Governing Council of the ECB shall adopt its resolutions by a simple majority in the 2/3 quorum, unless the Statute provides

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Regulations of the General Council of the ECB - decision of the European Central Bank ECB / 2004/12 of June 17, 2004 adopting the Regulations of the General Council of the European Central Bank (Official Journal of the EU, L 230, 61); Statute - protocol (No. 4) to the Treaties.

[1] As pointed out by Górka, M. „Europejski Bank Centralny" in *Instytucje i prawo Unii Europejskiej,* ed. J. Barcz, M. Górka, A. Wyrozumska (Warszawa: 2017), 216.

otherwise. In case of an equal number of votes, the chairman's vote is decisive. In the absence of a quorum, the chairman may convene an extraordinary meeting without the requirement of quorum. For the adoption of certain decisions, the votes of members of the Governing Council of the ECB shall be "weighted" according to the shares of the national central banks in the subscribed capital of the ECB. Since 2015, the so-called "rotational" voting system has been applied, containing modifications that take into account the size of the economies of the Eurozone countries and financial sectors. A decision requiring a qualified majority shall be taken when votes for its acceptance represent at least 2/3 of the subscribed capital of the ECB and at least half of the shareholders. The right to vote is exercised in principle in person, only exceptionally, the regulations may allow voting by means of teleconferencing. Meetings of the Governing Council are confidential. However, it may decide to announce the result of the meeting to the public. The Governing Council meets at least ten times a year.

According to art. 284 TFEU, the President of the Council and a Member of the Commission (EU institutions) may participate in meetings of the Governing Council of the ECB without having the right to vote. The President of the Council may submit a motion for deliberation to the Governing Council of the ECB. The President of the ECB is invited to participate in Council meetings when the Council is discussing matters relating to the objectives and tasks of the ESCB. The ECB shall address an annual report on the activities of the ESCB and on the monetary policy of both the previous and current year to the European Parliament, the Council and the Commission, as well as to the European Council. The President of the ECB presents this report to the Council and the European Parliament, which may hold a general debate on this basis. The ECB shall prepare and publish reports on the activities of the ESCB at least once every quarter. The ESCB's consolidated financial statement is published weekly. The President of the ECB and other members of the ECB's Executive Board may, at the request of the European Parliament or on their own initiative, be heard by the competent committees of the European Parliament.

The Executive Board of the ECB comprises the President, the Vice-President and four other members (art. 283 sec.2). All of them are appointed by the European Council – according to a special procedure provided by the treaty – from among persons of recognized standing and

professional experience in monetary or banking matters. Their mandate lasts eight years and is not renewable. Only citizens of EU Member States can become members of the Executive Board. If a member of the Board ceases to fulfill the conditions necessary for the performance of his duties or if he has been guilty of serious misconduct, the Court of Justice may dismiss him at the request of the Governing Council of the ECB or the Executive Board of the ECB. Members of the Executive Board, in principle, may not engage in any other gainful or non-paid professional activity.

The Executive Board of the ECB is responsible for the implementation of monetary policy in accordance with the guidelines and provisions of the Governing Council of the ECB. It provides the necessary instructions to the national central banks. The Executive Board manages the current activities of the ECB, prepares the meetings of the Governing Council of the ECB and exercises other tasks entrusted by the Governing Council of the ECB on a delegation basis. The Executive Board of the ECB shall take its decisions by a simple majority of votes, and if the number of votes is equal, the vote of the President of the ECB shall prevail.

Although art. 129 TFUE lists only the Governing Council and the Executive Board among the ECB bodies, and - as long as there are Member States with a "derogation" in the EU - the General Council, which is the sole body of the entire ESCB and not only the Eurosystem, should also be included in the decision-making bodies. The General Council comprise the President and Vice-president of the ECB, the Governors of the national central banks of all EU Member States (including countries outside the Eurozone). Other members of the Executive Board of the ECB may also participate in the General Council meetings, but without the right to vote, and - similarly to the meetings of the Governing Council of the ECB - the President of the EU Council and a representative of the Commission. The General Council shall adopt its rules of procedure. The General Council is informed by the President of the ECB about decisions taken by the Governing Council.

The General Council performs primarily transitional tasks related to the derogation of some EU Member States. In particular, it performs an advisory role in the preparations to abolish the derogation, supports the preparations necessary to irrevocable determination of the exchange rates of Member States with a derogation to the euro. The General

Council, moreover, supports the collection of statistical information and ECB reporting activities, participates in the annual ECB report, participates in the establishment of uniform accounting and reporting procedures applied by the national central banks and participates in determining the conditions of employment of ECB staff.

5. In view of the fact that the Treaty determines that the ESCB is composed of the ECB and the national central banks of all EU Member States, it is also worth emphasizing that the ESCB does not have legal personality and is therefore headed by the decision-making bodies of the ECB. The ESCB does not own any assets. It is not subject to rights and obligations. It cannot sue and be sued. The ESCB also does not have its own staff. Therefore, it is not an EU body or institution. It is referred to as "the framework for the exercise of monetary authority"[1]. The ESCB has undoubtedly European and transnational nature. It is mainly understood as a two-stage, but decisively centralized organization of central banking, not a federal type organization. The central national banks constitute a decentralization component and the ECB is a centralistic element. Importantly, according to the ESCB Statute, most of the system's tasks are carried out with the participation of the national component of the entire system. In connection with capital and organizational aspects, it is important to emphasize the deep interpenetration of both elements - Community and national[2]. The ECB thus ensures the implementation of tasks entrusted to the ESCB either through its own activities or through the activities of the national central banks of the EU Member States[3]. In the field of international cooperation related to the tasks entrusted to the ESCB, the ECB decides how to represent the ESCB[4].

To the extent deemed possible and appropriate, without prejudice to the responsibilities of decision-making bodies, the ECB shall have the right to request the national central banks to carry out operations that form part of the ESCB's tasks[5]. The obligation of EU Member States is,

[1] As pointed out by Pawłowski, Sz. „Europejski Bank Centralny w obliczu kryzysu zadłużenia" (Warszawa: 2014), 20-21.
[2] Pawłowski, „Europejski Bank Centralny", 23.
[3] Art. 9 sec. 2 of the ESBC and ECB Statute.
[4] Art. 6 of the ESBC and ECB Statute.
[5] Art. 12 sec. 1 *in fine* of the ESBC and ECB Statute.

among others, to ensure that its legislation, including the statute of the central bank, is compatible with the Treaties and the Statute of the ESCB and the ECB. The statutes of the national central banks must provide, in particular, that the term of office of the President of the national central bank shall not be less than five years. The President may be released from office – with regard to warranty procedures - only if he/she no longer fulfills the conditions necessary for the performance of the functions or if he/she is guilty of serious misconduct. National central banks may also perform other functions than those specified in the ESCB and the ECB Statute, but on their own responsibility and under the condition that they are not considered part of the ESCB functions[1].

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3. Molisz, A. „Europejski Bank Centralny" in *Wielka Encyklopedia Prawa, t. III – Prawo Unii Europejskiej,* ed. Z. Brodecki. Warszawa: 2014.
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[1] Art. 14 of the ESBC and ECB Statute.

INSOLVENCY "AROUND THE WORLD". A NEW "DESIGN" ON THE GLOBAL GEOGRAPHICAL MAP

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Abstract:

In the present study we aim to "make a journey around the world" allowing us to carry out a complex analysis of the normative framework related to insolvency in the context of accelerating the internationalization and globalization trend under the "umbrella" of the new orientations, principles and policies of the EU and international institutions bodies. In a world where we speak of foreign ownership, foreign trade partners, foreign finances and external contracts, foreign shareholders, foreign operations, international trade, and last but not least a global economic order permanently reconfigured by "the variable geometry of superpowers", we need a "normative mapping" of the insolvency regime through a comparative analysis of many contemporary jurisdictions in order to remove some geographical "barriers" and differences between the legal systems of the states in terms of insolvency proceedings. In fact, the field of insolvency is on the agenda of the interests of International and EU bodies and institutions, such as the World Bank, the Organisation for Economic Co-operation and Development, the United Nations Commission on International Trade Law, the World Trade Organization, the European Commission, the European Parliament, with recently published analysis reports which reflect an insolvency "around the world", based on analysis statistics and indicators which outline a widely varying "design" of the insolvency regimes across countries. Nevertheless, the institution of insolvency benefited from a restructuring in almost each legal system, with the promotion and development as a priority of a "rescue culture" – a second chance, reorganization, a fresh-start and the elimination of the stigma of bankruptcy, by prioritizing new interests in the context of the economic and social cohesion.

Key words: *insolvency; economy; globalization; insolvency of administrative and territorial units; analysis indicators; EU/international bodies; jurisdictions; reforms; forecasts.*

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INTRODUCTION. MULTIDISCIPLINARY VISION. INSOLVENCY - COROLLARY OF THE MARKET ECONOMY

The globalization of modern society has brought about major changes and has triggered a national re-identification, with the international context changing deeply in a world taken under control by the economic imperative and exploited by it, in a world of international treaties, multi- and bilateral agreements, and of the international organizations to which the states have joined, and in which the power games in are organized the global trade, and the new international economic order is outlined that aims to be an international order based on rules[1]. As a matter of fact, we cannot deny the existence of a multidisciplinary scientific universe in which religion, legal norms, economy, philosophy and art have long been globalized, and competition between them is intensified, the solution for this competitiveness being parallelism and interdisciplinarity, not servitude. We need to recognize these new connections in order to avoid falling into irrationality, all the more so as we are taking into consideration a few errors that lead to economic crises or to the inability to overcome certain difficulties that are not merely economic, the social dimension gaining more ground in this context of the need for "correction" of the economy, the great philosophers calling into question the fact that "*inequality is not just a matter of values and morality, it is about the economy itself ... economists should not bypass it, because the financial crisis and inequality are mutually implied.* "[2] It is obvious that the economy will continue to guide political decisions in a description of the future world, the great philosophers talking about "*a variable geometry with continuous displacements of planes where problems in one system will be presented in the clothes of another system, the actors of the world that are coming being increasingly nuerous, and a reaffirmation of the nations being just at the beginning"*[3]. This image of superpowers actually arranges not only

[1] For the development concerning the globalized economic and the international economic order, see Ionel Didea and Diana Maria Ilie, "(R)evolution of the insolvency law in a globalized economy", *Tribuna Juridică*, no. 1 (March 2019): 91-112, http://tribunajuridica.eu/arhiva/An9v1/8.%20Didea,%20Ilie%20%20EN.pdf.
[2] See Joseph E. Stiglitz, *The Great Divide* (2015), 96, *apud* Andrei Marga, *După globalizare* (Meteor Press, 2018), 290.
[3] Marga, *După globalizare*, 245.

the global economy but also all other systems, such as the legislative system, the new legal constructions, as is the case of insolvency, which are instruments of economic integration and regulation of the market relationships. Without getting into details and without having an exhaustive debate on the decisive role of the economy and international trade, we can say that the economic integration triggers a continuous action mechanism for the codification of international and regional legal norms, and the legal status of insolvency becomes an adaptable system, a corollary of the market economy in this reality and global order evolving in a legislative, economic and social cohesion.

The OECD has recently voiced its concern about the sudden slowdown in trade, the key artery of the global economy. Based on an official report - *Global Growth Weakening as some risks materialize* - available from March 2019[1], the risks preventing global expansion, among which the slowdown of the external and internal demand, the political uncertainty in Europe, including the Brexit case, have been highlighted, a disorderly exit being susceptible to substantially increase the costs for the European economies, given that the United Kingdom is an important trading partner for many countries. In a scenario of the trade between the United Kingdom and the EU, carried out under WTO terms, which would obviously vary from one state to another, the OECD estimates that the bilateral exports of smaller countries to it could fall by approximately 15%.

In a World Bank Group (WBG) report published in May 2018[2], Romania received intense criticism in relation to sustainable growth, ranking 45th in "Doing Business 2018". Thus, Romania has a poor macroeconomic policy, while the private sector, although dynamic, is small and limited to financing, especially for small and medium-sized enterprises, being the country with the lowest levels of financial intermediation in the EU, both in the banking markets, as well as in the

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[1] GLOBAL GROWTH WEAKENING AS SOME RISKS MATERIALISE, 6 March 2019 - http://www.oecd.org/economy/outlook/global-growth-weakening-as-some-risks-materialise-OECD-interim-economic-outlook-handout-march-2019.pdf

[2] Report No. 126154-RO, "*INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT AND INTERNATIONAL FINANCE CORPORATION AND MULTILATERAL INVESTMENT GUARANTEE AGENCY COUNTRY PARTNERSHIP FRAMEWORK FOR ROMANIA*", available at: http://documents.worldbank.org/curated/en/954721529638270108/pdf/Romania-CPF-May-21-05252018.pdf.

capital ones, with strong social differences that are also increasing. According to the WBG report, the unstable business environment is also a direct consequence of institutional failures, such as frequent changes in the taxpayer identification number and the lack of consultation with the private sector. Given the current context of Romania, namely taking over the presidency of the EU Council (January-June 2019), we consider that it is a good moment to build the country's vision for a more prosperous, competitive and inclusive society through global engagement. As a matter of fact, we hope that under Romania's Presidency, the Directive[1] on on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures still under political debate[2], will be adopted, the field of insolvency becoming a key factor in the sustainability of the national economy.

Starting from an "in globo" research of the main legal and economic directions outlined in the EU and international context, in a moment where the ongoing global financial crisis and the business globalization drastically increased the complexity of insolvency, we aim at identifying the best practices and solutions for the substantiation of the norms concerning the legal regime of insolvency, always referring to reminding here the problem of the stigma of the bankrupt which still inhibits the restructuring of enterprises, or the problem of the lack of early warning mechanisms of insolvency, taking into account, at the same time, certain changes brought through Government Emergency Ordinance no. 88/2018 to this institution. Despite the reforms in the field of insolvency, norms are still divergent and remain inefficient in certain countries, the result being legal insecurity, the generation of additional costs for investors in relation to the assessment of their risks, less developed capital markets and the persistent barriers to the efficient restructuring of viable trading companies in the European Union and elsewhere.

[1]http://ec.europa.eu/transparency/regdoc/rep/1/2016/RO/COM-2016-723-F1-RO-MAIN-PART-1.PDF

[2] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A8-2018-0269+0+DOC+XML+V0//FR; https://www.consilium.europa.eu/ro/press/press-releases/2018/10/11/directive-on-business-insolvency-council-agrees-its-position/

1. THE "DESIGN" OF INSOLVENCY REGIMES VARIES SIGNIFICANTLY BETWEEN COUNTRIES. ANALYSIS INDICATORS UNDER THE AEGIS OF THE REGIONAL AND INTERNATIONAL BODIES. REFORMS AND FORECASTS

On the global stage, we are talking, firstly about a new "design", a (r)evolution of insolvency in most legal systems, which develops a new facet of this institution by shaping a "rescue culture." On the other hand, we are witnessing major tendencies and major efforts to harmonize and streamline legislation in the field of insolvency, both at regional and EU level, and even at the international level, although the identity of a European or international insolvency law remains a quite new subject unlike other more traditional fields. Also worrying is the fact that, in an attempt to create a broader Europe, while preserving, at the same time, the cultural diversity of the member countries, there has in fact been an increase in the number of non-binding standards. The foreign doctrine highlights that the European Union has temporarily renounced the idea of harmonizing legislation on insolvency by binding acts, trying to achieve this goal through non-binding acts[1], and indeed, we have the example of such EU acts which have remained at the stage of legislative guidelines such as the European Communication and Cooperation Guidelines for Cross-border Insolvency (the CoCo Guidelines), or Commission Recommendation no. 135/2014 on a new approach to business failure. On the official website of the European Parliament we can find the legislative resolution of 28 March 2019[2], the Parliament adopting, in ordinary legislative procedure, its position at first reading and requesting the Commission to notify it again if it replaces or substantially amends its proposal, with the President being entrusted with submitting to the

[11] Carballo Pineiro, *Towards the Reform of the European Insolvency Regulation: Codification rather than Modification* (Nederlands Internationaal Privaatrecht, 2014), 207-213, *apud* Reinhard Bork, Renato Mangano, *European Cross-Border Insolvency Law* (United Kingdom: Oxford University Press, 2016), 4-6.

[2] Legislative Resolution of the European Parliament of 28 March 2019 concerning the Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU COM/2016/0723 – C8-0475/2016 – 2016/0359(COD)) - http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2019-0321&format=XML&language=RO.

Council and the Commission, as well as the national parliaments, its position. Consequently, we aspire that this *"insolvency puzzle"*, which is prioritized on the agenda of the European Union, be appropriately supplemented, going beyond the stage of implementing rules, standards that are limited to co-operation between courts and coordination of insolvency procedures of a cross-border nature. By continually evoking the principle of sovereignty and proportionality, insolvency will remain only at the stage of national legislative creation, while a legislative harmonization of the EU will not be able to be substantiated by legally binding legislative instruments which only propose standards that may or may not be taken into consideration by national legislators.

The tendency towards uniformity appears to be particularly attractive because the differences between national laws prevents the economic integration of the EU, favours the "*forum shopping*" and compromise the rule of law. It is interesting to mention the fact that this forum shopping trend becomes an option in the USA, where it would not be justified because, unlike the European Union where debtors are actually seeking to implement a more advantageous insolvency law, the insolvency law in the USA is federal, the Insolvency Code being applied in all US states. Nevertheless, the "forum shopping" is used in the sense of opening insolvency proceedings in a more general legislative framework, the law of insolvency interfering with other laws, such as the company law, the administrative law, and the fiscal law, security laws, laws are not federal and which can obviously favour a successful development of a judicial reorganization. Consequently, the jurisdictions of Delaware and the South District of New York have become "magnets" of the insolvency proceedings, attracting many big-size companies, such as General Motors, American Airlines, or even the most recent Energy Future Holdins case. We can notice the fact that, while the EU is struggling with the harmonization of the insolvency rules, the USA is facing the need to harmonize rules that interfere with the already uniformized insolvency law and which can have a vital contribution to the creation of a more favourable legal framework for carrying out a judicial or bankruptcy reorganization process, although the United States, unlike the EU, already benefits from the regulation of a recognized

economic law that provides for the abolition of those rules that impose excessive barriers on interstate or international trade[1].

Regulation no. 2015/848 goes beyond the much-discussed dichotomy, more specifically, the universalism-territorialism conflict, being in fact a compromise between the two, the EU labelling it rather as a "controlled universality", due to the fact that there is a possibility of opening the main insolvency proceedings if the centre of main interests (COMI) is located on the territory of a member country, but at the same time the Regulation also allows for the opening of secondary proceedings against the same debtor whose effects will be limited to the assets of the debtor located on the territory of the member country of the secondary proceedings, with the mention that such secondary proceedings will modify and restrict the competence of the main proceedings as well as the power of the liquidators[2].

In reality, what is the degree of reflection, national integration of these legislative harmonization efforts, even if those member countries that have implemented, for example, the European Commission's Recommendation, did it in a selective way? In many countries, business restructuring remains just an aspiration, not a reality, and this is confirmed by the comparative studies conducted by numerous regional and international bodies. A study of the Directorate-General for Justice and Consumers[3], which was organized at the level of the Commission, has provided a cross-cutting analysis by comparing the substantive insolvency law across the EU. The fields of interest were: the duties of the directors, the order of priorities, and the conditions under which certain harmful facts can be avoided, the conditions for the opening of insolvency proceedings and the fast or standardized procedures for SMEs, the timetable for reducing and discharging debts, the creditor involvement, and publicity and advertising costs. Consequently, the recovery rates are higher in economies where the restructuring is the most common insolvency procedure, with creditors expecting to recover

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[1] Elise Lheritier, „*Perspectives comparees vis-a-vis de la gestion du risque d'insolvabilite: l'exemple americain*", in Andra Cotiga-Raccah, Laura Sautonie-Laguionie, *Le nouveau droit europeen des failletes internationales*, (Brussels-Belgium: Bruylant, 2018), 47-60.

[2] See Marcela Comșa, *Regulamentul privind procedurile de insolvență, Jurisprudența Curții de Justiție a Uniunii Europene* (Bucharest: Universul Juridic, 2017).

[3] "*New EU insolvency rules give troubled businesses a chance to start anew*" - file:///C:/Users/Admin/Desktop/articole/de%20tradus/EPRS_BRI(2018)623548_EN.pdf

83% of their claims in such economies, compared to an average of 57% in winding-up proceedings.

At global level, the main "actor" in the harmonization and unification of international trade law, as well as of the other legal systems that stem from it, as is the case with the international insolvency law, remains the United Nations Commission on International Trade Law, established by the UNO in 1966, which plays an essential role in substantiating the strategy on the approach to insolvency. In the July 2018 session, UNCITRAL adopted and enacted the Model law on recognition and enforcement of insolvency-related judgments, developed over the past four years by UNCITRAL Working Group V and designed to supplement the UNCITRAL Model Law on Cross-Border Insolvency. The globalization of legal issues and the lack of global authorities with authoritarian powers in the field of insolvency, such as the EU-CJEU, increase uncertainty and barriers to legislative uniformity, although there are countries that have fully transposed the guidelines developed by UNCITRAL at internal level, such as, for example, the United Kingdom and Romania. Nevertheless, there are countries such as Germany, Austria and Portugal that have not shown interest in this international instrument. Moreover, some national legal systems adopt a sort of "legal transplant theory" by attempting to transpose at internal level a doctrine/a national regulatory framework considered prestigious at European or international level, cases that we will exemplify herein.

In a recently published analysis and research document (8 September, 2018), drawn up under the coordination of the OECD Economic Department[1], it was ascertained, based on quantitative indicators built from the answers of 36 countries to a recent questionnaire concerning the OECD policy, that the design of insolvency regimes varies considerably from one country to another, with important differences occurred in the treatment of failed entrepreneurs, the availability of preventative and streamlining tools and ease of corporate restructuring. The indicators – which are available for 36 countries for

[1] Adalet McGowan, M. and D. Andrews, „*Design of insolvency regimes across countries"*, (OECD Economics Department Working Papers, No. 1504, OECD, Paris, 2018), available at:
https://www.oecd-ilibrary.org/docserver/d44dc56f-en.pdf?expires=1541671387&id=id&accname=guest&checksum=C905B65C5B393FE0DA4A196726D14AE3;

2010 and 2016 –aim to better capture the key design features of insolvency which impact the timely initiation and resolution of personal and corporate insolvency proceedings. OECD specialists said that while the analysis highlights that recent reform efforts have improved the policy design, there are many possibilities for reforming insolvency regimes in many OECD countries[1].

Through the analysis report drawn up under OECD aegis, 13 "key" characteristics were identified based on best international practices and the existing research, which include: 1) two features that raise the personal costs to failed entrepreneurs: time to discharge and fewer exemptions; 2) the absence of three mechanisms that aid prevention and streamlining: early warning mechanisms, pre-insolvency regimes and special insolvency procedures for SMEs; 3) five features that may potentially impose barriers to restructuring: creditors' inability to initiate restructuring, an indefinite stay on assets, lack of priority given to new financing, no cram-down of restructuring plans on dissenting creditors and the dismissal of incumbent management during restructuring: 4) three other factors: a high degree of court involvement, a lack of a distinction between honest and fraudulent bankruptcy and restrictions on individual and collective dismissals during proceedings. While the indicators were designed to address the insolvency-productivity nexus, they are potentially relevant for understanding other economic phenomenon, including the propagation of macroeconomic shocks, financial sector behaviour and a range of labour market outcomes.

Various legislative initiatives around the world aim at improving the capacity to restructure applicable local laws. Such developments are currently in the spotlight of INSOL International[2], which has recently debated and published articles on the official website, India and Singapore drawing its attention due to the fast way in which they have been able to revise the regulatory framework on insolvency, giving

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[1] Adalet McGowan, M. and D. Andrews, *"Insolvency Regimes and Productivity Growth: A Framework for Analysis*" (OECD Economics Department Working Papers, No. 1309, 2016) - https://www.oecd-ilibrary.org/docserver/d44dc56f-en.pdf?expires=1555057715&id=id&accname=guest&checksum=78CF5C280D89FEBDEA625C7C89C29C12

[2] *INSOL International* is a federeation at the global level of the regional and national associations of insolvency professionals, and there are currently 44 member associations from the entire world and more than 10,500 professional Insol members – https://www.insol.org/, https://email.insol.org/4WAM-4JLE-D51AATYN71/cr.aspx.

priority to the recovery of the corporate debtors. Consequently, as a result of a successful leadership conference in Delhi, an update was made on India's position on the insolvency regime, with major changes to the the Insolvency and Bankruptcy Code, 2016[1] (IBC). As proposed at some point in Romania as well, especially at the level of doctrine[2], IBC intends to bring all insolvency proceedings in India under a single "umbrella", more specifically, the insolvency framework applicable to limited liability companies (the Insolvency and Bankruptcy Board of India Regulations – the CIRP Regulation) and those that applicable to individuals (Insolvency Resolution for Individuals of 2016). Unlike the previous regime which focused on liquidation, the IBC places primary importance on the revival of the Corporate Debtor, as well as to professionalization in this area, with over 1900 insolvency professionals currently registered with IBBI. The fast pace of the IBC's first two years is a "breath of fresh air" compared to the extremely slow pace of previous Indian insolvency cases, and this is also due to the incorporation of the UNCITRAL Model Law on Cross-Border Insolvency. This legislative reform can bring India to the forefront of restructuring and insolvency actions, with IBC's initiatives even closer to the UK scheme.

INSOL International also presents the case for Singapore's first arrangement with creditors in an article analysing the Singapore Companies Act, amended in May 2017 just to introduce a few improvements to Singapore's debt restructuring laws. Thus, the High Court approved the first pre-packaged scheme of arrangement under Section 211 of the Companies Act, a section allowing courts to approve a pre-packaged scheme without the need to order or hold a meeting of the scheme creditors. The scheme proposed by Hoe Leong Corporation Ltd, a company listed on the Mainboard of the Singapore Exchange Limited (the Singapore Stock Exchange) to deal with secured and unsecured creditors, was approved just two months after the date of the dispatch of

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[1] *India's Revised Insolvency Framework Too Fast From Too Slow?* - http://insol-techlibrary.s3.amazonaws.com/67439f98-c0b7-4a42-bae4-abe563895e06.pdf?AWSAccessKeyId=AKIAJA2C2IGD2CIW7KIA&Expires=1554708886&Signature=LapReeI%2BxV%2Bob4PIdgzoWNaIM6g%3D

[2] See Ionel Didea, Diana Maria Ilie, "*Prioritization of insolvency in the universal legal picture. New legal views passed through the filter of equity, solidarity and social responsability"*, C.H. Beck -The International Conference European Union's History, Culture and Citizenship 11th of edition Pitesti (18th -19th May 2018): 198-217, https://www.upit.ro/_document/29537/e-book_iccu2018_c.pdf

the documents, this speed in the proceedings, coupled with the removal of costs of a court hearing to seek its approval for the convening of a creditors' meeting and the convening of said meeting clearly offers considerable time and cost savings for distressed companies and is likely to become the preferred option going forward. As a matter of fact, according to recent INSOL International information, 2019 will be an eventful year in the restructuring and insolvency sector in Singapore, taking into account, as well the much-anticipated Insolvency, Restructuring and Dissolution Act 2018, due to come into force in the 2019.

2. "BANKRUPTCY STIGMA" - OMNIPRESENT AT GLOBAL LEVEL

Many entrepreneurs feel discouraged from resuming a business due to stigma, difficulties, or discrimination faced after bankruptcy. These are the consequences of a business failure, the stigma of bankruptcy still having an "echo" in most states. In the international specialised literature we come across recent studies that have made a "geographic map" of the stigma of bankruptcy by parallel research of many contemporary jurisdictions over the "stigma of bankruptcy", which in our opinion is a comprehensive interdisciplinary analysis that will be the subject of a separate study, which also highlights the psychological, sociological, and insolvency effects of both consumers and company directors or employees. A World Bank report in 2013 found, for example, that the presence of stigma becomes very problematic by discouraging honest debtors from resorting to judicial reorganization proceedings, due to the fact that the insolvency systems give rise to deep feelings of guilt and shame, insolvency being viewed as "reputational damage" or a violation of moral standards"[1].

The intensity of the "stigma of bankruptcy" varies from one jurisdiction to another, but is omnipresent in modern societies, from China, to Europe and the United States, and inevitably affects the new

[1] Teresa A. Sullivan, Elizabeth Warren and Jay Lawrence Westbrook, *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, (59 Stanford L. Rev. 213–256, 2006), 233, *apud* Tajti, "*Bankruptcy stigma and the second chance policy: the impact of bankruptcy stigma on business restructurings in China, Europe and the United States"*, 9.

reforms applied in relation to the "architecture" of insolvency, the second chance philosophy being the preponderant tendency in mos countries. The spectrum of stigma remains rather difficult to quantify, but we can validly say that currently there is no modern legal system in which it is not present with a certain level of intensity, even in the USA, which still benefits from the most low stigma index. In the USA, we are already talking about an era in which a combination of reorganizations in court, preceded by out-of-court pre-packed negotiations where rapid consensus is reached, is predominant. For this reason, it is not surprising that Niall Ferguson, the author of the best-selling books dedicated to the field of finance, referred to the United States as one of the countries in which insolvency law, viewed as "a new beginning", becomes almost an inalienable constitutional right, due not only to the well-known Chapter 11, but also to the omnipresence of bankruptcy in society, including the unprecedented indebtedness of citizens[1].

Germany is exactly the opposite of the USA in relation to the intensity of the bankruptcy stigma, one of the most important German insolvency lawyers, Reinhard Bork, saying a while ago that "in the German business world, it is known that the opening of the insolvency proceedings is a assumption, an admission of one's own failure, regardless of the real cause."[2] Business people have been aware of this problem, often opting for forum shopping, the closest and most "friendly" system being the UK one.

Stigma persists with varying degrees of intensity, whether in China, Europe or even in the USA, clearly affecting the implementation of insolvency laws in all systems studied in this research, regardless of the success of the reorganization regulations. This is precisely why we are talking about the stigmatization-restructuring interface, an indicator also identified in the OECD analysis, and a balance is needed between them so that the second chance philosophy may function as a reform in the structure of insolvency law. Stigmatization can affect not only consumers, but also entrepreneurs, administrators and managers of

[1] Niall Ferguson, *The Ascent of Money* (Penguin Books 2009), 60, *apud* Tajti, "*Bankruptcy stigma and the second chance policy: the impact of bankruptcy stigma on business restructurings in China, Europe and the United States*", 16.

[2] Reinhard Bork, *Rescuing companies in England and Germany* (Oxford University Press, 2012), section 2.12, *apud* Tajti, „*Bankruptcy stigma and the second chance policy: the impact of bankruptcy stigma on business restructurings in China, Europe and the United States"*, 19.

companies and, ultimately, companies themselves as consumers, suppliers or creditors of such companies as well, who change their position when they face bankruptcy[1].

3. THE NEED FOR A NATIONAL LEGISLATIVE REFORM IN THE FIELD OF INSOLVENCY. PROPOSED DIRECTIONS

Moving the analysis in our country, we find that there is a room for internal reform in the field of insolvency law even though it has shown an uptrend and seems to have revolutionized the legislation in the field, and in the last years, there has been a law aspiring towards the unification and consolidation of a complex and comprehensive Insolvency Code comprising the entire insolvency law in one common set.

But what would be the priority directions towards a new legislative reform in Romania and what is the true "value" given to the second chance?

There are many internal barriers to a realistic and not just scriptural chance of reorganization and reinsertion on the financial market of a debtor in financial collapse. From a comparative perspective of the best practices identified and analysed in this study, and without claiming that we have carried out an exhaustive analysis of them, we believe that it would be appropriate to highlight certain aspects. In Romania, there is no difference between an honest debtor and a debtor in bad faith so that insolvent or over-indebted entrepreneurs who are honest receive a full debt repayment after a reasonable period of time has elapsed to allow them a second chance and a separate legal discharge and reorganization regime. Moreover, are not several restructuring frameworks, as we can see in other countries. Furthermore, our legislative system lacks early warning tools in relation to the insolvency

[1] In 2013 the World Bank drew up a quite brief report, with a provisional list of legal tools for combating the insolvency stigma, suggesting that debtors are no yet aware of the advantages of the system and do not use the relief options. However, the report needs to be reviwed, following many legislative amendments - *World Bank (2013) Insolvency and creditor/debtor regimes task force, Report on the treatment of the insolvency of natural persons* - http://siteresources.worldbank.org/INTGILD/Resources/WBInsolvencyOfNaturalPersonsReport_01_11_13.pdf

risk, which is why preventive restructuring frameworks, although present at scriptic level, more specifically the ad hoc mandate and the agreement with credotors, do not go beyond to the stage of theory to be implemented in practice most of the times. At the same time, we underline that at national level there is no clear differentiation from the beginning of the insolvency proceedings between viable firms for reorganization and the so-called "zombie" companies, there are no distinct proceedings for SMEs, granting the second chance by reorganization or insolvency prevention procedures do not apply to the professional individuals, to the category of liberal professions, to individual or family businesses, for these debtors the legislator offering only the possibility of direct entry into the simplified bankruptcy proceedings.

In addition to all these regulatory shortcomings, domestic related laws, in particular the tax law, and the uncertainty of regulations, unevenly and chaotically altered, inconsistent with the EU and the international guidelines, continue to create major barriers to the evolution of an insolvency law which should have a real contribution to the development of a sustainable economy. We are taking into consideration Emergency Ordinance no. 88/2018 amending and supplementing certain normative acts in the field of insolvency and other normative acts, published in the Official Journal of Romania no. 840/02 October 2018, which mainly seeks to amend Law no. 85/2014 on insolvency and insolvency prevention procedures and prioritises the budgetary system to the detriment of Romania's economic and social interest. We find that this ordinance is a legislative regression, as the business environment is experiencing a much more aggressive recovery of budgetary receivables and a more difficult implementation of the judicial reorganization process, affecting core principles such as concurrency and unity, by allowing for the enforcement of current debts in the insolvency proceedings, thus destabilizing the process of reorganization, which accounts anyway for a very small percentage in Romania, of 5-6% of the total number of insolvencies[1]. Moreover, according to the new

[1] For development see Ionel Didea and Diana Maria Ilie, Letters V - *O nouă (r)evoluție internă a dreptului insolvenței declanșată de intrarea în vigoare a Ordonanței de Urgență nr. 88/2018 pentru modificarea și completarea unor acte normative în domeniul insolvenței și a altor acte normative. Progres sau regres?* – în "(R)evolution

regulations of the ordinance, judicial reorganization can no longer be triggered if the fiscal administration does not obtain at least 50% of the tax receivables by a schedule, and the exemption from the remaining 50% is not justified by a public interest. In other words, the tax administration is granted the right to accelerate the proceedings initiated for recognizing current tax receivables by opting quickly for bankruptcy in the case of non-payment of these receivables, thus saving the SMEs and even that of large but private companies, becoming almost impossible. Under such circumstances, we ask ourselves what are the real chances of the evolution of insolvency law and how the directions for a new legal identity can be reached, as is desired and promoted at the EU level, but also at the global level.

Coming back to the national "weaknesses" identified in the area of insolvency, we consider that it is necessary to take as starting point the gaps in the reorganization proceedings. There are differences between the member countries in terms of the number of proceedings that debtors in financial difficulty can resort to in order to restructure their business. Certain member countries have a limited number of proceedings that allow companies to restructure their business only at a relatively late stage in the context of the insolvency proceedings, while in other member countries the restructuring is possible at an early stage, but the existing proceedings are either inefficient or very formal, often limiting the possibility of resorting to out-of-court settlements. For example, the new Polish legislative development opts for multiple ways of restructuring, similarly to the United Kingdom, as alternatives for jurisdictions that know only one type of reorganization procedure (like Hungary). Thus, in 2016, Poland adopted a distinct statute and introduced four distinct types of restructuring proceedings instead of only one. The European Parliament said that more alternatives become a better formula for spreading the rescue culture, due to the fact that businessmen can choose, and the possibility of choosing itself seems to be a panacea against the fear of bankruptcy and stigmatization[1]. Belgium has also

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of the insolvency law in a globalized economy", 110-112, http://tribunajuridica.eu/arhiva/An9v1/8.%20Didea,%20Ilie%20%20EN.pdf.

[1] European Parliament legislative resolution of 28 March 2019 on the proposal for a directive of the European Parliament and of the Council on preventive restructuring, second chance and measures to increase the efficiency of restructuring, insolvency and debt relief amending Directive 2012/30/EU (COM(2016)0723 – C8-0475/2016 – 2016/0359(COD)). -

experienced a strong uptrend in the field of insolvency, with the country already being governed by a Code of Economic Law, which was also proposed in Romania at a certain point but remained in derision, a code that was resized and republished on 13th July, 2017, the Belgian legislator adopting and inserting the draft law Charter XX, which revolutionized insolvency by adopting new measures. For example, the Belgian legal system offers today the opportunity to address three forms of judicial reorganization, namely, the reorganization by mutual agreement ("Réorganisation par accord amiable"), the reorganization by collective agreement ("Réorganisation par accord collectif" and the reorganization by transfer ("Réorganisation par transfert") [1]. Our attention was also drawn by the possibility of obtaining a "patent of honour" by the Belgian debtor who has managed to successfully implement a reorganization plan, and in practice it is very important to formally establish that insolvency was successfully closed. In reality, these forms of reorganization are found in another form in our legal system as well, but are promoted and known by only by debtors. In addition to the merger and the "controlled" insolvency arrangement, the "business transfer" can be approached as a reorganization strategy, being a method expressly permitted by Law no. 85/2014 on insolvency and insolvency prevention procedures. It may imply "the transfer of all or some of the debtor's assets to one or more natural persons or legal entities, established before or after the confirmation of the plan." [2]

In order to justify the effort and the assumption of the common "sacrifice" for the rescue of an enterprise, a clear distinction must be made between viable and non-viable companies, due to the fact that, if a debtor in financial distress is not economically viable, or its economic viability cannot be recovered rapidly, all these restructuring efforts could lead to the acceleration and accumulation of losses to the detriment of the creditors, employees, and other stakeholders, as well as the economy as a whole ("zombie" companies). Law no. 85/2014 brought as a novelty, at the internal level, the provision according to which "the compliance with

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http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2019-0321&format=XML&language=RO.

[1] Cedric Alter and Zoe Pletinckx, "Depistage, mesures provisoires et reorganisation judiciaire (nouvelles dispositions)", 133-152.

[2] Radu Bufan, "Transferul de afacere. Efecte fiscale", in *Revista Română de Drept al Afacerilor* no. 3 (2015): 11-21.

both the lawfulness and the viability conditions is a prerequisite for the confirmation of the reorganization plan", the doctrine[1] considering that, by this regulation the syndic judge acquires besides the duties of verifying the lawfulness, duties of establishing the viability, opportunity, and profitability of a business, which somewhat outweigh his/her competence. Nevertheless, the law does not prohibit the possibility for the syndic judge to request a neutrally-grounded opinion to an insolvency practitioner, an option that can provide a real and motivated view of the viability of a reorganization plan, such a court decision being pronounced knowingly and risk-free. For example, in the French law, unlike our legislation, the list of persons who may request the opening of insolvency proceedings is much bigger, in addition to debtors and creditors, including the court of law and the Public Ministry[2], which is why we notice, as is the case of the Belgian law, a much better cooperation and an active involvement of several entities in the detection of company in financial distress. As mentioned by the European Parliament, the degree of involvement in the restructuring frameworks of the judicial or administrative authorities, or of those appointed by these authorities ranges from a lack of involvement, or just a minimum involvement, in certain member countries, to full involvement in other member countries.

In what SMEs are concerned, they should benefit from a more coherent approach, because they are more likely to be liquidated than to be restructured, incurring disproportionately higher costs than those incurred by multinationals for example. Another approach is justified by the fact that SMEs do not have the resources to cope with high restructuring costs and to take advantage of the available restructuring proceedings, especially when they are facing financial difficulties. Consequently, in order to provide a realistic chance of reorganization, it is necessary to approach a distinctive regime tailored to the needs and peculiarities of SMEs that involve much lower costs.

Early warning tools are also very important, because they warn debtors that they need to act quickly. For example, the Belgian insolvency regime has introduced a kind of "screening" – "*depistage*"[3],

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[1] Simona-Maria Miloș et alii "Reorganizarea*"*, in *Tratat practic de insolvență*, Radu Bufan (coordinator), (Bucharest: Hamangiu, 2014), 644.
[2] Miloș, "Reorganizarea*"*in Bufan (coordinator), *Tratat practic de insolvență*, 589.
[3] Cedric Alter and Zoe Pletinckx, "Depistage, mesures provisoires et reorganisation judiciaire (nouvelles dispositions)", 82-83.

which constitute the object of the detection of businesses in financial distress and can be an early warning tool. At national level, the doctrine[1] has identified as a means of preventing the insolvency of a company, the involvement of internal censors and internal auditors, organizational and functional elements of the joint stock company as well as financial (external) auditors, where censors and auditors have the attribution to trigger an alert when the management of the company endangers the proper functioning of the company. In fact, the alert procedure can also be triggered by the shareholders of the company, either directly or through the censors.

CONCLUSIONS

In an increasingly interconnected market where goods, services, capital and workers circulate freely, and which has a growing digital dimension, very few enterprises remain purely national if we consider all the relevant elements, such as the customer base, the supply chain, the scope, the investor base and the capital base. Even purely national insolvency cases can have a regional or international impact through the so-called "domino effect" of insolvency, whereby a debtor's insolvency can trigger other insolvencies in the supply chain. Therefore, we need an instrument that is not strictly limited to judicial cooperation, but which can also help establish minimum standards of material law for preventive restructuring proceedings, as well as proceedings leading to a debt remission for entrepreneurs, thus reducing the differences between member countries that translate into additional costs for investors when they assess the risk of investing in viable business. Reducing the differences in the legal status of insolvency would create added transparency, legal certainty and predictability both within the European Union and at international level. Greater consistency of restructuring and insolvency procedures would encourage cross-border investment and would facilitate the restructuring of groups of companies, regardless of where the group members are located. We need flexibility in applying common principles while also complying with the national legal systems.

[1] See Gheorghe Piperea, "*Insolvența. Metodele și procedurile de prevenție a insolvenței*", available at - https://www.juridice.ro/35301/insolventa-metodele-si-procedurile-de-preventie-a-insolventei.html.

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CONDITIONS FOR CIVIL LIABILITY UNDER TORT LAW IN THE EVENT OF THE UNILATERAL TERMINATION OF THE ENGEGEMENT

Nora Andreea DAGHIE[1]

Abstract:

Still questionable in terms of its legal nature (a legal act or a legal deed) and in the absence of relevant case-law on this matter, the engagement is seen nowadays as a social, moral and cultural relationship, with possible material legal consequences in the event of its unilateral termination.

The exercise of the right to unilateral termination of the engagement for the purpose of causing excessive or unreasonable harm or damage, contrary to good faith, may result in civil liability under tort law, pursuant to the conditions provided for in Article 1357 of the Civil Code.

In terms of liability, the particular circumstances under which the unilateral termination of the engagement has occurred represent the key element.

Key words: *engagement; unilateral termination; abuse of rights; indemnities; burden of proof*

PREAMBLE

In the old French law, the engagement was considered a contract that generated "an obligation of performance", namely the obligation to conclude the marriage. The fiancé/ fiancée at fault was liable for the non-performance of this obligation and owed damages[2].

The first Romanian laws, Calimah, Caragea and Donici Codes, regulated the engagement similarly, as a contract (pre-contract) that

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[2] Bogdan Dumitru Moloman, *Civil and Religious Marriage in Romanian Law* (Bucharest: Universul Juridic, 2009), 60.

bound the parties to conclude the marriage[1]. Moreover, an engagement concluded with the priest's blessing, subject to the parents' agreement and with advance payments represented an impediment for those parties' marriage to other persons as "that engagement and that promise were considered to be a full wedding"[2].

The Romanian law in force provides for the fiancé's/ fiancée's "right" to "break off the engagement" under Article 267(1) of the Civil Code. Article 269(1) of the Civil Code, which regulates the "abusive" breaking-off of an engagement, consolidates this provision.

In line with the doctrine, breaking off an engagement is "the legal act undertaken by the fiancé/ fiancée or both parties, whereby an engagement is ended in compliance with public order and principles of morality"[3].

The right to break off an engagement ensures the protection of matrimonial freedom. Even if the breaking-off of an engagement were abusive, it would end the engagement and it cannot be rendered ineffective in a manner that would bind the parties to maintain the engagement[4]. The abusive nature of the act of breaking off an engagement can only result in civil liability in tort under the law.

Thus, under the marginal title of "liability for the breaking-off of an engagement", Article 269 of the Civil Code actually regulates two circumstances which result in liability for the breaking-off of an engagement: the fiancé's/ fiancée's liability for the "abusive breaking-off of the engagement" [paragraph (1)] and the fiancé's/ fiancée's liability for "culpably determining the other party to break off the engagement" [paragraph (2)].

As regards the first case, Article 269(1) of the Civil Code provides that the party who abusively breaks off the engagement may be forced to pay damages for the expenses already made or contracted with a view to the marriage to the extent to which they have been in line with

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[1] Aurelian Ionașcu, *Course of Romanian Civil Law. Family Law*, Volume II, (Sibiu, 1941), 18; Marieta Avram, *Civil law. Family*, 2nd revised and enlarged edition, (Bucharest: Hamangiu, 2016), 30.

[2] Ion Amuza, *Marriage and Divorce in Old Romanian Law*, (Bucharest: Sylvi, 2001), 49.

[3] Teodor Bodoașcă, "Opinions on the Regulation of Engagement in the Romanian Civil Code", in *Legal Studies* (Bucharest: Universul Juridic, 2018), 68.

[4] Avram, *Civil law. Family*, 36.

the circumstances (first sentence) and for any other losses caused (second sentence).

As regards the second case, pursuant to Article 269(2) of the Civil Code, the party who culpably determines the other party to break off the engagement may be forced to pay damages in accordance with paragraph (1).

Thus, an abusive act – the sudden breaking-off of an engagement or culpable conduct determining the other party to break off the engagement gives rise to the "victim" party's right to damages, which may be enforced against the fiancé/ fiancée who is culpable for the breaking-off of the engagement[1].

The specialized literature unanimously mentions that the deed committed during the exercise of a subjective right may be an unlawful deed that can result in civil liability in tort[2] only if it has caused a loss through the abusive exercise of a subjective right, namely in bad faith, in excess of its legal limits and diverting from its economic and social purpose for which it has been lawfully recognized. Based on this legal construction, the normal exercise of subjective right has been included in the category of causes that can remove the unlawful nature of a deed ("The party that causes a loss through the very exercise of its rights is not under an obligation to remedy such loss, unless the right has been abusively exercised." – Article 1353 of the Civil Code), together with self-defense, the state of need, the order or permission by law or an order by a superior and the victim's consent. In line with these coordinates, the doctrine concludes that "the abuse of rights represented by the abusive exercise of subjective rights has acquired the same legal meaning as a civil offence, being considered the source of the perpetrator's liability in tort whenever a loss is claimed to have occurred"[3].

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[1] Emese Florian, „Article 269 of the Civil Code" in *New Civil Code. Comment on articles*, ed. Flavius Antoniu Baias et. al. (coordinators), (Bucharest: C.H. Beck, 2012), 301.

[2] As regards the liability for the abusive breaking-off of an engagement, the former doctrine has considered that the legal basis is represented by the rules of general law on civil liability in tort (Article 998 to 999 of the Civil Code of 1864). See Avram, *Civil law. Family*, 32.

[3] See Lacrima Rodica Boilă, „Article 1353 of the Civil Code" in *New Civil Code. Comment on articles*, ed. Flavius Antoniu Baias et. al. (coordinators), (Bucharest: C.H. Beck, 2012), 1495.

This approach can be seen in most of case-law judgments in which the abuse of rights was the legal basis for an order for reinstatement of the circumstances prior to the unlawful deed[1].

The Civil Code regulates the abuse of rights in Article 15: "No right can be exercised for the purpose of damaging or injuring another or in an excessive or unreasonable manner, contrary to good faith".

Consequently, as regards the liability for the losses caused through the abusive breaking-off of an engagement, the provisions of Article 1357 of the Civil Code laying down the general principle of civil liability in tort for a party's own deeds become applicable together with the provisions of Article 15 of the Civil Code.

ANALYSIS OF CONDITIONS TO BE MET FOR LIABILITY TO BE ESTABLISHED

Ab initio, it must be noted that the breaking-off of an engagement is not an unlawful act, but merely a type of exercise of a person's fundamental right (and freedom) to marry, expressed in its negative form: the right not to marry. However, even this right cannot be exercised abusively, any abuse resulting in liability for the losses caused to the other party[2].

As regards liability in tort, how the breaking-off has occurred (suddenly, brutally, incorrectly)[3], and not the act in itself is important, as

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Abuse of right has been defined as "the abnormal, excessive, unreasonable and bad-faith exercise of subjective rights, which forces the perpetrator to reinstate the prior circumstances through the termination of abusive action or inaction, the compensation for the losses and other consequences thus occurring" – Lacrima Rodica Boilă, "Arguments on Abuse of Right as Distinct Assumption Related to Civil Liability in Romanian Law", RRDP, no 3 (March 2011): 67.

"As regards social relations of mutual and profitable tolerance, subjective rights are both legal means of limiting the others' behavior towards their holders and limits of the behaviors of the holders of subjective rights towards the others" – Ion Deleanu, *Subjective Rights and Abuse of Right*, (Cluj Napoca: Dacia, 1988), 50.

[1] Boilă, *Article 1353 of the Civil Code*, 1496.

[2] Emese Florian, Family Law. *Marriage. Matrimonial Systems. Parentage*, 6th edition, (Bucharest: C.H. Beck, 2018), 25.

[3] Pursuant to recent case-law, the abusive breaking-off of an engagement refers to the manner in which it occurs (since any of the parties is free to decide that he/she no longer wishes to conclude a marriage and cannot be forced to do so by any means) and not to the reasons which have determined this decision. The evidence submitted in this case

it only provides the context of that liability. "The key element is the existence of an action or of a set of actions as a result of which the promise of marriage has become undesirable for one of the parties"[1].

Therefore, the examination of the abusive nature of the unilateral breaking-off of an engagement and establishing the culpability as element of the civil liability in tort are matters of fact.

Moreover, further to the examination of Article 1353 of the Civil Code, the doctrine has noted that it does not refer in any way to the "culpability" of the person responsible for the breaking-off as a condition for the compensation obligation to occur and merely qualifies the exercise of the right as "abusive", which leads to the idea that, independently from that person's subjective attitude, if other persons' subjective rights or legitimate interests have been prejudiced, liability may be established[2].

The abusive nature must be "a total defeat of good faith"[3]. Pursuant to the provisions of Article 14(2) of the Civil Code, good faith is presumed until proven otherwise; thus, the person lodging a claim for damages must prove the abusive nature of the breaking-off of the engagement.

In line with the doctrine, the examination of the abusive nature must take into consideration the intentional nature, the temporal element (period of engagement) and the material element (concrete reasons which justify the breaking-off of the engagement). For example, an engagement broken off shortly after its conclusion may be considered abusive as such attitude questions the reliability of the person breaking off the engagement upon its conclusion. One may also consider as abusive an engagement broken off shortly before the wedding date, after the fiancé and fiancée have lived together for a long period of time, after the wedding invitations have been sent, after wedding-related expenses have

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reveals that the breaking-off of the engagement has not been sudden and has not occurred under abnormal circumstances so that its abusive nature could be noted and it could result in the special civil liability in tort of the respondent – Brăila Tribunal, Civil Judgment No 854/09.10.2017, on www.rolii.ro

[1] Florian, *Article 269 of the Civil Code*, 301.

[2] Boilă, *Article 1353 of the Civil Code*, 1496.

[3] Gabriela Cristina Frențiu, *Comments on the Civil Code. Family*, (Bucharest: Hamangiu, 2012), 35. For example, the fiancé's marriage to another person after the promise to his fiancée has been repeatedly and publicly restated, in the absence of prior dialogue. See Florian, *Family Law. Marriage. Matrimonial Systems. Parentage*, 28.

been made, after the documents have been submitted to the Register Office[1].

Since the principle of full compensation for a loss is a fundamental principle of remedial civil liability, which governs the rules used to determine the extent of the compensation owed by the culpable person [pursuant to Article 1385(1) of the Civil Code, "full compensation must be provided for the loss, unless the law provides otherwise"], compensation may be provided for both material and non-material damages. Consequently, for the compensation to be full, it is necessary that all harmful consequences of the unlawful deed or circumstance having generated them should be removed so that the victim could be reinstated to the prior circumstances.

The expenses actually incurred by the date when the engagement is broken off and those not incurred, but contracted, which must be made in the future under an undertaken contractual obligation are included in the category of compensation which may be requested for the abusive breaking-off of an engagement[2]. For example, the expenses incurred for the booking of the venue where the wedding will be celebrated, the expenses for the wedding gowns of the future bride and groom, the amounts paid as advance to secure services required for the wedding (booking of photographer, DJ), possible expenses for the purchase of goods which the spouses will need in order to prepare their home, which would not have been purchased if there was no wedding (such as the purchase of an apartment which will become the home of the spouses, the purchase of movable assets to decorate or furnish a property regarded by the fiancé and fiancée as their future home[3]), in other words, any expense that is proved to have been made, either contracted, without being paid,

[1] Frențiu, *Comments on the Civil Code. Family*, 36.
[2] Frențiu, *Comments on the Civil Code. Family*, 37.
[3] The loan taken out by the parties to renovate the rented property where they lived is "an expense contracted with a view to marriage", therefore the respondent has been ordered to pay compensation of ½ of the loan – Arad County, Civil Judgment No 2595/23.05.2017, pe www.rolii.ro
The expenses incurred in relation to the property owned by the other party in order for this property to be converted into a joint dwelling may be reimbursed, but obviously those expenses cannot be prior to the engagement, nor can they occur after the engagement has been broken off – Cluj-Napoca, Civil Judgment No 2003/20.03.2017, pe www.rolii.ro

but which must be paid, as it has been incurred mandatorily for the purpose of celebrating the wedding or in light of the marriage[1].

The lawmaker conditions the award of such compensation on "the extent to which they have been in line with the circumstances". In other words, the amounts of money requested as compensation must represent expenses usually incurred in relation to the celebration of a wedding, "with consideration to extrinsic elements such as the social status of the future spouses, their living standards, financial situation, elements which differ from one wedding to another"[2].

Compensation may be equally awarded for other losses caused by the breaking-off of an engagement, such as non-material damages for the harm to the dignity, the honor of the fiancé or fiancée or their physical or mental health[3].

The doctrine[4] considers that whenever the engagement is doubled by the couple's actually living together, particularly if for a long period of time, this circumstance may offer factual elements which scale up both the material and the non-material element of the loss in question.

Similarly to Roman law (*onus probandi incumbit actori* or *actori incumbit probatio*), pursuant to the provisions of Article 249 of the Code of Civil Procedure, the burden of proof as regards the liability for the breaking-off of an engagement rests with the claimant: "The party who makes a certain allegation during the trial must prove it, except in the cases specifically provided for by law".

From the perspective of the active procedural legitimacy, civil liability in tort for the breaking-off of an engagement may be established both at the request of the injured party and at the request of third parties who have incurred or contracted certain marriage-related expenses. Thus, in accordance with the doctrine[5], an action for civil liability concerning financial losses may be also commenced at the request of the parents of the fiancé or fiancée, who prove the material support offered further to the conclusion of the engagement and in light of the marriage.

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[1] Frențiu, *Comments on the Civil Code. Family*, 37.

[2] The expenses considered to be excessive, which are not necessary for the organization of a wedding, are not included as compensation. In this regard, see Frențiu, *Comments on the Civil Code. Family*, 37.

[3] Bogdan Dumitru Moloman and Lazăr-Ciprian Ureche, *New Civil Code. On Family. Comments, explanations and case-law*, (Bucharest: Universul Juridic, 2016), 82.

[4] Florian, *Family Law. Marriage. Matrimonial Systems. Parentage*, 29.

[5] Frențiu, *Comments on the Civil Code. Family*, 38.

Pursuant to the provisions of Article 270 of the Civil Code, the right to lodge an action for liability concerning the abusive breaking-off of an engagement is subject to a special limitation period of 1 year, which starts running from the date when the engagement has been broken off.

CONCLUSIONS

Nowadays it is unanimously admitted in the national law, private international law, international commerce law and European contract law that good faith is a significant rule of conduct, being viewed as a general principle of law meant to govern all legal relations, irrespective of their sources and nature[1].

The principle of "good faith" is also enshrined at a sub-textual level in the provisions of Article 17 of the European Convention, which prohibit the abuse of rights[2], in the provisions of Article 54 of the Charter of Fundamental Rights of the European Union, which reiterate the provisions of Article 17 of the Convention, in the provisions of Article 30 of the Universal Declaration of Human Rights, in Article 5 (1) of the UN Covenant on Civil and Political Rights and, explicitly, in the provisions of Article 57 of the Romanian Constitution, pursuant to which "Romanian citizens, foreign citizens and stateless persons shall exercise their constitutional rights and freedoms in good faith, without infringing on the others' rights and freedoms". Under these circumstances, in the presence of a conventional, EU and constitutional principle, it appears justified to consider, alongside other Romanian authors[3], that there is a

[1] Nora Andreea Daghie, *Sources of Civil Obligations* (Bucharest: Universul Juridic, 2018), 43.

[2] Article 17 of the European Convention provides that: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention". Article 18 of the European Convention also provides that: "The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed". Both provisions refer to the requirement of good faith and incriminate the abuse of rights.

[3] See Ion Deleanu, *Fundamental Rights of the Parties in Civil Proceedings* (Bucharest: Universul Juridic, 2008), 407.

fundamental right to a conduct in line with the principle of good faith, which cannot be abusively exercised.

Cicero suggestively defined good faith as "truth (*veritas*) and fidelity (*constantia*) to promises and agreements"[1]. Good faith implies the consistency between thought and its expressions, between the expressed psychological fact and aim pursued.

Consequently, good faith requires the fiancé and the fiancée to take all actions rationally possible to ensure the durability of the originally foreseen action, while violating the obligation of good faith gives rise to liability[2].

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[1] Marcus Tullius Cicero, *De officiis* in Dimitrie Gherasim, *Good Faith in Civil Legal Relations* (Bucharest: Academy of the Socialist Republic of Romania, 1981), 193.
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FORCE MAJEURE-A CONTRACT CLAUSE EXEMPTING PARTIES FROM CONTRACTUAL LIABILITY

Viorel TERZEA[1]

Abstract:

The creditor is entitled to damages in the event of unjustified or culpable non-performance of the contract, as the case may be. A debtor invoking force majeure may be exempt from the contractual liability provided that the respective fortuitous event is in an exclusive causal link with the non-fulfilment of contract obligations.

The present study analyzes the requirements imposed by the law for an event to be considered a case of force majeure, as well as the effects generated by the occurence of the said fortuitous event.

Key words: *force majeure; contractual liability; damages; causal link.*

INTRODUCTION

According cu article no. 1,351 (Civil Code), the intervention of force majeure will lead to a case of exemption from liability, thus the culpability of the debtor or of the author of the illicit deed being eliminated. It should be noted that the above-mentioned legal provision is applicable both to the liability in tort, and to the contractual liability situations.

Since under the assumption of contractual liability, the culpability of the debtor is presumed, according to article no. 1,548 (Civil Code), invoking and subsequently proving the existence of a case of force majeure will mainly determine the overturning of the presumption of culpability, therefore the debtor will be exempt from liability, because he/she cannot be held culpable of the non-performance of contractual

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obligations.

However, the existence of a force majeure case may also have other effects, such as: termination of contract, cessation of obligation or temporary suspension of contract performance. These effects must be analyzed in every particular situation.

1. DEFINITION.

„Force majeure" refers to any external, unpredictable, irresistible and inevitable event [article no. 1,351 paragraph (2) Civil Code].

First of all, it should be noted that the notion of „event" is broadly used to include: natural events (such as flooding, earthquake, fire, etc.), political events (for example war, strike, massive protests, closing of borders, etc.) and legal events (expropriation, legal limitation of the exercise of a certain right, prohibition of an activity, etc.)[1].

Second, it must be remarked the fact that „force majeure" involves the cumulative meeting of several requirements, which, on the one hand, have the role of configuring the scope of the above-mentioned concept in relation with other events that might occur for the duration of a contract, and on the other hand, are meant to customize that specific event which might have a liability exemption effect.

One must underline that the legal standard by which the conceptualization of force majeure is carried out does not have an imperative nature. Therefore, the parties can conventionally settle for a different scope of the force majeure notion, including the possibility to consider an event as a force majeure case, even if not all the requirements stipulated by article no 1,351 (Civil Code) are met.[2]

2. SCOPE.

In principle, invoking the force majeure as a liability exemption

[1]G.-A.Ilie, *Risks in Contracts. From the Old Civil Code to the New One* (Bucharest: Universul Juridic, 2012), 52. It has been remarked in the same study that confiscation cannot be considered as a case of force majeure, since the respective measure is prompted by the unlawful behaviour of the debtor. The solution must be nuanced, in the sense that it remains valid provided that the confiscation measure is legal. The confiscation measure which is later proved to be illegal can also have an exempting effect that remains to be acknowledged.

[2]Also see V.Karim, *Les obligations*, vol.I (Montréal: Wilson & Lafleur, 2015), 1383.

cause is possible when dealing with the non-fulfilment of all types of obligations: obligation to provide, obligation to to or obligation not to do.

Taking into consideration the provisions of article no. 1,634 paragraph 6 (Civil Code), according to which, when the obligation involves generic goods, the debtor cannot invoke the impossibility to perform, could the force majeure represent a liability exemption clause in case of non-performance of duties regarding generic goods?

We consider that the answer to this question should be affirmative for the following reasons:

First, any limitation of the legal exercise of a right should closely relate to the legal interpretation and application. Therefore, article no. 1,634 paragraph 6 (Civil Code) should be interpreted within the legal context in which it has been ellaborated, context which essentially involves that, in case of such obligations, the final impossibility to perform will not lead to the cessation of the obligation regarding the transfer of fungible goods, while the temporary impossibility will not incur the suspension of the performance of the respective obligation.

Second, the meaning of the said provision is that the creditor can resort any time to the foreclosure in kind (article no. 1,516 paragraph 2 point 1 – Civil Code, referring to article no. 1,527 paragraph 1 – Civil Code). However, he/she also has the possibility to cumulate the previous solution with a claim for default damages, which are to be established according to the provisions of article no. 1,535 or 1,536 (Civil Code).

Therefore, in case the creditor claims to be granted default damages, the debtor has the possibility to become exempt from liability regarding the default damages claim if he/she can prove the existence of a case of force majeure[1]. An application of this rule is to be found, for example, in the matter of the transport contract, which stipulates that the carrier is not responsible for the delay in execution generated by a case of force majeure (see article no. 1,984 – Civil Code, referring to article no. 1,959 paragraph 2 – Civil Code). It should be noted that the law does not make distinctions depending on the type of goods being the object of the

[1]It has been decided in the French judicial practice (Cass.fr., 3 ch, 17 February 2010, n0.08-20943, *www.courdecassation.fr*, last accessed on 14.02.2019) that the occurence of a technical failure in the IT systems of a bank, which has caused a delay in the processing of a payment order, represents a case of force majeure if the respective failure has intervened on weekend or summer season and if the processing of payment orders has previously been carried out as agreed over a significant period of time.

transport contract, therefore the legal norm is also applicable if the transported goods are generic.

It should also be mentioned that an event that has been determined or favoured by a culpable behaviour, an imprudence or a negligence of the contractual debtor cannot be considered a case of force majeure[1]. For example, it has been decided[2] that a garage keeper in charge with a client's car, who has failed to properly protect his workshop form foreign intrusions and hasleft the car keys in contact, cannot invoke a case of force majeure in the event of a theft, because of his own imprudence, therefore he cannot be exempt from the obligation to return the car to its owner.

The debtor who, while fulfilling a contractual obligation, has delegated his/her responsabilities to another person, cannot invoke the deeds of the said person as liability exempting causes, but he/she can avail oneself of the liability exempting cause which may be invoked by his/her substitute (article no. 1,519 – Civil Code).

3. CONDITIONS.

For an event to be considered as falling within the scope of „force majeure", it has to cumulatively meet some attributes imposed by the law, such as: externality, unpredictability, irresistibility and inevitability. However, meeting these requirements is not enough to generate the liability exempting effect. Another requirement is imposed, at least implicitly, that the respective event is undoubtedly in a casual link with the non-performance of a contractual obligation by the debtor[3].

In this respect, it has been decided[4] that „the force majeure is that unpredictable and unavoidable event or circumstance that, objectively and without any fault from the part of the debtor, hinders the performance

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[1]P.V. Ommeslaghe, *Traité de droit civil belge – Tome II : Les obligations*, Volume 2 (Bruxelles; Bruylant, 2013), 1.427

[2]Tribunal de première instance Bruxelles, 3 November 1964, apud P.V. Ommeslaghe, *Traité de droit civil belge – Tome II : Les obligations*, volume 2, 1.428, text and annotations 3739

[3]Similarly, see also in the French law: O.Deshayes, T.Genicon, Y.-M. Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations. Commentaire article par article* (Paris: Lexis Nexis, 2016), 477

[4]Romanian High Court of Cassation and Justice, Second Civil Section, sentence no. 253/16 February 2017, *www.scj.ro*, last accessed on 14.02.2019

of the contractual liability".

It has also been stated that[1] „the prolonged period of drought and the extreme meteorological phenomena, such as strong storms and hailstorms represent circumstances beyond the control of the parties, absolutei unpredictable and unsurmountable events; even if this type of phenomena has had a higher incidence in recent years, no probabilistic estimate of a repeatability pattern could be scientifically formulated, therefore the competent meteorological authorities cannot issue warnings or forecasts in a reasonable time span before the occurence of natural calamities, so that farmers could subsequently make predictions at the moment of crop setting".

The externality of the event. The first trait of an event which could qualify it as a case of force majeure is the requirement of externality.

This requirement can be analyzed either from a material or an intellectual perspective[2] .

Addressing the requirement of externality by means of the material criterion will result in a significant reduction in the number of hypotheses that might fall within the scope of the force majeure, without allowing the inclusion of those situations which, despite the total lack of control of the debtor over the respective event, do not have an origin beyond the debtor and his/her assets. More specifically, only those events which are completely external to the debtor, to his/her delegates and to the goods used by the debtor to fulfil his contractual obligations could be considered as traits of a force majeure case.

The second perspective is prevailing in determining the concept of „externality" in the specialized literature and standardized private law. It has been thus proven[3] that externality refers to the non-participation of the debtor to the occurence of the event[4], as well as to the fact that the

[1]Buzău Law Court, Second Civil Section, sentence no. 1042/22 JUne 2017, *www.rolii.ro*, last accessed on 14.02.2019

[2]See also G.-A. Ilie, *Risks in Contracts. From the Old Civil Code to the New One*, 58. Sometimes, the second perspective is also called the psychological perspective (see for example D. Lluelles , B. Moore, *Droit des obligations*, 2e éd.(Montréal: Thémis, 2012), 1.664

[3]D. Lluelles, B. Moore, *Droit des obligations*, 1.664

[4]It has been decided (Vâlcea Law Court, First Civil Section, sentence no. 82/3 February 2015, *www.rolii.ro*, last accessed on 14.02.2019) that the contractual debtor's state of

debtor has no control whatsoever over the event and its consequences.

In the same respect, it has been shown[1] that the debtor cannot exempt himself/herself from the contractual liability by invoking an event which he/she has provoked/started or an event generating legal consequences when the law imposes a warranty obligation upon the debtor. For example, a defect in the debtor's equipment cannot be considered a case of force majeure, except for the case when the defect could not be foreseen and the consequences are unavoidable[2].

The use of the intellectual criterion allows a more accurate delimitation of the scope of the „force majeure", by highlighting all the circumstances surrounding the event that is to be qualified as a force majeure trait.

Also, it has been argued[3] that the concept of externality must be approached from different angles, depending upon its object: the debtor, the goods that must be used or delivered during the execution of the contract, or the type of activity carried out by the debtor.

From this perspective, a differentiated assessment has been carried out regarding the debtor's health condition influencing the performance of the contractual obligations, depending upon the specificity of the contract where the respective obligations have derived from.

For example, in the French legal practice[4] it has been stated that the health condition of the contractual debtor could represent a case of force majeure when triggering the impossibility to perform the contract. Such an approach concerns the hypothesis of contracts having as object the debtor's assumption of an obligation to perform *intuituu personae,* in the case of which the alteration of the debtor's health condition will

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insolvency cannot represent a case of force majeure, since the respective state is a direct result of the debtor's behaviour.

[1]G. Viney, P. Jourdain, S.Carval, *Les conditions de la responsabilité*, 4e édition , (Paris: LGDJ, 2014), 320

[2]O.Lando, H.Beale, *Principles of European Contract Law , Parts I and II (Combined and Revised),* prepared by the Commission of European Contract Law (The Hague/London/Boston: Kluwer Law International, 2000), 380

[3]G. Viney, P. Jourdain, S.Carval, *Les conditions de la responsabilité*, 325

[4]Cass.fr., assemblée plénière, sentence no.538/ 14 April 2006, nr.02-11.168, available at *www.courdecassation.fr*, last accessed on 14.02.2019

render impossible the performance of the contractual obligations[1].

However, if the object of the contract is not represented by the debtor's obligation to perform *intuituu personae*, then his/her health condition will not influence the performance of the contract. For example, it has been decided[2] that the health condition of a tenant farmer is not a liability exempting cause if he/she has concluded a lease subcontract, even if such a option was forbidden.

In addition, it must be pointed out that a poor health condition deriving from a deliberate behaviour of the debtor – such as the alcohol abuse – cannot be a cause leading to an exemption from contractual liability[3].

In exchange, the illness present at the conclusion of the contract or which might be reasonably expected to be present by the debtor, taking into account his/her current health condition, cannot be considered a liability exempting cause, because, in these cases, it is presumed that the debtor has concluded the contract while assuming the health risks, therefore the requirement of unpredictability cannot be met[4].

As to the strike that affects the activity of a debtor represented by a legal person, the liability exempting effect is excluded, except for the situations when the strike extends beyond the limits of the respective company (for example a national strike or an industrial branch strike), when it is illegal[5] or when the strike is to due to the employer and the respective company has no possibility to prevent or put an end to the strike[6].

In case the non-performance of the contractual obligations is the result of a defect in the asset used by the debtor (such as a car used by a carrier) or of a product delivered to the creditor, the liability exempting

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[1]G. Viney, P. Jourdain, S. Carval, *Les conditions de la responsabilité*, 325, text and annotations 33

[2]Cass.fr, 3 e ch, 22 January 2014, no.12-28246, *www.legifrance.gouv.fr*, last accessed on 14.02.2019

[3]J.Flour, J.L. Aubert, E. Savaux, *Droit civil : les obligations.3.Le rapport d'obligation*, 9e édition (Paris: Sirey, 2015), 218

[4]P.V. Ommeslaghe, *Traité de droit civil belge – Tome II : Les obligations*, volum 2, 1430

[5]J. Flour, J.L. Aubert, E. Savaux, *Droit civil : les obligations.3.Le rapport d'obligation*, 218

[6]Ph. Tourneau (ed.), *Droit de la responsabilité et des contrats - Régimes d'indemnisation 2018-2019*, 11e édition (Paris: Dalloz, 2017), 691

cause is inapplicable, because the requirement of externality imposed by article no. 1,351 paragraph 2 (Civil Code) is not met.[1]

For example, in the case of a sale – purchase contract, if the disposed asset is affected by a hidden defect, the seller has the obligation to issue a warranty certificate, under the condition that the defect or its cause are present at the time of the transfer of assets (article no. 1,707 paragraph 3 – Civil Code) and cannot be exempt from the warranty obligation not even when invoking a case of force majeure (article no. 1,713 – Civil Code).

In the above-mentioned case, if the force majeure case is either subsequent or external to the sold goods, having no connection whatsoever with the disposed asset, the seller can be exempt from liability if he/she invokes a case of force majeure[2].

It is also remarkable that the law can impose special norms aiming to regulate the legal regime of damages caused by goods, a situation in which the respective norms are prominent. For example, *Law no. 240/2004 regarding the liability of manufacturers for damages incurred by defective products*[3] regulates the legal relationship between manufacturers and clients who have been injured or damaged by defective products put into circulation, as well as the civil liability for the damages incurred by these products or the right to take action in order to remedy said damages (see article no. 1 from Law no. 240/2004).

The same legal act stipulates, by means of article no. 7, several hypotheses according to which, even if the delivered product is defective, the manufacturer cannot be held liable. Among those hypotheses, one could mention the situation when the level of scientific and technological knowledge at the moment of the delivery has not allowed the manufacturer to spot the defect in cause (article no. 7 paragraph 1 letter e from Law no. 240/2004).

However, the existence of this legal document that imposes a type of special, objective liability, not conditioned by the culpability of the manufacturer, does not exclude the possibility to apply the legal regime

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[1] See also G.-A. Ilie, *Risks in Contracts. From the Old Civil Code to the New One*, 58.

[2] D. Chirică, *Civil Law Compendium, Special Contracts. Volume I. Sale and Exchange*, (Bucharest: Hamangiu, 2017), 430

[3] Published in the Official Monitor no.313/22 April 2008, with further amendments. This legal document transposes the EU Council Directive from 25 July 1985 regarding the uniformization of legal and administrative norms of EU member states as to the liability for defective products (published in JO L 210, 7.8.1985, p. 29-33)

of common law contractual liability (see article no. 9 from Law no. 240/2004)[1].

As far as the nosocomial infections are concerned, one must point out that there is a special regulation in this respect. Thus, according to article no. 655 paragraph 1 letter a from Law no. 95/2006 on the reform of the medical system[2], public and private medical institutions, in their quality as medical services providers, are legally liable, in conformity with the common law, for damages incurred during prevention, diagnosis and treatment activities, if the respective damages are the result of nosocomial infections, except the case when it is proved that the damages have been caused by an external factor, which the medical institution could not control[3].

Unpredictability. Another requirement imposed by the law for an event to be qualified as a case of force majeure is that the respective event is unpredictable, which means that, at the time the contract was concluded, the debtor did not predicted or did not have the reasonable possibility to predict the subsequent event that has prevented the proper performance of the assumed contractual obligation, or he/she did not have the possibility to predict the consequences of the respective event[4].

If such an event is predictable at the moment of the conclusion of the contract, then the contractual debtor is presumed to have assumed the risk of its occurence, thus the liability exempting effect is no longer valid[5]. For example, in case of a lease, the owner cannot be exempt from the obligation to ensure the use of the rented property if the object of the contract has been previously rented and the former tenant has caused

[1]Also see the EU Court of Justice, 4th Chamber, sentence from 20 November 2014, *Novo Nordisk Pharma GmbH* , C-310/13, ECLI:EU:C:2014:2385, *www.curia.europa.eu*, last accessed on 14.02.2019

[2]Republished in the Official Monitor no. 652/28 August 2015, with further amendments

[3]In order to precisely analyze this type of liability, see G.A. Năsui, *Medical Malpractice*, second edition revised and added (Bucharest: Universul Juridic, 2016) , 156 and the following.

[4]Also see J. Flour, J.-L.Aubert, E.Savaux, *Droit civil : les obligations.3.Le rapport d'obligation*, 215

[5]G.-A.Ilie, *Risks in Contracts. From the Old Civil Code to the New One*, 55. Similarly: L.R. Boilă, *Commentary upon article no. 1,351 (Civil Code)*, în Fl.A. Baias, E.Chelaru, R. Constantinovici, I.Macovei (coordinators), *The New Civil Code. Commentaries upon Articles*, second edition (Bucharest: C.H.Beck, 2014), 1.491

significant damage which is yet to be remedied[1].

In order to prevent such impossibility of exemption, specific clauses can be included in the concluded contract, allowing the contractual debtor to predict the possibility of exemption also in case of future events which are foreseeable at the time the contract is concluded[2].

Similarly, if the contractual parties have specifically established to fulfil certain obligations when certain fortuitous events occur (for example, an insurance contract stipulates the obligation of the insurer to pay the insurance indemnity even in case of some fortuitous events, such as theft, fire, flooding, etc,), then the debtor cannot invoke the exemption from liability in case of the fortuitotius events for which he/she has assumed the liability risk[3].

By way of exception, some events can be qualified as cases of force majeure, although the requirement of unpredictability is not met, such as: dangers at sea, bombing of the strategic objectives in times of war, extremely violent hurricanes and so on[4].

It has also been argued[5] that the requirement of unpredictability may not expressly be met in case the parties involved have predicted when concluding the contract that an event affecting their capacity to perform their contractual obligations might occur, in case the said parties have reserved the possibility to decide upon the way they will share the risks in a subsequent distinct convention, but ultimately the contract has not been concluded until the occurence of the respective event.

In order to establish whether an event was unpredictable or should have been unpredictable at the time the contract was concluded, one must determine the level of professional diligence that should have been borne by the debtor at the respective moment. We consider that, in this scenario, one should apply the good ownership criterior stipulated in article no. 1,480 (Civil Code). It is true that the respective provision specifically refers to the manner of performing contractual obligations, but, following the identity of reasons principle, its applicability be be extended to

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[1]For this example, see: P.V. Ommeslaghe, *Traité de droit civil belge – Tome II : Les obligations*, 1.429-970

[2]D.Llueles, B.Moore, *Droit des obligations*, 1.660

[3]Also seeV.Karim, *Les obligations*, vol.I, 1.381

[4]P.V.Ommeslaghe, *Traité de droit civil belge – Tome II : Les obligations*, 1.428

[5]P. Pichonnnaz, în St.Vogenauer (ed.), C*ommentary on the UNIDROIT Principles of International Commercial Contracts*, second edition (Oxford: Oxford University Press, 2015), 876

determine the unpredictable trait of an event which has occured after the conclusion of the contract.

This requirement imposed upon the debtor to predict potential subsequent events that might prevent the fulfilment of assumed contractual obligations represents a specific application of the principle of good faith in performing a contract, stipulated in article no. 1,170 (Civil Code).[1]

Therefore, in order to determine the unpredictability of an event, one must resort, in principle, to the criterion of the diligent owner, which states that the unpredictability requirement of an event is met when the respective event could not have been predicted by a normal diligent and cautious person at the moment of contract conclusion[2]. Of course, this benchmark of the diligent person must be adapted to the type of activity carried out by the debtor, as well as to the level of professional specialization required by the said activity[3].

In exchange, there are several factors related to the personal situation of the debtor that present zero relevance in terms of determining the unpredictability trait of an event, such as: poor education, inadequacy, lack of technical access to certain data, etc[4].

By way of exception, the debtor's diligence might be assessed more closely when there are special contractual or legal provisions in this respect, or the specificity of the activity carried out by the debtor requires it (article no. 1,480 paragraph 1 final thesis – Civil Code and article no. 1,480 paragraph 2).

In addition, it has been pointed out[5] that even if the event was unpredictable at the time the contract was concluded, out of contractual loyalty, the debtor has the obligation to take the necessary measures to limit the damages that will be generated by the case of force majeure and

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[1]Also see P.Pichonnaz, în St.Vogenauer (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts*, 876

[2]Similarly: L.Pop, în L.Pop, I.-Fl.Popa, St.I.Vidu, *Civil Law Course, Obligations*, (Bucharest: Universul Juridic, 2015), 348; M.-L.Belu Magdo, *Contractual Liability in the New Civil Code*, (Bucharest: Hamangiu, 2017) , 172-40; D.Lluelles, B.Moore, *Droit des obligations*, 1.661

[3]G. Viney, P. Jourdain, S.Carval, *Les conditions de la responsabilité*, 348

[4]Fl. I. Mangu, *Civil Liability. The Constant Traits of Civil Liability*, (Bucharest: Universul Juridic, 2014), 210; C. Jugastru, *Civil Law. The General Theory of Obligations*, (Bucharest: Universul Juridic, 2017), 246

[5]G.-A. Ilie, *Risks in Contracts. From the Old Civil Code to the New One*, 55

to notify the creditor in due term.

Irresistibility and inevitability. These requirements imposed by the law for an event to be qualified as a case of force majeure involve, on the one hand, the debtor's impossibility to prevent the occurence of the event and its consequences (inevitability), and on the other hand, the debrtor's impossibility to eliminate the consequences of the force majeure (irresistibility)[1].

First of all, the contractual debtor has the obligation to exercise the necessary diligence to prevent the occurence of the force majeure event and its consequences, while secondly to take the necessary steps to eliminate or diminish the negative effects generated by the respective fortuitous event[2].

Thus, according to usual commercial practice, the contractual parties have the duty to make sure that the production is not hampered by technological malfunctions, that the selected personnel is qualified for the job and that the management performance is efficient, so that distinctive results are obtained at the unit level[3].

It has also been decided[4] that „an excessively prolonged drought cannot be considered a case of force majeure, since it is not an absolutely irresistible event in the light of article no. 1,351 paragraph 2 9Civil Code), which stipulates that the respondent had the possibility to limit the effects of the lack of natural rainfall by means of an irrigation system".

It has been correctly noted[5] that the inevitability refers to the period before the occurence of the force majeure event, while the irresistibility is related to the period after the occurence of the fortuitous event.

The criterion that can be used to determine whether an event is inevitable and irresistible is that of the person exercising the highest level

[1]Fl. I. Mangu, *Civil Liability. The Constant Traits of Civil Liability* ,211
[2]P.Pichonnaz, în St.Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts*, 872
[3]P.Pichonnaz, în St.Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts*, 872
[4]Ilfov Law Court, Civil Section, sentence no.3437/4 October 2017, *www.rolii.ro*, last accessed on 14.02.2019
[5]Fl. Mangu, *Civil Liability. The Constant Traits of Civil Liability*, 211

of diligence and caution, that is *superior pater familia*[1]. Such an approach is justified by the use of the phrase „absolute", which means that the irresistibility of an event regards any diligent and cautious person.

In addition, it should be stressed that the irresistibility of an event, seen in its two components, the inevitability and the invincibility, must also be assessed in connection with the scientific and technological progress; thus the area of irresistible events fluctuates depending upon the above-mentioned indicator[2].

The requirement of irresistibility is not met when a debtor invoke that fact that his performance has become more onerous because of an external event outside his/her action field (article no. 1,271 paragraph 1 – Civil Code)[3]. If the performance of a contract becomes excessively onerous, the debtor may resort to the mechanism of hardship, according to article no. 1,271 paragraph 2 (Civil Code).

Consequently, the requirement of irresistibility involves an objective impssibility to fulfil an obligation, which is either tenporary, or final. If the fortuitous event can be prevented or its consequences can be eliminated due to additional performance from the part of the debtor, then the said debtor has the obligation to take all the necessary measures, by virtue of the principle of the bona fide execution of obligations stipulated by article no. 1,170 (Civil Code).

The debtor's obligation to exercise additional diligence is limited on the one hand by the respect for reasonableness, which states that the supplementary measures are not excessive, and on the other hand by circumstances related to the location, timing or any other aspects (for example: in the case of the *intuituu persone* contracts, if the fortuitous event hinders the personal perform of the cotract, then the delegation of the said obligation to another person will not be possible)[4].

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[1]L.Pop, în L.Pop, I.-Fl.Popa, St.I.Vidu, *Civil Law Course, Obligations*, 349; Fl. Mangu, *Civil Liability. The Constant Traits of Civil Liability*, 212

[2]M.-L. Belu Magdo, *Contractual Liability in the New Civil Code*, 172; C. Jugastru, *Civil Law. The General Theory of Obligations*, 247

[3]În acela?i sens: Fl. Mangu, *Civil Liability. The Constant Traits of Civil Liability*, 212; I.Adam, A.R.Adam, *Civil Code. 5th Chapter. About Obligations. Titles I-VIII (art. 1164-1649). Commentaries and Explanations*, (Bucharest: C.H. Beck, 2016), 646

[4]Also see P. Pichonnaz, în St.Vogenauer (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts*, 874

4. THE EFFECTS OF FORCE MAJEURE.

The occurence of an event having tehe traits of a case of force majeure will generate multiple effects, depending upon the duration of the impossibility to perform the contract, the nature of affected obligations, the nature of the contract, etc.

One of the effects of force majeure is that the debtor is exempt from contractual liability, provided that the exemption is legal, or that there are no derogations from the rule established in a special convention of parties (article no. 1,351 paragraph 1 – Civil Code)[1].

Is is notable that the exempting effect of force majeure is produced irrespective of all the other effects generated by the impossibility to perform the contract, which means the creditor is not entitled to damages regardless of the fact that the contract has been cancelled according to article no. 1,557 (Civil Code), the contractual obligation has been terminated according to article no. 1,634 paragraph 1 (Civil Code) or its performance has been suspended following article no. 1,634 paragraph 3 (Civil Code).[2]

It has been argued[3] that the existence of a force majeure case, as a liability exempting cause, cannot be invoked if a warranty obligation (such as a warranty for defects) is imposed by law upon the debtor or if such a warranty has been established by means of a convention.

It must be noted that, in such cases, special legal provisions are issued to determine the effects of force majeure upon the warranty obligation. For example, according to article no. 1,713 (Civil Code), loss of or damages to the goods in question, even in case of force majeure, cannot prevent the buyer to obtain the application of measures stipulated by article no. 1,710 paragraph 1 (Civil Code).

If the force majeure has not single-handedly led to the non-performance of the contractua obligations and there are other contributing factors (such as a fortuitous case, a deed carried out by the creditor, the deed of a third party), in order to determine the effects

[1]Also see M.-L. Belu Magdo, *Contractual Liability in the New Civil Code*, 174

[2]Similarly, see in French legal practice G. Chantepie , M. Latina, *La réforme du droit des obligations*, (Paris: Dalloz, coll. « Hors collection », 2016), 539

[3]Ph. Delebecque, F.-J. Pansier, *Droit des obligations. Contract et quasi-contrat*, 7e édition, (Paris: Lexis Nexis, 2016), 324

incurred, the following distinction must be made[1]:

a) if the additional factors have the same liability exempting effect, either by law or by the convention concluded between the parties, then the liability exempting cause is in full effect;

b) if the additional events are not assimilated as traits of force majeure, then the debtor's liability exempting effect is not valid and there will only be a diminution of damages proportional with the influence of the event deemed as a force majeure case.

Such a conclusion is justified by the fact that, according to article no. 1,530 (Civil Code), the creditor is entitled to damages only for what is a direct and necessary consequence of the culpable non-fulfilment of contractual obligations. Therefore, when the damages are partly the effect of force majeure, the total amount of the compensation must be reduced in proportion with the contribution the fortuitous event has had to the occurence of damages.

Of course, the occurence of a force majeure event affecting the performance of a contractual obligation will determine the exemption of the debtor from the liability, provided that the damages claimed by the creditor are in direct causal link to the fortuitous event. Therefore, if the damages claimed by the creditor are the result of other deeds of the debtor, separate from those related to the non-performance of the assumed contractual obligation, the liability exempting effect is not valid. For example, the debtor has to compensate for damages generated by the delayed notification regarding the occurence of a force majeure event (article 1,634 paragraph 5 – Civil Code).

If the contract has generated several obligations upon the debtor and the force majeure event has only affected some of them, then the debtor has to fulfill the remaining assumed obligations, except for the situation when there is a causal co-dependence between the obligations affected by the force majeure and the other contractual liabilities.

In case of a legal dispute, the debtor invoking the force majeure event must prove on the one hand that the event meets all the legal requirements to be qualified as force majeure case, and on the other hand, that there is a direct causal link between the non-performance of the

[1]See Fl. I. Mangu, *Civil Liability. The Constant Traits of Civil Liability*, 212 (for the hypothesis of the civil liability in tort); I.Adam, A.R. Adam, *Civil Code. 5th Chapter. About Obligations. Titles I-VIII (art. 1164-1649). Commentaries and Explanations*, 647

contractual obligation and the force majeure event[1].

CONCLUSIONS

The multiple effects of a force majeure event highlight the importance of this institution within the mechanism of contractual liabilitiy. This is why an analysis of the scope and requirements of force majeure, either direct or indirect is necessary to be carried out, in order to achieve a proper settlement of creditor claims for ensuing damages.

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SOME ASPECTS OF INTEREST FOR THE NOTARIAL SUCCESSORIAL PROCEDURE

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Abstract:

The notarial succession procedure, initiated at the request of any interested person, and the secretary of the local council of the locality in which the assets of the deceased were located at the time of death (which distinguishes it from opening the inheritance, which operates lawfully, automatically, independently of the formulation of a requests by interested persons) implies, according to the Law no. 36/1995 of the public notaries and the notarial activity, republished, passing several stages until its closing, which is usually accomplished by issuing the certificate of the heir. Of all this, we will discuss in our paper only the request for proving the procedure, the prior verification of competence by the notary public, the succession citation and the recording or, as the case may be, the proof of the succession option.

Key words: *the opening of the inheritance; proving the notarial succession procedure; succession; the place of the inheritance opening; the date of the inheritance opening; the succession option.*

INTRODUCTION

Inheritance proceedings[2] may be initiated at the request of any interested person only after the inheritance of the natural person has been proved[3]. The date of the inheritance opening is the date of his death *de*

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[2] For this issue, see also L. Stanciulescu, *Moștenirea. Doctrină și jurisprudență,* (Bucharest: Hamangiu, 2017), 390-416.

[3] We note that we cannot speak similarly about the legacy of the legal person, as it is not susceptible, such as the physical person, of physically found death or declared by court. Not being a relative of the deceased, the subject of collective law is not part of the four classes of legal heirs, as it can not even be the surviving spouse of the person whose legacy it is and, as a result, cannot come to the legal inheritance of a natural person,

cuius, proven by the death certificate, whether it is physical death or declared by court[1]. Often, in practice, it is confusing the procedure of inheritance opening with that of proving the succession. That is why we make it clear that opening the inheritance operates automatically, as a result of the death of the individual, without the need for any action in this respect, whereas the opening of the succession procedure, whether it is notary or judicial, can be triggered only at the request of an interested person. Moreover, in the case of the judicial one, the pre-trial procedure regulated by art. 193 par. (3) of the Code of Civil Procedure[2], on which we will not insist here.

We also note that the deceased's successors are not legally bound to request the opening of the notarial deed, so that they can address the competent public notary or the court competent to initiate this procedure at any time. The current legislation sets only a one-year limitation period, within which the right of inheritance option must be exercised in the forms provided by the law, namely a 2-year term after which the state tax is due to 1% of the value of the succession real estate. Both terms begin to flow from the same moment, namely from the date of the inheritance opening. As we have already pointed out, the succession procedure may be notarial, assuming the consent of all successors in the case of the judicial or legal succession, which is invoked if those interested in succession do not understand the issues that it entails. From these two forms of the succession procedure, in the present paper we will discuss only the notarial one, which involves going through several steps, the carrying out of several operations, as follows: the notification of the

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lacking his legal succession. Instead, to the extent that the deceased is grateful to a legal person through a connection in the will, it creates a vocation, a call to the testamentary heritage.

[1] D. Chirică, *Tratat de drept civil. Succesiunile şi liberalităţile,* (Bucharest: C.H. Beck, 2014), 14-15; B. Pătrașcu and I. Genoiu, „Moștenirea și felurile ei". in *Noul Cod civil. Studii şi comentarii*. Vol. II, edited by Marilena Uliescu, 567-595, (Bucharest: Universul Juridic, 2013), 579-582; Fr. Deak and R. Popescu, *Tratat de drept succesoral.* Vol. I. (Bucharest: Universul Juridic, 2014), 58-61; D. Văduva, *Succesiuni. Devoluţiunea succesorală,* (Bucharest: Universul Juridic, 2012), 17-19; Stănciulescu, *Moștenirea. Doctrină și jurisprudență*, 54-56.

[2] According to this text of the law, "Upon hearing the court regarding the inheritance proceedings, the plaintiff will file a statement issued by the notary public regarding the verification of the inheritance records provided by the Civil Code. In such a case, the court will, in its own motion, or the defendant, rely on the failure of the prior procedure."

public notary, kept in the power of the law, and verifies territorial competence; citing successors when necessary; hearing witnesses; the recording, respectively the proof of the succession option; determination of succession ground. The notarial succession procedure may be suspended under the law and is closed in principle by the issue of the certificate of inheritance[1]. It will not be the subject of our concerns, which is also very extensive, of the notarial succession procedure, but only some of the alleged aspects, namely the notification of the public notary and the verification by the latter of its territorial competence, the succession census and its registration, or, in case, the proof of the succession option.

The inheritance law institution whose issues concern us here is regulated by the following normative acts: Law no. 36/1995 of the notaries public and the notarial activity, republished; The Regulation on the Application of the Law on Notaries Public and Notary Activity no. 36/1995 (hereinafter referred to as the *Regulation*); the Civil Code; the Code of Civil Procedure.

1. THE APPLICATION FOR THE OPENING OF THE NOTARIAL SUCCESSORIAL PROCEDURE

If the successors of the deceased come to terms for the debate of the inheritance and choose the way of the notarial process, they make a request for the opening of the succession procedure. According to art. 103 par. (1) and art. 104 par. (3) of the Law no. 36/1995, republished, this request can be made by any interested person, as well as by the secretary of the local council of the locality in which the assets of the deceased were located at the date of the inheritance. By "interested person" we mean any successor, the creditors of the succession or the successors, as well as any other person who justifies a legitimate interest. Therefore, such an application can not be made by any person, but only by a person who justifies at least one legitimate interest. Such an interest mainly justifies the successors of the deceased and the creditors, both of the succession, of the deceased, who are interested in satisfying their claim rights from the assets of their deceased debtor, now deceased, but of the successors as well as interested to make use of their claim rights in

[1] For the notarial successional procedure, see also I. Genoiu, *Drept civil. Succesiuni, Caiet de seminar* (Bucharest: C.H. Beck, 2019), 396-430.

the assets of the inheritance, which could be collected by their debtor in the succession. We do not believe that it is irrelevant to show here that by "successive" the Civil Code in force "sees the person fulfilling the conditions stipulated by the law in order to be able to inherit but who has not yet exercised his right of succession option" (art. 1100 par. (2) Civil Code]. In other words, the successive changes its quality to that of the heir as an effect of accepting the inheritance.

In the application for inheritance proceedings, the civil status of the deceased, the surname, the first name and the domicile of the presumptive heirs, the assets of the deceased, mentioning their value, as well as the inheritance liability, shall be mentioned.

Upon the receipt of the application, the notary public will verify its territorial jurisdiction and only if it finds that it is in possession of it shall register that application in the Register of Succession held at the level of the notary, but only after it has been registered in the succession records held at the level of the Chamber constituency is operating. Such records shall only be operated if, as a result of the checks, it is found that there is no other file concerned, the same notary office or other notarial office in the same territorial jurisdiction. The position in the inheritance register of the notary office closes upon the issuance of the certificate of inheritance, the suspension of the file or in other cases of the closing of the succession proceedings.

2. THE COMPETENCE OF THE PUBLIC NOTARY

According to art. 103 par. (2) - (7) of Law no. 36/1995, republished, the notary public is obliged to verify in advance the territorial competence, and if he finds that the debate on the succession is under the competence of another notary public, he shall proceed without citing the parties, informing the applicant for the notary public competent to carry out the inheritance procedure.

Where there are several public notaries in the district of a court, the competence of the inheritance procedure lies with the first notary public concerned. As we have already pointed out, the public notary will verify that the succession proceedings have not been opened with another public notary in the same district, investigating for this purpose the Registry of Inheritance Records kept at the level of the Chamber.

The criterion by which we determine the territorial jurisdiction of the notary public (and at the same time the court and the secretary of the local council respectively) is the last domicile of the deceased, proof of which is in all cases with his death certificate [art. 954 par. (2) Civil Code]. It is important to note that not residence (that temporary dwelling of a natural person) is a reference in the matter that concerns us, but only the domicile of the deceased (in the sense of the law, namely, the main permanent residence) and not any of the domiciles by the defunct throughout life, but only the last of them.

If the last domicile of the deceased person is not known or is not on the Romanian territory, the jurisdiction of the debate on the inheritance belongs to the first notified public notary provided that at least one immovable good exists in the constituency in which it is located. If the last domicile of the deceased is not in Romania, and the inheritance patrimony does not include real estate on the territory of Romania, the first notary public is competent, provided that there are movable assets in its constituency. If the last home of the deceased is not in Romania, and in the succession heritage there are no goods in the territory of our country, the first notary public is competent[1].

These rules also apply to deceased persons whose last domicile is not known. Also, if the death certificate specifies only the state in whose territory the deceased had its last domicile, the provisions of Art. 954 par. (3) Civil Code, above.

3. CITING THE SUCCESSIVES

According to article 106 of Law no. 36/1995, republished, after observing that it is legally notified, the notary public records the case and orders the citing of those who have the inheritance title, and if there is a will, he cites also the legatees, as well as the established testamentary executor[2]. Therefore, all those who have a succession (inheritance

[1] Regarding the place of the inheritance opening, see: Chirica, *Tratat de drept civil. Succesiunile şi liberalităţile,* 16-17; Pătrașcu and Genoiu, „Moștenirea și felurile ei", in *Noul Cod civil. Studii şi comentarii*, 584-589; Deak and Popescu, *Tratat de drept succesoral*, 63-74, Vaduva, *Succesiuni. Devoluţiunea succesorală*, 19-20; Stănciulescu, *Moștenirea. Doctrină și jurisprudență*, 58-61.

[2] The executor is the person with full exercise capacity, designated under the law by the testator, to enforce his ultimate will.

summon)[1], both legal and testamentary, must be summoned, and from the perspective of the legal succession, it is necessary to summon those who have the general legal potential (the relatives of the four classes of legal heirs and the surviving spouse), as well as those who have a concrete succession vocation, being in class and preferred degree.

The citation must include, in addition to the elements provided for in the Code of Civil Procedure, a declaration of invalidity, stating that if the successor does not exercise his/her right to accept the inheritance within a legal term of one year, the successor in title shall be presumed by article 1112 Civil Code.

This law in fact establishes a relative presumption of renunciation of inheritance (which should not be confused with the presumption regulated by Article 1113 Civil Code[2], but which has an absolute character), so that the successor summoned under the law, which, upon the expiration of the one-year term, has not given an express declaration of acceptance or renunciation of the inheritance, it can, however, prove that he has accepted the legacy in question, but tacitly, under Art. 1110 Civil Code, or may also rely on the suspension of the period of the succession option or may request the reimbursement within that period.

If, as is apparent from the information in the case file, the current domicile of the successor is unknown, it is possible to summon it, cumulatively, by displaying the deceased's last domicile, displaying at the last known domicile of the successor, publication in a nationwide newspaper.

If a universal covenant (with the vocation to the universality of the inheritance) is established by an authentic testament, only the legatees are summoned in the absence of reserved heirs; if the testament is a

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[1] See, for the issue of this general condition of the right to inherit, Chirica, *Tratat de drept civil. Succesiunile şi liberalităţile*, 34; B. Pătraşcu and I. Genoiu „Condițiile generale ale dreptului de a moșteni", in *Noul Cod civil. Studii şi comentarii*. Vol. II, edited by Marilena Uliescu, (Bucharest: Universul Juridic, 2013), 622-628; Deak and Popescu, *Tratat de drept succesoral*, 134-139; Văduva, *Succesiuni. Devoluţiunea succesorală*, 29-33; Stănciulescu, *Moștenirea. Doctrină și jurisprudență*, 71-72.

[2] According to art. 1113 Civil Code "(1) For good reason, at the request of any interested person, a successor may be obliged, by applying the procedure provided by the law for the presidential decree, to exercise his right of inheritance within a time limit set by the court, shorter than that provided in art. 1103. (2) A successful person who does not opt within the time limit set by the court shall be deemed to have renounced the inheritance."

holographic or a mystic, the legal heirs are summoned and their presence is necessary for the purpose of validating the testament, according to art. 1042 Civil Code. In both cases, the testamentary will be summoned if it has been designated by will.

In the succession to be declared vacant[1], the notary public cites the authority of the competent public administration to take over the goods. For the goods on the territory of Bucharest, the representative of the City Hall of Bucharest is summoned. The failure to present the local public administration authority legally summoned in the proceedings does not prevent the issue of the succession holiday certificate and its communication.

In the case of the incapacitated heir (minor less than 14 years of age or a person under judicial interdiction), his legal representative and his guardianship authority are summoned.

Summoning the heirs and, as the case may be, of legatees is not mandatory if the certificate of heir or legatee is made on request following a final court decision, except for cases where the notary public considers it necessary for certain clarifications.

4. REGISTRATION OR, AS THE CASE, THE PROOF OF SUCCESSORIAL OPTION

According to art. 107 of the Law no. 36/1995, republished, on the basis of a declaration or evidence administered in the case in question, it will be determined whether the successors accepted the succession within the legal term, thus changing their successor status, the heirs, the successors[2]. As a result, the public notary will check the inheritance

[1] The vacant inheritance is due, as the case may be, to the commune, town or municipality on whose territory the deceased had property, respectively to the Romanian state, if the deceased had goods outside the country. Inheritance is vacant, for example, if the deceased had no legal or testamentary heirs, thus speaking of total inheritance or if the vocation of the deceased's legal and/or testamentary heirs does not cover the entire succession - inheritance part.

[2] For the aspects that the succession option currently involves, see: Chirică, *Tratat de drept civil. Succesiunile şi liberalităţile,* 457-496; B. Pătraşcu and I. Genoiu, „Aspecte esențiale ale opțiunii succesorale potrivit noului Cod civil", in *Noul Cod civil. Studii şi comentarii*, vol. II, edited by Marilena Uliescu, (Bucharest: Universul Juridic, 2013), 910-941; Deak and Popescu, *Tratat de drept succesoral*, 17-114; M. D. Bob, *Probleme de moşteniri în vechiul şi în noul Cod civil*, (Bucharest: Universul Juridic, 2012), 188-236; Stanciulescu, *Moștenirea. Doctrină și jurisprudență*, 317-370.

records of the inheritance notary (RNNEOS), a registry held electronically at national level, the inheritance options included therein (either in the sense of accepting the inheritance or giving up the inheritance) will take note of the inheritance option papers presented by the parties and will record the succession options of the heirs present. The following types of inheritance declaration shall be entered in the RNNEOS by the instrumented notary public at the date of their authentication: the declaration of express acceptance of the inheritance, given in the form of an authentic instrument[1], the declaration of renunciation of the inheritance and, where applicable, the declaration of inheritance the revocation of the renunciation of inheritance, as well as the declaration of non-acceptance of the inheritance over the legal term, whereby a successor declares that he has not acquired the quality or title of heir within the term of one year's succession option and understands to surrender the succession. Since we cannot discuss the succession option, which remains unaltered in both its forms, the declaration of non-acceptance of the inheritance given within one year under Art. 1111 Civil Code[2], referred to in the specialist practice and doctrine as "provisional non-acceptance declaration", is not subject to registration in RNNEOS.

Transmitting the declarations to the registry shall be done on an electronic basis, under the conditions set by the administrator of the notarial national registers. The acceptance of the succession by the present heirs is recorded in a closure and is not communicated to RNNEOS for enlisting.

We also note that it is still useful, considering the principles governing the enforcement of civil law over time, to know the legal regime applicable to the succession option before October 1, 2011, when the current Civil Code comes into force. This, since the inheritances opened before this date are subject to the prescriptions of the law in force at the time of his death *de cujus*.

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[1] We note that express acceptance of the inheritance can be achieved, under art. 1108 par. (2) Civil Code, either by an authentic instrument or by a private signature. As a result, only the declaration of express acceptance of the inheritance that takes the form of an authentic document is subject to registration in the specialised register at the expense of the heir.

[2] According to this law, "A successful person who intends to perform an act which may have the meaning of accepting the inheritance, but who does not wish to be considered as an acceptant, must give a genuine notary statement before performing the act."

As a result, under the Civil Code of 1864, which is currently abrogated, it is possible that the successors accepted the inheritance beneath the inventory - the form of accepting the legacy that is no longer regulated by *de lege lata* -, thus changing this quality into that of heirs, with the consequence of incurring the passive inheritance *intra vires hereditatis* (i.e. within the limits of the succession asset). Similarly, the successors of the deceased could give an express statement of pure and simple acceptance of the inheritance, resulting in the assumption of bearing successive liability *ultra vires hereditatis* (over the limits of the assets of the inheritance, including the heir's own property)[1].

CONCLUSION

As far as we are concerned, it is indisputable that the discussion of any aspects of the succession procedure is of particular practical utility. Undeniable is also the fact that the variety of practical situations can not be ensured by the letter of the law. That is why we consider that doctrine and jurisprudence play a special role from this perspective, by striving to identify the most just and appropriate solutions for the problems encountered by public notaries or judges on the occasion of the debate on the inheritances, especially the successive ones, opened under the empire of different normative acts.

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[1] For the aspects of the succession option in the light of the old Civil Code, see: I. Genoiu, *Drept succesoral*, (Bucharest: C.H. Beck, 2008), 269-328; Fr. Deak, *Tratat de drept succesoral* (Bucharest: Actami, 1999), 420-502.

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ASPECTS RELATED TO PATRIMONIAL EFFECTS OF DIVORCE IN RELATION TO COMPENSATION AND COMPENSATORY PROVISION

Carmen Oana MIHĂILĂ [1]

Abstract:

The social, economic, and psychological consequences of divorce are a reality that is more and more common nowadays. The paper analyses only part of the effects of marriage dissolution, in particular those relating to the right of the spouse who is not faulty of divorce, to receive compensation for the damage suffered (whether material or moral), but also a compensatory benefit which has the role of balancing the living conditions after divorce. If the right to compensation is a well-known institution, which, in the opinion of the specialists, constitutes a particular application of tort law, the compensatory benefit is a new institution introduced in the Romanian Civil Code, of French inspiration, which provokes some doctrinal controversies.

Key words: *patrimonial effects; divorce; right to compensation; compensatory benefit; exclusive fault.*

1.THE RIGHT TO COMPENSATION

Unlike the compensatory benefit to which the legislator has incorporated several articles in the Civil Code, the right to compensation is treated in a concise manner, which may give rise to certain uncertainties as to its practical application. As noted by the specialists in the field, the doctrine and the judicial practice allow the possibility of

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"adapting this aspect according to the factual circumstances of the case deducted from the analysis"[1].

Article 388 The Civil Code provides that "the innocent spouse who suffers a damage by marriage dissolution may ask the faulty party to compensate him/her. The tutelage court resolves the claim by divorce decree. "The text shows that these damages are distinct from the compensatory benefit regulated by Art. 390. As the doctrine states, the two institutions have "different origins, effects and purposes"[2].

The conditions for granting damages based on art. 388 are the spouse's fault in divorce, the existence of harm to the spouse not faulty of marriage dissolution and the causal link between marriage dissolution and damage.

Only the spouse who is not faulty of marriage dissolution is considered to be the creditor of the obligation, this right being a particular application of tort liability[3] (there are authors who consider that the legal nature of this right takes the form of a culpable husband's punishment). Thus, it is only possible to apply in dissolution of marriage based on the defendant's exclusive fault (including the divorce based on separation in fact more than two years). No indemnity can be awarded if the court finds a joint fault of the spouses divorcing.

The French Civil Code, which is the source of inspiration for art. 388, in art. 266 (prior to the 2004 amendment) provides that the right to reparation may also be granted to a spouse who has not itself filed an application for divorce by agreement[4]. In spite of the old regulation in the

[1]Bogdan Moloman and Lazăr-Ciprian Ureche, "Scurte consideraţiuni privind dreptul la despăgubiri în caz de divorţ, potrivit art. 388 NCC" - Brief considerations regarding the right to redress in the event of divorce, according to art. 388 NCC (n.t.), *RRDJ* no. 6 (2014): 185.

[2]Flavius-Antoniu Baias and Eugen Chelaru and Rodica Constantinovoci and Ioan Macovei, *Noul Cod civil. Comentariu pe articole*, Comment art. 388 (București: CH Beck, 2012), 327.

[3]Gabriela Cristina Frențiu, *Noul Cod civil - Comentarii, Doctrină și Jurisprudență*, vol. I, comment art. 388 Civil Code, (București: Hamangiu, 2012), 577. Marieta Avram, *Drept civil. Familia* (București: Hamangiu, 2013), 143 It is shown that the damage is caused by marriage dissolution, not through an illicit deed.

[4] *French Civil Code*, available on http://codes.droit.org/CodV3/civil.pdf, accessed on 10 April 2019.

matter, the new French provision conditions the granting of compensation by creating damages of particular gravity[1].

It should be made clear that the damages that give rise to the right to compensation **are determined by the dissolution of the marriage**, so it is not possible to be qualified the damages during the marriage, which eventually constitute grounds for divorce[2]. For example, the abusive or violent behavior of the husband, which has incurred medical expenses on the part of the wife cannot create the right to compensation except through common law, with the application of art. 1357 Civil Code (any damage caused by the act of one of the spouses can be repaired, a repair which will not be conditioned by the culpability at the moment of dissolution of the marriage).

This action may be introduced during divorce, but also before or after divorce. In the case of the indemnities provided by art. 388, the claim for damages must be made only in the divorce proceedings and not later on, the application being settled by the tutelage court by the divorce decree. It should also be noted that the claim for damages under art. 388 cannot be made until the divorce fault is established[3]. Compensation received under art. 388 do not exclude, however, other damages, even in the course of divorce proceedings, based on tort law[4]. Adultery, for example, is the basis for awarding damages under art. 388, but may cause reparable damage on the basis of common law[5].

Art. 918 Para. 1 letter d Civil Procedure Code also provides that the divorce court rules on the claim and the damages claimed for material

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[1]Based on art. 266 compensation was paid to the seriously ill wife who could no longer rely on the husband's help after divorce.

[2] Dan Lupașcu and Cristina Mihaela Crăciunescu, *Dreptul familiei* (București: Universul Juridic, 2017), 351.

[3] It turns out that the divorce application is not settled, and the fault was not established in the dissolution of the marriage, so the claimed right is not present. By civil sentence no. 1147/2015 of the Horezu Court, it was allowed the exception of the prematurity of the claim pleaded by the defendant and the request was rejected as prematurely formulated, civil sentence no. 576 of May 12, 2016, Vâlcea Court, http://www.rolii.ro/hotarari/598a96a8e490094caa0003d4, accessed on 13.04.2019.

[4]In this respect, damages were claimed on the basis of Art. 1357 and art. 388 Civil Code, civil sentence 116 of 19 January 2019, Sect. 1 Bucharest, http://www.rolii.ro/hotarari/5c3e9bb6e49009b01e000031, accessed on 13.04.2019.

[5] Marius Floare, "Unele observaţii privind despăgubirile în caz de divorţ conform art. 388 din Noul Cod civil" - Some remarks on divorce compensation under Art. 388 of the New Civil Code (t.n.), in *S.U.B.B.* no. 1 (2013): 155.

or moral damages suffered as a result of the marriage dissolution[1]. This claim cannot be split from the divorce application[2]. Therefore, the jurisdiction to judge this claim belongs to the divorce court.

It is considered that a request for modification or reassessment of the amount of compensation after a final divorce decree is possible, as it is not about a new application[3]. We disagree with this view as the legislator has clearly stated that such damages are granted through divorce, even if after the final divorce decree there are consequences that could not be foreseen at that time (they may possibly be covered by the common law if the conditions for doing so are met[4]). Moreover, there are authors[5] who state (in an isolated opinion) that the application may also be introduced after the divorce has been pronounced within the 3-year general prescription period that will run from the date when the innocent spouse knew the damage.

Both material and moral **damages** can be invoked.

The damages must be certain and can be determined or determinable. Future damages must be imminent, to be sure they will be produced and be quantifiable.

In the doctrine and practice (including the French one) several examples of prejudice have been outlined: loneliness after a long marriage, loss of parish by a priest, refusal to return children to the wife during the divorce proceedings, damage to the image of a politician in the electoral campaign, the husband's aggressive behavior during the divorce

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[1] The Court rejects the claim for damages brought after the divorce, civil sentence no. 893 of January 24, 2013, Oradea Court, http://www.rolii.ro/hotarari/58a06246e49009a042001c47, accessed on 13.04.2019. In this view, civil sentence no. 1705 of 31 January 2013, Craiova Court http://www.rolii.ro/hotarari/589e068be490093847000b08, accessed on 13.04.2019.

[2] Lupașcu and Crăciunescu, *Dreptul familiei*, 353. The contrary solution is in the civil sentence no. 2687/2014, Zalău Court.

[3] Emese Florian, *Dreptul familiei în reglementarea NCC*, ed. 4, (București: C.H. Beck, 2011), 136, Bogdan Moloman and Lazăr-Ciprian Ureche, "Scurte consideraţiuni privind dreptul la despăgubiri în caz de divorț, potrivit art. 388 NCC" - Brief considerations regarding the right to redress in the event of divorce, according to art. 388 NCC (n.t.): 187.

[4]Cristiana Mihaela Crăciunescu,"Efectele divorțului cu privire la raporturile dintre soți, precum și dintre părinți și copiii lor minori" - The effects of divorce on relationships between spouses, as well as between parents and their minor children (t.n.), 13.

[5]Baias et all, *Noul Cod civil. Comentariu pe articole*, Comment art. 388 (București: CH Beck, 2012), 328.

process in order to cause the wife to give up the divorce proceedings, the wife's exposure to social stigma caused by divorce, refusal to consent to divorce by agreement[1], leaving the wife after a long-term marriage in which a disabled child resulted, who is now an adult, but which only the mother will have to take care of, the husband and child abandonment by the wife after having created big debts to the family, to move with another man. Material injuries are less common. For example, the material losses suffered as a result of trips to divorce or dismissal due to absences from work to attend court hearings. Also the expenses involved in analyzes or medical treatments caused by the stress of divorce[2]. Compensation was also granted if the wife left her job to help the husband in her professional activity by carrying out secretarial activities, thus losing the right to an acceptable pension[3]. The loss of married spouse's status may in the future lead to a possible rejection of a loan application, which may be a reason for granting damages. The husband's 55 year old husband's obligation to abandon the profession of farmer he could no longer carry out after the liquidation of the matrimonial regime, as he had to take care of 5 children and pay the part of the dwelling[4].
Proof of injury can be done by any means of proof.

As to the form of compensation, it is considered in an opinion[5] that in the silence of the law, these may be granted in the form of sums of money, goods or claims. Compensation cannot be continuous, on a regular basis. In another opinion[6], damages can only be granted in the

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[1]Emese Florian and Marieta Avram(coord), *Dreptul familiei. Fișe de drept civil*, (București: Universul Juridic, 2018), 128.

[2]Gabriela Cristina Frențiu, *Noul Cod civil - Comentarii, Doctrină și Jurisprudență*, vol. I, comment art. 388 Civil Code, 561-562.

[3] Cristiana Mihaela Crăciunescu, "Efectele divorțului cu privire la raporturile dintre soți, precum și dintre părinți și copiii lor minori":11, http://www.inmlex.ro/fisiere/d175/Efectele divortului cu privire la raporturile dintre soti si dintre soti si copii minori.pdf, accesed on 11.04.2019.

[4] Cour d'appel de Rennes, 10 mars 2005, Divorce, Dommages-intérêts https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000006946711&fastReqId=1516495179&fastPos=12, accessed on 12.04.2019.

[5]Dan Lupașcu and Cristiana Mihaela Crăciunescu, *Dreptul familiei*, 353.

[6]Bogdan Moloman and Lazăr-Ciprian Ureche, "Scurte consideraţiuni privind dreptul la despăgubiri în caz de divorţ, potrivit art. 388 NCC" - Brief considerations regarding the right to redress in the event of divorce, according to art. 388 NCC (n.t.): 187, Marius Floare, "Unele observaţii privind despăgubirile în caz de divorţ conform art. 388 din

form of a sum of money that may even be a regular benefit. Article 1386 distinguishes between reparation in kind and payment of damages. Thus, art. 388 contains a rule derogating from this principle of civil liability[1].

Compensation in the form of regular benefits would to some extent contradict the provisions of Art. 388, because it would be harder to imagine a damage that would produce effects over a longer period of time.

As for the fault of the spouse who created the damage, it can take the form of intent or fault[2].

From this analysis, the legal characters of the right to compensation can be outlined: optional, patrimonial, intuitu-personae, cumulative character[3].

As regards the application in time of these provisions, Law 71/2011 by art. 45 establishes that the provisions of art. 388 are applicable only if the reasons for divorce arise after the entry into force of the Civil Code.

2. COMPENSATORY BENEFIT

The compensatory benefit institution is newly introduced into the Civil Code also on the French branch. It aims to offset the imbalance caused by the divorce in terms of the living standard of the spouse not faulty of marriage dissolution. In fact, we are talking about maintaining a certain standard of living with which the innocent spouse became accustomed during marriage. It should not be confused with the right to redress and the maintenance obligation between ex-spouses because they have different purposes and grounds.

Noul cod civil" - Some remarks on divorce compensation under Art. 388 of the New Civil Code (t.n.): 156, http://arhiva-studia.law.ubbcluj.ro/pdfs/1493143816-07Floare151160.pdf, accessed on 12.04.2019.

[1]Gabriel Lefter, *Dreptul soţului nevinovat la despăgubiri pentru prejudiciul cauzat prin desfacerea căsătoriei*- The right of the innocent spouse to compensation for the damage caused by marriage dissolution (t.n.), https://www.juridice.ro/255675/dreptul-sotului-nevinovat-la-despagubiri-pentru-prejudiciul-cauzat-prin-desfacerea-casatoriei.html, accessed on 11.04.2019.

[2]Baias et all, *Noul Cod civil. Comentariu pe articole*, Comment art. 388, 328.

[3] Bogdan Moloman and Lazăr-Ciprian Ureche, "Scurte consideraţiuni privind dreptul la despăgubiri în caz de divorţ, potrivit art. 388 NCC" - Brief considerations regarding the right to redress in the event of divorce, according to art. 388 NCC (n.t.): 190.

Under French law[1], the compensatory benefit is intended to eliminate the inequality that divorce would generate in terms of the spouses' living conditions. It does not take account of the culpability of the spouses, but the court may reject the claim of benefit by the spouse faulty of marriage dissolution (Article 270 of the French Civil Code). It does not take into account either the period of common pre-marital life[2] or the length of marriage as in the Romanian law.

Legal conditions and characters

Thus, similarly to the right to compensation, the obligation to perform the compensatory benefit is the responsibility of the spouse who is faulty of divorce alone (divorce for well-founded reasons due to the exclusive fault of the defendant spouse[3] and the divorce for separation in fact that lasted at least 2 years). This means that it cannot be granted if the marriage is dissolved due to the common fault of the spouses.

The purpose of the benefit seems to have a sanctioning role, since only the culpable spouse has to execute it. The spouse not faulty of marriage dissolution will have to prove this fact by any means of proof,

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[1]Compensatory benefit is regulated in addition to art. 270-281 French Civil Code and art 1079-1080 French Cicivil Procedure Code https://www.legifrance.gouv.fr/affichCode.do?idArticle=LEGIARTI000006411888&idSectionTA=LEGISCTA000006181716&cidTexte=LEGITEXT000006070716, accessed on 15.04.2019.

[2]Cour de cassation, Chambre civile 1, 5 décembre 2018, 17-28345, https://www.legifrance.gouv.fr/affichJuriJudi.do?oldAction=rechJuriJudi&idTexte=JURITEXT000037819432&fastReqId=589938507&fastPos=1, accessed on 15.04.2019.

[3]In the doctrine, the question arises as to the case where the defendant makes the counter-claim that is admissible, then the claimant's request is rejected. It is stated that the provisions of art. 390 par. 1 Civil Code are discriminatory in this situation and that it would be more appropriate for the text to refer to "the former spouse whose exclusive fault has led to the divorce being pronounced" in T. Bodoașcă, A. Csakany, „Contribuții la studiul reglementărilor interne referitoare la prestația compensatorie în caz de divorț" - Contributions to the study of internal regulations relating to the compensatory benefit in the event of divorce (t.n.), volume of the International Conference The Civil Trial and Foreclosure. Theory and Practice, Tg. Mureș, Ed. Universul Juridic, (2015): 11-19; In the same view, other authors consider that the position of the defendant or the plaintiff in the application or the counterclaim is irrelevant, but the fault in the divorce, in Bogdan Moloman and Lazăr-Ciprian Ureche, „Prestația compensatorie - Sprijin acordat soțului inocent și vulnerabil urmare a divorțului" - " - Compensatory benefit - Support granted to the innocent and vulnerable spouse following divorce (n.t.), RRDJ nr. 6 (2013): 170.

the court being the one which will have to appreciate on a case-by-case basis the existence of the significant imbalance (for example, the spouse will prove that he/she no longer has the living conditions he/she has benefited from during the marriage, he/she will no longer benefit from the family car, he/she will not have the necessary money for the household expenses[1]). The spouse's living conditions during the marriage and the conditions in which he/she will live after the divorce will be established[2]. It will be pursued to enjoy the standards he/she had during marriage[3]. In the specialty literature it has been said that this compensatory benefit should not give the innocent spouse a material advantage over the faulty spouse but must generate a balance.

The court's assessment of the patrimonial imbalance will take into account the criteria listed in art. 391 Civil Code, namely: "the resources of the spouse who requests it and the means of the other spouse at the time of the divorce, the effects of the liquidation of the matrimonial regime or of any other foreseeable circumstances capable of modifying them, such as the age and health of spouses, the contribution to the raising of the minor children that each spouse has to have, their professional training, the possibility of carrying out a revenue-generating activity and the like."

Another condition provided by art. 390 par. 2 involves marriage duration of at least 20 years. The long duration of the marriage makes it unlikely that these benefits will be granted in the case of marriages concluded from pure interest, which usually do not last very long. Even if there are specialists who propose to eliminate these conditions, on the grounds that an innocent spouse may suffer an imbalance and after a 15-year marriage, for example, I think the legislator has chosen a reasonable time in this context.

The compensatory benefit will be determined by the tutelage court (may be considered as an application for access to the divorce[4])

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[1]Cristiana Mihaela Crăciunescu, "Efectele divorţului cu privire la raporturile dintre soţi, precum şi dintre părinţi şi copiii lor minori" - The effects of divorce on relationships between spouses, as well as between parents and their minor children (t.n.).

[2] Art. 271 French Civil Code provides that the compensatory benefit is determined by the needs of the creditor spouse and the resources of the debtor spouse.

[3] Dan Lupașcu and Cristiana Mihaela Crăciunescu, *Dreptul familiei*, 355.

[4]Article 919 Civil Procedure Code provides that "upon request, the court of divorce will also rule on the maintenance obligation or the compensatory benefit between the former spouses".

only when the marriage is dissolved, therefore no application consequent to marriage dissolution is possible[1]. The question that arises is whether this can be established by the parties by convention, the court only taking note of the parties' understanding (as in the French law).

The compensatory benefit is optional (the spouse *can* benefit ...). Also, the character of intuitu-personae must be mentioned, the right ceasing by the death of the creditor, not transmitted to the heirs, the legal character, the variable character.

According to art. 390 par. 3 Civil Code, the spouse seeking the compensatory benefit cannot claim maintenance allowance from the former spouse.

As has been rightly pointed out by the specialists in the matter, it cannot be applied by analogy the failure to pay the compensatory benefit as it happens in the case of non-fulfillment of the maintenance obligation (Article 378 governing family abandonment) [2].

Form and duration of compensatory benefit

"The compensatory benefit may be settled in cash, in the form of a sum of money or an annuity, or in kind, in the form of usufruct on movable or immovable property belonging to the debtor" (Article 392 paragraph 1 of the Civil Code). It may also have a mixed form, for example a usufruct plus an annuity.[3]

The annuity[4] may be set in a percentage of the debtor's income or in a certain amount of money, and it may be established for a certain

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[1]The doctrine states that the compensatory benefit could be claimed separately, but before the divorce decision is pronounced, following to be joined to the divorce case, if it was not claimed even through the divorce application, by a distinct head of claim, in Baias et all, *Noul Cod civil. Comentariu pe articole*, Comment art. 391, 331.

[2] Bogdan Moloman and Lazăr-Ciprian Ureche, "Scurte consideraţiuni privind dreptul la despăgubiri în caz de divorţ, potrivit art. 388 NCC": 174.

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[3]Dan Lupașcu and Cristina Mihaela Crăciunescu, *Dreptul familiei*, 355; Cristina Codruța Hageanu, *Dreptul familiei și actele de stare civilă*, 169. Bogdan Moloman and Lazăr-Ciprian Ureche, "Scurte consideraţiuni privind dreptul la despăgubiri în caz de divorţ, potrivit art. 388 NCC": 174 .

[4]In the opinion of some authors the legal nature of the allowance is the one given by the annuity contract, art. 2242-2253. See Baias et all, *Noul Cod civil. Comentariu pe*

duration or for the lifetime of the innocent spouse of the dissolution of the marriage. The usufruct may also be life-time or fixed-term, it may consist of movable, immovable, tangible, intangible property.

This time extent of the compensation benefit depends on the criteria listed above, as provided by art. 391 Civil Code.

In order to ensure the fulfillment of the obligation to pay the annuity, similar to the provisions of art. 277 of the French Civil Code, at the request of the creditor spouse, the court can force the debtor to make a real guarantee or to give a bail, according to art. 393 Civil Code (this may consist of a mortgage or immovable mortgage or a pledge[1]).

Under the French law, according to art. 271 Civil Code, the court takes into account the needs and resources of spouses, the situation of spouses at the time of divorce and its evolution in the near future. At the time of claiming the compensation benefit or at the time of its review, the parties prove their income, assets and living conditions. The benefit consists of payment of a sum of money, assignment of property of some goods[2], temporary or lifetime right of habitation or usufruct (including amounts due to work injury or disability pension). If the amount of money cannot be paid, the French legislator provides the possibility of forbearing it into installments that will be indexed for a maximum of 8 years. In exceptional circumstances, the court may reasonably require that the payment deadline be longer than 8 years. The allowance may be revised, suspended or canceled in the event of a significant change in the resources or needs of the former spouses (Article 276-3 French Civil Code). The average amount of a compensatory benefit payable in France is about 25,000 euros[3].

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articole, Comment on art. 392, 332 ..The compensatory benefit in the form of annuity cannot consist of fungible assets as provided by art. 2242 Civil Code in the matter of annuity .

[1]Marieta Avram, *Drept civil. Familia*, (București: Hamangiu, 2013), 148.

[2] The debtor's consent for the transfer of property acquired through inheritance or donation is required.

[3] Compensation benefits are granted in about 19% of divorces (23,800 out of 125,100 in 2013), and in 9 out of 10 cases the beneficiary is the wife, and in 1 out of 10 cases the benefit is 100,000 euro, Zakia Belmokhtar and Julie Mansuy, "En 2013, neuf prestations compensatoires sur dix sous forme de capital", Ministère de la Justice, Bulletin d'information statistique no 144/2016, Infostat justice n° 144, (2016), http://www.justice.gouv.fr/art_pix/stat_Infostat%20144.pdf, accessed on 14.04.2019.

Modification and termination of the compensatory benefit

The compensatory benefit may be increased or decreased if there are significant changes in the debtor's resources and the creditor's resources (Article 394 paragraph 1 of the Civil Code).

If this is set as a sum of money, it will be indexed by law, quarterly according to the inflation rate.

Nothing prevents the court, at the request of one of the spouses, to alter the benefit, turning it in terms of form, from kind to money or vice versa. Also, the term of the benefit can be changed. The court will, however, analyze the conditions on a case-by-case basis[1].

Under the French law, the debtor of the compensatory benefit in the form of an annuity can claim the court to replace it in whole or in part. And the lender of the annuity may request this if he considers that the debtor's situation has changed (Article 276-4 French Civil Code).

The compensatory benefit will cease at the death of one of the spouses (cessation of right) if the spouse is remarried or if he / she obtains resources that can assure him/her living conditions similar to those during the marriage (court cessation also found by the tutelage court) (art. 395 Civil Code). Also, the obligation to pay the compensatory benefit ceases when the court has ordered it to be fulfilled for certain duration. The benefit will not cease if the debtor no longer has the resources to fulfill his obligations, the law only providing for it to be increased or decreased[2].

Under the French law, in the event of the death of the creditor, the compensatory benefit will be deducted from the inheritance, within the limits of the inheritance asset. The heirs are not personally liable for the payment of the benefit.

CONCLUSIONS

The suffering of the innocent spouse of marriage dissolution cannot be measured in money, but ways can be created to compensate for

[1] The court rejects the request to increase and change the fixed term of 5 years of annuity, civil sentence 359 of 24 March 2017, Videle Court, http://www.rolii.ro/hotarari/58e69c98e49009681000003c, accessed on 12.04.2019.

[2]In this view, see civil sentence 118 of 25 January 2018, Caracal Court, http://www.rolii.ro/hotarari/5a879eede49009344e00002c, accessed on 12.04.2019.

the damage suffered as a result of divorce. Whether we are talking about compensation or compensatory benefit, a balance will be created between the situations of the former spouses.

If the right to compensation can be cumulated with the maintenance allowance between the former spouses, the grant of the compensatory benefit excludes the maintenance obligation.

From the content of the paper it can easily be noticed that in the doctrine there are enough adversarial opinions referring to these institutions, which will probably be solved by the practice of the courts.

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APPLYING THE PRINCIPLE OF EQUAL TREATMENT BETWEEN MEN AND WOMEN AT THE TERMINATION OF THE INDIVIDUAL EMPLOYMENT CONTRACT. NORMATIVE REGULATION AND CONSTITUTIONALITY IN ROMANIA

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Abstract:

Women and men must be treated equally regarding labor relations, including termination of the employment contract. One case of termination of the contract regulated by the national legislature is the situation where the employee cumulatively fulfills a minimum contribution period and the standard age set by law in order to benefit from a retirement pension. In Romania, however, the standard age is different for men and women. In those circumstances, it was for the Constitutional Court to analyze how the legal provisions respect the principle of non-discrimination between women and men in the event of termination of the individual employment contract.

Key words: *equality; contract termination; standard age; retirement pension*

INTRODUCTION

The right to work and the right to old-age pension are two interconnecting benefits, whose exercise is nevertheless governed by different rules. Therefore, it is very important to delimit the right to legal employment relationship stability from the right to old-age pension claim. Old-age pension is a social insurance benefit to which the person fulfilling the conditions provided by the law is entitled. These conditions may be different for men and women. The right to

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work, which includes protection in the event of termination of the employment contract, must be equally exercised in the case of both men and women, in accordance with the provisions of Art. 5 of the Labor Code.

THE CONCEPT OF DISCRIMINATION IN THE LEGAL EMPLOYMENT RELATIONSHIP.

According to par. (1) of art. 2 of GO 137/2000, discrimination means any distinction, exclusion, restriction or preference, based on race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, disability, chronic non-contagious disease, HIV infection, affiliation to a disadvantaged category, as well as any other criterion that has the object or effect of restricting, removing the recognition, use or exercise on an equal basis of human rights and fundamental freedoms or rights recognized by law in the political, economic, social and cultural spheres or in any other areas of public life.

(2) The provision to discriminate against persons on any of the grounds provided in paragraph (1) shall be considered discrimination within the meaning of this enactment.

(3)[*] In accordance with the present Enactment, the apparently neutral provisions, criteria or practices that disadvantage certain persons, based on the criteria set out in par. (1) to other persons are considered discriminatory, except the case when these provisions, criteria or practices are objectively justified by a legitimate purpose and the methods of achieving that aim are appropriate and necessary.

Any direct or indirect iscrimination against an employee based on sex, sexual orientation, genetic characteristics, age, nationality, race, color, ethnicity, religion, political option, social origin, disability, family status or responsibility, membership or trade union activity is forbidden.

Acts of exclusion, distinction, restriction or preference, based on one or more of the criteria provided by law, which have the purpose or effect of not granting, restricting or abolishing the recognition, use or exercise of the rights provided by labor law, shall be considered directly discriminatory.

Acts and facts apparently based on criteria other than those prescribed by law, but which produce the effects of direct discrimination shall be considered indirect discrimination.

According to art. (6) of Directive 2000/78 / EC, transposed into national law by OG 137/2000, Member States may provide that *a difference of treatment on grounds of age shall not constitute discrimination where it is objectively and reasonably justified under national law, by a legitimate objective, particulaly by legitimate policy objectives of employment, labor market and professional training, and the means to achieve this goal are appropriate and necessary*.

However, none of the normative acts cited in the decision to release from office provides the objective pursued by termination of the employment relationship by retirement at the standard retirement age, different for men and women.

The CJEU decided, however, that from art. (6) of Directive 2000/78 / EC, it cannot be inferred that the lack of clarification regarding the objective pursued would automatically exclude the possibility of justifying it in the context of that provision. Under these circumstances, it is important that other elements, deduced from the general context of the measure in question, allow the objective on which that measure is based to be identified. The aim is to exercise judicial control over its legitimacy, as well as the appropriateness and necessity of the means used in order to achieve this objective (Case C-411/05 Pallacios de la Villa, ECR I-853, paragraphs 56 and 57, of October 2007, Case C-341/08 Petersen, paragraph 40, of 12th January 2010 and Case C-45/09 Rosenbladt, paragraph 58, of 12th October 2010).

The CJEU has admitted that, in the case of professions where the number of available jobs is limited, retirement at an age set by law is likely to facilitate the employment of young people. However, it has also decided that it is the duty of the authorities of each State to strike an appropriate balance between the different interests at stake, while ensuring that they do not go beyond what is appropriate and necessary to attain the objective pursued (Case C-411/05 Pallacios de la Villa, ECR I-853, paragraphs 69 and 71 and Case C-45/09 Rosenbladt, paragraph 44).

Moreover, the regulation of the legal termination of the employment relationship at a different retirement age for men and women does not correspond to the aim pursued, even if it was

legitimate, as it violates both national and union law in the field of equality of chances and treatment of men and women. Thus, according to art. 5 par. (1) of Directive 76/207 / EEC, the application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, requires that men and women be guaranteed the same conditions without discrimination on grounds of sex. This article was repealed by Directive 2002/73 / EC, which, however, resumed in Art. 3 lit. c) the principle of equal treatment on grounds of sex in terms of employment conditions, including dismissal.

The CJEU decided in Case 152/84 Marchall v Southampton and South West Hampshire Area Health Authority that Article 5 (1) of Directive 76/207 / EEC must be interpreted as meaning that a general dismissal policy involving the dismissal of a woman on the sole ground that she has reached or exceeded the age at which she is entitled to a State pension and which is different for men and women under national law, constitutes discrimination based on sex. The arguments in this case are valid in the circumstances in which the test of Article 5 was taken over in art. 3 of Directive 2002/73 / EC, which amended Directive 76/207 / EEC.

The notion of dismissal, according to the case-law of the CJEU, also includes the imposition of an age limit for compulsory cessation of activity, even if such cessation implies the granting of a pension.

According to art. 148 paragraph (2) of the Romanian Constitution, as a result of our country joining the European Union, the provisions of the EU constitutive treaties as well as the other binding Community regulations take precedence over the contrary provisions of the internal laws, in compliance with the provisions of the Treaty of accession.

In order to create and ensure a single area of justice in the European Union, it is necessary for EU law to be understood and applied in a unitary manner in all Member States. The only means the EU has for this purpose is the prejudicial matter procedure provided by art. 267 TFEU. If the interpretation of EU law remained at the discretion of the national courts or whether they should decide on the validity and interpretation of acts adopted by the Union's institutions, bodies, offices or agencies, it would necessarily lead to legal

uncertainty within the Union. The reason for this is that the courts of the Member States could give a different interpretation to the same issues. The CJEU does not apply Union law but only interprets it, which determines its legal nature.

According to the CJEU case law, national courts are required to interpret national law in accordance with European Union law because of the latter's priority. Therefore, they are held by the interpretation that the CJEU has given to the EU's legislative acts.

The establishment by the national legislation of a different retirement age for women and men is a measure of social protection that the state has taken in relation to women, who have the possibility and not the obligation to require the establishment of pension rights earlier than men. Only such a goal is non-discriminatory.

2. THE UNCONSTITUTIONALITY OF THE PROVISIONS OF ART. 56 PARA. (1) (C), THE FIRST THESIS OF THE LABOR CODE, FROM THE PERSPECTIVE OF THE CONSTITUTIONAL COURT OF ROMANIA

By Decision no. 387/2018 CCR determined on the objection of unconstitutionality of the provisions of art. 56 para. (1) (c) the first sentence of Law no. 53/2003 - Labor Code.

The author of the exception of unconstitutionality questioned these legal provisions, according to which the individual labor contract in force ceases at the moment of cumulative fulfillment of the conditions regarding the minimum contribution period and the standard retirement age. According to this provision, the individual work contract in progress at the age of legal retirement will terminate earlier for women than for men. Therefore, the exercise of women's right to work at retirement age depends on the conclusion of a new individual employment contract if the employer agrees to do so. However, viewed from the perspective of a woman who wishes to exercise her right to work under the same conditions as men, this regulation no longer appears as a favorable measure intended to support her but embraces the valences of a negative discrimination based on the sex criterion.

In analyzing this criticism, the Court considered that it was necessary to emphasize the distinction between the issue of retirement conditions and that relating to the termination of the labor contract.

The division of these issues stems not only from the different national regulations but also from the different regulation of these institutions at European level. In this regard, the distinction that the Court of Justice of the European Union makes between the retirement conditions (allowing for different ages between men and women) and the conditions for termination of the employment contract, which must be uniform for men and women, is relevant. Both by Judgment of 26 February 1986 in the case of MH Marshall v Southampton and South Hampshire Area Health Authority (Teaching), paragraphs 32 and 36, and by judgment of 18 November 2010 in the case of Pensionsversicherungsanstalt v Christine Kleist, paragraph 24, the European Court emphasized that "the issue of the conditions for granting the old-age pension, on the one hand, and the conditions for termination of the employment relationship, on the other hand, are distinct." To that end, it made a clear distinction between the provisions of Council Directive 76/207 / EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, training and promotion as well as working conditions, published in the Official Journal of the European Union, L series, no. 39 of 14 February 1976, provisions stating the application of the principle of equal treatment in respect of working conditions, including those governing dismissal, which stated that men and women would be guaranteed the same conditions without discrimination on grounds of sex (Art. 5 par. (1) and Art. 3 par. (1) lit. c)] and the provisions of Council Directive 79/7 / EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security, published in the Official Journal of the European Union, L series, no. 6 of 10 January 1979, stating that the national rules on the determination of the retirement age for the purpose of granting the old-age pension could be excluded from the scope of the latter directive so that Member States could set different retirement ages for women in relation to men (art. 7 par. (1) lit. a)]. In this respect, the European Court in the MH Marshall case against the Southampton and South Hampshire Area Health Authority (Teaching), paragraph 37, emphasized that "while the exception provided for in Article 7 of Directive 79/7 takes account of the consequences deriving from the age limit for social security benefits, the present case concerns dismissal within the meaning of

Article 5 of Directive 76/207. " The same considerations were also upheld by the order of 7 February 2018, delivered by the Court of Justice in Joined Cases Manuela Maturi, Laura Di Segni, Isabella Lo Balbo, Maria Badini, Loredana Barbanera v Fondazione Teatro dell'Opera di Roma and Fondazione Teatro dell'Opera di Roma against Manuela Maturi, Laura Di Segni, Isabella Lo Balbo, Maria Badini, Loredana Barbanera, Luca Troiano, Mauro Murri (C-142/17) and Catia Passeri against the Fondazione Teatro dell'Opera di Roma 143/17), paragraphs 25 and 26, referring to the current provisions of art. 14 par. (1) lit. (c) of Directive 2006/54 / EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation[1]. These provisions prohibit any direct or indirect discrimination on grounds of sex in the public or private sectors, including public bodies, as regards "the conditions of employment and work, including the conditions of dismissal, as well as remuneration, as stated in Article 141 of the Treaty ', thus replacing the abrogated provisions of Directive 76/207, referred to above.

Examining the criticism of unconstitutionality reported to the provisions of art. 56 para. (1) lit. c) the first sentence of Law no. 53/2003 - The Labor Code[2], the Court held that they instituted a cause of legal termination of the individual labor contract at the time of meeting the standard age conditions and the minimum retirement contribution. This legal provision applies equally to women and men, but at different ages, since the statutory retirement age for women is different from that of men, according to art. 53 par. (1) of the Law no. 263/2010.

The court found that art. 56 of the Law 53/2003 - The Labor Code did not establish an option for the employee to continue the working relationship in progress at the age of retirement. Moreover, the termination of the individual employment contract was not left to the employer's disposal, it was the ope legis. Thus, the only possibility for a person meeting the standard age and minimum retirement contribution to continue working under an individual employment contract was to conclude a new contract with the same employer if they agreed, or to another employer. From this point of view, the

[1] Published in Jurnalul Oficial al Uniunii Europene, series L, no. 204 of July 26, 2006
[2] Republished in Monitorul Oficial al României, Part I, no. 345 of May 18, 2011

difference in legal treatment between men and women in terms of age at which the individual employment contract is terminated had obviously lost its character as a measure aimed at supporting women, considering less favorable social, family, and economic conditions,. On the contrary, it created a disadvantage for those women who wish to exercise this right on equal terms with men. Thus, as a result of the provisions of art. 56 para. (1) lit. c) the first sentence of Law no. 53/2003, the regulation with social reparatory effect for women, contained in art. 53 par. (1) the first sentence of Law no. 263/2010, had become a discriminatory regulation that affected the exercise of women's right to work as opposed to men's.

"The right to work is a complex right involving various aspects, of which the freedom to choose the profession and the workplace is only one of the components of this right. Thus, once a job has been acquired, it must enjoy a series of guarantees to ensure its stability, and it can not be conceived that the constitutional provisions would ensure the freedom to get a job, but not the guarantee of its preservation, obviously respecting the constitutional conditions and limits[1]." The Constitutional Court considered that the opportunity for the woman to exercise her right to work after retirement by concluding a new individual employment contract did not represent a sufficient guarantee of this fundamental right. Moreover, the Court found that, in such a situation, there was a restriction on the exercise of the right to work based solely on sex, which did not meet the requirements of objective and rational justification.

Thus, the provisions of art. 56 para. (1) lit. c) the first sentence of Law no. 53/2003 are constitutional only insofar as, upon reaching the statutory retirement age, entitle the woman to opt either for the opening of the pension right and the termination of the individual work contract in progress or for the continuation of this contract until the legal age provided for men at that time. According to the provisions of art. 53 par. (1) of the Law no. 263/2010, the standard retirement age is 65 years for men and 63 years for women, but reaching this age is achieved by increasing the standard retirement ages according to the breakdown provided in Appendix no. 5 to this law. According to Appendix no. 5, following its gradual increase, the retirement age for men has reached the 65-year ceiling since January 2015, but the

[1] See paragraph 30 in Decizia CCR no. 279 of April 23, 2015

retirement age for women will increase until the 63-year threshold is reached in January 2030. In case the legislator decides to change the retirement age, these considerations remain valid, taking into account the provisions in force at the date of reaching the retirement age by the employee.

The Court has held that that interpretation is within the meaning of European regulations, as is clear from the case-law of the Court of Justice of the European Union. Thus, the Court holds that, according to Art. 14 par. (1) lit. (c) of Directive 2006/54 / EC, "any direct or indirect discrimination based on sex in public or private sectors, including public bodies, shall be prohibited as regards: [.....] c) the conditions of employment and work, including the conditions of dismissal, as well as remuneration as stated in Article 141 of the Treaty. " As noted above, similar legislation was also found in Directive 76/207 / EEC. By judgment of 26 February 1986 in the case of MH Marshall v Southampton and South West Hampshire Area Health Authority (Teaching), paragraph 38, judgment of 18 November 2010 in the case of Pensionsversicherungsanstalt against Christine Kleist, paragraph 28, and the Ordinance of 7 February 2018, Lauda Di Segni, Isabella Lo Balbo, Maria Badini, Loredana Barbanera against the Fondazione Teatro dell'Opera di Roma, and Fondazione Teatro dell'Opera di Roma against Manuela Maturi, Laura Di Segni, Isabella Lo Balbo, Maria Badini, Loredana Barbanera, Luca Troiano, Mauro Murri (C-142/17) and Catia Passeri against the Fondazione Teatro dell'Opera di Roma (C-143/17) the European Court stated that a general policy of dismissal involving the dismissal of an employee solely on the ground that she had attained or exceeded the age at which she is entitled to old age pension, which according to national law is different for men and women, constitutes discrimination on grounds of sex, which is prohibited by the provisions of those directives.

In this respect, the Court of Justice of the European Union has considered national regulations comparable to those analyzed by the Constitutional Court. For example, in the judgment in the Pensionsversicherungsanstalt case against Christine Kleist, the European court considered the compatibility of the Austrian national rules concerning the setting of different retirement ages for women in relation to men, namely the possibility of being dismissed when they have acquired the right to a retirement pension.

Although in cases brought before the Court of Justice of the European Union the termination of the employment relationship was the result of dismissal and not the work of law, it was based on national legal provisions and was not merely a discretionary act of the employer. Therefore, according to the Constitutional Court, recitals retained by the European Court of Justice, are also applicable, mutatis mutandis, to the provisions subject to constitutional review in the present case.

CONCLUSIONS

The legal termination of a woman's individual labor contract at a lower age than the man's can and should remain an option in the current social context. The transformation of this legal benefit into a consequence of the termination of the individual labor contract resulting from the opere legis acquires unconstitutional valences, insofar as it ignores the woman's willingness to an equal treatment to that applicable to men. The reasons for the different treatment of men and women as regards the conditions for obtaining the right to retirement do not retain their logical foundation when transposed into the matter of termination of the employment contract and cannot, therefore, be relied upon as the basis of different regulations in the latter situation.

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3. Decizia CCR no. 279 of April 23, 2015

UNIFICATION OF THE PRIVATE LAW. ABSORPTION OF THE COMMERCIAL LAW

Mihai Marian ICU[1]

Abstract:

The entry into force of the current Civil Code and the repeal of the Old Commercial Code has given salience to the controversy between the partisans of the unification of private law and those who have supported the autonomy of commercial law against civil law.

Although the Old Commercial Code has been repealed, the rules specific to commercial matter, to professionals in general, have been taken over and extended to all private law relations, and it can be concluded that commercial law has not disappeared; rather it has been naturally absorbed by private law by encoding this matter in the current Civil Code.

At the present time, the current Civil Code is the common law for all private law branches, including for Commercial Law naturally absorbed with the repeal of the Old Commercial Code.

Key words: *Private Law; Commercial Law; Professional; Trader Unification.*

INTRODUCTION

In the Recitals to the draft of the current Civil Code, it was stated that it pursues the idea of promoting a monistic conception of regulating private law relations in a single code and therefore it incorporated the "totality" of the regulations regarding individuals, family relationships and commercial relations. Monism is a philosophical conception according to which there is only one substance in the Universe.

In materializing this view, art. 2 ("The subject matter and content of the Civil Code") stipulates under par. (1) that the provisions of the Code regulate patrimonial and non-patrimonial relations between

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individuals as subjects of civil law, and under par. (2) it stipulates that that code is made up of a set of rules which constitute the common law for all the matters covered by the letter or the spirit of its provisions.

Summing up the monist theory regarding the unification of private law, we could say that it supports the incorporation of commercial law in its entirety into civil law and the provision of a single and unitary regulation which is common and applicable equally and without distinction to all subjects of private law (traders or non-traders, professionals or nonprofessionals respectively).

The application of commercial law to non-traders as well is required by the need for the legal relationship to be unitarily regulated. However, commercial law applies only to the legal relationship between the trader and the non-trader, and not to the legal status of the latter.

The current Civil Code establishes certain provisions applicable only to traders who have become terminologically professionals, so that certain institutions, such as fiduciary, the determination of the price between professionals, the lease of premises intended for carrying out one's business activity, the current account contract concluded between professionals, the liability of the professional for its act, the remuneration of the professional intermediary, the obligations of the professional depository, the creditors of the professionals, who divide the patrimony for the exercise of the profession, the special prescription periods for professionals, etc., are taken from commercial law.

The entry into force of the current Civil Code did not trigger the controversy between the partisans of unifying private law and those who supported the autonomy of commercial law over civil law, a controversy that existed prior to the entry into force of this code; on the contrary, this controversy has become more pronounced.

Thus, in one of the early works[1], which contains vehement criticism concerning "the law giver's inconsistency and the shortcomings created by the ambiguity of terms professional, enterprise and the exploitation of an enterprise," a work published just before the entry into force of the current Civil Code, it was rigorously argued that the attempt to unify private law is a failure, both in terms of a (quantitatively) single

[1] Marilena Uliescu, *The New Civil Code, Studies and Remarks, Volume I* (Bucharest: Universul Juridic, 2010), 9-14.

regulation and of a (qualitatively) unitary regulation, since the code contains only a few of the rules governing trade relations and establishes differences of legal status depending on the position as professional, or non-professional respectively, of the subjects of the obligational legal relationship[1].

Subsequently, four more volumes were published, the studies and remarks being conducted both by a notable representative of the doctrine in the person of the reputed professor Marilena Uliescu, but also by a group of scientific researchers practicing didactic and practical activities, and these critics regarding the "failure" of the unification of private law were maintained over the period 2010-2016. In 2016 the last paper containing also a "Summary of the proposals for the amendment and completion of the current Civil Code" was issued[2] .

At the opposite pole there is Professor Marian Nicolae, the top representative supporting the unification of private law and unconditionally endorsing the current Civil Code.

Thus, the author discusses about the fact that "at the moment, in the light of the current Civil Code, which has reconfigured many of the institutions of Romanian law, unifying the alleged Private Law by suppressing the formal distinction between civil and commercial obligations, restoring the common-law right of the provisions of the current Civil Code not only for the so-called private subjects but also for those claimed by the alleged Public Law, and also proclaimed the individual's preeminence, dignity and freedom in relation not only to the various social, cultural or religious communities, groups or communities, but to with the state itself."[3], the unity of private law is complete.

In the view of the same author, the current Civil Code regulates a civil law that "is no longer a mere law under the subordination of public law, or, as the case may be, a simple general private law, that is, a common residual law."[4]

Between these two sides set on poles apart in supporting the pros and cons of unifying private law and the current Civil Code, we also

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[1] Gheorghe Buta, *The New Civil Code, Studies and Remarks, Volume I* (Bucharest: Universul Juridic, 2010), 16.

[2] Marilena Uliescu, *The New Civil Code, Studies and Remarks, Volume IV* (Bucharest: Universul Juridic, 2013), 592.

[3] Marian Nicolae, *Civil Law, General Theory, Volume I, Theory of Civil Law* (Bucharest: Solomon, 2017), XXXI.

[4] Nicolae, *Civil Law. General Theory, Volume I, Theory of Civil Law*, XXXII.

found a neutral, reserved point of view of almost all the experts involved in the field of magistrates' training, a point of view trying to refer both to the existence of a unity of private law and to a "survival" of commercial law.

In this respect, the group of experts operating with the National Institute of Magistracy expressed these views in which, alongside the terms "civil law", a contract that remains "driven by the civil law", there is also a "commercial contract" "specific to commercial law, but regulated by the Civil Code", "can be concluded both by professionals and non-professionals", "belongs to the commercial law"[1].

Also, in a continuation of this position, which oscillates between the existence of the professional, the existence of the non-professional, the existence of the commercial, the existence of the commercial but regulated by the civil law, it is stated that through the adoption of the Civil Code there have been practical consequences of the paradigm changes which have not led to a revolution in the matter, but to an evolution in the field[2].

The same expert shows that the "umbrella" found in the provisions of art. 2 paragraph (1) of the current Civil Code is seen here as a unitary regulation in terms of form, namely that all private law relations are viewed by the distinction made by the Roman law as opposed to public law.

The term "umbrella" used here in a neutral way regarding the provisions of art. 2 paragraph (1) of the current Civil Code is also used by partisans of the first side referring to the provisions of art. 3 Civil Code on the "general application of Civil Code" shows that, in fact, this provision does not contain a general regulation of the application of the Civil Code, but merely represents an "umbrella" for the introduction of the new term "professional" replacing the term "trader", a term applied by the vast majority of law systems.

Finally, it appears that under the new regulation the subjective criterion has become preponderant and that, basically, it must be ascertained whether a professional is involved in that legal relationship

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[1]Smaranda Angheni, *Regulation of legal relations between professionals, Booklet Conferences on the New Civil Code* (Bucharest, 2015), 180.

[2]Radu Rizoiu, *Professionals and the enterprise in the light of the new Civil Code Brochure Conferences on The New Civil Code* (Bucharest, 2015), 196.

and, in the alternative, the existence of an enterprise is being verified, this mechanism leading to a reversal of the situation with respect to previous regulations, which stipulated that priority was to be given to the objective and then to the subjective criterion in determining the existence of a commercial legal relationship.

As shown above, Professor Marian Nicolae is an outstanding representative of the unification of private law and the lack of autonomy in commercial law.

In one of his works[1] of total and unconditional support for the unification of private law and the lack of autonomy of commercial law, he mentions the fact that "at present, in the light of the current Civil Code, which has reconfigured many of the institutions of Romanian law, achieving the unification of the alleged Private Law by suppressing the formal distinction between civil[2] and commercial obligations, restored the common law right of the provisions of the current Civil Code not only for the so-called private matters but also for those claimed by the alleged Public Law, and, at the same time, proclaimed the individual's preeminence, their dignity and freedom in relation not only to the various groups or collectivities or social, cultural or religious political communities, but also to the state itself."

In the opinion of Professor Marian Nicolae, the current Civil Code regulates a civil law that "is no longer a simple law now subordinated to public law, or, as the case may be, a simple general private law, i.e. a residual common law."

In the same train of thoughts, it can be concluded that the current Civil Law is no longer neither *ius privatum* (as in the modern age) nor *ius proprium civitatis* (as in the Roman age), rather *ius comune civitatis* or more precisely the right of civil society itself (*ius proprium societatis civilis*).

It is more than that *ius privatum*, because it also applies to the relations between the state and private individuals or even between public authorities and institutions, but it is less than *ius civil romanum*, as it only represents *ius comune substantiale*, without including *ius*

[1] Nicolae, *Civil Law. General Theory, Volume I, Theory of Civil Law*, XXXI.
[2] Marian Nicolae, *Unification of Civil and Commercial Obligations* (Bucharest: Universul Juridic, 2015), 9.

commune processuale and even less the so-called *ius publicum* (constitutional law, administrative law, criminal law)[1].

This new aspect of civil law in the same work is investigated in relation to the monistic conception of the Civil Code (unitary, humanist and universalist)[2] on the relations between individuals (and not only), a concept that reformed traditional private law by laying the foundations of the New Legal Order, abolished the family code, incorporating its institutions, suppressed the anachronistic distinction between civil and commercial obligations, expanded the regime of goods and obligations also in the case of public goods and administrative obligations, establishing, *in terminis*, the common law for all the matters covered by the letter or the spirit of its provisions.

In conclusion, civil law now has a different content, and the name of civil law is no longer a simple rule of private law, which means that its place within private law as a general private law is today difficult to admit even when the fundamental division in private law and public law, of continental origin, would still be justified and proven.[3]

From this perspective, the author considers that there is a certain reluctance on the part of many civilists to address the issue of civil law content in relation to the provisions of the current Civil Code since this unification of private law has been achieved by talking about private law in relation to the content of the "Current Civil Code".

Professor Eugen Chelaru[4] whose opinion we studied, speaks about the fact that the current Civil Code has actually reintroduced into its body the rules regarding family relations, regulating the transport contract as well as legal relations with cross-border implications, given that the delimitation of the branches of law is a complex operation, which is not limited to the identification of their main sources, it is preferable to state that "the legal institutions belonging to the civil law field are in this respect sheltered from any controversy", namely: the civil legal relationship; the civil legal act; subjects of civil law (individuals); rights in rem; civil obligations (the general theory of obligations); special civil

[1] Nicolae, *Unification of Civil and Commercial Obligations*, 17.
[2] Nicolae, *Unification of Civil and Commercial Obligations*, 19.
[3] Nicolae, *Unification of Civil and Commercial Obligations*, 21.
[4] Eugen Chelaru, *The General Theory of Civil Law* (Bucharest: CH Beck, 2014), 6.

contracts; inheritance (estate); the right to intellectual property (copyright and industrial property rights)[1].

As previously shown, we share Professor Chelaru's opinion, as the "shelter" from any controversy concerning the legal institutions that make up the civil law, i.e. the civil legal relationship, the civil legal act, the subjects of civil law; rights in rem; civil obligations (the general theory of obligations); special civil contracts; inheritance (estate); the right to intellectual property (copyright and industrial property rights) would be a strong argument for "a truce" between civilist views, a truce which is based on the common view that at least these legal institutions represent the civil law field beyond "any controversy".

In opposition to Professor Marian Nicolae's point of view, Professor Marilena Uliescu together with the group of researchers who made the four volumes of studies and reviews of the Civil Code in force unconditionally support the autonomy of commercial law.

Apart from the multitude of comments and criticisms contained in the first volumes, which we referred to at the beginning of this paper, in a recent paper[2], which also contains a "Summary of Proposals for the Amendment and Completion of the Current Civil Code" it is stated, as an example in support of the thesis on the autonomy of commercial law, the fact that the usage was erroneously regulated as a source of law, since, according to the universal dictionary of the Romanian language, its main meaning refers to a way to proceed for a certain thing, for a certain field and a second meaning involves the totality of the practices and rules regulating the activity of some institutions, the relations between states, etc. diplomatic and parliamentary protocols.

The dictionary mentions, as a final meaning, the constant custom, tradition, use, adding that it originates from the French word "usance". The term used by the Civil Code and being explained as custom or tradition and professional uses (related to notaries or lawyers) is due to an inappropriate translation, the term that can be a source of law is not "usance" but "usage", which is sometimes synonymous with the term "custom".

A third meaning would indicate that the term often designates a particular practice of a profession (usages profesionales)[3] in a region or

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[1] Chelaru, *The General Theory of Civil Law*, 4.
[2] Uliescu, *The New Civil Code, Studies and Remarks*, 593.
[3] Uliescu, *The New Civil Code, Studies and Remarks*, 594.

locality, rather than a rule of law, in which case the mandatory force is variable.

If business practices are crystallized in international trade relations, professional uses have never been a source of law, which is why it proposes that paragraphs 2 and 6 of Art. 1 of the current Civil Code should be replaced by "practices or customs".

In the same train of ideas, it is mentioned that art. 3 of the current Civil Code starts from a special situation, namely the relations between professionals, in order to establish a general rule that is not expressed directly but in an elliptic way, regulating the application of the civil law to a category of subjects of law whose relationships were governed by the Commercial Code (traders).

Therefore, the same author shows that the title of art. 3 Civil Code "General Application of the Civil Code" does not contain a general regulation of the application of the Civil Code, but represents merely an "umbrella" for the introduction of the new term "professional" replacing the term "trader", a term applied by the vast majority of legal systems.

Consequently, replacing the term "trader" with "professional" is considered uninspired and unsubstantiated. This is because the use in paragraph 1, art. 3 Civil Code of the word professional as a subject of civil law "seems to be a prose"[1].

It has been previously stated that the term "professional" in the current Civil Code could and would have to be rigorously clarified, which has not happened until now, the law implementing the current Civil Code in Article 8, paragraph 1, ruling that the concept of "professional" referred to in Article 3 of the current Civil Code should include the categories of trader, entrepreneur, economic operator and any other persons authorized to carry out economic or professional activities as these concepts are stipulated by law at the date the Civil Code entered into force.

Obviously this situation allowed the doctrine to notice that if, according to the current Civil Code, all persons are considered professionals, they are considered professionals because they operate an enterprise, and if any trader is a professional, not every professional is a trader.

Within the current legal framework, there is no specific distinction made, namely trade activity that logically differentiates the

[1] Uliescu, *The New Civil Code, Studies and Remarks*, 595.

trader and should distinguish it from the other "professionals", all the more so as the manufacturing, trade and service activities can be achieved equally by both traders and other professionals.

Finally, Article 6 paragraph 1 of Law 71/2011 provides that "in the normative acts applicable at the date of entry into force of the Civil Code, references to traders shall be considered to be made to natural persons or, where applicable, to legal entities subject to registration in the Trade Register, according to the provisions of art. 1 of Law no. 26/1990 on the Trade Register, republished, with the subsequent amendments and completions, as well as with those brought by this law."

Hence, these provisions do not apply to the legal provisions governing trademarks and geographical indications, consumer protection, fruit growing legislation, consumption code, false advertising and comparative advertising, the sale of food or any other normative acts in which the meaning of the term "trader" is specific to the provisions contained in these normative acts.

The existence of this non-uniform terminology can only lead to the conclusion that the term "trader" compatible with all legal systems should be returned to, despite the application of the current Civil Code to legal relationships between professionals, as well as to any other subjects of civil law, one must admit that there is, in fact, the category of "professional traders at least after enrolling in the trade register", and there is also a specialization of the courts on the functional competence in the settlement of commercial litigation.

Apart from the aforementioned arguments, the current Civil Code systematizes and integrates regulations of commercial law, which implies the absorption of these principles so as to continue to be applicable to professional traders and not only, being under certain conditions also applicable to other professionals or even to non-professionals.

The current Civil Code chose the method of extending the application of the rules to all private law relationships regardless of the parties to this relationship or the taking over of derogatory rules by the current Civil Code to be applied only to professionals.

CONCLUSIONS

Considering the relationship between the whole represented by Private Law and the part, which is the Commercial Law, the latter has not

disappeared, as it has been naturally absorbed by Private Law by codifying this matter in the current Civil Code.

The current Civil Code is rather a code that has absorbed Commercial Law, because the rules of commercial matter, of professionals in general, are taken over and extended to all private law relations.

At this time, the current Civil Code is the common law for all branches of private law, including for Commercial Law naturally absorbed with the repeal of the Old Commercial Code.

Law no. 71/2011 on the implementation of Law no. 287/2009 on the Civil Code expressly stated that the term "professional" includes the categories of trader, entrepreneur, economic operator, as well as any other persons authorized to carry out economic or professional activities.

Therefore, the liberal professions (lawyers, insolvency practitioners, valuators, executors, etc.) are included in the scope of the concept of professional but without acquiring the capacity of trader, as opposed to the capacity of trader, who will always be defined as a professional.

Also, given the views that alternate between the existence of the professional, the existence of the non-professional, the existence of the commercial but governed by civil law, it can indeed be said that through the adoption of the Civil Code there were practical consequences of the paradigm shift, changes that did not lead to an evolution in the field.

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REVIEW IN ADMINISTRATIVE CONTENTIOUS

Andreea TABACU[1]
Amelia SINGH[2]

Abstract:
The extraordinary right of action of the review, regulated in Law no. 554/2004 followed a sinuous legislative path, but the need to protect and respect the principle of Union law has led to its maintenance in extraordinary remedies. Its legal regime, which is summarized in the special law, will be supplemented by the Code of Civil Procedure of the revision of common law.

Key words: *Review; administrative contentious; law union; legal regime.*

1. PRESENTATION.

The review is the extraordinary way of attack, withdrawal, common and unsupported enforcement, which seeks to change a court decision, in the cases expressly provided by law, either related to the state of facts or data existing at the time of the judgment, or to situations or new circumstances unknown at this time.

The matter of administrative litigation has long been undermined by the rules of the Civil Procedure Code revision as a common law, with which the special rule is supplemented by express reference.

However, the legislator's option to Romania's accession to the European Union was to devote itself to a special case of revision determined by the need to comply with the jurisprudence of the Court of Justice by the domestic courts.

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2. REVIEW IN ADMINISTRATIVE CONTENTS. CROSSING

The Law on Administrative Contentious devoted a special case to the review of the court decision, through the amendments brought by Law no. 262/2007 Article 21 of Law no. 554/2004[1].

It was initially provided that, in addition to the grounds for revision stipulated in the Code of Civil Procedure, it constitutes a case of review and delivery of judgments which remain final and irrevocable in breach of the principle of the primacy of Community law. As a result, if after a final and irrevocable settlement of a solution in administrative litigation it is found that a certain European norm, whether of primary or secondary law but binding, has not been respected, the solution being contrary to the one envisaged, obviously within the scope of European regulations, the review could be required.

Under the procedural aspect, Art. 21 par. (2) sentence II provided that "the request for revision shall be introduced within 15 days of the communication, which shall be, by way of derogation from the rule laid down in Art. 17 par. (3), at the duly motivated request of the interested party, within 15 days of its pronouncement. "

The text was declared unconstitutional by decision no. 1609/9 December 2010[2], in which the Constitutional Court held, for each individual hypothesis, the confused, unclear character of the criticized provision, finding that such provisions are likely to violate free access to justice[3].

After publishing the decision in the Official Journal, the legislator had 45 days to agree on the norm found unconstitutional with the fundamental law, but did not make any mention in this respect, the courts, against the decision of unconstitutionality, considering the review in question is either not susceptible to a term, or susceptible to the term of ordinary law[4].

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[1] Published in Official Journal no. 510 from July 30, 2007.

[2] Published in Official Journal no. 70 from January 27, 2011.

[3] "The principle of free access to justice, provided in art. 21 of the Basic Law implies, inter alia, the adoption by the legislator of clear procedural rules laying d-own precisely the conditions and time limits for the exercise of individual procedural rights, including those relating to appeals against decisions pronounced by the courts ".

[4] C. Ap. Piteşti, s. II civil account. adm. fiscal, dec. no. 857 of April 6, 2012, Ecris 4.0. - "given the exceptional nature of the review request based on Art. 21 of Law 554/2004, it

In the event of a decision of the Luxembourg Court, the calculation of the period from the date of publication of the decision could not be ruled out and, in the absence of such a judgment, from the date on which the party became aware of the judgment under appeal or from the date on which discovered the violation.

In December 2011, through Law no. 299/2011, the legislator completely abrogated art. 21 par. (2) of the Law no. 554/2004, the special case of revision being totally removed from the revision hypotheses, remaining to apply only to the situations covered by the Code of Civil Procedure.

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was considered that the timeframe for exercising it is, as argued above, since the publication of the interpretative decision of the TFEU in the JOUE, considering that only from that moment the party has, objectively, the possibility of knowing the reasons for which the dismissal in the case concerned is in breach of the principle of European law priority "; C. Ap. Piteşti, s. II civil account. adm. fiscal, dec. no. 736 of March 23, 2012, Ecris 4.0. - "Common right for the review request regulated by Art. 21 of Law no. 554/2004 is art. 322 et seq. civil procedural Code, which applies accordingly. In the absence of the legislator's intervention to regulate the review period for the case presented and to respect the principle of legal certainty, the Court considers that the term of revision of the common law is applicable in the case, which is, according to the introductory part of Art. 322 civil procedural Code, one month.

As regards the beginning of that period, it is clear that the legislature regulated this point distinctly for each case of revision without drawing a general rule in that regard which could be applied in addition to or in the absence of a rule of a nature in particular, as is the case here.

Therefore, with regard to a regulatory vacuum, it is necessary to resort to the logical interpretation method based on the analogy argument; this implies the application of a rule of law which is edited for a particular situation by extending it to an expressly unregulated case, considering that the reasons given for adoption of the rule are found in the given case (ubi eadem est ratio, ibi eadem solutio esse debet) "; C. Ap. Piteşti, s. II civil account. adm. fiscal, dec. no. 476 of 24 February 2012, dec. no. 2694 December 2, 2011, Ecris 4.0.

In December 2011, through Law no. 299/2011[1], the legislator completely abrogated art. 21 par. (2) of the Law no. 554/2004, the special case of revision being totally removed from the revision hypotheses, remaining to apply only to the situations covered by the Code of Civil Procedure[2].

The law was declared unconstitutional by decision no. 1039 of 5 December 2012[3] with the consequence, expressly accepted by the Constitutional Court, that the rule abrogated by the text declared unconstitutional continues to produce effects.

It has also been retained by the Court in the recitals of Decision no. 1039/2012 that during the period between the entry into force of Law no. 299/2011 and 25 December 2011 respectively, and the publication in the Official Journal of the decision to declare the unconstitutionality of the repealing rule, "the provisions of art. 21 par. (2) of the Law no. 554/2004[4] were repealed and did not produce legal effects, but after the decision of the Constitutional Court was published in the Official Journal, they are reintroduced into the active fund of the legislation". Corroborating the solution of unconstitutionality of the abrogating text with the previous decision, which found the unconstitutionality of art. 21 par. (2) the second sentence of Law no. 554/2004 and considering the subject of the review from the perspective of judgments that do not evoke the fund, the Constitutional Court concluded that Law no. 299/2011 is unconstitutional

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[1] Law no. 299/2011 for the abrogation of para. (2) of art. 21 of the Administrative Contentious Law no. 554/2004, published in Official Journal no. 916 of December 22, 2011.

[2] C. Ap. Piteşti, s. II civil account. adm. fiscal, dec. no. 432 of February 22, 2012, Ecris 4.0.

[3] Published in Official Journal no. 61 of January 29, 2013 - "The Constitutional Court considers that the regulation of a procedural means allowing the reformation of a final and irrevocable court judgment pronounced by a court in violation of European Union law, as found by the CJEU, is not such as to violate either the right to a fair trial and the principle of legal certainty. A final and irrevocable court decision can not be considered as lawful as long as it is based on a normative act contrary to the provisions of European Union law, and the latter have, by virtue of Art. 148 par. (2) of the Constitution, for priority application to the contrary in the national laws. The Court has held in its case-law that the principle of the stability of legal relations can not involve the promotion of a right by means of unlawfulness. "

[4] *"It is the reason for the revision, which is added to those provided by the Code of Civil Procedure, the pronouncement decisions which have remained final and irrevocable in violation of the principle of the priority of Community law regulated by art. 148 par. (2), corroborated with Art. 20 par. (2) of the Constitution of Romania, republished. "*

in its entirety and that the provisions of art. 21 par. (2) of the Law no. 554/2004 will continue to produce legal effects after publication of the decision in the Official Journal, except for the provisions of the second sentence of the text, declared unconstitutional by the decision no. 1.609 of December 9, 2010. Also, the first sentence of the Law on administrative contentious no. 554/2004 has been found to be unconstitutional in so far as it is interpreted as meaning that the final and irrevocable judgments of the courts of appeal can not be subject to review, in breach of the principle of the primacy of European Union law, when it does not refer to the substance of the case.

In the context, it follows that, although Article 21 (2) of the law, which enshrines the case of revision, was declared unconstitutional and the legislature did not replace these normative provisions, on the contrary, by submitting Article 21 (1) to the remedies provided by the Code of Conduct civil procedure, the special review was admissible in the administrative litigation, according to the text in the form before the repeal.

Things were settled and clarified only by the adoption of Law no.212 / 2018 through which the provision of art. 21 of the Administrative Litigation Law, according to the arguments of the Constitutional Court, thus providing for the legal regime of this extraordinary way of attack in the matter in question. Therefore, a special case for the review of judgments given in administrative litigation was recognized if they were pronounced in breach of the provisions of European law, in which they fall also the case-law of the European Court of Justice in Luxembourg.[1]

3. REVIEW IN ADMINISTRATIVE LITIGATION. OBJECT.

Law no.554 / 2004 deals with final decisions in the field of administrative litigation, which fall within the scope of European law.

Faced with the lack of a distinction in the text, breach of European law can be represented by both non-compliance with provisions of the primary or secondary law and the failure to acknowledge the Court's dismissal in a preliminary procedure in interpreting the supranational

[1] T. Ştefan and B. Andreşan-Grigoriu, *Drept comunitar* (Bucharest: C.H. Beck, 2007), 137.

norm, the judgments of the Luxembourg Court have no effect only for the future, since the interpretation given by the Court is binding on the Member States since the adoption of the interpreted text[1].

In order to comply with the Constitutional Court's decision on court judgments in the matter of administrative litigation that does not evoke the fund, Law no. 212/2018 expressly introduced the provision according to which they are subject to review, and for that reason final decisions that do not refer to the fund.

In its jurisprudence, the Constitutional Court also took into account the necessity of reviewing the constitutionality of the provisions of the Code of Civil Procedure in certain cases or assumptions, even if the judgment does not refer to the fund, by way of derogation from the general rule established in the matter.

The justification of the admissibility of these exceptions to the rule that the subject of the review must be constituted by fund judgments or which evoke the fund is determined by the importance of the situations which arose in connection with the judgment given and which obviously influenced it, to have a fair justice, to respect the rights of the defense, the res judicata, the judgments of a supranational court or the Constitutional Court, and it is not possible for the judgment to produce further effects, and it is necessary to recognize an effective remedy for

[1] C 263/10, Iulian Nisipeanu c. General Directorate of Public Finances Gorj and Others, Judgment of July 7, 2011, par. 32 and 33 - "32. According to settled case-law, the interpretation of a rule of European Union law by the Court of Justice in the exercise of the jurisdiction conferred on it by Article 267 TFEU, clarifies and specifies the meaning and scope of that rule as it should or should have been understood and enforced since its entry into force. It follows that the rule thus interpreted can and must be applied to the legal relationships which arose before the judgment on the request for interpretation, even if the conditions for bringing the dispute concerning the application of that rule to the competent courts are met (see, in particular, the Decision from February 2, 1988, Joined Cases 24/86 Blaizot and Others,p. 379, paragraph 27; the Decision from January 10, 2007, Skov and Bilka, C 402/03, Rep., p. I 199, paragraph 50, and the Decision from January 18, 2007, in Case C 313/05 Rep., Brzeziński, p. I 513, paragraph 55).
33. It is therefore only exceptionally that the Court may, in applying the general principle of legal certainty inherent in the legal order of the European Union, be determined to restrict the possibility of relying on a provision which it interprets. In order to impose such a it is necessary to meet two essential criteria, namely the good faith of those concerned and the risk of serious disturbances (Decision Skov and Bilka, paragraph 51, and Decision from June 3, 2010, Kalinchev, C 2/09, not yet published in the Rep, paragraph 50). Eur lex.

the reconsideration the case, even if the judgment does not evoke the fund.

Thus, in relation to the earlier forms of the code, the arguments put forward in the Constitutional Court's Decision no. 233/2011 on the objection of unconstitutionality of art. 322 point 9 Civil previously procedure Code, supported such a derogation from the rule that the decision to evade the fund and in the decision no. 866/2015 on the exception of the unconstitutionality of the provisions of art. 509 par. (1) point 11 and paragraph (2) of the Code of Civil Procedure, the Constitutional Court has found that the rule is unconstitutional with reference to the reason for the revision provided in paragraph 11, given that review is limited to judgments that resolve or evoke the Fund for reasons related to the necessity of producing the effects of the decisions of the Constitutional Court, respectively the citizens' equality of rights, so that the provisions of art. 509 par. 2 C.pr.civ. compared to those adopted by the Constitutional Court.

All the more, these arguments are required when in discution is the compliance of the supranational European norms.

4. RULES OF PROCEDURE.

In the previous form, the law did not provide for special rules on the time-limit for exercising the appeal, so that the application could be formulated within a common law term of one month.

As regards the moment when it flowed, it was necessary to take into account the principle of security of legal report, as recognized by the Court of Justice of the European Union as part of the European legal order[1].

The Court held that the principle opposes the suspension of the right to a final judgment through the possibility of challenging sine die, by means of extraordinary ways of attack, even in the absence of regulation by the national legislator.

As such, the jurisprudence appealed to the analogy rule by applying the most similar case of revision, which could be the date of publication in the Official Journal of the European Union of the

[1] The case C-381/97, *Belgocodex*, Data Collection 1998, p I-8153, paragraph 26.

Luxembourg Court's ruling on the interpretation of the supranational rule or the date of delivery of the final judgment[1].

Currently, the law provides for a review request to be filed within one month of the date of the final judgment being served, which results in the addressee being aware of a breach of European law within the time-limit laid down by law, which is not verified in all cases.

In practice, the one month term thus established is open to another court (another panel of judges, in the case of absolute incompatibility in Article 41 § 1 C.pr.civ.), the way of revision as an extraordinary way to submit to the discussion the issue of the compliance of the internal norm with supranational norm and the respect of the case law of the Luxembourg Court.

If a supranational court decision had preceded the court of appeal in administrative litigation in that case, the court was obliged to respect it, all the more so if it was relied on.

In this context, a first issue concerns the relationship between the res judicata of the appeal court ruling that analyzes the supranational norm as interpreted by the Luxembourg court and the need to respect the primacy and priority of European law. If the court found that the supranational rule was respected as interpreted by the case law of the CJEU, which the court is considering and mentioning, the review is no longer possible since the legislator does not open the way to redrafting these issues by overriding the authority res judicata, but only to analyse the compliance in the case with the European law[2].

In this respect, the Supreme Court has also ruled in the procedure to rule out issues of law that "the petition for revision is inadmissible, in

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[1] Tr.C. Briciu. *Noul Cod de procedură civilă, comentat şi adnotat,* vol. I, art. 1-526 coordonatori V.M Ciobanu, M. Nicolae, vol. I (Bucharest: Universul Juridic, 2017),1178.

[2] In Case C-213/13, reference for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 11 January 2013, received at the Court on 23 April 2013, in the proceedings between Impresa Pizzarotti & C. SpA v Commune di Bari, Giunta di Bari, Consiglio communale di Bari, it was held in paragraph 59 of the judgment that 'Union law does not require the national court to disregard the application of internal rules of procedure conferring authority res judicata on a court decision, even if it would allow correction of a national situations incompatible with such law (see, to that effect, Case C-126/97, Decision Eco Swiss, EC: C: 1999: 269, points 46 and 47, Decision Kapferer, EU: C: 2006 : 178, points 20 and 21, Decision Fallimento Olimpiclub, EU: C: 2009: 506, points 22 and 23, C-40/08 Decision Asturcom Telecomunicaciones, EU:C:2009:615, points 35 to 37; decision Commission v Slovakia, C-507/08, EU: C: 2010: 802, points 59 and 60).

which, in the absence of any novelty (which could be judgments given by the CJEU or uninvolved Union law provisions in the case or, although not invoked, untreated by the court) seeks to revise a final decision which has already left the question of the application of the priority principle of Union law as it is opposed to the character of the extraordinary review of the withdrawal, not of reform, correlated with the principle of res judicata. "[1]

A second aspect, derived from the first, is the answer to the question of whether, for the admissibility of the review, it is necessary to invoke the supranational norm in question, before the final solution remains. In other words, if there is no breach of the European norm in the litigation, is the review admissible?As to the specific nature of this extraordinary remedy, it emerges that it is incidental to the fact that, after the judgment has been delivered, occured certain new elements which have not been considered by the court or subsequently discovered and have not been analyzed before the court whose decision is being challenged. As such, if the European rule was not invoked in the case in question, the review is admissible, meaning that the person concerned sees this in the extraordinary way of reviewing the appeal, invoking the failure to comply with a decision or case law of the CJEU, and it is irrelevant that in the appeal has been invoked or not. Consequently, there is no consequence of discussing the reason for the review before the appeal or first instance courts, compliance with European law being a new matter deducted from the court of the review court, but it is necessary for the European rule to be applied to the subjective right invoked in court and which demands to be protected.

In this respect, in the same decision no. 45/2016 of the Supreme Court, it was binding that it was not necessary for the party to invoke in violation of any European law in the course of solving the process, having to invoke only the subjective right protected by European law, even though it did not refer to the incompatibility of the internal norm with the supranational norm[2]. The sense is that the reason for the revision

[1] Paragraph 72 of the Decision no. 45 of 12 December 2016 on the interpretation and application of the provisions of Art. 21 par. (2) sentence I of Law no. 554/2004, in order to determine whether the application for review is admissible on the basis of decisions of the CJEU, irrespective of the time at which they are delivered and whether or not the premiss of the pre-existing European law, violated by the judgment revision is required, published in the Official Gazette of Romania, Part I, no. 386 of 23 May 2017

[2] Paragraph 78 of the Decision no. 45/2016

is the legal classification of the facts in the light of the European law in question or its interpretation resulting from a CJEU decision, and not the facts inferred from the judgment, which can not be changed in this special review procedure[1].

A third aspect is that the text can not cover the assumption that the interpretation of the European law is carried out by the CJEU at a later stage in another case and becomes binding on the national courts, on the grounds that the term does not allow the application to be formulated for one month from the date of delivery of the final judgment.

Thus, an essential element of the CJEU's interpretative decisions is that they are subject to the rules interpreted and applied in all situations where European interpreted law is applied, namely legal relationships that were born / modified / deleted prior to the taking of decisions, and which are still final (namely are subject to pendinte litigation). As regards the Court of Justice of the European Communities, the Court has held that only exceptionally, in applying the general principle of legal security, inherent in the legal order of the Union, the possibility of invoking a provision which it has interpreted may be limited, so that what subsequently unrelated to other cases must also be invoked for legal relationships that were previously consumed.

This effect refers in particular to previous legal relationships and for which judicial proceedings have not been completed or have not yet been triggered. It is certain that the rule refers to the status of previous legal reports but for which judicial proceedings have not been excluded, by final judgments, since, in the case of final solutions[2], they can no longer be challenged with a review unless the period prescribed by law, including the principle of security legal relations. In such cases, it is possible to incur State liability to obtain legal protection for rights holders[3].

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[1] Paragraph 79 of the Decision

[2] In Case C-213/13, reference for a preliminary ruling under Article 267 TFEU from the Consiglio di Stato (Italy), made by decision of 11 January 2013, received at the Court on 23 April 2013, in the proceedings between Impresa Pizzarotti & C. SpA v Commune di Bari, Giunta di Bari, Consiglio communale di Bari, it was held in paragraph 60 of the judgment that 'European Union law does not therefore require a judicial organ the obligation that, in order to take account of the interpretation of a relevant provision of that right, adopted by the Court after that judicial organ has delivered the decision which has acquired the authority of res judicata, to revert to that decision in principle.

[3] In Case C-69/14, reference for a preliminary decision under Article 267 TFEU from the Sibiu District Court (Romania), made by decision of 16 January 2014, received at

In the context of the conditions for the exercise of a revision hypothesis in question, it follows that the interpretation of a court after the judgment, becomes binding practice only for the future, although the decisions taken by Luxembourg also arise for the past, as it has solved several times this one[1].

5. CONCLUSIONS

The established review of administrative litigation to which the revision rules of the Civil Procedure Code originally applied, as a common law, has now been subject to a special regulation, although brief, but necessary to ensure the application and respect of the principle of Union law priority.

However, the period of one month from the date of notification of the final administrative contentious review decision, subject to review, does not appear to be effective in ensuring that the aforementioned principle, since a judgment of the Luxembourg Court pronounced after its expiry can no longer be relied upon and the decision before it will be invoked only in accordance with the term.

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the Court on 10 February 2014, in the proceedings between Dragoş Constantin Târşia and the Romanian State, The Community civil service regime for the driving and registration of motor vehicles, it was stated in paragraph 40 that 'in constant case law, inter alia, the fact that an infringement of such rights by European Union law may not, normally, be subject to a remedy, individuals may not be deprived of the possibility of incurring State liability in order to obtain, by that means, legal protection of their rights (see, to that effect, Köbler Decision, C 224 / 01, EU: C: 2003: 513, point 34, and Traghetti del Mediterraneo Decision, C 173/03, EU: C: 2006: 391, point 31). "

[1] Decision of 10 January 2006, Skov and Bilka, C 402/03, EU: C: 2006: 6, point 51, and Decision of 14 April 2015, Manea, C 76/14, EU: C: 2015: 216, point 54.

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COMPLIANCE WITH THE PRINCIPLES OF THE STATE OF LAW IN THE REPUBLIC OF MOLDOVA

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Abstract:

According to the Constitution „The Republic of Moldova is state of law, democratic, in which human dignity, the rights and freedoms,... represent supreme values and shall be guaranteed" (Article 1(3). The achievement of these provisions is put in charge of the system to the authorities of state power, which assumes the government and responsibility for the implementation of the principles of the rule of law.

After 28 years from the date of the declaration of independence, the governing in our country has not yet been able to reach a concept and a unique perception of the basic principles of the rule of law, such as: the observance of the separation of powers, legality, equality before the law, etc.

As a result, there was no continuity of good practice of edifying a State of Law. In addition, frequently changes of the Governments has led to a diverse and confused applicability of these principles, to the detriment of the completion of the fundamental rights of the citizens and democratic government.

In this work, we will analyse the situation in the Republic of Moldova through the prism to the completion of the principles of the rule of law and the extent to which they are guaranteed fundamental rights and freedoms of citizens.

Key words: *State of Law; democracy; legality; principles; the rights; freedoms.*

INTRODUCTION

The concept of the rule of law, which, in fact, is characteristic of capitalism, was also taken over in the Soviet space. Since 1985, the "rule of law" has become a successful slogan for the secretary-general of the

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PCUS, and the last head of state of the USSR, Mikhail Gorbachev. Without referring to the existing doctrine in this area, the USSR leader characterized the rule of law as a stage of advanced development of the Communist state. This led to a confused perception of the essence of the rule of law, which was felt especially after the collapse of the USSR (1991), when the former union republics, including the Republic of Moldova, chose the democratic development path based on the principles the rule of law.

The most important principles of rule of law are: separation of powers, legality and equality before the law. The latter two can only be secured in the presence of an independent and fair justice. Respecting and promoting these principles in the Republic of Moldova has deteriorated considerably in recent years. As a consequence, more often in our country we hear the term "captured state" or "oligarchic state". Thus, in the European Parliament Resolution of 14 November 2018 on the implementation of the EU-Moldova Association Agreement, it was mentioned, among other things, that: "the independence and impartiality of the judiciary are undermined by political leaders in power business interests, so that the Republic of Moldova became a state captured by oligarchic interests with a concentration of political and economic power in the hands of a small group of people exercising influence over Parliament, Government, political parties, public administration, police , the judiciary and the media ".[1]

More serious, however, is that because of the situation created by the ignorance or the failure of the state authorities to respect the principles of the rule of law, the population does not benefit from good governance and an effective assurance of citizens' rights and freedoms.

1. SEPARATION AND COLLABORATION OF POWERS

The principle of separation of powers is one of the basic foundations of the democratic state. Although, over two hundred years have passed since its elaboration and implementation, this principle has remained as important and current as it is today.

[1] European Parliament resolution of 14 November 2018 on the implementation of the EU-Moldova Association Agreement (**2017/2281(INI)**) http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2018-0458+0+DOC+XML+V0//RO

As Montesquieu, one of the founders of the principle of separation of powers, states in three states, there are three distinct powers: the legislative, executive and judicial powers. These three powers must be attributed to separate organisms independent of each other. But any man who has power is inclined to abuse it. Therefore, in order not to abuse power, it is necessary by putting things to stop power.[1]

Drawing on this idea, the Professor Tudor Draganu stated that: "In order for the individual freedoms not to be disgraced, the public power must be divided between several powers so that one power opposes the other and creates, instead of a single force, a balance of forces. By the fact that the power of command in the state is divided between several organs, which have the same interest that their powers are not violated by the other state bodies, strict enforcement of the laws and observance of individual freedoms is ensured. "[2]

In his turn, Prof. Antonie Iorgovan mentioned that "the unity of political power is a reality that cannot be challenged."[3] We fully agree with this view. At the same time, we consider that the principle of the separation of powers, since it refers only to the basic functions of the state, does not affect in any way the unity of the political power. The absolute separation of the three powers is hindered by the provisions of the Constitution, which, in art. 6, consecrates "Separation and Collaboration of Powers"[4] in state. It is through cooperation that the unity of power is strengthened, and, by mutual control between the three powers, their balance is maintained.

In addition, Professor Tudor Draganu mentioned, insofar as the constitution embodies in a more or less expressive form the principle of the separation of powers, and establishes a more or less broad spectrum of brakes and counterweights between the powers of the state, we can

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[1] Montesquieu, *De l'Espritdes lois. Défence de l'Esprit des lois*, Tome Premier, le texte – édition de 1758 livre XI, ch. VI (Paris : Ernest Flammarion Éditeur, 1909), 169-170.

[2] Tudor Draganu, *Introducere în teoria și practica statului de drept* (Cluj-Napoca: 1992), 30

[3] Antonie Iorgovan, *Administrative law*, vol. 1 ("Hercules": 1993), 48

[4] Art. 6 Separation and collaboration of powers*: „In the Republic of Moldova the legislative, executive and judicial power are separated and cooperate in the exercise of their prerogatives, according to the provisions of the Constitution "*, the Constitution of the Republic of Moldova of 29.07.1994, Published: 12.08.1994 in the Official Gazette no. 1, Date of entry into force: 27.08.1994, www.justice.md

detach which is the form of government in the given country: presidential, parliamentary or mixed.[1]

In recent years, public authorities in our country have approached an erroneous, unprecedented interpretation and application of the principle of separation of powers. For example, the practice begun at the end of 2017 when the Parliament suspends the President of the Republic for several hours while the President of Parliament signs in his place the Decree appointing new ministers,[2], continued in 2018 with several similar episodes, although, according to the Constitution, this is an exclusive prerogative of the head of state: "In the event of a government reshuffle or vacancy, the President of the Republic of Moldova revokes and appoints, at the proposal of the Prime Minister , some members of the Government "(para. (6), art. 98).

In our opinion, this unusual practice is a manifest interference of the legislative power in the constitutional attributions of the executive power of the state. Regrettably, the respective approach to the principle of separation of powers was also supported by the Constitutional Court by Decision No. 28 of 17.10.2017 and the four subsequent Opinions. [3] Thus, the Court invoked as a "circumstance justifying the interim of the position of President of the Republic of Moldova ... deliberate refusal ... to appoint the proposed candidate repeated by the Prime Minister ...", and he described this as "temporary impossibility of exercise his / her attribution in question "(Article 91 of the Constitution).

In fact, the President has made an assumed decision to repeatedly refuse to appoint the same person for the same portfolio, repeatedly submitted by the Government. If that decision did not agree with the Government, this does not mean that the President may be temporarily unable to exercise a single mandate while being replaced by the President of Parliament only on this matter. At the same time, the state of impossibility does not affect the other duties of the President of the Republic. And, after the signing of the Decree of the refused minister, the

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[1] Draganu, *Introducere..*, 32-35

[2] Maria Orlov and Gabriela Condurache, *Moldavie 2016 et 2017, Moldavie 2018,* Revue Est Europa , Chronique politique et constitutionnelle des pays postcommunistes de l'espace balkanique - Année 2017-2018 (dirigée par Odile Perrot) https://www.est-europa.univ-pau.fr/images/archives/enligne/moldavie2018.pdf

[3] Judgement of the Constitutional Court, no. 28 of 17.10.2017; Opinion No 2 of 20.10.2017; Opinion No.1 of 02.01.2018; Opinion No 2 of 05.01.2018; Opinion No.4 of 24.09.2018, http://www.constcourt.md

state of impossibility, including temporary, is consumed. Such an interpretation of the principle of separation of powers in the state leads to an erroneous application of the provisions of art. 91 of the Constitution,[1] according to which the interim of the position of President of the Republic may intervene if he is: "temporarily incapable of performing his duties". Therefore, the impossibility refers to all attributions and not only to one taken separately.

In the rule of law, all public authorities, including the head of state, are obliged to exercise the attributions they are entrusted with, because failure to do so causes difficulties in the functioning of the system of authorities exercising state power. Failure to fulfil constitutional powers by the head of state may be considered a violation of the Constitution. In this situation, Parliament initiates the constitutional procedure of political responsibility of the head of state (impeachment) by suspending and subsequently deleting it by a referendum.[2] Although such a procedure is enshrined in the Constitution of the Republic of Moldova, Parliament has elected to replace the head of state and to take decisions in its place without being held accountable in accordance with the Constitution.

As mentioned above, the principle of separation of powers is based on the separation of the main functions of the state - the legislative, the executive and the judiciary. Its role is to maintain balance and avoid any interference, duplication, confrontation, or substitution of the three powers. In our case, it is not just a mere interference, but a serious violation of the Constitution by both the Parliament and the President of the Republic and the Government. In other words, this is a serious violation of the principles of the rule of law, which can generate a

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[1] Constitution of the Republic of Moldova of 29.07.1994, Published: 12.08.1994 in the Official Gazette Nr. 1 Date of entry into force: 27.08.1994, www.justice.md

[2] Art.89 from Constitution *: "(1) In case of committing serious acts in violation of the Constitution, the President of the Republic of Moldova may be suspended from office by the Parliament, with the vote of two thirds of the deputies.*
(2) The proposal for suspension may be initiated by at least one third of the deputies and shall be brought to the attention of the President of the Republic of Moldova without delay. (3) If the proposal for suspension of office is approved, a referendum shall be held within no more than 30 days for the dismissal of the President. "
Note: the provisions of Article 89 were amended by the Law no. 1115-XIV of 05.07.0, while the President of the Republic was elected by the Parliament, but the respective amendments were declared unconstitutional by HCC7 of 04.03.16, MO59-67 / 18.03 .16 art.10; in force on 04.03.16, so it returned to the original text, as set out above.

political, social and economic crisis and directly affects *citizens' right to good governance.*

2. LEGALITY AND EQUALITY BEFORE THE LAW

Legality and equality before the law are, along with the separation of powers, fundamental and indispensable principles of the rule of law. Equality before the law is enshrined in the Constitution,[1] both as a fundamental right of the citizen, and as an obligation (duty) of the state to ensure the realization of this right. As far as *legality* is concerned, this principle is not expressly enshrined in the Constitution of the Republic of Moldova, but can be deduced from many other constitutional provisions, meaning the obligation to comply with legal provisions by all members of society. For these principles to be respected, the state needs some instruments, in particular, a judiciary capable of achieving an independent and fair justice.

Restoring legality when private law enforcement has violated the law is much simpler, and judicial mechanisms exist since ancient times in each country. Much more difficult, however, is restoring legality if state authorities violate prescribed laws or abuse the power entrusted to them by law. In this respect, Prof. Ioan Alexandru mentions that an essential characteristic of the rule of law is the principle of the lawfulness of the activity of the public administration, which, together with the organizational division of the state power into three constituent elements, aims to guarantee the freedom of the citizens to direct intervention state. The state must be a state governed by law and must precisely establish the limits of its powers; it must not act more than its legal competence.[2]

The obligation of the state to ensure the lawfulness of the public administration is imperatively removed from the fundamental right of the citizens, stipulated in art.53 par. (1) of the Constitution: - *The right of the*

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[1] Art.16 *„ Respect for and protection of the person is a primary duty of the state. All citizens of the Republic of Moldova are equal before the law and the public authorities, irrespective of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, wealth or social origin "* Constitution of the Republic of Moldova of 29.07.1994, Published: 12.08.1994 in the Official Gazette Nr. 1 Date of entry into force: 27.08.1994, www.justice.md

[2] Ioan Alexandru, *Drept administrative european*, Second Edition, reviewed and added (Bucharest: Universul Juridic, 2010), 135

person injured by a public authority.[1] The reinstatement of the person injured by a public authority by an unlawful administrative act consists in its cancellation. Thus, the annulment of an unlawful administrative act has a double effect: reinstatement of the injured person and restoration of legality in the administration. The same is true if the person is harmed by a public authority by refusing to resolve an application for a right provided by law. Administrative justice will oblige the public authority to resolve the request so that the injured person can claim his lawfully claimed right and the public authority to exercise in full the duties assigned by law in its competence. Such mechanisms of administrative justice, designed to protect people from the abuse of state authorities, and to ensure legality in the governance process, exist in all democratic states.[2]

The need for specialized administrative justice to ensure the legality of public administration is also generated by the fact that the legal report of administrative law, which has as its object the injury of a person to a public authority through an administrative act, contains some specific features, namely: the individual is not in a position equal to the administration but inferior to it, which requires the restoration of balance by granting the possibility of defence to the individual, ultimately through requests to the courts.[3]

As mentioned above, according to the Constitution, the Republic of Moldova is a state of law in which "human rights and freedoms are supreme values and are guaranteed." In this context, in order to guarantee the right of a person injured by a public authority (Article 53 (1) C), the Law on Administrative Contentious (no. 793/2000)[4]. The law, which has

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[1] *"A person injured in a right by a public authority by an administrative act or through failure to resolve an application within the legal term is entitled to the recognition of the claimed right, the annulment of the act and the repair of the damage"*, art. 53 paragraph (1), the Constitution of the Republic of Moldova, dated 29.07.1994, Published: 12.08.1994, Official Gazette No 1, Date of entry into force: 27.08.1994,www.lex.justice.md/document_rom.php?id=44B9F30E:7AC1773. , viewed 20.04.2019

[2] Maria Ureche, *Autoritățile publice în dreptul statelor europene* (Alba Iulia: Altip, 2011), 85-87

[3] Elena-Mihaela Fodor, *Drept administrativ*, Complete and Revised Edition (Cluj-Napoca: The Blue, Cluj-Napoca, 2017), 323

[4] Law of administrative contentious, no. 793 from 10.02.2000, published: 18.05.2000 in the Official Gazette Nr. 57-58, art. No: 375, Date of entry into force: 18.08.2000, http://lex.justice.md/md/311729/

worked with great difficulty, including because the government has abandoned the establishment of specialized courts for administrative litigation, and the magistrates applied a similar procedure to the civil cases to the abusive treatment of public authorities. All these measures taken by the state power have led to the distortion of the essence of administrative justice, thus preventing the reinstatement of the injured person by a public authority and ensuring the legality of the administration.[1]

Probably, considering that all these obstacles to administrative justice were not enough, the Moldovan legislator definitively dissolved it with the adoption of the Administrative Code in July 2018, whereby Law no. 793/2000 was abrogated.[2]

The abrogation of the Law of Administrative Litigation means for the Republic of Moldova a big step back: strengthening democracy and the rule of law; ensuring human rights and fundamental freedoms; counteracting abuses and excesses of public authorities; ensuring equality of persons before the law and before public authorities, lawfulness in administration, and the right of citizens to good governance.

The Administrative Code, which repeals this law, and which entered into force on 1 April 2019, contains only a section devoted to the administrative litigation, Third Book, entitled Administrative Dispute Settlement Procedure. Compartment, where the most serious procedural errors were enacted, applied to the examination of litigations of administrative litigation until the repeal of Law no.793 / 2000, such as:

- examination of all cases of administrative litigation at first instance by common law courts (including the individual administrative acts of the President of the Republic, the Government, the Ministries);
- the substitution of public authorities by the court, which in some cases will adopt administrative acts in their place;
- the formation of specialized courts of administrative litigation will not be mandatory. Within the Courts of Appeal and the Supreme Court of

[1] Maria Orlov**,** *Curs de contencios administrativ* (Chisinau : „Elena VI" SRL, 2009), 158

[2]According to art. 257 par. (2), on the date of entry into force of the Administrative Code: "The Law on administrative contentious no. 793/2000 ... ", Administrative Code of the Republic of Moldova, no. 116, dated 19.07.2018, Published MO of RM no. 309-320, dated 17.08.2018, no. 466, https://www.monitorul.md/monitor/v-2061-v/

Justice, administrative justice will be carried out by full formations within the Civil Collegium;
- the procedure for examining cases of administrative litigation is fully assimilated to that applied to civil cases by: establishing *Appeal - as a mandatory way of attack, followed by the Appeal; adding the witness institution; of experts; of the intervening interveners; accepting the parties' reconciliation and giving up action; putting the burden of probation on the account of all participants in the process, etc.*

The repeal of the framework law, the substantive law of the administrative litigation, and its replacement with inadequate and incoherent procedural rules will totally compromise the realization of the principle of legality in the administration. In our opinion, witnesses, experts, or addressees are of no relevance to the examination of the action in administrative litigation because the court is seized of the unlawfulness of an administrative act or of the unjustified refusal of the public authority to resolve an application to a right provided by law. Therefore, one piece of evidence is sufficient - the law - which should have been enforced or respected in the present case, and one expert - the judge specializing in the examination of administrative litigation cases. In addition, in the rule of law, it is inadmissible to waive the action, or to reconcile the parties when the person is injured by a public authority, because it would mean reconciliation with the illegality or with the abuse of the public authorities.

From the above mentioned, we can see with certainty that, by adopting the Administrative Code, the legislator pursued only one goal, - to abrogate the Law of Administrative Contentious, thus transforming the principles of legality into administration and equality of law in the simple statements.

CONCLUSIONS

The conclusion that the governing of our country should adopt is that the principles of separation of powers, legality and fair justice are true democratic values, are fundamental and have a special importance in the building of the rule of law, as well as in securing the right of citizens to good governance. Compliance with these principles in the Republic of Moldova faces many difficulties due to the lack of maturity of the political class under government as well as the lack of political will of the

legislator to adopt appropriate laws and to establish effective mechanisms for the implementation of the principles of the rule of law.

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THE FORCED PAYMENT OF BUDGET RELATED DEBTS ACCORDING TO THE REGULATIONS OF THE FISCAL PROCEDURE CODE

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Abstract:

The forced payment of the budgetary claims represents an actual issue of major interest both for the public institutions participating in the process of the budgetary execution, for professionals, as well as for non-professionals who, directly or indirectly, interact with these institutions. Currently, the issue of the forced payment of the budgetary claims is completely under the incidence of the Tax Procedural Code[3], Title 4, Chapter 8-9, Art 220-262. It states a special procedure for the payment, under the competence of the fiscal organs – through the revenue agents, with the exclusion of the competence of the judicial executors, given the interest of the operative collection of these claims, as well as the need to streamline the forced execution of financial claims. In addition to this regulation shall apply the provisions of the Civil Procedure Code[4], Book 5, Art 622-631, as common law in the area of forced executions – to the extent to which do not contradict the special norms of the Tax Procedural Code. We shall analyze the forced execution of the budgetary claims, with special reference over those sourcing from contractual relations and from "special cases", the current study having as object the configuration and particularization of the legal regime of this execution. We shall use as documentation the two normative acts above-mentioned and the jurisprudence in this area.

Key words: *budget related debts; tax related debt; enforceable title; title containing a tax related debt; fiscal executor.*

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[3] Law No 207/2015 on the Tax Procedure Code, published in the Official Gazette, Part 1, No 547/23 July 2015.

[4] Law No 134/2010 on the Civil Procedure Code, published in the Official Gazette, Part 1, No 247/10 April 2015.

INTRODUCTION

The Code of Fiscal Procedure brings to its area of application, through Art 2 Para 2-3 the administration of the budgetary claims – the ones which the law assimilates to tax receivables, conferring additional prerogatives to tax authorities. But, Art 2 Para 4 expressly eliminates from its area of application the management of the budgetary claims resulted from contractual legal relations, for Art 26 Para 3 to state the opposite – bringing them, only under the aspect of the forced execution, in its area of application. In this context, given the provisions of Art 623 of the Code of Civil Procedure, expressly removes from its area of application the forced execution of the budgetary claims, are raised the following questions: what are the budgetary claims and which is their area of application; to what extent the payment of the budgetary claims, especially those from contractual legal relations, fall under the incidence of the Tax Procedural Code; which are the conditions for their enforcement – with regard to the enforceable title? All these questions represent so many aspects that we will focus on our further analysis.

For this, our study shall focus on the interpretation of the following normative acts: Law No 500/2002 on public finances[1]; Law No 273/2006 on local public finances[2]; Law No 69/2010 on fiscal responsibility[3]; Law No 207/2015 on the New Tax Procedural Code; Order of the President of the National Agency for Fiscal Administration no. 3744/2015 determining the special cases of enforcement, and the structures empowered to carry out the precautionary measures and the enforcement proceedings[4] (O.P.N.A.F.A); Law No 134/2010 on the Civil Procedure Code. To the same extent, we have as landmark also the Decision of the High Court of Cassation and Justice No 66/2017 solving certain matters of law[5], especially aiming the provisions of Art 226 Para 3 of the Tax

[1] Published in the Official Gazette, Part 1, No 597/13 August 2002.
[2] Published in the Official Gazette, Part 1, No 618/18 July 2006.
[3] Re-published in the Official Gazette, Part 1, No 330/14 May 2015.
[4] Published in the Official Gazette, Part 1, No 981/30 December 2015, with subsequent modifications.
[5] Published in the Official Gazette, Part 1, No 969/7 December 2017.

Procedure Code, related to Art 2 Para 4 and corroborated with Art 623 of the Civil Procedure Code.

1. THE NOTION OF THE BUDGETARY CLAIM

Legally, the notion of budgetary claim is identified by the Tax Procedural Code – the common law in the area of financial enforcement, Art 1 Pct. 7: "the right to receive any sum due to the general consolidated budget, representing the main budgetary claim and the adjoining budgetary claim". Obviously, we have: *a)* main budgetary claims, seen as "the right to cash in any amount due to the general consolidated budget, other than the adjoining budgetary claims"; *b)* the adjoining budgetary claims, seen as "the right to cash in the interests, penalties or other similar amounts, based on the law, related to certain main budgetary claims".

The budgetary claims represent the value equivalent of the expressed budgetary incomes, originating from taxes, contributions and other payments to the budgets constituting the consolidated general budget, based on legal provisions. Without any doubt, the Tax Procedural Code marks as identical the budgetary incomes ("any amount due" to the budgets) and the budgetary claims due to the general consolidated budget. Synthetically, the budgetary claims represent the right to cash in the incomes ("amounts") due to the general consolidated budget from the person who owes them ("debtor"). Naturally, the following questions emerge: what is the general consolidated budget; which are its incomes; are the budgetary claims and the tax receivables the same thing?

The general consolidated budget has a specific meaning stated by Art 3 Para 2 of the Law No 69/2010[1] on fiscal responsibility, which the High Court of Cassation and Justice took into consideration in the reasoning of its Decision No 66/2017: "the ensemble of the budgets composing the budgetary system, including (…), the state budget, the budget of state social insurances, the budgets of special funds, the general centralized budget of the administrative-territorial units[2], the budget of State Treasury, the budgets of the autonomous public institutions, the

[1] Re-published in the Official Gazette, Part 1, No 330/14 May 2015.

[2] The centralized budget of the administrative-territorial units – the incomes and expenses of the general budgets of the administrative-territorial units, defined by Art 3 Para 1 of the Law No 273/2006.

budgets of the public institutions financed completely or partially from the state budget, from the budget of state social insurances or from the budgets of special funds, and where appropriate, from the budgets of public institutions completely financed from their own revenues, from the budget of the funds from external credits contracted or guaranteed by the state and whose reimbursement, interests and other costs are insured from public funds, from the budget of the non-reimbursable external funds, as well as from other entities of public administration, aggregated, consolidated and adjusted according to the Regulation (EU) No 549/2013 to form a whole".

Which are the incomes of the general budget? The area of the general consolidated budget is circumscribed by all the budgets of the budgetary system – in the meaning of the Law No 500/2002[1] on public finances; practically, it is re-dimensioned through aggregation, consolidation and adjustment of these budgets, given their connections, in order to establish the real dimension[2] of the total incomes and expenses (nationally). However, it is difficult to determine the types of revenue due to each type of budget in the budgetary system, given the diversity of these revenues. For a specific situation, the determination of the quality of the income/budgetary receivable will be based on the special normative act that regulates it, as well as the type of legal relation that generates it.

Are the budgetary claims and the tax receivables the same thing? In accordance with the revenues it expresses, there are different forms of budgetary claims, generated by a variety of sources, without being structured according to these sources.

The budgetary claims have a wide area, being formed both by tax receivables (taxes, contributions), as well as from "other budgetary incomes". Visibly, "other budgetary incomes" gather any amounts/budgetary claims, regardless of their source, other than taxes or custom debts. These "other budgetary revenues" are a mosaic, having different sources among the civil, administrative, criminal legal relations, including contracts, unlike the tax receivables which are exclusively based on legal relations stated by the tax/customs law.

The differentiation of the tax receivables and budgetary claims is stated by the Tax Procedural Code, which defines them separately and

[1] Official Gazette, Part 1, No 597/13 August 2002.
[2] To avoid the duplication of certain revenues/expenses.

differently, dedicating specific provisions. The budgetary incomes having a fiscal nature have the majority within the state budget, the budget of the state social insurances and the budgets of the administrative-territorial units, representing their own revenues, their management being subjected to the Tax Procedural Code.

The interest of labeling certain claims as being budgetary must be seen from the perspective of the possibility of their enforcement according to the Tax Procedural Code. Are of further importance the budgetary claims[1] subjected to forced execution under the provisions of the Tax Procedural Code, other than those of a fiscal nature.

2. THE ENFORCEMENT OF BUDGETARY CLAIMS

2.1. The incidence of the Tax Procedural Code over the enforcement of the budgetary claims

The common law in the area of enforcement is represented by the Civil Procedure Code – Law No 134/2010, which in Art 623 ("Enforcement authority") expressly exempts from enforcement through revenue agents the enforceable titles having as object the revenues due to the general consolidated budget or to the budget of the European Union[2] and to the budget of the European Atomic Energy Community (generically, the budgetary claims). In this context, we need to establish the legal ground for the enforcement of the budgetary claims, as well as its conditions for application.

Excluded from the area of application of Art 623 of the Civil Procedure Code, the enforcement of the budgetary claims falls under the application of the Tax Procedural Code, which represents, according to Art 3 Para 1[3] "the common law procedure for the management of the claims stated by Art 2" – tax receivables and budgetary claims assimilated to tax receivables. But, certain provisions of Art 2, whose

[1] For details: https://www.juridice.ro/520889/jurisprudenta-inedita-citr-20-care-creante-sunt-bugetare.html.

[2] Regarding certain aspects of the European integration, see also: Constanta Matusescu, Claudia Gilia, Cristian Mares and Oana Raluca Glavan, *Dreptul Uniunii Europene si colectivitatile locale* (Bucharest: Universul Juridic, 2013), 203-206.

[3] According to Art 3 Para 2 of the Tax Procedural Code: "Where this Code does not have, the provisions of the Civil Code and the Civil Procedure Code, republished, shall apply to the extent that they may be applicable to relations between public authorities and taxpayers".

generic titles is "Object and area of application of the Tax Procedural Code" are not without any criticism, as we shall present.

First of all, Art 2 Para 1 reveals the applicability of the Tax Procedural Code regarding the administration of the tax receivables owed to the general consolidated budget. According to Art 2 Para 2, to the extent to which "the special law does not state otherwise", are included in the area of application of the Tax Procedural Code also the claims (*budgetary, n.n. – R.P., S.I.*) which, according to the law, are assimilated to the tax receivables. In the meaning of Art 2 Para 3 of the Tax Procedural Code, are assimilated within the category of the tax receivables the customs rights and mining and oil royalties, royalties resulting from concession contracts, lease and other effective land use contracts for agricultural purposes concluded by the State Domestic Agency. The area of the budgetary claims assimilated to tax receivables is wider than the above-mentioned examples, also including other types of claims, "according to the law", namely to the provisions of Art 2 Para 2 Let c) of the Tax Procedural Code.

The provisions of Art 2 refer to the management of claims, as main prerogative of the competent tax authorities, without circumstantiations. In this context, the management should be taken into consideration as according to the Tax Procedural Code, which defines it as following: "(…) any of the activities conducted by the fiscal organs in relation to: a) the fiscal registration of taxpayers and other subjects of the fiscal legal relations; b) declaration, establishment, control and collection of tax receivables; c) solving the contestations against the fiscal administrative acts; d) assistance or guidance of taxpayers, upon request or ex officio; e) the application of sanctions according to the law" (Art 1 Pct. 2). One can deduce from this that the management represents a complex activity, stated with the purpose of settling the tax receivables.

Though it is not expressly stated by the definition, the enforcement is integrated within the activity of collection, defined by Art 152 Para 1 of the Tax Procedural Code as being "the ensemble of the activities having as purpose the settlement of the tax receivables". Moreover, according to Art 22 of the same code, the settlement can be made through: "payment, compensation, enforcement (*s. ns. R.P., S.I.*), exemption, cancelation, prescription or by other means expressly stated by the law". Therefore, the enforcement is, based on its finality, part of

the management of tax receivables, being performed according to specific rules.

Then, as it is obvious from Art 2 of the Tax Procedural Code, there are revenues/budgetary claims unassimilated to tax receivables. Which are these and which is the legal regime of their management, namely of their enforcement? The Tax Procedural Code exempts from its object and area of application, in Art 2 Para 4 "the management of the budgetary claims resulting from legal agreements, except those stated by Art 2 Let b)[1]". Hence, the legislator does not assimilate these claims with the tax receivables.

As it is drafted, the interpretation of Art 2 of the Tax Procedural Code leads to the following conclusion: its provisions state *in expresis verbis* as object of activity and area of application of the Tax Procedural Code *the management of the tax receivables* and of the claims assimilated to tax receivables, owed to the general consolidated budget; are exempted the budgetary claims which are not assimilate to tax receivables, other than the ones mentioned by Art 2 Para 2. We need to mention that the public authorities may conclude both administrative agreements (of public law), as well as private agreements[2], but the legislator does not differentiate between them. In this context, we consider that Art 2 Para 4 aims all of them, except the ones mentioned by Art 2 Para 2 Let b). As example, we invoke: receivables from dividends due to an administrative-territorial unit from a company whose shareholder is; receivables from renting[3] a land private property of an administrative-territorial unit for private parking places.

Thus, how the provisions of Art 2 Para 4 governing the inapplicability of the Tax Procedural Code for the administration of the budgetary claims resulting from legal agreements[4] cope with the provisions of Art 226 Para 3 of the same code, according to which: "The enforcement of budgetary claims resulting from legal agreements shall

[1] The budgetary claims that the legislator expressly assimilated to tax receivables, completely overlapping them, under the aspect of their collection, to the Tax Procedural Code, above-mentioned.

[2] The ones in which the agreements aim the assets from the private patrimony of the state or of the administrative-territorial units.

[3] Art 28 Para 3 of the Law No 273/2006, provisions according to which "the amounts cashed in from the concession or rent of assets enlisted in the public or private area of the administrative-territorial units shall represent incomes for the local budgets".

[4] Except the legal agreements mentioned by Art 2 Para 2 of the Tax Procedural Code

apply based on the judicial decision or other writing which, according to the law, represents an enforceable title"? Practically, after it exempts their administration according to the Tax Procedural Code, it reinserts them in its area, in Art 226 Para 3, but partially – only regarding their enforcement.

The corroboration of Art 2 Para 4 with Art 226 Para 3 of the Tax Procedural Code generates the following conclusion: the provisions of Art 2 Para 4 excludes from the application of the Tax Procedural Code the management of the budgetary claims resulted from legal agreements, this representing the prerogative of the public authorities and institutions owners of these claims; by presenting a certain specificity, their management is placed, naturally, within their competence. As mentioned before, the management of these claims is exempted, in its narrow meaning stated by the legislator, but not the enforcement of these claims, approved by Art 226 Para 3 of the same code, in accordance with Art 623 of the Civil Procedure Code.

Moreover, the placement of Art 226 Para 3 in relation to Art 2 Para 4, provide the first the quality as special norm. Therefore, one can conclude that these two provisions are not contradictory.

Also, one can consider that, according to *lege lata*, the provisions of Art 2 Para 4 are poorly stated – a terminological inconsistency, which the legislator missed, their modification being necessary in order to be in harmony with Art 226 Para 3 and with Art 623 of the Civil Procedure Code. *De lege ferenda*, Art 2 Para 4 could be easily restated as: "Except the operations stated by Art 2 Let b), the current code shall not apply for the management of the budgetary claims resulted from legal agreements, except the operations for their enforcement". We consider that this conclusion, as well as the interpretation provided by the Decision No 66/2017 of the High Court of Cassation and Justice, are in the spirit of Art 13 of the Tax Procedural Code[1].

[1] According to Art 13 of the Tax Procedural Code: "(1) The interpretation of the tax regulations shall obey the will of the legislator as expressed by the law. (2) If the legislator's will is not clearly stated by the law, in its establishment shall be considered the purpose of the normative act as it is mentioned by the public documents accompanying the normative act during its drafting, debate and approval. (3) The provisions of the tax legislation shall be interpreted one through another, each of them receiving the meaning resulted from the ensemble of the law. (4) The provisions of the tax legislation are susceptible of multiple meanings interpreted in the meaning closest to the object and purpose of the law. (5) The provisions of the tax legislation shall be

The High Court of Cassation and Justice (H.C.C.J) stated a different interpretation for these provisions[1]. It has corroborated Art 226 Para 3 of the Tax Procedure Code with Art 623 of the Civil Procedure Code, reaching to the conclusion of the enforcement of the budgetary claims resulted from legal agreements according to the Tax Procedural Code. Since the Civil Procedure Code exempts them from enforcement through revenue agents, they remain, naturally, under the application of the Tax Procedural Code, as stated by Art 226 Para 3. But the H.C.C.J admits the discrepancy between the principle stated by Art 2 and the provisions of Art 226 Para 3 of the Tax Procedural Code, without focusing on the interpretation of the notions of management-collection – enforcement.

Synthetizing, the Decision No 66/2017 of the H.C.C.J has stated in the meaning of the competence of the revenue agents the enforcement of the enforceable titles – legal decisions or other documents issued in relation to the budgetary claims resulted from legal agreements, the enforcement being unitary, according to the Tax Procedural Code, even if the enforceable title is issued according to the common law.

Moreover, the H.C.C.J has stated that Art 226 Para 3 is "indissolubly related to the delimitation of the area of competence of the revenue agents by that of the tax authorities".

We consider that the enforcement of the claims resulted from legal agreements according to the Tax Procedural Code is tributary to an older desiderate – that of insuring the unitary feature of the enforcement for all budgetary claims, by offering this competence to tax authorities.

Special cases of enforcement according to the Tax Procedural Code. Based on the desiderate to insure a unitary feature for the enforcement of budgetary claims, the Tax Procedural Code states provisions also regarding other types of budgetary claims. Specifically, a special category of budgetary claims is being targeted – the ones stated by criminal legal decisions owed to the general consolidated budget, resulted from offences, for whom it dedicates a special section in Chapter

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interpreted in the meaning of its effects, and not in the one in which it could not produce any. (6) If after the application of the rules of interpretation stated by Para 1-5 the legal provisions are still unclear, they shall be interpreted in favor of the taxpayer".

[1] Decision of the High Court of Cassation and Justice No 66/2017 for solving certain matters of law.

12^1 ("Provisions applicable for special cases of enforcement"), Art 266^1-266^5 of the Tax Procedural Code.

In the meaning of the O.P.N.A.F.A No 3744/2015, issued for the application of Art 266^1 of the Tax Procedural Code, the special cases of enforcement subsume the application of the legal provisions in the area of enforcement, generated by:

a) *The definitive legal decisions issued in criminal matters*, ordering the recovery of budgetary claims from debtors natural or legal persons or by any other entities, except the definitive legal decisions issued in criminal matters ordering only the recovery of judicial expenses, which shall be applied by the central tax authorities with competence in the management of budgetary claims;

b) *Documents issued in criminal matters* by the courts or other competent authorities for the fulfilment by tax authorities under the N.A.F.A of precautionary measures or for their removal, where appropriate;

c) *Other enforceable titles* establishing interests, delay penalties, delay increases or other amounts, ordered, but unidentified by definitive judicial decisions issued in criminal matters, including those establishing the legal debt collection fees, establishing the amount representing the price difference and/or the expenses for the legal pursuit of the asset, as well as the decisions stating the solidary responsibility issued in accordance with the law for the purpose of recovering the budgetary claims stated by definitive legal decisions issued in criminal matters.

All these are seen as budgetary claims, but it is their source – the offences – that makes them special, which generated a particularization of the competence of fulfilling the precautionary measures and the performance of their enforcement.

2.2. The conditions for the enforcement of the budgetary claims

The enforcement of the budgetary claims is approached by the legislator as an exceptional measure: it can take place only when the debtor fails to willingly fulfil his obligation at maturity, except the case in which there is a pending request for restitution/reimbursement and the amount of the requested sum is equal or higher than the tax receivable owed by the debtor.

For the incidence of the provisions of the Tax Procedural Code are relevant both the quality as budgetary claim of the amount due to the

general consolidated budget, as well as the existence of an enforceable title based on which the enforcement shall be initiated.

The quality as budgetary claim. The Tax Procedural Code includes in its area of application, under the aspect of enforcement, all budgetary claims, regardless of their type/source, its provisions confirming this. The nature of the amounts to be collected – budgetary or non-budgetary – results from the law. But, in a specific case, the budgetary nature of the claim to retrieve results from the debt security or from other document individualizing the amount to be retrieved, on whose base the enforceable title is being issued.

The claims, other than the budgetary ones, shall be enforced according to the Civil Procedure Code, through the revenue agents[1].

The enforceable title. In order to be enforced, the budgetary claim shall be clear, liquid and exigible. According to Art 226 Para 1 of the Tax Procedural Code: "the enforcement of the tax receivables shall be performed based on an enforceable title issued according to the Tax Procedural Code by the competent tax organ, according to Art 30".

According to Art 226 Para 2 of the Tax Procedural Code: "The enforceable title, issued according to the law by the tax organ stated by Para 1, shall enlist the main and adjoining tax receivables, not paid at maturity, identified and individualized by enforceable titles[2] drafted and communicated according to the law, as well as the budgetary claims individualized by other documents, which, according to the law, are enforceable titles. No enforceable title shall be issued in the absence of a title containing a tax related debt issued and communicated according to the law or of a document which, according to the law replaces an enforceable title".

For the tax receivables, usually the debt security is represented by a notice of assessment or a definitive tax return, according to the conditions stated by the special legal tax norms. The budgetary claims, other than typical fiscal ones, are individualized by "other documents", based on which the tax authority shall issue an enforceable title. As

[1] Regarding the prerogatives of the revenue agents/judicial executors, see Arina Dragodan, "Executorul fiscal în noul Cod de procedură fiscală. Analiză comparativă cu executorul judecătoresc", *Revista de finanțe publice și contabilitate*, 7-8/2016, 17-27.

[2] According to Art 226 Para 4 of the Tax Procedural Code, "The debt security shall become enforceable at the date of its maturity or at the payment deadline stated by the law".

example, we need to mention: the title of electronic debt/offense report, in the case of a civil penalty/fine[1]; the mandatory provision of measures – under G.E.O. No 94/2011 regarding the economic and financial inspection carried out at the economic operators – the hypothesis in which the verified economic operator has to pay a sum of money to the general consolidated budget; the electronic debt security issued/the report/observation note, issued in accordance with G.E.O. No 66/2011 regarding the ascertaining and sanctioning of irregularities occurred in the obtainment and usage of European funds and/or national public funds afferent to these. Obviously, the debt securities are being issued by other entities than the tax authorities, according to their competence, and notified to the tax organs competent for their enforcement.

Based on these administrative financial/tax legal documents – the debt securities, the enforcement organ shall issue an enforceable title, stating the reference elements to which Art 226 Para 2 and 6 coroborated with Art 46 of the Civil Procedure Code refer to.

According to Art 226 Para 3, "the enforcement of the budgetary claims resulting from legal agreements shall be performed based on the judicial decision or other document[2] which, according to the law, represents an enforceable title". According to Art 632 of the Civil Procedure Code, are enforceable titles the judicial decisions, as well as any other decisions or documents which can be enforced (…). Clearly, we are in the presence of an enforceable title – a judicial decision or other debt security – issued according to the common law, their enforcement being applied according to the Tax Procedural Code.

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[1] Art 2 Let c) of the Law No 203/2018 regarding measures to increase the efficiency of the fines collection states the electronic debt security gathering the data from the contravention report. According to Art 14 of the same law, "(1) The electronic debt security shall be issued by the organ to which the inspector is attached to and sent to the organ competent with the collection of tax receivables". The electronic debt security becomes enforceable, according to Art 37 of the G.E.O. No 2/2001 and represents the base for the initiation of the procedures of recovery performed by the competent tax authorities according to the Tax Procedural Code. The means of registering and transmitting within the informatic system of the data necessary for the creation of the electronic debt security is in progress, not being generalized yet. But, according to Art 25 Para 3 of the G.O. No 2/2001, the contravention report represents a debt security and payment notification. According to Art 37, the contravention report not appealed within the term stated by Art 31, as well as the definitive judicial decision which settled the complaint represent an enforceable title, without any other formality.

[2] For example, an agreement qualified as enforceable title based on the law.

If an enforceable title has in its content different obligations, as well as the obligation to pay a certain amount of money as rent and the obligation to evacuate a rented building belonging to an administrative-territorial unit, in order to avoid the separation of the enforcement from its content, we consider necessary the establishment of a unitary enforcement, on the same legal ground – the Tax Procedural Code, all the more so since it is a single legal relationship here of a contractual nature.

The enforcement title, as well as the nature and amount of the debt which is subjected to the enforcement, shall be mentioned by all documents of the enforcement (Art 229 Para 1).

The enforcement starts with the communication of the summons, together with a copy of the enforceable title issued by the tax authority.

According to Art 266[4] of the Tax Procedural Code, for the claims stated by definitive legal decisions issued in criminal matters[1], the measures for enforcement set by this code shall apply, without issuing another enforceable title by the tax authority. For special cases of enforcement, the requirement regarding the summons shall not apply.

2.3. *The competence of enforcement* of the budgetary claims belongs to the tax authorities. The delimitation of the competence for enforcement belonging to tax authorities shall be in accordance with Art 29 ("General competence of the central tax authority"), Art 30 ("Material and territorial competence of the central tax authority"), Art 37 ("General competence of the local tax authority") and Art 38 ("Territorial competence of the local tax authority") of the Tax Procedural Code.

The enforcement of budgetary claims shall be performed by the tax authority – through revenue agents[2], as expressly mentioned by Art 220 Para 4-5 of the Tax Procedural Code. As also mentioned by the H.C.C.J., beside the prerogative of the management of budgetary claims, the legislator has attributed for the tax authorities "a secondary role, here as enforcement authority for budgetary creditors".

We are in the presence of an enforcement in the competence of the tax authorities, without any special investment for them and without the intervention of the courts. The courts have competence to solve the

[1] The hypothesis of the special cases of enforcement.

[2] According to Art 1 Pct. 22 the revenue agent is "the person from the tax authority with attributions in enforcement". His prerogatives are stated by Art 223 of the Tax Procedural Code, but regarding his role, see also Dragodan, *Executorul fiscal*, 17-27.

appeal against enforcement, as stated by Art 260-263 of the Tax Procedural Code or any other litigations, limited by law[1].

For the budgetary claims resulting from offences, established by criminal legal decisions ("Special cases of enforcement"), the competence is attributed according to the O.P.N.A.F.A No 3744/2015, drafted for the application of Art 220 Para 2[1] of the Tax Procedural Code. Within NAFA, at the level of its own apparatus, we have the *General Direction for special cases of enforcements*, comprising in its structure the *Regional Service for special cases of enforcement* – entrusted with the fulfilment of the precautionary measures and the performance of the procedure of enforcement of the above-mentioned special cases, except the communication of the summons and the establishment of bank garnishments, which are conducted by the central tax authorities with competence in budgetary claims.

Which are the entities enjoying the role as revenue agents? Any authority or public institution shall enforce its own budgetary claim through the revenue agents mentioned by Art 220 Para 4-5. They shall communicate their debt securities/enforceable titles to the tax authorities with competence in this area. These authorities do not have their own revenue agents; therefore, all is left for them is to address the enforcement organs for the recovery of the amounts due.

The enforcement is not exempted from expenses – "it is without costs and without negative consequences"[2].

CONCLUSIONS

All budgetary claims, regardless of their nature and source, are, indistinctly, under the aspect of their enforcement, under the incidence of the Tax Procedural Code, insuring a unitary legal ground for this enforcement. To all cases it is relevant the quality as budgetary claim, individualized by the debt security, in the variety of its species, becoming mandatory.

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[1] We are taking into consideration, punctually, the provisions of Art 220 Para 15 which empower the courts to order the joining of the enforcement with the request of the interested party or of any of the revenue agents, for the case in which "upon the same assets of the debtor were initiated enforcements by a judicial executor and an enforcement organ. The enforcement shall be made in accordance with the Tax Procedure Code, by correctly applying Art 654 Para 2-4 of the Civil Procedure Code.

[2] Dragodan, *Executorul fiscal*, 17-27.

The enforcement of budgetary claims, in their integrity, shall be made directly by the tax authorities, as state enforcement organs, through revenue agents, with the competences attributed by the Tax Procedural Code.

The enforcement shall be performed based on the enforceable titles issued by the tax authorities or sent to them for the recovery of the budgetary claims, according to the Tax Procedural Code.

The interest for the enforcement of the budgetary claims according to the Tax Procedural Code resides in the recovery without costs and operatively, the enforcement organ enjoying an "operative independence".

Also, the procedure stated by the Tax Procedural Code prioritizes the tax enforcement in relation to the enforcement generated according to the common law.

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2. Law No 134/2010 on the Civil Procedure Code, published in the Official Gazette, Part 1, No 247/10 April 2015.
3. Order of the President of the National Agency for Fiscal Administration no. 3744/2015 determining the special cases of enforcement, and the structures empowered to carry out the precautionary measures and the enforcement proceedings, published in the Official Gazette, Part 1, No 981/30 December 2015.

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THE TRANSNATIONAL IDEA AND PERCEPTION OF RULE OF LAW

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Abstract:

The rule of law is today one of the most important concept of legal perception inside societies. For any lawyer the dimension of social perception become today more important than ever, because the legal science is not acting in a laboratory. Today the social help become an important weapon in the public law cases and public perception of some legal concepts is important: lawyers are not isolated by society and their cases influence the whole people from big communities. In this new social and legal paradigm, the rule of law concept becomes international and it obliged us to analyse a bit its limits.

Key words: *Rule of law; perception; society; isolation; international; new paradigm.*

INTRODUCTION

The legal science is different today than yesterday, because the main changes brought by technological development create a "new world", where some parts of older ideas and traditions are hit by caducity.

As example, we must examine the situation of pregnancy, who was settled by lawyers between some days (in Romanian law, 180 – 300 days), but the science made possible for a child to appear even before first part of legal term. These changes have consequences in private law, in heritage problems, in filiations area, etc. But we must mention that those changes are not complete in whole world: some states have not enough money to extend medical procedures for the of mother and child conditions and their legal system know less provocation than the

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developed states meet today. Money are followed by new technologies, which are in front of legal changes too; is a human mind chain, where the last position belongs to the law system.

Technologies made legal problems to become transnational, because the same methods are used to solve some problems, meaning the human behaviour must be the same. For same very modern behaviour, the same legal regulations we can say. In such paradigm, modern behaviour means transnational ideas in legal regulating process. Can we consider that transnational ideas being just on private law? Our answer is different; for sure is time to examine the transnational ideas on public law too.

1. Transnational ideas are not something new for humanity; the state borders are a complex concept only since the 19th century. Before the second half of this siècle borders was just limits of political power, but less an administrative line totally controlled.

As result, ideas and people circulation was not difficult and border's cross was almost natural, which was a god opportunity for tolerant rulers to achieve clever or skilled people. For example, the Nantes Edict revocation made in 1685[1] forced a lot of French protestants to leave their country and they gone in Holland and Switzerland (big majority), increasing the economic strength of those states. In the same paradigm we must count the migrations in many parts of Europe, where populations was attracted by some tax privileges to move in another countries (German populations colonised during the Middle Age parts of Romania, Baltic States, etc.).

Those people brought new ideas, new technologies, new concepts of life and new religious practices. Of course, not all new things were well received by the autochthones; some of them reject economic or technologic practices, but in a while the ration won and the changes were made for improvement. We must note that some communities were isolated (at the beginning) and only after a while better relations (mixed families, vocabulary changes) appeared.

We need to note too an important factor of changes: the main direction on idea's transfer (technologies area was much obvious) was from the rich communities to the poorer one. Is a transfer of ideas

[1] https://www.museeprotestant.org/en/parcours/la-revocation-de-ledit-de-nantes-et-ses-consequences/, consulted on 19th of April 2019.

brought by envy, by observation of life level and – of course – an allowed transfer of ideas, because every community tries (instinctively) to influence other social groups. We must underline again that the first transfer belongs to technologies – for hundreds of years, agricultural one were the most important – and only after richness achievements the transfer of social and cultural ideas starts.

Technological transformations from the last century made a human world more connected than ever, with some specific actors on the field on ideas and concept change. Global society of today is full with strong companies who create good practices in many field of one-own administration, showing a coherent framework for states (as macro-level) and persons.

2. No country is an island economically and the way that countries engage with the rest of the world is a key determinant of their development outcomes. The increasing integration of the world – in terms of financial, trade, aid, and other economic flows, as well as health, educational, scientific, and other opportunities – requires an increasingly sophisticated policy capability. So too does the management of the risks associated with increased integration into the global community. The threat posed by pandemics, cyber attacks, financial crises, and climate change and other global developments could derail the best-laid development efforts. Systemic risks have a particularly negative impact on development outcomes, and have negative distributional consequences. The existence of effective policies, or their absence, shapes the harvesting of the upside opportunities and mitigation of the risks arising from globalization[1].

Cross-cultural encounters accelerated by globalization occur everywhere – from New York to villages in Africa – and in various forms: from face-to-face interactions to virtual social networks. Such encounters have become an unavoidable phenomenon, connecting every place, as well as every person, more than ever before. The existence of transnational organizations and corporations is one of the catalysts for human mobility beyond national borders and a driving force for producing such encounters[2].

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[1] Ian Goldin, *The Pursuit of Development. Economic Growth, Social Change and Ideas* (Oxford University Press: 2016), 55.

[2] Yukimi Shimoda, *Transnational Organizations and Cross-Cultural Workplaces* (Palgrave Macmillan: 2017), 3 – 4.

Globalisation represents today a process without end and no one can escape to it. In this case, a lot of commercial institutions, legal practices and good administration examples become not just national, but real global, because a good English language translation helps not to information spreading, but to educated other people too. Controlling globalisation means today not to "control", but to profit more than loosing from its opportunities, becoming famous and a model for other societies/companies/people/ NGOs, etc.

3. Globalisation is something "happening now", meaning is acting everywhere. In the same time, globalisation is not at the same speed in every area; some processes are faster than others and the limits of traditional life are completely changed.

We cannot compare the speed of changes in all human life in one article for a conference, but we note that the rule of law is one of the most important concept today, influenced by the globalisation. In the same time, we must underline that the rule of law benefit much more than any legal concept (from private or public law).

In perhaps its most influential early articulation, drawing on a long tradition of political philosophy and in turn frequently reiterated today, the rule of law appears as a sort of social glue, a connective tissue holding society together. In this picture, a generalised obedience to the law combines with a pervasive legalism in both public and private spheres. The law itself functions in the background, largely internalised and functionally independent of the coercive and administrative power that guarantees its efficacy. Associated with the 'social fabric', this rule of law is *immanent*. It is already present in the everyday interaction of law-abiding citizens. Its reappearance in official and legal processes is the concrete expression of profoundly held principles and habits of thought – but not their source. Legal actors and public officials, in this view, do not arrive at law-sustaining conduct merely by following preassigned rules. In the first instance, they draw on an ingrained, even intuitive, understanding of the proper operation of the polity[1].

The rule of law is a cornerstone of contemporary constitutional democracy as was underscored by its role in cementing the recent transitions from authoritarian or totalitarian regimes to constitutional democracy in Eastern Europe and elsewhere. In the broadest terms, the

[1] Stephen Humphreys, *Theatre of the Rule of Law. Transnational Legal Intervention in Theory and Practice* (Cambridge University Press: 2010), 29.

rule of law requires that the state only subject the citizenry to publicly promulgated laws, that the state's legislative function be separate from the adjudicative function, and that no one within the polity be above the law. The three essential characteristics of modern constitutionalism are limiting the powers of government, adherence to the rule of law, and protection of fundamental rights. In the absence of the rule of law, contemporary constitutional democracy would be impossible[1].

The rule of law provides protection. From the standpoint of investors, entrepreneurs and all economic agents, the rule of law is manifested as an efficient protection of private property rights,1 as well as an efficient control of contract performance (the fulfillment of contractual obligations), and/or efficient contract enforcement, if need be. The rule of law has long been known (centuries, even from Adam Smith) to be a prerequisite for economic efficiency and economic growth. It is precisely the rule of law that enables the employment of selfish human interests and their activities aimed at accomplishing these interests, for the purpose of maximising social welfare. This finding has not been contested for more than two centuries by any serious economist or scholar from another relevant field. The main argument corroborating this thesis was presented at the very beginning of this paper. Bearing in mind that people behave rationally and respond to incentives, a particular action will be taken only if it brings benefits, i.e., people will invest (in the broadest sense of the word) only if they can enjoy the fruits of their investment[2].

4. Why "rule of law" concept spread more than any other legal concepts?

First of all, because its name is clear for everyone and easy to keep in mind, is not necessary to remember complicate Latin expressions or long national language description. For every citizens "rule" means to lead, and "law" means not only a general term, but also something who include in its description a strong part of restriction.

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[1] Michel Rosenfeld, *The rule of law and the legitimacy of constitutional democracy*, at https://pdfs.semanticscholar.org/5051/52a584c8e61e40ba7d958f713efcc9cc04f0.pdf, p. 1, consulted on 24.04.2019.

[2] Boris Begović, Gordana Matković, Boško Mijatović and Danica Popović, *From Poverty to Prosperity: Free Market Based Solutions* (Belgrade, Center for Liberal-Democratic Studies: 2007), 122 – 123.

The second argument is given by the abstract dimension of word "law". It seems not important, but for human beings the rule of government, rule of kings and emperors, rule of parliaments means a lead of other people, with their passions and ambitions. A lot of ambitions creates wars and millions of deaths (20th century showed a perfect example of such bloody relation between politicians and normal people's deaths). In such paradigm, a law is something more abstract – even is created by other humans, too – but by itself a law means a stop against abuse.

Democracy is a complex concept in the modern times and it is very briefly described as a rule of people inside their national state, after a vote who involve all state citizens. But history shows that vote can be manipulated and the result is political power achievement of a dictator. In such case, democracy as definition is not enough, and many top arranged by international organisations or mass-media describe not only the legal process of national elections, but also some other items.

For example, the Democracy Index for 2018[1] – made by the famous magazine The Economist – is based on five categories: electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture. Based on their scores on 60 indicators within these categories, each country is then itself classified as one of four types of regime: full democracy; flawed democracy; hybrid regime; and authoritarian regime[2].

Despite the fact we need simple definition of daily concepts, we are forced to recognise the state governance is not a kids-game and for a better result we need more items to democracy and rule of law description. However, those items appear in adult minds, because the state leading is not for children and not for very old people who lost a part of their mental strength.

Today life complexity force us to search for the best administrators and this operation (searching) becomes much more a mathematic one, analysing professional competence and medical position; despite the beautiful words who "packed" this process of searching, electors are watching these items on every person. On this searching, the candidates attitude to rule of law is very important too.

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[1] https://www.eiu.com/topic/democracy-index, consulted on 26th of April 2019.

[2] Index of Democracy 2018, foreword, https://www.eiu.com/topic/democracy-index, consulted on 26th of April 2019.

So, how people observe the rule of law on politicians? In fact, with a stronger filter, because citizens do not want to let their political lead on thieves. But for a thieves stop we need information, a free press, a decent communication of public administration with citizens and real civil liberties. As we can see, those needs are in fact the same criteria used for Democracy index, which must forced us to think more.

Despite the complexity of legal concepts, the rule of law is clear for everyone: not even the supreme state position should be eluded from law control. Making differences between people and politicians is not a rule of law violation, but a first step to create a kind of totalitarian regime (first, with benefits for politicians, and after a while – just for one party of the system).

Perception of rule of law is clear for everyone, but the tolerance of its content violation is different and depends by specific factors in every country (historic, economic, etc.). However, remaining the most clear concept for citizens – no matter their legal education – and in the same time the most important for a coherent society, the rule of law principle won a transnational significance and almost a transnational explanation.

CONCLUSION

In any pluralist society with diverging conceptions of the good, there may be as wide a lack of consensus concerning what ought to count as a fundamental right, as regarding what would constitute a fair means to stabilize legal expectations. The more disagreement there is on both of those issues, the more existing legal norms are likely to be perceived as a function of politics rather than the institutionalization of the rule of law. More generally, in terms of perception, the rule of law seems to go hand in hand with a relatively high level of integration among diverse perspectives, while the rule of politics seems tied to significant fragmentation within the polity. It is worth noting, however, that the perceptions in question have little to do, strictly speaking, with whether legal outcomes are in fact unpredictable. It may be that in a badly fragmented society, most citizens are alienated from the law but can nonetheless predict legal outcomes or even consider them as inevitable as they are unfair. In contrast, in a polity rapidly moving towards greater integration, it may be that widely supported, constantly evolving

fundamental rights upset expectations but promote greater fairness and legitimacy. In short, if the rule of law depends on fairness, it should be open to a large measure of unpredictability[1].

The rule of law means today an instrument of daily life appreciation; is not something very abstract for citizens and it influence their decision to remain or to leave a country. Today the number of migrants abroad is more than 258 million migrants (2017) – 3,4% world population[2]; there are 4,8 million students (2016) and more than 150 economic migrants (2015). Those people left their country not just because of the economy – *patria ubi bene*, like Latin said – but because the functional society is missing. The best criteria for understanding the limits of politics and bad administration are the rule of law implementation. Its conceptual limits show the real skill of politicians, but also offer a direction for citizens, who really need and try to fight for a better world.

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THE WAY FROM OHRID TO PRESPA

Mihaela STĂNCIULESCU[1]

Abstract:

The Ohrid Framework Agreement, which brought peace in the Republic of Macedonia (the Former Yugoslav Republic of Macedonia[2]), was signed on August 13, 2001. Romania contributed significantly to developing and signing this agreement because our country held the OSCE (Organization for Security and Co-operation in Europe) Chairmanship in 2001. The framework agreement represented the end of the internal conflicts in the Republic of Macedonia and it addresses to respecting and protecting the rights of the ethnic communities in this country, as it is a historical document both for the Republic of Macedonia and for the Western Balkans.

The Prespa Agreement was signed on June 17, 2018 and it establishes the constitutional and official name of the Republic of Macedonia, which is the Republic of North Macedonia. It also includes recognition of the Macedonian language in the United Nations and of the Macedonian citizenship, thus a historical issue regarding the fact that the Macedonians in the Republic of North Macedonia cannot claim their descent from the Antiquity Macedonians was clarified.

Key words: *Ohrid; Prespa; agreement; rights; ethnic communities;Macedonia*

The Ohrid Framework Agreement, which brought peace in the Republic of Macedonia (the Former Yugoslav Republic of Macedonia[3]),

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[2] This is the temporary name which this country was accepted with in the United Nations Organization in 1993. Romania recognized the name of Republic of Macedonia and used it in the relations with Skopje.

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was signed on August 13, 2001. Romania contributed significantly to developing and signing this agreement because our country held the OSCE (Organization for Security and Co-operation in Europe) Chairmanship in 2001. The framework agreement represented the end of the internal conflicts in the Republic of Macedonia and it addresses to respecting and protecting the rights of the ethnic communities in this country, as it is a historical document both for the Republic of Macedonia and for the Western Balkans. It is a model of collaboration between the important actors of the international community– NATO, EU, OSCE – and local political forces with a view to designing a new political perspective for this country. The agreement represents the instrument by means of which the Albanian minority is provided with more political power and its culture is respected, but, on its turn, this minority gave up to the secession intentions and recognized the institutions of the Macedonian state.

The Prespa Agreement was signed on June 17, 2018 and it establishes the constitutional and official name of the Republic of Macedonia, which is the Republic of North Macedonia. It also includes recognition of the Macedonian language in the United Nations and of the Macedonian citizenship, thus a historical issue regarding the fact that the Macedonians in the Republic of North Macedonia cannot claim their descent from the Antiquity Macedonians was clarified. Its ratification by the Parliament of the Hellenic Republic (on January 25, 2019), as well as by the Parliament from Skopje (on January 11, 2019) reflects the engagement of the two countries in the process of peace and reconciliation of bilateral relations, with a view to regional stability, security, welfare, while it significantly contributes to the boosting of the European and Euro-Atlantic perspectives.

The dispute between the two countries has lasted since 1991 and the agreement signed at Prespa, which is situated on the border between these two countries, is meant to provide solutions to the issues that the UN Security Council Resolutions 817 (1993)[1] and 845 (1993)[2] addressed

[1] The UN Security Council Resolution 817, adopted unanimously on April 7, 1993 refers to the application of Macedonia, under the name of the Former Yugoslav Republic of Macedonia, to join the United Nations.

[2] The UN Security Council Resolution 845, adopted on June 18, 1993, refers to the way the disputes between Greece and the Former Yugoslav Republic of Macedonia should be solved.

to, to terminate the Interim Accord of 1995 and to establish a strategic partnership between the parties. Besides, in 2008, the Republic of Macedonia filed a lawsuit against Greece at the International Court of Justice for violation of art. 11 in the Interim Accord of 1995, because at the NATO summit, organized in Bucharest in 2008, Greece opposed to the Republic of Macedonia's accession. Three years later, this court admitted that Greece did not respect this accord and violated it.

The ratification of the Prespa Agreement was achieved during another Romania's mandate, as the Presidency of the Council of the European Union is currently held by Romania (January-June 2019).

Both the Ohrid Agreement and the Prespa Agreement presume the essence of a common project which mainly aims to accessing to European Union and NATO. Moreover, the last phase of the Greek-Macedonian Prespa Agreement ended on February 8, 2019, when the majority of the Greek deputies approved North Macedonia's accessing to NATO, after the ambassadors of the 29 members of the North-Atlantic Alliance signed the accession protocol, an important step towards North Macedonia's becoming the 30th member of the organization until the summit on December 2019.

Ohrid and Prespa alike were motivated by a common project which mainly aims at domestic peace and stability, as well as between states.

The common project is the project which aims to one or more objectives accepted by a group of partners who take part in achieving them, regardless other interests or specific objectives, transcending any differences at the level of their cultures[1].

The roots of the philosophy of the common project can be found in the functionalist theory[2], which developed immediately after the Second World War and benefited from the experiment of creating the European Economic Community (EEC). The main representative of this trend - David Mitrany, an English political thinker with Romanian origins – focused on recommending certain techniques for avoiding wars among the great powers, as his ideal was building a long lasting and functional peace. He asserted that „ *the nowadays problem is not the way*

[1] Mircea Maliţa, *Jocuri pe scena lumii* (Bucharest: C.H. Beck, 2007), 106

[2] The functionalist theory promotes a technocrat vision upon leading a society, while its premises can be found in the principle of subsidiarity (making decisions as close to the citizen as possible). It represented the basis for the European economic integration.

to maintain nations in a state of peace, but the way to determine them to work actively together".[1] The functionalist theory helps to understanding what happens in the distributive conflicts (for example, who controls a territory) which are the most difficult to be controlled. Wars and battles range among the games where one wins, while another loses, but the negotiations and peaceful means are specific to the non-zero-sum games.

The Macedonian Orthodox Christians and the Macedonian Muslims had been *inseparably opposites* in the Republic of North Macedonia, before the Prespa Agreement. If I quoted the Swiss philosopher Jacques Freymond, an expert in the international relations, I should say that Macedonian Orthodox Christians and Macedonian Muslims were opposite, but inseparable, then, when extending the relation between the whole and a part to the possibility of European and Euro-Atlantic integration of the Republic of North Macedonia, although they are different, they coexist and beat simultaneously[2]. Solving the conflict situation in the Republic of Macedonia at the beginning of this century represents an example of the way the precepts of the theory of the international relations found applicability, as well as of the role of foreign policy and diplomacy in contemporary world. As "a relatively young state", the Republic of Macedonia faced many challenges during the process of transition from members of the Former Yugoslav Federation to sovereign states, based on the principles of democracy and market economy.

The Republic of North Macedonia is a state with a particular specific, generated by historical harsh conditions, by distinct cultural and religious patterns and by very complex geopolitical conditions. The nearness with Kosovo province influenced the internal evolutions in Macedonia. A wave of migrants from Kosovo came at the end of the '80s, when, under Milosevic regime, it became almost impossible to live in peace in that autonomous province. Milosevic policies were suggestively claimed by the nationalist fans of the Serbian leader, who

1 Șerban Filip Cioculescu, *Introducere in Teoria Relatiilor Internationale* (Bucharest: Military, 2007), 112

2 Mircea Maliță – Inseparable opposites, (Cadran Politic Journal, archive 2003-2010), http://arhiva.cadranpolitic.ro/view_article.asp?item=2856

talked about him as "the only person who can face – or win – the Albanian problem"[1].

This country stayed in peace during the wars in the region of the Former Yugoslav Federation in the beginning of the '90s, in exchange for a few minor changes regarding the border with Yugoslavia in order to avoid conflict which were accepted. It separated from Yugoslavia peacefully, declaring its independence after a referendum on September 8, 1991.

The end of the process of dissolution of the Yugoslav Federation and the setting of the Republic of Macedonia as an independent and sovereign state brought to light a new characteristic, that was the relation with the largest minority, the Albanians.

Macedonians had already received a good appreciation from the Badinter Commission for implementing the minorities' rights at international standards, especially through the Constitution of 1991. This was probably the only international recognition formulated within European space for the effort to create a multi-cultural society, reflected in the system of political institutions, with a high degree of tolerance for the cultural differences and variety, compared to other countries in Europe.

In the Republic of Macedonia a policy of social and administrative inclusion of the Macedonian Albanians in the public institutions has been gradually developed, which represents a remarkable performance of democracy, compared to other Balkans states.

The policy for Albanian minority inclusion has represented a considerable contribution of Macedonia to the process of stopping the secession ideas, as well as to pacifying the region.

A frequent question about the legal aspect of the independence of Macedonia, stipulated in the Constitution of 1991, is whether in the text of the new Constitution, during the development period, there was any possibility to include also those provisions regarding the minority rights, which were to be stipulated only in the Ohrid Agreement. According to certain Macedonian authorities, the answer is no.

For realizing this *sui-generis* treaty of peace, known in the recent history under the name of the *Ohrid Agreement*– after the name of the

[1] Borjan Tanveski , "The problem between the Macedonian and Albanian ethnic groups in the Republic of Macedonia and its future " in *New Balkan Politics,* Journal of Politics, Vol. 9, Published by „Ian Collins" (Skopke, 2005)

place where it was signed –a part of international community had an important role for sure, and the president Boris Trajkovski also had an important role later on, as he acted both for the foreign factor and for the domestic factor alike. This document was signed by seven persons, among whom two represented Macedonia, and one represented the international community, i.e. the EU and the USA.

In the Macedonian group, one of the parties belonged to the Albanian minority, represented by two Albanian political parties- DPA (Democratic Party of Albanians) and PDP (The Party for Democratic Prosperity). Both of them allied with ONA (Albanian paramilitary troops) and signed the *Prizren Declaration* together with Ali Ahmeti, leader of ONA. In this declaration, the political objectives of the Albanian paramilitary troops can be found and they were legitimated by two important Albanian political parties.[1]

The negotiators on behalf of the EU and of the USA – François Leotard and James Perdew – were also an active o part and they played the role of facilitators of this process.

Two provisions of the document stipulate that Albanian party and Macedonian party should be compelled to stop the military actions, to maintain peace, to promote minorities' rights and democracy. On its turn, the international community is obliged to support the first party in bringing the regions blocked by the crisis back to a normal life and in bringing Macedonia closer to NATO and the EU.

What is the core of this agreement?

Firstly, it is about *enlarging the framework of expressing in the minorities' languages* along the following directions: use of minorities' languages in Parliament, according to the European Charter for Regional Minorities' Languages. The considered principle is that the identity of a member of the minority community entails his right to express himself freely, according to his own feelings, in his native language, both in his public discourse in Parliament, and in the commissions of the Parliament.

Secondly, the agreement stipulates the use of minorities' languages when their representatives addresses to certain national institutions, while the eventual answer provided should also be

[1] For further details regarding the way the participation in the negotiations in Ohrid was designed, see Ljuomir Danailov Frckoski, *Negotiation in identity conflict* (Skopje, Templum Publishing House, 2007)

formulated in the minority's language. The government continued with issuing bilingual passports on application (an aspect which was not included in the Ohrid Agreement) and recognized the University of Tetovo.

The language pillar became a parliamentary procedure of vote ("Badinter majority" – after the name of the one who had the idea), with the intention to protect minority groups' rights regarding the management of the problems they are directly interested in, but, in fact, it was about the cultural rights.

The stipulation referring to recruiting minority members for the public administration system was another pillar of the Agreement.

Thus, for the first time in this country, in the text of the Agreement there can be identified such notions as *"local democracy"* and *"decentralization process"*, which are important because they have never been disputed within a lawsuit[1].

There were no means to enable the anticipation of the crisis in 2001, which the Macedonians consider to be "imported" from Kosovo. It is even considered that, if the reforms provided by this Agreement had been achieved earlier, before 2001, the next step would have probably been the federalization of the Republic and organizing it into cantons.

Currently, the Ohrid Agreement operates by extending the space for expressing the minorities' rights, together with preservation of the unitary feature of the Republic. In this situation, the constitutional model in 1991, that seems to have been sufficient at that moment, proved to be outdated after only a decade.

The Ohrid Agreement *is benefic to Macedonia because it maintains the unity of the state. It is not an agreement for state dissolution, but it represents a treaty of peace and of ending the battle, it is an alliance which supported the unity characteristic of the state and it maintained a legitimate and functional government.*

[1] Ljubomir. D. Frchkoski, „Process of gaining independence for Republic of Macedonia", in *Bulletin from the scientific gathering for the 60 years Yubilee of ASNOM* (15-16 december 2004, Skopje, Macedonia), (Macedonian Academy of Sciences and Arts, Skopje, 2005) 134-137.

THE AGREEMENT WITH GREECE REGARDING THE NAME OF THE REPUBLIC OF NORTH MACEDONIA

International community acted according to the provisions of the Ohrid Agreement through an intense diplomatic activity in Balkans Peninsula, so that in September 2018, the Republic of Macedonia organized the referendum by which the citizens expressed their opinion related to changing the name of the country to *the Republic of North Macedonia.*

The dispute regarding the name started in 1992 when a million of people demonstrated in the street in Salonic, the capital of the Hellenic region Macedonia. Several years later, in 2016 the Greek minister for migration was threatened with being dismissed because he used the name Macedonia during a TV interview, and Yannis Mouzalas had to apologize publicly. In 2017, even the Greek feminine handball team refused to play with the Macedonia's team, under this name, at Skopje, within the European Championship.

In the Republic of Macedonia, the religious propaganda was intense, by expressing various interests within this region and by attempts to establish the Greek, Bulgarian or Serbian origin of the Macedonian people. The Orthodox Church played a main role in the efforts of recognizing the Macedonian nation, so this institution fought in order for the Macedonian language to be used for the religious service and for the strengthening of the Macedonian nation. However, the Macedonian state created after the second Macedonian war represents the real support both for people and for nation. Once it was established, education in Macedonian language was introduced. Before the Second World War, priests, teachers or clerks were not Macedonians, but Serbians, due to the assimilation of the Macedonians.

After 1990, through declaring Macedonia's independence, the situation is clarified and solved in this respect. Still, in this former Yugoslav area, several "historical objections" persisted, i.e. Serbia does not recognize the Macedonian Church, Bulgaria does not recognize Macedonian language and nation, while Greece did not recognize the name of the Macedonian state. Albanians do not cause problems, as they recognize both the language and the state with its name.

Taking into account that Macedonia is at the beginning of the negotiation process for accession to the European Union, Bulgaria can

cause difficulties, by its expressed position, as the Bulgarian declare that if Macedonia joins the European Union, they will observe the language will be spoken and whether the Macedonian nation will remain. As far as the Church is concerned, the solution of the problem regards the Serbian Orthodox Church and the Macedonian Orthodox Church.

The geopolitical circumstances in the Western Balkans influences also Macedonia. The best solution is integration in NATO and the EU, which imposes and supposes good relations with the neighbors of each member state.

The dissensions between Greece and Macedonia lasted for 27 years, because the Greek state opposed to using the name of Macedonia without a distinctive determination that can delimitate it, not to create territorial confusions, as the Antique Macedonia has a historical relevant impact for the contemporary Greeks. The blocking imposed by Greece against adopting the name Macedonia affected the process of this country's accession to NATO and the European Union. The question at the referendum was formulated this way: *Do you agree with accessing the EU and NATO by accepting the agreement between the Republic of Macedonia and Greece?*

In 2018, Greece and Macedonia reached a historical agreement which is meant to solve the old dispute regarding the name of the former Yugoslav republic. According to this agreement, Macedonia will have the official name of *Severna Makedonija* (North Macedonia). The official language will be Macedonian and the citizens will be recognized Macedonians. The new name will be used both at international level and at bilateral level, so that even the countries that recognized the name Macedonia will have to adopt the new name of North Macedonia.

The agreement was approved by referendum in Macedonia and by the parliaments of the two countries. Prime Minister Alexis Tsipras declared that "the agreement will be submitted to vote in the Greek Parliament only if Macedonia will respect the engagement". The dispute between the two countries regarding the name *Macedonia* started in 1991 when the former Yugoslav republic declared its independence under the name of the Republic of Macedonia. Athens a claimed that a country cannot use this name, because a region in the Northern Greece has already had the same name.

In 1993, because of this dispute, the former Yugoslav republic accessed the UN with the temporary name of Former Yugoslav Republic

of Macedonia abbreviated FYROM. The dispute affected the procedures for Macedonia's accession to the EU and NATO. The effect of the Agreement can be foreseen due to the way the question that the participants in the referendum had to answer to was formulated: *Do you agree with accessing the EU and NATO by accepting the agreement between the Republic of Macedonia and Greece?*

The referendum was validated by the Parliaments of the two countries which voted for this change and it will be followed by constitutional changes.

This time again, the Prespa Agreement, similarly to the Ohrid agreement, has been intensely negotiated, involving directly the High Representative of the European Union for Foreign Affairs and Security (Federica Mogherini), as well as the Special Representative of the UN (Matthew Nimetz), the latter being involved from the very beginning, since 1994. The diplomatic circumstances proved to be favorable to developing an agreement with benefits during a period marked by the revival of nationalism. The internal nationalist groups in both countries, the political forces from the opposition that supported the censure motions did not manage to surpass the determination and the consistency through which two political leaders –Macedonian Prime Minister, Zoran Zaev and the Greek Prime Minister, Alexis Tsipras – managed to sign an important page in the contemporary history of Western Balkans. In February 2019 the two states sent the General Secretary of the UN an informative letter regarding the date when the Prespa Agreement came in force, as well as verbal notes for the member states of the UN and for other international bodies.

The Prespa Agreement is the viable model by which the disputes/conflicts can be solved through a holistic approach and valuing the potential long term benefits. One of the articles stipulates: *the enhancement of cooperation between states and societies is necessary more than anytime, especially in the domain of social activities, technologies and culture.* It is essential that the real priorities of a people should be identified in the ethnic and nationalist dispute of identity, so the Prespa Agreement is a practical example in this respect, a model of diplomatic creativity and political will. Once again, Romania has the opportunity to validate this bridge, as it holds the Presidency of the Council of the European Union.

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EXAMINING THE ORIGINALITY OF DISPUTED WORKS

Gheorghe GHEORGHIU[1]

Abstract:

The problem of originality when it comes to intellectual property works is of interest for jurisprudence as well as for the doctrine and it shall be analysed based on reliable criteria that establish the originality of a work challenged in a judicial proceeding.

In this study, I shall present some problems and criteria related to the originality of intellectual property works, that are selected from the European, French and Romanian case law, along with the comments from case law.

Key words: *criteria; constitutionality; originality; novelty; merit; style; destination; burden of proof; the role of judges.*

PRELIMINARY REMARKS

In infringement suits, the defendant often attempts to avoid liability claiming either that the work of the plaintiff lacks originality, being aware the proof of originality is a difficult task, either that his or her acts concern elements that are not covered by authors'rights. In this type of lawsuit, solving the problem of originality is a priority because depending on it, the other claims of the plaintiff (prohibition to use the work, the withdrawal and the destruction of infringing products, information on the distribution network, publication of the judgment, material and moral damages) shall be upheld or dismissed.

The parties in dispute, as well as the judges, have a difficult mission because there is no legal definition of originality, although it is mentioned in the legal, national and conventional texts as a condition for

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the eligibility for protection of intellectual works. Furthermore, there is no legal definition for the intellectual work, aspect that is considered in doctrine[1] as being a legislative technique called "framework concept technique" through which the legislator indicates the concept, the content and delegates to the judge a part of the normative power seeking to fill the content, inspired by legal "milestones" (the non-exaustive list of works) which "allowed the inclusion in copyright of various creations, from pure art to applied art and the absorption of the creations generated by the new techniques".

The recent legal practice of French and Romanian courts gave answers meant to define the principles and the rules for identifying the originality of works protected by copyright, which have been taken and commented by the legal doctrine.

The recent legislation of the European Union and the judgments of the Court of Justice of the European Union had a major contribution to this effort. In a previous study[2], I mention this involvement, necessary to harmonise the national legislation of the European Union countries, but also the divergences existing between the jurisprudence and the doctrine, at a European level. The European Union established, by means of 3 directives, the criterion to be applied in appreciating the originality of a category of works: Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs, provides for in recital 8 that "In respect of the criteria to be applied in determining whether or not a computer program is an original work, no tests as to the qualitative or aesthetic merits of the program should be applied" and according to article 1.3 "A computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection"; Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights, in article 6, entitled "Protection of photographs" provides: "Photographs which are original in the sense that they are the author's own intellectual creation shall be protected in accordance with Article 1. No other criteria shall be applied

[1] Pierre Sirinelli and Alexandra Bensamon, „Chronique de la jurisprudence. Acces à la protection par droit d'auteur", *RIDA* no. 255(2018): 143-205.

[2] Gheorghe Gheorghiu, „The criterium of originality of intellectual property works", *RRDPI* no. 2(2016): 7-19.

to determine their eligibility for protection. Member States may provide for the protection of other photographs". Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases provides in recital 15 that the criteria used to determine whether a database should be protected by copyright should be defined to the fact that the selection or the arrangement of the contents of the database is the author's own intellectual creation, solution also provided for in article 3.1 as following: "In accordance with this Directive, databases which, by reason of the selection or arrangement of their contents, constitute the author's own intellectual creation shall be protected as such by copyright. No other criteria shall be applied to determine their eligibility for that protection".

Through case law, the CJEU has applied these provisions of the directives to all types of creations. Thus, in the Infopaq I case CJEU held that it is protected by copyright an object "which it is original in the sense that it is the author's own intellectual creation"[1] and in the Painer case[2] that a work is original "if it is the author's own intellectual creation reflecting his personality, expressing his free and creative choices in the production of that work" with the mention that "these choices can be made in several ways and at various points in its production (…) even in the preparation phase because the author can choose". However, in other judgment[3], CJEU motivated that meaningful information needed to create a database "cannot as such justify the protection of it by copyright under Directive 96/9, if that labour and that skill do not express any originality in the selection or arrangement of that data", being irrelevant for the purpose of assessing the eligibility of the database for the copyright protection provided for by Directive 96/9 whether or not that selection or arrangement includes 'adding important significance' to that data, because no other criteria than originality is to be applied to determine the eligibility of a database for the copyright protection provided for by the directive.

[1] CJEU, JUDGMENT OF THE COURT (Fourth Chamber), 16 July 2009, case C 5/08.
[2] CJEU, JUDGMENT OF THE COURT (Third Chamber), 1 December 2011, case C 145/10.
[3]CJEU, JUDGMENT OF THE COURT (Third Chamber), 1 March 2012, case C 604 /10.

The above mentioned generalization has led to various interpretations in the doctrine: in some authors' view the theory of the forehead sweat of English origin has triumphed, theory that ensures copyright protection for all elements which involve an effort or an investment or which have not been taken from other work. Other authors have appreciated as being more important the subjective conceptions of the French and German legal systems concerning the stamp of the author's personality.[1]

The French case law, as well as the Romanian case law complies with this second opinion

For example, the Supreme Court of Romania, First Chamber, stated that: "a work is original if it is a creation of the one who claims the authorship and not just a copy of a previous work"[2] and that "originality is a criterion that should be taken into account to establish whether a written work is a eligible for protection, as well as to analyze the legality of reproduction, it being determined by the form of expression of the ideas. The more technical the idea is, the less original the work is and the legal protection granted is weaker"[3]. In a recent judgment[4], The Supreme Court of Romania, First Chamber stated that the originality of a work is given "besides idea and composition (concretization of an idea) by the the intrinsic form of expression of the work (words, figures of speech etc.) from which should result the activity of intellectual creation of the author, the spiritual attributes of the author, the talent, the personality, as it is considered in doctrine and not from the oratorical qualities of the one who reproduces it".

I maintain my comments from the previous study on the importance of the originality criterion for the identification and protection of works by copyright and the distinction from other creations,

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[1] See Pierre Sirinelli, „Chronique de jurisprudence. Accès à la protection par droit d'auteur", *RIDA* no. 244(2015): 153-318; Viorel Roş, *Intellectual property law*, Vol. I.*Copyright, related rights and sui-generis rights*, (Bucharest: C.H. Beck, 2016), 204-2019.

[2] The Supreme Court of Romania, The Civil and Intellectual property Chamber, Judgment no. 6428 – 30 June 2006, in O. Spineanu-Matei, *Intellectual Property (2).Case Law 2006 -2007* (Bucharest: Hamangiu, 2007), 245-250.

[3] The Supreme Court of Romania, The First Chamber, Judgment no. 8 /11 January 2011, published on www.csj.ro.

[4] The Supreme Court of Romania, The First Chamber, Judgment no. 738 /13 March 2018, published on www.csj.ro.

the historical evolution of the originality criterion, the critics regarding objective originality and the impossibility of eliminating entirely from the analysis the following concepts: quality, esthetics, value and destination, these being linked to originality and, as a consequence, I make reference to that study.

Further, I shall present criteria for analysis of originality established by case law and doctrine as well as the burden of proof of originality.

1. CRITERIA FOR ANALYSIS OF ORIGINALITY ESTABLISHED BY LAW, CASE LAW AND DOCTRINE

To establish the originality of a work, in doctrine is often made a two-step analysis: in the first step the creations and elements excluded from the sphere of theconcept of originality are decelerated and removed, according to the law, and in the second step it is analysed if the elements that remained in the work have originality.

1.1. Categories of works excluded from copyright protection by law

These works are laid down by article 9 of the Law no. 8/1996, according to which "The following shall not benefit from the legal protection accorded to copyright: a) the ideas, theories, concepts, scientific discoveries, proceedings, functioning methods or mathematical concepts as such and inventions, contained in a work, whatever the manner of the adoption, writing, explanation or expression thereof; (b) official texts of a political, legislative, administrative or judicial nature, and official translations thereof; (c) official symbols of the State, public authorities and organizations, such as armorial bearings, seals, flags, emblems, shields, badges and medals; (d) means of payment; (e) news and press information; (f) simple facts and data."

The following of these categories present a difficulty of analysis:

a. The ideas contained in a work whatever the manner of the adoption, writing, explanation or expression thereof

It is renown the analysis of the creative process carried out by Henri Desbois[1] who establishes three phases in the creation of a work: the idea phase, during which the author thinks of an idea which is not susceptible of appropriation; the composition phase in which the author builds the plan of the work and the phase of manifestation of the creation in an original expression with the relevant observation that "that the relative originality manifests itself either in the composition and the expression, or only in the expression, or finally, only in the composition".

Copyright does not protect ideas, but only the the form of expression thereof. As it has been argued in doctrine "the ideas, theories, concepts, scientific discoveries whatever the manner of the adoption, writing, explanation or expression thereof shall not benefit from the legal protection accorded to copyright and are not protected considering the adverse consequences such a protection may cause to the development of science and culture (…) There is no personal idea in itself, but only a personal treatment of the ideas, of the themes, of the subject. Only the power to give ideas a concrete, personal form, to communicate them in an original way is reflected in the act of creation which benefits from legal protection. An idea which have been expressed by someone may be resumed, the one who has formulated it the first not having a monopoly on it. (…) As a rule, an idea can be expressed in several ways but the protection of the idea which has been at the base of a work would lead to the formation of a monopoly of use of the author on an entire genre of works and not only a monopoly on a determined work."[2] Only "the idea explained is the expression of the idea and this expression is subject to copyright"[3]

In practice, it is difficult to distinguish the idea which is not protected from its protected expression, namely to establish the fine line between them, depending on which there is an infringement

b. Inventions, contained in a work, whatever the manner of the adoption, writing, explanation or expression thereof (article 9 letter a of Law no. 8-1996)

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[1] H. Desbois, *Le droit d auteur en France,* (Paris: Dalloz, 1978), 32.

[2] Viorel Roş, Dragoş Bogdan and Octavia Spineanu-Matei, *Copyright and related rights. Treaty,* (Bucharest: All Beck, 2005), 186.

[3] Roş, *Intellectual property law,* vol. I., *Copyright, related rights and sui-generis rights,* 185.

Technical creation, characterized by novelty is excluded from copyright protection because it is an objective demarche based on a chronological appreciation whereas originality is a subjective concept and reveals the link which unifies an author and his work.

The French Court of Cassation[1], in a case concerning the possible protection of an architectural leisure complex, held that "demonstrating the absence of anteriority and the novel character of the choices made in designing the building and their amenities is not enough to establish the originality of the elements concerned because of the failure to characterise the arbitrary choices bearing the stamp of their author's personality

The Supreme Court of Romania, First Chamber, in judgment no. 738/13.03.2018 held that "the mere invention of the facts if the form of expression is trivial does not lead to copyright protection".

In doctrine[2], it is relevantly affirmed that "something that is new does not have to be original, on the contrary, every original creation is necessarily new, originality meaning novelty plus a personal approach".

1.2. Elements excluded by the law from the concept of originality

They are laid down in article 7 of the Law no. 8-1996: "The subject matter of copyright shall be original works of intellectual creation in the literary, artistic, or scientific field, regardless of their manner of creation, specific form or mode of expression and independently of their merit and purpose".

The French Court of Cassation[3], held in a case that protection is not acquired by itself but a combination of trivial or functional elements may be protected by copyright if it has an original character and results from a creative effort that reflects the personality of its author.

If a form of expression in a work is original, there is of no relevance if the originality is strong or fairy little.

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[1] Judgment no. 11-24273, 22 January 2014, published in *Revue Internationale du Droit d' Auteur – RIDA* no. 244(2015): 321-326.

[2] Sirinelli, „Chronique de jurisprudence. Accès à la protection par droit d'auteur", 215.

[3] Judgment no. 13-23076, 10 December 2014, published in *Revue Internationale du Droit d'Auteur – RIDA* no. 244(2015): 361-366.

In a case having as subject matter the infringement concerning an advertising image which the plaintiff considered protected by copyright it was held that the image was composed by pre existing photographs borrowed illegally, the defendant had taken and transformed the images, the court of first instance holding and the court of appeal confirming[1] that the work is of "fairy little originality", that copyright infringement cannot be established by "lack of creative originality ... and lack of full reproduction". The ruling is criticizable because it has contradictory grounds: originality exists no matter how weak is the stamp of the author's personality and it can not be measured.

The Supreme Court of Romania, First Chamber[2], held that: "the fact that the level of creative activity to establish the originality of a work is reduced does not mean that the writings or narrations which are trivial or do not have anything out of the ordinary are the subject of copyright protection", being trivial those writings which do not "stand out from the triviality of a story between friends, with the typical exaggeration for this type of moment, of an anecdotal incident (lived by oneself or heard from others)"; the court also held that "the oratorical talent, the witty spirit of the one who relates the so called work does not influence the originality of the work, even if it is an oral work".

1.3. Elements of a work which can bring originality

By removing the elements mentioned in 2.1 -2.2, the following question arises: what is originality?

The notion of originality can be defined as a subjective demarche of the author of a work to make personal choices. It has been said that "a creator is an author because he made personal choices which, escaping from an automatic and constraining logic, are revealing his personality"[3].

In a copyrigt infringement case, a journalist who had published three interviews with French presidents sued the Publisher of Historia Magazine for publishing on a website the interviews, without his consent.

[1] CA Paris Judgment no. 13-15517, 30 April 2014, published in *Revue Internationale du Droit d'Auteur – RIDA* no. 244(2015): 341-345.
[2] The Supreme Court of Romania, Judgment no. 738/13.03.2018.
[3] Sirinelli, „Chronique de jurisprudence. Accès à la protection par droit d'auteur", 217.

TGI Paris[1] admitted the claims on the grounds that was an assault on his economic and moral rights (right to be named). The defendant challenged the judgment, criticising the ruling on the grounds that the interviews in question can constitute protected works only for somebody who led the creative process and left the stamp of his personality without making transcripts. Or, the journalist didn't prove churning out the information provided by the interviewed in order to be eligible for copyright protection and the mere fact of collecting what others have said during appointments and the transcription "in a literary form" does not represent a work of the mind .

The Court of Cassation[2] held that the journalist "Transcribed the interviews in a literary form, in order to give the oral expressions a studied written form, the fruit of an intellectual investment, as a result of which the disputed articles were eligible for the protection conferred by copyrigt"

Originality means making choices but not all the choices are necessarily bearing the stamp of their author's personality, for example, when the choice fits into the trend of fashion, situation in which it is difficult to identify the stamp of its author's personality because anyone who is in such a situation would make the same choice.

To overcome this kind of difficulties, in accordance with the French doctrine, Professor Pierre Sirinelli recommend looking for originality in abstract or fantastical choices[3].

Indeed, for a person to express his creativity in original forms, those forms shall bear the stamp of his personality, what will make them unique.

The stamp of the author's personality shall be identified by answering questions such as: did the author have a certain attitude? did he arouse a certain feeling? did he make constructive choices susceptible to identify him?

[1] Judgment of 11 May 2012.
[2] Judgment no. 11-24145, 30 January 2014, published in *Revue Internationale du Droit d'Auteur – RIDA* no. 244(2015): 327-333.
[3] Sirinelli, „Chronique de jurisprudence. Accès à la protection par droit d'auteur", 227.

2. THE BURDEN OF PROOF OF THE ORIGINALITY OF THE DISPUTED WORKS

There is a rebuttable presumption that originality should not be proved, presumtion which can be inferred in the wording of article 1 paragraph 1 and 2 of the Law no. 8/1996 "(1) The copyright in a literary, artistic or scientific work and in any similar work of intellectual creation shall be recognized and guaranteed as provided in this Law. That right vests in the author and embodies attributes of moral and economic character.

(2) A work of intellectual creation shall be acknowledged and protected, independently of its disclosure to the public, simply by virtue of its creation, even though in an unfinished form."

This rebuttable presumtion of originality obliges the defendant to prove the lack of originality, which is a difficult task taking into account the proving of the non existence of a disputed fact. For the court to rule the work is protected by copyright, when bringing an action having as subject matter the copyright infringement, the plaintiff whose work is contested by the defendant as lacking originality, has to prove the existence of an original form, as well as to identify the subject matter regarding which he has to prove his copyright, for the defendant to defend himself and to be in an open debate.

Accordingly, it is incumbent upon the party bringing an action for copyright infringement to identify the characteristics of the work for which that party is seeking protection, as being the only person able to identify the elements bearing the stamp of their author's personality, but also because the principle of contradictoriality laid down in article 14 of the Code of Civil Procedure provides the defendant shall know precisely the characteristics of the infringement he is sued for.

TGI Paris held that "Whereas the author benefits from protection of a creation of the mind without any formality and by the mere fact of creating an original form, bearing the stamp of its author's personality and not being a trivial resumption of a common fund which cannot be appropriated, the person who claims having copyright (the existence of which is disputed) has to define and explain the originality. The author is the only one in a position to identify the elements bearing the stamp of his personality and justifying his monopoly and the principle of contradictoriality provided for in article 16 of the Procedure Code

involves that the defendant knows exactly the objections on which the infringement is based and to prove the lack of originality.

The French Court of Cassation held that the party that brings a lawsuit having as subject-matter the infringement of copyright is obliged, on the one hand, to identify the characteristics of his work and on the other hand to prove the originality of his creation, motivating as following: "It is constant that it is the obligation on the paintiff's part to adduce evidence the work claimed is an original work of mind, opening the way for the protection by copyright"[1].

The reserved form must be accurately determined for each element, which is difficult because "the originality of certain elements could, by capillarity or contamination, lead to the originality of other forms", or "Shape protection strongly could result in reservation of other non-formal elements or that are not naturally covered by copyright, like the proceedings, a style aimed at a concept"[2].

In accordance with Article 14 of the Code of Civil Procedure, the person who claims protection by copyright has to prove its existence.

CONCLUSIONS

In conclusion, in the absence of the specifications of the originality of a work, the defendant is not in a position to debate the originality of the disputed work and the judge cannot appreciate its relevance. The insufficient description of the elements that characterize the originality represents a violation of the principle of contradictoriality.

"It is not enough for the judges of the facts to employ almost sacramental terms as grounds for a decision (peremptory statements, stock phrases of anabstract kind), but they have to explain why it is original, and in doing so, to respect the contours and the content of the concept of originality"[3]. By invoking an elaborate composition an arrangement "in a carefully prepared setting", the judges lead to a reasoning that reaveals the benefits of an appreciation of merit and aesthetic value, rather than searching for the stamp of the author's personality. Or, such an approach is provided for in article L. 112-1:

[1] Judgment no. 13-22.798, 15 January 2015, published in *Revue Internationale du Droit d'Auteur – RIDA* no. 244(2015): 373-375.
[2] Sirinelli, „Chronique de jurisprudence. Accès à la protection par droit d'auteur", 179.
[3]Sirinelli, „Chronique de jurisprudence. Accès à la protection par droit d'auteur", 201.

"The provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expresion, merit or purpose".

With regard to the burden of proof of originality and the rebuttable presumption of originality, It should be analyzed if the provisions of article 1 paragraphs (1) and (2) and the provisions of article 7 of the Law 8/1996 are constitutional, even if until now there have not been raised any exception of unconstitutionality. In the French case law, there have been raised the exception of unconstitutionality of article L 111-1 paragraphs (1) and (2) of The French Intellectual Property Code which provides for: "The author of a work of the mind shall enjoy in that work, by the mere fact of its creation, an exclusive incorporeal property right enforceable against all persons. This right has intellectual and moral attributes, as well as economic attributes, laid down in Books I and III of this Code" and article L 112-1 accoring to which " The provisions of this Code shall protect the rights of authors in all works of the mind, whatever their kind, form of expresion, merit or purpose".

In an infringement case, the plaintiff who discovered that her work – a tarot guide, had just been made available on a website without her brought proceedings for copyright infringement against the creator, the developer and the publisher of the website involved, as well as against the technical service provider. By the judgment of 13 June 2013, TGI Paris dismissed her claim based on article L 111-1 of The French Intellectual Property Code, on the grounds that it was not specified what constitutes the originality of that work and that the work does not bear the stamp of its author's personality. The ruling was challenged at the Court of Appeal where the plaintiff asked the Court to take note of the constitutionality question related to Article L 111-1 of the Intellectual Property Code for violation of articles 1, 2, 6, 16 and 17 of the Declaration of the Rights of Man and Citizen of 26 1789, Article 5 of the Constitution of France, as well as the principles of the law's comprehensibility and accessibility stated by the Judgment no. 2006-544 DC of 27 July 2006. She motivated that she cannot defend her rights since article L 111-1 of The Intellectual Property Code obliged her to prove the originality of her work, without telling her how to she should anf could fulfil such obligation. In the appellant's view, according to the provisions, all works of the mind must be able to enjoy copyright

protection and a legal construction that requires the work's originality ignores the rights and freedoms guaranteed by the Constitution.

The Court of Paris refused to transfer the question to the Constitutional Council stating that the three conditions required for the transferare not fulfilled, holding that the plaintiff did not formulate any precise question. The Court also held that the provisions of L 111-1: "as interpreted by the Court of Cassation settle different situations differently, as 'works of the mind ' are not all eligible – given that intellectual property is not a general and absolute right – to enjoy the protection without formalities established by those provisions but need, in order to qualify for copyright protection, to be expressed in a form capable of being communicated to the public and to stem from choices expressing the author's personality; they are also justified in the light of the pursued objective of achieving a balance between everyone's right to the protection of their moral and material interests arising from a production within the ambit of cultural creation, on the one hand, and fundamental freedoms, like freedom of expression, freedom of business, commerce and industry or again freedom of movement of goods and services, on the other".

Commenting on this judgment, Professor Pierre Sirinelli observes that "authors' literary and artistic property rights appear to be a sort of compromise between everyone's fundamental right to the protection of their moral and material interests arising from an intelectual creation and the guarantee to other freedoms – expression, business, commerce, industry and free movement – granted to others. In actual fact, this balancing is a contemporary concept (...) However, it will be hard to find it clearly expressed in the founding texts on authors' rights"[1]. Also, the French statutes focused more on proclaiming a natural right or sacred property and the concern for a balance did not appear until later, by the introduction of certain exceptions (quotation, parody, press reviews), but also "in the progressive emergence of conditions to qualify for protection. Not everything could be protected or prohibited"[2]

[1] Sirinelli „Chronique de jurisprudence. Accès à la protection par droit d'auteur", 169-170.
[2] Sirinelli „Chronique de jurisprudence. Accès à la protection par droit d'auteur", 171.

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CONCEPTONS ABOUT THE ENTREPENEUR IN ECONOMIC SCENCE

Cezar VASILESCU[1]

Abstract:

In this article I presented, in chronological order, a series of significant scientific opinions about the entrepreneur. For this reason-the selection of opinions of a scientific nature –didn't present the opinions of businessmen, managers or economic analysts (some interesting ones). I started by presenting the classical concept of the entrepreneur: a skilled dealer (Cantillon), the owner of the surfaces of the field (Ricardo) and the owner of the capital (Say). Neoclassics extended the vision of the entrepreneur: Marshall (responsible person), Schumpeter (innovator) and Knight (risk taking). In recent visions, the entrepreneur is characterized as looking for new opportunities.,Kirzner and Rothbard. Gerber believes that the current entrepreneur is 10% entrepreneur, 20% manager and 70% technician, and Baumaol makes the distinction between the mimetic entrepreneur and the innovative one.

Key words: *landowne; owner of capital; mimetic and innovative entrepreneur*

INTRODUCTION

Even if the man manifested as an entrepreneur in economic plan since ancient times, expert opinions about the significance of entrepreneurial concept crystallized much later with the appearence and development of economic science. In this study we will chronologically present a series of conceptions about the entrepreneur as these have been outlined in economic theory. It should be noted from the beginning that this study is intended to be a small synthesis of the opinions about the entrepreneur devoted to economic science. For methodological reasons, a large and detailed exposure of the opinions of businessmen,

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representatives of the public and private sector, mass media, etc. to the entrepreneurial phenomenon (somewhat interesting) was avoided.

THE ENTREPRENEUR – TRADER AND OWNER OF THE CAPITAL IN THE VIEW OF CLASSICAL ECONOMISTS

The classics of the political economy had different visions about the entrepreneurship. Richard Cantillon in his "Essay on commerce in generally"(1730) used the concept of entrepreneur for the first time.This entrepreneur-trader, according to Cantillon, takes risks because it buy at a certain price and sells at an uncertain price. It can be manifested in the banking, commercial or even in the field of agriculture[1]Jean-Baptiste Say has made significant contributions to entrepreneurial thinking in "A Treatise on Political Economy"(1803). In Say's opinion, the entrepreneur has a central role both in production and distribution of goods-the two distinct fields analyzed as separate books in his famous treaty. To be noted the fact that Say is the only classic economist who uses the concept of entrepreneur. Smith makes a distinction between the capitalist and the workers and in Ricardo's conception, the entrepreneur is mainly the landowner.

THE INNOVATIVE ENTREPRENEUR IN THE NEOCLASSICAL CONCEPTION

Neoclassics extended the previous vision of the entrepreneur. Alfred Marshall in his work "Principles of Economics"(1890) believes that intake entrepreneur to carry out business is the provision product innovation and progress while simultaneously performed. Within the company, entrepreneur owns and exercises control responsibility looking for new ways innovation and reducing losses. Marshall considered that entrepreneurial talent is limited by lack of skills.[2] Contrary to Cantillon's view that the progress of a branch of activity doesn't imply innovation, Joseph Schumpeter highlights for the first time the role of innovation in business transactions. In his opinion, the entrepreneur is an innovative pearson. According to it, clusters of new technologies can lead to the

[1] Sebastian Vaduva, *Entrepreneurship, vol I*. (Bucharest: Economic, 2005), 82;
[2] Alfred Marshall, *Principles of Economics 8th edition* (LondonMac Millan and CO, limited, 1920), 123;

elimination of big monopolies on the market and to economic progress.[1]It emphasizes the role of innovation in addressing entrepreneurial activity without specifying what is and is not innovation. The analysis puts the economy in the context of a temporary general equilibrium and focuses on the market as a dynamic process impelled by "creative destruction." In his vision, the entrepreneur leads to the emergence of new industries, leading to major structural changes in the economy. They become obsolete and can't oppose the innovative process. In Schumpeter's view, the relationship between "creative destruction" - as a market process generating progress and entrepreneurship-is shaped as the main promoter of innovation. As Cantillon's conception of risk assumption, Frank Knight (prof. at the University of Chicago) in his work" Risk, Uncertainty and Profit"(1921) considers that entrepreneur support economic system uncertainty. Knight considers the fact that bussiness decisions are concrete calculation entrepreneur specializing with situations of uncertainty like as technological changes, changes in consumers preferences, changes in the purchasing power, etc. Knight says the entrepreneur can take the risk off as an insurance company but, in return, inevitably bears the uncertainty behind a decision taken. It accepts to do so by relying on the fact that the revenue obtained could exceed the costs involved in this decision[2].

THE CONTEMPORARY ENTREPRENEUR-LOOKING FOR OPPORTUNITIES

In the contemporary situations, at least three opinions are mosthly of beeing highlighted. Israel Kirzener in "Work, Consumption and Entrepreneurship" (1973) assigns to entrepreneur a central position in the market. This is the person who needs to identify and exploit profit opportunities[3]. He argues that the entrepreneur is "responsible" for the steady state of the market as a consequence of the continuous stimulation

[1] Joseph Schumpeter ,*The theory of economic development in the history of economic thought* (London,Mac Millan St.Martins Press, 1968), 84;
[2] Frank Knight,*Risk, Uncertaninty and Profit* New York, Augustus M.Kinley Publishers,1968),112;
[3] Israel Kirzener., *Work,Consumption and Entrepreneurship* (New York: Hardcover 2013), 174;

of entrepreneurial discoveries. In his view, these findings refer to the correction of errors previously committed by market participants, the role of the entrepreneur being to constantly focus attention on the discovery of these errors in order to take advantage of their removal. Kirzner introduces the concept of "pure entrepreneur," which he attributes to the speculator, which always targets arbitrage opportunities. The speculator discovers that he can make profits when buying at a price and sells at a higher price elsewhere or at any other time. This entrepreneur should finance his activity by borrowing money from the capitalist, that is, from the individual who accumulates. The entrepreneur uses the borrowed money, then repays the creditor with interest and keeps for him the "pure entrepreneurial profit" as Kirzner calls it. This reasoning determines the representative of the Austrian School of Economics to mistakenly consider that the entrepreneur shouldn't at the same time be the owner, that he mustn't have the capital goods necessary to carry out the entrepreneurial activity as long as he can borrow them. Although the capitalist has a decisive role in entrepreneurial activity, Kirzner is making a distinction between the two motivating that the capitalist owner doesn't have to be careful about the profit opportunities. Another conclusion reached is that time doesn't matter in pure entrepreneurial activity, dominant in the behavior of the entrepreneur purely arbitration, seen by Kirzner as the defining feature of entrepreneurship in the market economy. Kirzner demonstrates that innovation can contribute to an efficient allocation of resources precisely by removing a previously existing imbalance, an action that generates profit opportunities in the form of exploiting unidentified errors until then. Thus, entrepreneurs have found better ways of allocating resources, achieving a higher level of coordination between existing resources, on the one hand, and technological possibilities and consumer preferences, on the other. Another representative of the Austrian School, Murray Rothbard, corrects the two visions, providing a picture of the entrepreneur drawn from the economic reality dominated by uncertainty and the time factor, incompatible from the outset with the hypothesis of the general economic equilibrium. If we start from the assumption of economic equilibrium or efficient markets, then we must accept the absence of profit opportunities that determine the risk of doing business as "profits and losses disappear and each firm discovers that the sales price is equal to the cost of

production"[1]. So we cannot talk about the entrepreneur in the kirznerian sense, because there is no such imbalance, those "mistakes" perceived as entrepreneurial opportunities. Despite these shortcomings, many authors have been quick to consider Kirzner's theory as defining the image of the current entrepreneur. However, the setting in which the british economist places his entrepreneur lacks an element that Mises regards as essential: uncertainty. Ludwig von Mises believes that the entrepreneur is the one who bears the uncertainty and the market ensures profitability to the extent that the anticipation of future developments is correct, or else he will lose: "as any man acting, the entrepreneur is always a speculator. He is confronted with the uncertain conditions of the future. Its success or failure depends on the correctness of its expectations of uncertain events"[2]. Michael Gerber in his latest book "Myth of the Entrepreneur"(2008) believes that a typical entrepreneur must be manifested in three ways: entrepreneur, manager and tehnician. The entrepreneur must live in the future, finds new opportunities and builds new situations. The manager lives in the past and deals with the coordination situations .The technician currently lives, being interested in how to make abstract ideas, concrete situations. Gerber considers that for a typical entrepreneur the proportion in which we meet the three hypostases as follows: 10 % entrepreneur, 20% manager and 70% tehnician.[3] More recently in Baumol's work "Good capitalism, bad capitalism, the economy of development and prosperity" (2009) distinguish between the *mimetic entrepreneur*(the one that just reproduces an economic situation, after a certain pattern) and *innovative entrepreneurs* (those that come with something new on the market).

The first category is entrepreneurs selling a good like Cantillon's reproductive entrepreneurs (traders, manufactures and marchants of all kinds who buy products basis, give them some form and then sell them).The other category are the entrepreneurs who come with a new good or service on the market. Referring to the two categories, Baumol

[1] Murray Rothabard .*Man, Economy, and State* (Bucharest: Ludwig von Mises Institute, 2004), 63;
[2]Ludwig von Mises *Human Action –A treatise on Economics (*Alabama: Ludwig von Mises Institute, 1998), 86;
[3] Michael Gerber *The Myth of the Entrepreneur* (Bucharest: Amaltea, 2008), 48.

considers that entrepreneurs are the machine that moves the economy[1]. In this sens, prof. Daianu said: entrepreneurs gives the measure current progress in society but not every manager is a visionary able to identify major opportunities.

CONCLUSION

Concepts of theoreticians and economists on the entrepreneur evolved with the progress of economic science. As is normal, science explores the economic phenomenon in close connection with the evolution of the real economy, which is why the visions of entrepreneurship must be related to the phenomena of the time. In the classic and neoclassical vision, agriculture and the incipient industry being the economic branches prevailing in the economy, the entrepreneur is seen as a skilled trader, respectively the owner of the capital. Subsequently, the technological evolution and the extent of the tertiary sector change the vision of entrepreneurship. It is seen as innovative, looking for new opportunities. Moreover, the entrepreneur must have new qualities: a good knowledge of the respective field (technician), leadership and the person open to the new. It is expected that the evolution of knowledge economy and intangible products will imply new qualities of the entrepreneur that economics at will analyze and crystallize in pertinent views.

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THE FUNCTIONING OF THE FAMILY COUNCIL

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Abstract:

In this paper we shall approach the legal issues regarding the functioning of the family council, which are part of the area of regulation of Art 129 of the Civil Code. In a first step, we shall talk about the summoning of this council and after that about its valid meeting. The regulation of this aspects by the legislator it is owed to the fact that any entity with certain attributions must comply with well-established rules allowing it to function in a valid manner.

Key words: *family council; guardianship court; protected person; membership; legislation.*

INTRODUCTION

The family council may be summoned by different categories of legal subjects, the legislator thus insuring that this organism shall be summoned every time necessary for a good functioning of the guardianship. The legal text states that the person summoning the council is the guardian either from his own initiative, or at the request of any of its members, of the guardianship court or even of the minor who is 14 years old.

The members of the council shall be summoned according to our current Civil Code, with at least 10 days before the date of the meeting.

As a rule, the convoked persons are required to appear personally at the place mentioned in the summoning act. Given the fact that numerous factual circumstances may interfere to harden the possibility of the members to attend, the legislator leaves at their disposal the possibility to be represented. The representative of a council member

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shall be a relative or an affiliated of the minor's parents who is not appointed or summoned in his own name as a member of that body.

1. THE SUMMONING OF THE FAMILY COUNCIL

The family council may be summoned by different categories of legal subjects, the legislator thus insuring that this organism shall be summoned every time necessary for a good functioning of the guardianship. The legal text states that the person summoning the council is the guardian either from his own initiative, or at the request of any of its members[1], of the guardianship court or even of the minor who is 14 years old[2].

Even if the one who effectively summons the family council is always the guardian[3], the legislator has been preoccupied with not leaving the meeting of this organ to depend on the first's discretionary will, so that he may be forced to summon the council including by the guardianship court. It is also welcomed the fact that the legislator allows

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[1] According to Dimitrie Alexandresco, the family council can be summoned even by the relatives and affiliates of the protected person, who are not members of this entity. See also Dimitrie Alexandresco, *Explicațiunea teoretică și practică a dreptului civil român în comparațiune cu legile vechi și cu principalele legislațiuni străine, Tomul II*, 2nd Edition (Bucharest: Leon Alcalay Press, 1907), 607. In the doctrine of the time was also raised the question of the right that the prosecutor would have to summon the family council. It has been concluded on this matter that the public ministry has no right to act of its own in this matter, but only the capacity to notify the tribunal of the opportunity to convene a family council. See also Dalloz, Rép Minor-Tutelle, No 205 *apud* Constantin Hamangiu and Nicolae Georgean, *Codul civil adnotat cu textul articolului corespunzător francez, italian și belgian, cu doctrina franceză și română și jurisprudența completă de la 1868-1927, vol V: Doctrina franceză și română (Art. 1-460)* (Bucharest: Alcalay & Co Press, 1928), 546.

[2] It must be noted that the current regulation in this area is similar with the one of the old Civil Code in which Art 356 stated that: "The family council shall gather upon request or at the insistencies of any of the minor's relatives, or of his creditors or of other interested parties, or ex officio by the care of the competent court. Every person is free to notify the court about the circumstances requiring the appointment of a guardian".

[3] Regarding the summoning of the family council by the guardian, the old doctrine stated that he has the right to summon himself a meeting when on the agenda would be the receival of an authorization necessary for the guardian in performing his duties. See also Marcel Planiol and Georges Ripert, *Traité pratique de droit civil français. Les personnes, état et capacité,* 1st Volume, (Paris: LGDJ, 1925), 501-502.

the minor with limited capacity of exercise to decide the summoning of the council, for as long as he knows best the moments in which he needs the support of this organism. Being about the minor with limited capacity of exercise, his discernment cannot be questioned because of the legal presumption of discernment in his favour. The age of 14 is stated by the Romanian Civil Code precisely because it is the moment of acquiring the limited capacity of exercise when the minor can decide on his own patrimony, but the French legislation leaves such request only at the use of the minor aged 16, thus considering that only after this age he is mature enough, with a better shaped discernment.

Nevertheless, we consider the option of the legislator to leave the meetings of an organ with competence in supervising the guardian to be held each time by his intercession as being slightly criticized, as long as the members of the council should have the competence to establish themselves the moment when such meeting is necessary.

It is important to mention that though there is no legal provision in this sense, the old doctrine states that the persons appointed for the summoning of the family council have the competence to do so, without having an obligation[1].

Though the current legislator states the summoning of the family council in the competence of the guardian[2], the Civil Code of 1864 gives a higher importance for the court in this matter, stating that the court is the one ordering in this meaning based upon a reasoned request from the guardian, from a relative or even from a third party[3]. As the main inspiration was the civil regulation from the French legal system, one must notice the fact that within it including the current doctrine refers to the summoning of the family council by placing it in the competence of the tutelage judge.

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[1] Alexandresco, *Explicațiunea teoretică și practică a dreptului civil român în comparațiune cu legile vechi și cu principalele legislațiuni străine*, 608.

[2] Art 138 of the Quebecoise Civil Code states the summoning of the guardianship council at the initiative of the guardian, also mentioning the possibility of the guardian to receive from the court the authorization to act without the participation of the council, when this body cannot meet. Also, it is important to notice that the normative act to which we have referred to states in Art 234 that the meetings of the guardianship council shall take place at least once a year.

[3] Constantin Hamangiu, Ioan Rosetti-Bălănescu and Alexandru Băicoianu, *Tratat de drept civil român*, 1st Volume (Bucharest: All Beck, 2002), 403; Constantin Nacu, *Drept civil român*, 1st Volume (Bucharest: Socec, 1901), 592.

The court has a central role in the procedure of summoning stated by the former regulation, because it could sovereignly appreciate if a meeting of the family council is necessary or not. The only case in which the summoning of the family council was mandatory is that related to the meeting for the removal of the guardian from his position[1].

Under the aspect of the compared law we note that the French legislator stated under restrictive conditions even the possibility for the minor himself to summon the family council, only after the age of 16. Moreover, even in this case the judge could oppose this summoning by a reasoned decision[2]. Other persons who according to the French Code of Civil Procedure could summon the family council are: the guardian, his replacement, a number of two members of this collegial organ or the major person placed under interdiction.

The members of the council shall be summoned according to our current Civil Code, with at least 10 days before the date of the meeting. As exception, if there is an agreement between the summoned persons, the meeting can take place before the initially communicated day. As consequence, the term stated by the law for the valid summoning of the family council is not imperative, all the more the law proves its recommendation feature mentioning that the presence of all council members always covers for a vague summoning.

In the same meaning opines Dimitrie Alexandresco[3], according to who the term for the summoning of the family council shall be established by the court depending on the circumstances, being as short as possible, provided that the length of the term allows the summons to be handed over and, consequently, the presence of those convened in the proceedings of the Council. This opinion is based on Art 361 of the Civil Code promoted by A.I. Cuza, which states that "the term for the meeting shall be decided by the court in the mentioned day, in accordance with the location of the summoned persons' domiciles".

The French Code of Civil Procedure states for the summoning at least 8 days before the date of the meeting. Also, in this case, this term

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[1] Alexandresco, *Explicațiunea teoretică*, 608.

[2] Art 410 of the French Civil Code stated a provision in this meaning, no longer found in the current form of the substantial legislation, being taken by the Code of Civil Procedure. See also, Philippe Malaurie and Laurent Aynés, *Les personnes, les incapacités*, (Paris: LGDJ, 2003), 257; François Terré and Dominique Fenouillet, *Droit civil. Les personnes. La famille. Les incapacités*. 6th Edition (Paris: Dalloz, 1996), 995.

[3] Alexandresco, *Explicațiunea teoretică*, 608.

looks more like a recommendation, and the summoning in a shorter term would not be sanctioned if all the council members shall be present.

The doctrine subsequent to the old regulation[1] refers to the content of the summon, mentioning that its content shall comprise the date and hour for the meeting, as well as the place of meeting, but shall not refer to the purpose of the meeting.

Beside the information brought to the council members in the content of the summoning, also at a doctrinarian level[2] it is mentioned that the meetings of the family council are secret and private, to stop any possible leak of confidential information[3].

As the precedent of a family council meeting in French law, there is a possibility that the guardian judge may order a social inquiry so that all the relevant elements of the case are known by the members of the council when making a decision[4]. Regarding this social inquiry, it must be mentioned that failure to communicate the report to the council members, before the meeting, cannot be considered as a substantial vice generating the nullity of the decision, since the acts of the council are not issued in compliance with the principle of contradiction[5]. The lack of contradiction in the prerogative of deliberation of the family council is explained by the fact that the latter is not a judicial body, but rather one whose mandate tends to issue rules according to which the guardianship is exercised.

Not least we shall refer to the specific means of conducting a summoning, though such specifications lack from the current Civil Code. From our point of view, given the fact that in our civil system, the council members are summoned by the guardian, it is enough their notification according to the provisions of the common law, by any

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[1] Alexandresco, *Explicațiunea teoretică*, 608.

[2] Alexandresco, *Explicațiunea teoretică*, 613; Yvaine Buffelan-Lanore, *Droit civil. Première année*, 12th Edition, (Paris: Armand Colin, 2001), 246.

[3] In the French legal system, the Code of Civil Procedure stated that the council meetings are not public, and the members of this organ have the obligation to keep the secret of the debates towards third parties.

[4] Terré and Fenouillet, *Droit civil. Les personnes. La famille. Les incapacités*, 995; Jurisprudentially, conducting a social inquiry for a deliberation of the family council is reflected in a decision of the French Court of Cassation in 1972. See also Bernard Teyssié, *Droit Civil. Les personnes*, 6th Edition, (Paris: Litec, 2001), 230.

[5] Case première, 26 June 1984, Gaz Pal.1985, 1, 131 note MASSIP *apud* Terré and Fenouillet, *Droit civil. Les personnes. La famille. Les incapacités*, 997, line 6.

means insuring the proof of communication. Nevertheless, we appreciate that it is preferable a notification sent by a bailiff in order to provide it a higher degree of solemnity[1].

2. THE VALID MEETING OF THE FAMILY COUNCIL

2.1. *The personal presence or by representation in the meeting*

As a rule, the convoked persons are required to appear personally at the place mentioned in the summoning act. Given the fact that numerous factual circumstances may interfere to harden the possibility of the members to attend, the legislator leaves at their disposal the possibility to be represented. The representative of a council member shall be a relative or an affiliated of the minor's parents who is not appointed or summoned in his own name as a member of that body.

Art 129 Para 2 of the Civil Code states that spouses can represent each other. A legal provision with almost an identical content was founded not long ago in the French Civil Code[2]. Though currently there is no express statement regarding the representation of a family council member, there is no reason for this legal procedure to still be used, obviously with the condition that the frequency of representation shall not jeopardize the interests of the protected person and the cohesion of the family council as collective organ of guardianship.

First, it must be mentioned that the representation of the family council members has an exceptional feature because the quality as member of this mechanism has a powerful *intuit personae* justification, reason for which the personal presence of that member is important for the good functioning of this deliberative organ[3].

Though, the legislator's option in stating the representation in this area is not novelty, such provisions existing in the civil codes inspirational for the current Romanian Civil Code, as well as the provisions about this legal institution stated by the Civil Code of 1864.

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[1] According to Alexandresco, the summoning of the family council could be made not only by a summon, but also by a notification or a warning sent by the police or an usher of the court. Also, the old doctrine did not exclude the alternative of an oral summoning, case in which for the validity of the deliberation would have been necessary the presence of all council members; see also Alexandresco, *Explicațiunea teoretică*, 608.
[2] Former Art 412 of the French Civil Code.
[3] Alexandresco, *Explicațiunea teoretică*, 666.

Nevertheless, the existence of some express norms allowing the use of such procedure must not be interpreted in the meaning that the representation can be invoked unjustifiably often, so that it becomes abusive. In the same meaning states the doctrine[1] referring to the fact that the mandate of a third party cannot be given a permanent character so that it extends to all deliberations of the council, since such a mandate would turn into one that would contravene the intention of the legislator, by creating the possibility of the council members of evade the entrusted task by placing it on other people less close to the protected.

With regard to the persons who may act as guardians, it seems natural that they also fall within the category of persons who have a family relationship or affinity with the protected person, because only in this way can the aim pursued by the legislator be respected when he stated the possibility of constituting this body within the guardianship. In relation to the possible appointment of a sub-mandatory, the traditional doctrine ruled in the meaning that the mandatory appointed by a member of the family council to take part in the deliberations does not have the right to substitute another person to answer the summoning "since the mandate has a personal nature, *a fortiori* in this matter"[2]. However, the substitution of the principal representative for participation in the deliberation is allowed when the power of attorney expressly provides for such a circumstance, accompanied by the appearance of the person presenting himself or herself in the place of the trustee if he cannot respond to the convocation for objective reasons[3].

Beside the requirement of relationship or affinity, which narrows the possible trustees' list, the doctrine[4] stated that the persons incapable of being part from the family council will not be able to have the quality as trustees.

Though Art 129 of the Civil Code does not refer to the form and length of the mandate, such provisions were found in the former Civil Code[5] which stated that the family council members can be represented by trustees especially appointed by them. In other words, the power of

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[1] Alexandresco, *Explicațiunea teoretică*, 610.
[2] Alexandresco, *Explicațiunea teoretică*, 610-611.
[3] Alexandresco, *Explicațiunea teoretică*, 611, line 1.
[4] Alexandresco, *Explicațiunea teoretică*, 610; Planiol and Ripert, *Traité pratique de droit civil français*, 493.
[5] Art 362 of the old Civil Code.

attorney attributed to the trustee shall be a special one, by empowering the person to attend the deliberation of a certain legal act seen separately or if the deliberation is expanded on aspects to be debated during a certain meeting[1]. It was pointed out that by exception, for spouses such document proving the power of attorney is not necessary, presuming that their family relations are enough to prove that the spouse trustee wed empowered by the other one to take part in his name in the council meeting.

About the form of this special power of attorney, the old doctrine states that it must not be authenticated[2], its ascertainment by a document under private signature being enough for its validity and also to prove it. Given that in the current regulation there is no such provision related to the form of this power of attorney, we express our opinion that in order to protect the consent of the represented person and consequently the interests of the protected one, the power of attorney should be validly enforced in the form of an authentic document.

In order to foster a more in-depth discussion of the issues on the agenda in the meetings of the family council, the Civil Code of 1864 deems necessary to make it clear that a trustee cannot represent more than one member of the council. The purpose of the legislator was definitely the one to encourage the diversity of opinions and the avoidance of stating a certain point of view in the absence of debates[3].

The old doctrine[4], preoccupied with the efficiency of this mandate by relation to the purpose aimed by the family council as organ of the guardianship and the compliance with the specificity of its componence, also states that the trustee cannot substitute another person in his place.

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[1] Alexandresco, *Explicațiunea teoretică*, 610.

[2] Alexandresco, *Explicațiunea teoretică*, 609; Hamangiu, Rosetti-Bălănescu and Băicoianu, *Tratat de drept civil roman*, 403.

[3] The same purpose is aimed by the provision related to the nullity of the compulsory mandate. For the limits of the representation of a council member in the French legislation, see: Planiol and Ripert, *Traité pratique de droit civil français*, 492-493. There is clarification regarding the representation of a single member by each trustee, as well as the fact that the mandate given to another person is not imperative. Moreover, it is mentioned that it shall be deemed as void the deliberation in which a trustee failed to communicate the point of view of the represented council member. See Dalloz, Rép. Suppl., Minor-Tutelle, No. 111 apud Hamangiu and Georgean, *Codul civil adnotat cu textul articolului corespunzător francez, italian și belgian*, 556.

[4] Alexandresco, *Explicațiunea teoretică*, 610.

Though the current Romanian Civil Code does not state a sanction for the unjustified refusal of a member to take part in the meetings of the family council, the Civil Code of 1864 stated such provision which generated a constraint for the aimed persons insuring their consistency in complying with the attributions mentioned by the law. Art 364 of the above-mentioned normative act states that: "Any relative, father of a son/daughter-in-law, or friend who has been summoned and who, without legitimate excuse[1], will not come to the assembly, will be subject to a fine not exceeding 200 lei (old) issued by the court without appeal"[2].

One can mention here the fact that both the doctrine subsequent to the codification of 1864, as well as old French doctrine made numerous references on the conditions in which a family council member shall be fined.

First of all, it was said that when the convocation of a member was made verbally[3], if the latter was absent from the meeting, he could not be fined[4]. The argument in this matter is definitely the lack of solemnity of the summoning, so that the sanctioning of the person refusing to take part is disproportionate.

All the literature of the last century has made a distinction between the situation where a member of the council does not appear at the meeting for which he was summoned and in which he refuses to take

[1] For the legitimate excuses that a council member may invoke for his absence from a council meeting, as mentioned by the legal literature, shall refer to a state of illness or another fortuitous case. As such, in the meaning of this legal provision cannot be considered as excuses the cases protecting the guardian from the performance of his activity, as mentioned by Art 370 of the old Civil Code. Also, Alexandresco states that that the courts may sovereignly decide whether the excuse invoked by a council member is a legitimate one. Obviously, when it was ascertained the illegitimacy of the excuse, that person was fined; Alexandresco, *Explicațiunea teoretică*, 611, line 3.

[2] A similar legal provision sanctioning the unjustified absence from the council meetings was found until recently in the current French Civil Code. On the other hand, at the level of the French Code of Civil Procedure, Art 1234-2 stated that the council members missing from the meetings in the same unjustified manner can be revoked from this guardianship activity.

[3] We can say that in the absence of a contrary provision, moreover than in the absence of any legal provisions regarding the procedure for summoning the family council, cannot be excluded *de plano* the option of an oral summoning, for as long as it is directly addressed to the recipient.

[4] Alexandresco, *Explicațiunea teoretică*, 611.

part in the deliberations or withdraws before the end of the debates. For the latter situation, it has been argued that the participant cannot be fined since the provisions of the article stating this sanction are of limited interpretation, as whenever a rule of incrimination is under debate and involves the imposition of a sanction of any kind[1].

This is precisely why we consider that under the rule of the current Civil Code a fine for the members legally summoned for a meeting who fail to attend it cannot be invoked, as long as there is no legal provision regarding the incidence of any sanction for such behavior[2]. In addition, our civil law sought to resolve this impediment to the functioning of the family council by appointing alternate members within that body.

2.2. The meeting place

The place where the family council meetings are held is particularly important from a procedural point of view, which is why the legal provisions on this issue must be respected in order for the body to be able to validly deliberate. Thus, the meeting place represents a formal aspect which is not left to chance by the legislator, who wishes to give a certain solemnity to these meetings.

Art 129 of the Civil Code states that the meetings of the family council shall be held at the minor's domicile or at the headquarters of the tutelage court, when the summoning was performed at its request.

The first option for the council meetings is the minor's domicile. This choice is justified by the nature of the debates and the turnaround

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[1] François Laurent, *Principes de Droit Civil Français*. 4th Volume, (Brussels: Bruylant-Christophe&C-ie, 1902), No 456 *apud* Hamangiu and Georgean, *Codul civil adnotat cu textul articolului corespunzător francez, italian și belgian*, 557.

[2] The current Civil Code states that the sanction of the civil fine can be applied only for guardian if he adopts one of the behaviors stated by Art 163. First, we are referring to the unjustified refusal to continue the guardianship activity, but also about the case in which the guardian fails to perform the duties entrusted by the legislator in relation to both sides of guardianship, when his deed is a culpable one. It is obvious that this legal norm cannot be extensively interpreted so that it could be applicable for all members of the other organ participating in the guardianship of the family council. Though this behavior is described by Para 2 of the legal norm stating this civil sanction, could also comprise the failure of a council member to attend a meeting upon being summoned according to the law.

that they can take in view of the type of interpersonal relationships existing between its members.

Such regulation was also found in the Civil Code of 1864 which generated a huge controversy starting from the possible change of the domicile of the protected person throughout the tutelage[1]. The solution for this doctrinaire dispute lays in the concordance with the legal text of the Civil Code entered into force in 2011, in the meaning that the meeting place shall be the domicile of the protected person at the moment of that summoning, regardless of the place where the tutelage was opened[2].

On the other hand, it is as natural for a hearing to take place at the seat of the tutelage court when the members of the council are summoned at its initiative.

About the summoning of the family council ex officio by the tutelage court we can state that it is the expression of the competence of supervision over the guardianship granted to it by the legislator. As a result, the meeting will be held at the court's premises, while the activity may take place elsewhere only in exceptional cases expressly provided by law.

Regarding this legal issue a representative of the doctrine subsequent to the old regulation[3] states that the gathering place of the family council is stated by the court either on its premises or at the domicile of one of the members or the guardian. As one may note, the options regarding the meeting place are not that different from the current ones, because the domicile of the minor is the same as that of his guardian.

Up next, we shall refer to a decision of the Iasi Court of Appeal which we deem relevant under the aspect of multiple legal issues in relation to the functioning of the family council as mentioned by the old Civil Code. Though a large part of these legal solutions are not applicable under the empire of the current legislation, we consider that our reference to such decision is justified, on the one hand by the lack of the contemporary jurisprudence in this area, and on the other hand by the multiple aspects related to the analyzed legal institution, which have been subjected to judgment.

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[1] Hamangiu, Rosetti-Bălănescu and Băicoianu, *Tratat de drept civil român*, 401-402.
[2] Alexandresco, *Explicațiunea teoretică*, 606.
[3] Nacu, *Drept civil român*, 592.

Thus, the Iasi Court of Appeal shall rule in a decision dating from 1901in the meaning that "The family council as a deliberate body in a guardianship is not immutable, and its composition may take various modifications as some of its constituents are found to be able to be replaced by others closer to a degree of affinity with minors or their parents, or the lack of kinship with others proving that they were more in relation to the parents of minors and the law no longer provides for any sacramental formality for such a change, and it can be done after the approval of the guardian by the president of the tribunal.

The family council may deliberate without being summoned by the court. It is enough that the court be aware of its deliberation and to receive it, which referred to the fact that the very court allowed it to deliberate, especially when his opinions are confirmed. The court's confirmation of a deliberation covers up to a point the vices that would have slipped through such deliberation, such as the fact that the one of the council members would have was missing for a few days until the majority, although he was entitled as major and was recognized as such by the other members of the board and by the guardian. In any event, the other four members could form the majority, so that the presence of a minor member in the council would at most be a relative vitiation of the composition of the family council by the failure to participate of the fifth member and it cannot be argued in fact that there were not five members in deliberation, as required by Art 365 of the Civil Code"[1].

A first legal issue concerns the fact that the structure of the council can be changed at any time if such a measure corresponds to the interests of those placed under the protection of that body[2], all the more so since it was not necessary for it to be invested in a solemn procedure. Regarding this aspect we state that as above-mentioned the current legislator has stated a norm connecting the modification of the council with the interest of the protected person, which shall prevail during the exercise of such protective measure.

Secondly, it is discussed the possibility of the Council to deliberate even when it was not convened by the tribunal. Such conclusion is logical because the family council is an independent organ of the guardianship, even if it is placed under the authority of the court. Also, the judicial practice existing in this meaning could be seen as a

[1] Iasi Court of Appeal, 12 December 1901, *Curierul Judiciar 1902*, 277.
[2] As mentioned by Art 127 of the current Civil Code.

justification for the choice of the current legislation in leaving the summoning among the competences of the guardian, who shall act either ex officio or at the request of the persons listed by the law.

On the other hand, by solving as first court the litigation brought before it, the Court has ruled that the tribunal's approval of the deliberations of the council covers the non-substantive deficiencies related to the way it met when adopting the acts that were subject to homologation.

CONCLUSIONS

As a conclusion, the summoning of the family council can be performed by the guardian either from his own initiative, or at the request of any of its members, of the guardianship court or even of the minor who is 14 years old, the legislator thus insuring that this organism shall be summoned every time necessary for a good functioning of the guardianship.

Related to the valid meetings of the family council, it is required that the members be present themselves, the procedure and conditions for representation being precisely expressed by the Civil Code.

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BENEFITS OF CITIZEN'S FREE ACCESS TO PUBLIC INFORMATION, FOR PUBLIC ADMINISTRATION

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Abstract:

The main benefit of free access to public information is that it allows citizens to have a fair picture of the work of public authorities and the society in which they live. Thus, besides informing them correctly, citizens can report issues that they consider relevant, can criticize and engage actively in community, local or even central issues. Citizens are the partners of the authorities in matters of public interest and can help solve various aspects of public interest, public administration. Thus, the active participation of the citizen through the use of free access to public information is essential for decision-making in the public administration.

Key words: **citizen; legislation; public information; free access; public administration**

INTRODUCTION

Free access to information allows citizens to have a fair picture and to form a critical view of the society they live in and the authorities that govern them. It also encourages people's participation in issues and issues of public interest, helps to increase the efficiency of the administration, the legislature and the judiciary, and to preserve their integrity by reducing the risk of corruption. Free access to information contributes to the legitimacy of the administration as a public service and to the increase of trust in public institutions and authorities.

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It is important for people to have access to information that concerns them or are of public interest because they can actively and informedly participate in decision-making, can tell their opinion about publicly funded projects that are funded from public money, that is, ours, of all.

GENERAL ASPECTS REGARDING FREE ACCESS TO PUBLIC INTEREST INFORMATION

The basic notion around which this work is developed is information, but also free access. The notion of information has different meanings depending on the domain in which it is used. Information is knowledge, data processed for use. They have understood through the established relational connections. Meaning can be, but useful or not.[1]

It is difficult to achieve a definition of information and even choose one of the already existing multitudes that is sufficiently representative of the *concept in question, what it is, but we can not say what it is.* [2]

The right to information guaranteed by the Romanian Constitution became reality with the adoption of Law 544/2001 on free access to information of public interest. The right to information must not prejudice measures to protect young people or national security.[3] The right of the person to have access to any information can not be restricted .[4] In any case, information must be provided by all available means.[5]

Access to information is intended to lead to institutional transparency, transparency in the management of public money, and the responsibility of civil servants exercising a public service. Meeting a public, public need is a goal that requires administrative authorities to have some means, on the one hand, and certain prerogatives, a position of

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[1] Rizea, M., *Securitatea informațiilor clasificate* (Bucharest: Academia Naționala de Informații, 2006), 17

[2]Vedinaș, V., *Drept administrativ*, the 11th edition revised and updated (Bucharest: Universul Juridic, 2019), 123-124.

[3]Androne, N., *Ghid privind legislația și uzanțele Curții Europene a Drepturilor Omului* (Bucharest: Lumina Lex, 2004), 78.

[4]Bălan, E., *Procedura administrativă* (Bucharest : Universitară, 2016), 45.

[5]Renucci, J., translation by Constantin, C., Bodea, E., Popa, A., *Tratat de drept european al drepturilor omului* (Bucharest: Hamangiu, 2009), 178.

superiority over those who are administered.[1] Practically, real access of people and the press to information of public interest essentially determines the evolution towards a stable democracy.[2]

Information is the oxygen of democracy, and democracy can not be possible without the public's free access to information. The lack of transparency in political life and governance is one of the most difficult impediments to a democratic society in which citizens trust the political and the governors. Therefore, unhindered access of citizens to information of public interest and their participation in decision-making are considered to be two of the most important premises of a democratic and responsible government. The lack of citizens' trust in the political and administrative system is caused by the lack of local public institutions in the involvement of citizens in the decision-making process, and by the lack of transparency. Thus, there is always the impression among the citizens that public institutions are not at all foreign to the phenomenon of corruption and that they do not allow access to public information because they often take decisions in favor of interest groups and not according to the general interest of the citizens, to benefit from quality public services.

The information enables citizens, on the one hand, to appreciate knowingly the actions of the administration and, on the other hand, to take an informed part in the debates and decision-making that concern them.

If the notions of information and free access are clear to us, it is necessary to explain the meaning of the phrase: information of public interest. Information of public interest means any information relating to the activities or resulting from the activities of a public authority or public institution, regardless of its support or form or the manner in which it is expressed.[3]

Therefore, access to public information can be understood as the ability of any person to obtain information from state institutions. Access to information of public interest has become, in recent years, one of the

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[1]Vedinaș, V., *Drept administrativ și instituții politico-administrative* (Bucharest: Lumina Lex, 2002), 16.

[2]*Limitele accesului la informații în legislația română. Necesitatea unor corelări legislative* - study of the Association for the Defense of Human Rights in Romania - Helsinki Committee (APADOR – CH), noiembrie 2002.

[3]Marinică, E., *Promovarea și protejarea drepturilor omului prin mijloace contencioase* (Bucharest: Romanian Institute for Human Rights, 2011), 22

most important criteria, according to which a society is or not considered democratic.[1]

ORGANIZATION AND ASSURANCE OF FREE ACCESS TO PUBLIC INTEREST INFORMATION

Public authorities and institutions shall ensure free access to information of public interest either on their own or on request through the public relations department or the designated person for that purpose.

Everyone has the right to request public authorities or institutions, by means of a request, certain information of public interest. The authorities must also take note of this request and provide the interested citizen with the requested information either in writing or verbally. In the literature, it was appreciated that "the request for access to information of public interest is a petition".[2] In principle, it is clear that the public authority receiving the request, which must meet all the conditions required by the law, is obliged either to admit it or to reject it, communicating to the petitioner how to resolve.[3]

If the request for information is made verbally, the officers of the information and public relations compartments have the obligation to specify the conditions for access to the information requested and held by the public institution / authority concerned; in some cases, additional documents (certificates, delegations, etc.) are needed. Most of the time, the requested information can be provided on the spot. If they are not available at the time, the person is asked to complete a written request. Information of public interest requested verbally by the mass media will usually be communicated immediately or within 24 hours.[4]

For cases where an official of an institution or public authority refuses to provide the information requested, the law on access to information provides for a series of sanctions. A person who is unduly

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[1]https://www.transparency.org.ro/servicii/ghidurile_cetateanului/ghiduri/Raport%20privind%20liberul%20acces%20la%20informatiile%20de%20interes%20public%20in%20Romania.pdf., (accesat la 24.01.2019) p.5.

[2]Dragoș, D., Ranta, A. and Chiciudean, R., *Proceduri administrative* (Bucharest: Tritonic, 2013).

[3]Chiriac, L., *Activitatea autorităților administrative publice* (Cluj-Napoca : Accent, 2001), 37.

[4]Tudorașcu, M, *Etică și deontologie în administrația publică* (Cluj Napoca: Risoprint, 2017), 70.

denied the right of access to public information has several possibilities to react.

By the expression "unjustified refusal of an administrative authority to resolve the claim for a right recognized by law", the legislator considered the possibility of unjustified rejection of the application, either by violating some legal provisions or by misinterpreting them, the mistaken establishment of a state of fact.[1] If in the case of administrative silence we are in the situation of an implied refusal to solve the request, in the case of unjustified refusal we are in the presence of an explicit refusal to solve which must be expressed with excess power.[2]

Although the legislation on free access to information of public interest and decision-making transparency is concise and dates back almost 20 years, the practice in this field is still lax and makes citizens not only give up involvement in the decision-making process, but also considers that non-compliance with the rules on decisional transparency and access to public information is caused by certain practices involving, in addition to the lack of knowledge of the law, aspects of corruption[3].

However, free access to public interest information is much more than the action of openness and transparency in the work of the administration, it also means encouraging citizens in the decision-making and drafting of normative acts. An active and effective participation of the general public can be achieved only if it is informed about the problems, but also of the mechanisms by which they can actively engage.[4]

Adoption of Law no. 544/2001 on access to public information was a significant step forward in the process of ensuring the transparency

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[1]Chiriac, L., *Actele administrative normative* (Cluj-Napoca: Accent, 2000), 43.

[2]Dragoș, D., *Legea contenciosului administrativ-comentarii și explicații* (Bucharest: All Beck, 2005), 116.

[3]Corruption is called an abuse, whether active or passive, of civil servants (either elected or elected) in order to obtain private financial benefits or other benefits. Corruption is the abusive use of public power in order to satisfy personal or group interests. As an antisocial act, corruption is very common in society and is particularly serious because it favors the interests of some individuals, especially in the economic area, affecting the collective interests by: appropriating, diversifying and using public resources for personal interest, occupying public functions through preferential relations, the conclusion of transactions by circumventing the moral and legal norms.

[4]Ureche, M, *Autoritățile publice în dreptul statelor europene*, Publishing house Altip, Alba Iulia, 2011, p.156

of the governance activity and the accountability of the public institutions. However, there are some blurring and omissions that need to be remedied so that the law can be applied uniformly and effectively. In particular, certain provisions of the Law and its methodological norms (on deadlines to be followed for filing a complaint in court, granting moral damages) need to be clarified to ensure uniform practice; the work of the public information offices in the courts should also be of the same uniform nature at national level, whether it concerns the persons who sign the documents or the amount of the copy fees. These measures will contribute substantially to the settlement of cases based on the provisions of the Law no. 544/2001 on access to public information. At the same time, they will contribute to the effectiveness of implementing the provisions of this law that will ensure the public and the media that the state institutions operate according to the principles of transparency and accountability.

CONCLUSIONS

Access to public information is an important step in the administrative reform as it opened the way to transparent governance and somewhat led to increased accountability of public institutions and authorities to the activities undertaken but the mere existence of this law does not lead, , to a significant change in the administrative system in Romania. For this, a double effort must be considered: on the one hand, the administration, which is first called to implement and comply with the provisions of this law, and on the other hand, the citizens, who need to become aware of the advantage which they might have in dealing with state institutions if they use this democratic instrument.

Therefore, in order to create a better relationship between the administration and the citizens and to restore their trust in the state institutions, we recommend that all public interest information that must be communicated ex officio on the web pages of the public authorities or institutions be made available to citizens for a more easy consultation of this information by citizens and to increase the level of transparency of the institutions' activities.

Regarding the form of the webpages of public authorities or institutions, it would be preferable to impose or recommend a certain structure for the realization of these pages (sections and subsections or

categories and subcategories), because at present, in many cases reveal that there is a need for a high time of identification of the information, determined by the lack of their organization.

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"STREET CHILDREN" PHENOMENON IN THE ROMANIAN SOCIETY

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Abstract:

The phenomenon of „street children "became more visible in Romania after 1989. Causes are related to family conditions: poverty, violence, alcoholism of parents, neglect or indifference leading to family break up. Another reason for the "street children phenomenon" is the child protection institutions, characterized by poor conditions and inadequate treatment received by staff. The vast majority of street youth live in groups because of the advantages of group life. The majority of street youth are consumers of toxic substances. The level of school education is quite low, many of them not knowing how to read and write, which explains the failure of school integration. Many street youth suffering from various medical problems due to limited access to health services. Much of street youth are exposed to sexual abuse and prostitution, especially girls. The main source of income is begging. The situation of economic exploitation among street youth is quite high. The current legislation is discriminatory for the street youth. Problems faced by street youth is the inefficiency of the system of social assistance. "Street children" stigma is unjust, but it continues to exist. The objectives of the investigation are: the influence of socialization agents (family) on why choosing the street life and detection of conditions which lead the child to choose life on the streets To achieve the case studies, we analyzed children's files which included: social inquiries made natural family child psychosocial children sheets, monitoring reports, psychological reports prepared by a psychologist.

Key words: *street children; legislation; protection institutions; education; exploitation.*

INTRODUCTION

The "street children" are the category of children living on the streets. They can be divided into several types according to different

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criteria: by time spent in the streets: permanent, casual, workers on the street; after the family situation and their relationships with parents; by area of origin. The numerical value of "street children" varies according to data provided by various studies and research, intervention programs. Numerical estimates both at institutional and governmental level are carried out by UNICEF, Social Integration Support Association, Save the Children, Open House, Ministry of Interior, Department for Child Protection etc. The causes that lead to the appearance of "street children": urbanization, inadequate social protection of low-income families, poverty, dysfunctional families, parents' maltreatment of children, decreased social control. There are internal and external risk factors that can lead to the "street children" phenomenon. Internal factors are connected to the proper functioning, organization and structure of "street children" origin families. External factors are in a close relationship with all the economic problems, with low interest for education and culture.

Although considered a criminal offense under Law no. 272/2004, begging has become a "business" and the only source of income for many families who use their own children for this purpose. Social Assistance offers a limited number of facilities for children and parents. Violence in public care and protection of children is also an important factor.

The children are sometimes forced by their own parents to: begging, theft or prostitution to make various street work.

1. PROBLEM STATEMENT

The society sets the action and solving plan related to different problems depending on how you perceive and how to understand the social phenomena and depending on available resources.

Apart from the social perception they have specialists directly involved in work with them (psychologists, sociologists, social workers) there are social perception of other socio-professional categories, such as people working in the police or the medical field.

There are also social perception of the public be involved in social contracts with „street children". Media has provided over the years examples of systematic application of stigmata "homeles" or "beggars".

Newspaper headlines, reports show disgusting images in the public eye, an attitude of rejection and disgust.

The group it is a new family of "street children". Their lifestyle and survival patterns are diverse. Ways to generate income can be: begging (79,1%), car washing (15,7%), thefts (14,4%), luggage carryin (9%), prostitution (6,3%), newspaper selling (1,3%), Other methods (15,9%)- (Source: Street between fascination and servitude (National Study realized in 2016).

2. RESEARCH QUESTIONS

The main legal provisions on child labor are found in the Constitution, the Labor Code, Family Code and the conventions and recommendations of the International Labour Organisation. Constitution establishes the following principles: forced labor is prohibited (Article 39, paragraph 1); exploitation of children, their employment in activities that might be harmful to their health, morals, or that would endanger their life or their normal developing are prohibited (Article 45, paragraph 3); children under the age of 15 may not be employed as employees (Article 45, paragraph 4) ; The new Labour Code, adopted on the 24th of January 2003 provides in Article 13 that the individual becomes able to work at the age of 16. Under the Constitution, Article 32, the state guarantees every citizen the right to education regardless of gender, race, nationality, politics or religion, without restrictions that might constitute discrimination or segregation. The law of education provides in Article 20, paragraph 4 that the National Education Ministry can approve classes consisting of children who, for various reasons, did not graduate until the age of 14 the first four grades of compulsory education.

"Street children" live in conditions that people with normal families consider it awful, unbearable: cold, dirty and unchanged lingerie. The National Study regarding the "street children" situation 2015-2016 indicates the last medical examinationto "street children": current week (8,1%), current month (9,9%), in the last 6 months (9,9%), current year (16,6%), more than a year ago (55,5%).

3. PURPOSE OF THE STUDY

"Street children" have cognitive deficiencies and weaknesses generated by discouraging the socio-educational institution of the family that took the family functions.

Most of the "street children" have missed the point emotionally, have a "neurotic" structure, manifested by intra and interpersonal conflicts.

Specific aspects of the "street children" behavior are: self-image diminished, aspirations for the future limited, the area bounded strictly limited in which the "street children", live, the social relations chaotic, humiliation, mental insecurity, physical and verbal violence, the absence of identification used to determine the "street children", misperception of self-image, the presence of an inferiority complex about physical appearance, dress code, lack of family support.

The dirty clothes are an indicator of child adaptation to living environment (reference group), the rules and norms of social cohabitation imposed by membership, but, in relation to the general social frame, represents an indicator of inadequacy, of conflict between child and the environment.Communication and language are characterized by poverty (due to low information level, communication in general market, by images, concepts and ideas) and characteristic elements of street jargon.The main mechanism developed by young people for survival in the streets is aggressiveness.

Once in the street, the child is forced to choose one of the following alternatives: or he lives alone, isolated by the groups of children in the street, and then his chances of survival are reduced; or he integrate into a group where he will learn to accept other children's aggression or impose his own force.

Life risks in the street are numerous. Sexual abuseIn Romania exploitation and sexual abuse of children have not been studied well enough by the professionals in social domain, nor by the public authority. Thus, the absence of statistics on cases of exploitation and sexual abuse of children causes the ignoring and the minimizing exploitation and sexual abuse among children. Prostitution It is noted the tendency to engage in prostitution, especially for children who no longer have any contact with family, or have only sporadic connections with it. Prostitution is specific to girls. Some girls are determined in the street,

from very young ages to procure the basic needs through prostitution. Police estimations indicate as perhaps 10% of the girls who live among "street children" prostitutes even from a very young age. (Source: The National Survey on the situation of "Street Children" 2015). So far most of the "street children" have experienced alcohol, tobacco and volatile substances, appreciated not to fall into the category of drugs, but that has devastating effects on health.

According to the National Survey about the "Street Children" Situation in 2016, a third (33%) of "street youth" are permanent consumers, while 16% are sporadic consumers of drugs and alcohol.

Smoking is a habit practiced daily by "street children" regardless of age, with children aged 6 and 8 years who come to consume a pack a day. The tobacco use leads to serious damage of the respiratory tract, and it lead to the appearance of tuberculosis.

Alcohol consumption is less frequent among "street children". The great majority of "street children" said they prefer to buy volatile substances, being cheaper than alcohol.

The purpose of this study is to identify the risks that cause some children to get into the streets and problems of the social assistance system in Romania.

4. RESEARCH METHODS

In the realization of this study we identified the main the social assistant's skills: ability to persevere, ability to cope in situations of confrontation and to establish its authority, ability to get things moving, ability to get on and get to know the legal provisions, ability to work in a hostile environment, ability to work in a team, ability to establish interpersonal relationships, the social assistant should know the network of state institutions and NGOs, the social assistant must keep confidential data provided by the child, ability to know the value system of "street children".

There are the following issues in the social assistance system:
social assistants are less skilled in the domain; dispersal of social assistance programs at the level of NGOs and public institutions and ministries, which had the time and the positive effects for the protection of those in need, such as encouraging volunteering and partnership. There were also negative effects of such an institutional-administrative

fragmentation, resulting in a lack of coherence of activities, the impossibility of fixing priorities and hierarchy of needs for those in need, and the lack of programs that focused on family and child support; the decentralization of the social assistance system, which went in the opposite direction leading to wider social gaps area: the poorest have become much poorer, due to lack of own resources. In these areas social assistance could not be granted, occasional aid could not be provided, social assistance services could not be developed.

The large number of these children living in the streets are the legislation's deficiencies related to the child's protection.

Since many non-governmental organizations offer social assistance services, I have proposed to identify the types of services offered.

"Save the Children" Organization, outreach social assistance program in Bucharest -it has general objectives: promoting children's rights; reducing the number of abandoned children living on the streets and prevent or limit deviant behaviors; awareness-makers and public opinion on the urgency and necessity of social reintegration of children living on the streets; empowering the family on its obligation to raise and educate their children; recognition of the work the streets and street social worker status.

Specific objectives are: achieving and maintaining liaison with groups of children, with an emphasis on individual approach; identification of children contacted to enable social inquiry; specific problems in the street and a sense of urgency (medical and material problems); placing children in day care or residential centers (if places available to them); social inquiry in contact families of children and investigate possibilities for reintegration in the extended family (relatives of children); recreating the relationship between the child and the family; integration of the child in the extended family (when reintegration into the family home is not possible); report Child Protection Commission case in order to obtain a decision of family custody.

"Parada" Foundation mainly aims to help disadvantaged children, especially street children and former street children. Foundation programs include: assistance street; day center apartments transit / emergency social apartments, service integration and training.

The actions taken under the programs of the Foundation: evaluating and analyzing the needs of "street children": family, social and

school reintegration of "street children"; socio-professional reintegration of youth in need.

Street social assistance is offered as a mobile center of social and medical assistance "Parada" during the day and night, offering the following services: identification and knowledge of children, their social orientation and accompanying specialized agencies, information on rights, training opportunities, health care, information on hygiene- artistic workshops.

Types of support offered to young people, street children of *"Social Inclusion Support" Association (ASIS)*: help in removing the attitudes and behaviors of marginalized person, help in reshaping the value system of the language, help in finding a job, help in not giving up in case of temporarily or potential failure, medical aid (medicines and facilitate medical examinations), aid in contact with family and institutions. Projects carried out: Temporary residential center ,,Loc temporar de viaţă," the social apartments.

The association "Gavroche House" aims to facilitate the integration of street child in the family (natural or adoptive), schools, and society. "Gavroche House" is a residential institution, which provides temporary protection for: children with deviant behavior who are in the streets, children at risk, street children with low internship in the street, which is not in the criminal investigation.

"Gavroche House" ensures social protection concentrated in three areas: healthcare; social reintegration, school, family; development of methods and prevention programs.

The objectives of the investigation are the following:

- The influence of socialization agents (family) on why choosing the street life.
- Detection of conditions which lead the child to choose life on the streets.

The assumptions of the investigation were:

- If the family situation is characterized by aggression, indifference, then the risk of becoming a street child is greater.
- The more the personnel in child protection institutions behave indifferently to the situation of the child, the more the child is motivated to avoid contact with care institutions.

- The more the level of cooperation between state institutions and child protection non-governmental organizations is higher, the better the chance for "street children" to be socially reintegrated.

The method used for obtaining the information was to analyze social documents and discussions with foundation staff on which we formulated case studies.

The social document analysis is a non-creative method the researcher uses after the social phenomena have occurred, so that their development has not undergone any change due to the study, presence or intervention analyst of social life.

Case studies were carried out in a Bucharest NGO dealing with recovery, integration and resocialization of "street children". The purpose of conducting the case studies was highlighting outcomes arising from partnerships between Governments and non-governmental organizations aimed at social reintegration of street children and the influence of family factors.

To achieve the case studies, we analyzed the following documents: copy folders of the staff of the shelters where they come from; copy folders made by social assistants from the Child Protection Departments;dossiers of NGO staff; Children's files included: social inquiries made natural family child psychosocial children sheets, monitoring reports, psychological reports prepared by a psychologist.

Case number 1:
Name, Surname: I.L.
Sex: male
Age: 17 years old
Birthplace: Bucharest
Background: family
Socio-economic situation of the family: couple: legally constituted
Father: worker, addicted to alcohol
Mom: dead
Brothers: No
Attitudes towards parents: negative, especially for the father because of mistreatment
Reason for leaving the street: mistreatment of the natural father
Gain sources: theft, begging

The school situation: 3 classes
Consumption of toxic substances: smoke 15 cigarettes a day
The attitude towards the police: negative
Background, measures of socialization:
The first run away took place at the age of 9 years culminating in the father's ill-treatment on alcohol consumption.

I. L. was institutionalized in a center for juvenile delinquents, and after a period of three weeks was moved to an orphanage where he ran away.
I believe that he had to be included in a program of counseling and psychotherapy because of the mistreatment given by his father in childhood.

Case No. 2:
Name, Surname: G.M.?
Sex: Female
Age: 15 years
Birthplace: Bucharest
Background: family
Socio-economic situation of the family:
couple: parents are divorced
Father: remarried
Mother: living in cohabilitation relationship
Brothers: has a younger brother aged six years
G.C. lives with his mother
Attitudes towards parents: negative for both parents
Reason for leaving on the street: due to repeated rape of mother concubine
Gain sources : begging, prostitution
The school situation: 3 classes
Consumption of toxic substances: volatile substances two to three times a week
The attitude towards the police: negative due to disagreements
Background; measures: Following the divorce at age of 7 G.M.'s mother, G.M. ran away from home due to repeated sexual abuse of mother's concubine, a man who was younger than his mother.
Personal Solution:

- Establishing counseling sessions with both mother and child;
- Information on rights and the existence of socio-educational centers.

Case number 3:
Name, Surname: E.I.
Sex: male
Age: 16
Birthplace: Bucharest
Background: family
Socio-economic situation of the family: couple: legally constituted
Father: permanently abroad
Mother: permanently abroad
Brothers: No
Attitudes towards parents: negative due to negligence and indifference of the parents
Reason for leaving on the street: indifference and poor parenting
The school situation: graduated 10 classes
Consumption of toxic substances: drugs
The attitude towards the police: negative
History and social rehabilitation measures:
The first run on the street was at the age of 9 years old having as motivation: she was bored at home alone while parents did not give her any attention. Despite the efforts of social assistants to save her due to an overdose E.I. died at the age of 16 years.

5. FINDINGS

Before 1989 the legal framework was established by Law 3/1970 on the protection regime for some categories of minors.

Since 1989 child protection legislative framework has undergone important changes: new administrative structures have been established and have been developed extensive legislation.

Administrative structures with responsibilities in child protection: National Committee for Child Protection; Department for Child Protection; Commission for Child Protection; Specialised Public Service for Child Protection; National Authority for Child Protection and Adoption; General Directorate of Social Assistance and Child Protection; Public Social Services.

Law 18/ratifying UN conventions on the Rights of the Child, Emergency Ordinance no.26/1997 on the protection of children in difficulty, provide seven protection measures for "street children": entrusting the child to a family, an individual or a private authorised organization; custody of the child for adoption; temporary custody of the child to the specialized public service; place the child in a family or a person; place the child in an emergency. Law No. 705/2001 on the social assistance system and Law no. 272/2004 declare the protection and promotion of rights of the child, by stating that the child's best interests will be taken in all actions and decisions concerning the children, whether undertaken by public and private authorities and children's rights will be respected without discrimination regardless race, sex, financial status, status at birth or acquired status.

Children's rights is in continuous attention of international organizations, since the adoption on 10 December 1948 of the Universal Declaration of Human Rights.

Children's rights were set out in the Geneva Declaration of 1924, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights. During the General Assembly of 20 November 1989, the UN adopted the Convention on the Rights of the Child, is under review and ratification by Member States.

Romania ratified the ONU Convention on the Rights of the Child in September 1990 by Law No. 18/1990. According to the Convention on the Children's Rights, all children's rights are based on several principles.

CONCLUSIONS

The phenomenon of street children "became more visible in Romania after 1989. Causes are related to family conditions: poverty, violence, alcoholism of parents, neglect or indifference leading to family break up. Another reason for the "street children phenomenon" is the child protection institutions, characterized by poor conditions and inadequate treatment received by staff. The vast majority of street youth live in groups because of the advantages of group life. The majority of street youth are consumers of toxic substances. The level of school education is quite low, many of them not knowing how to read and write, which explains the failure of school integration. Many street youth suffering from various medical problems due to limited access to health

services. Much of street youth are exposed to sexual abuse and prostitution, especially girls. The main source of income is begging. The situation of economic exploitation among street youth is quite high. The current legislation is discriminatory for the street youth.

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THE REASONING OF JUDICIAL DECISIONS – EXPRESSION FOR THE JUDGES' INDEPENDENCE

Florina MITROFAN[1]

Abstract:

The reasoning of the judicial decisions represents a guarantee for justice seekers that their requests have been efficiently analyzed, while the inexistence of reasoning or excessively succinct or apparent reasoning does not meet the requirements of the right to a fair trial.

Quality motivation is the premise of a quality justice act and a guarantee of increasing public confidence in the judiciary.

Key words: *reasoning; judicial decision; arguments; guarantee; independence.*

INTRODUCTION

The independence of judges depends on the decisions their make and their reasonings, this fact being reflected in the independence seen by society.

Guaranteeing the independence of the judiciary represents a condition necessary for the supremacy of the law and contributes in insuring the quality and efficiency of the judicial act.

The reasoning of the jurisdictional act represents a guarantee of the right to a fair trial from the perspective of examining the *de facto* and *de jure* reasons on which it is based on and also necessary for the activation of the means of appeal.

The exposed considerations must lead to the adopted solution and allow the legality of the judgment to be reviewed[2].

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[2] Decision of the High Court of Cassation and Justice, No 33/23 January 2018, published in the Official Gazette of Romania, No 146/15 February 2018.

The principle of the independence of judges does not exclude the intervention of the judicial control courts by way of appeals against judgments or the decision of the supreme court to unify differences in the interpretation and application of the same law. Also, the purpose of the constitutional legislator was not that of regulating an interference of the High Court of Cassation and Justice in the activity of the courts, but the establishment of a unitary practice, when it is proven that the issues subjected to judgment have been solved differently by definitive judicial decisions.

DOCTRINARIAN AND JURISPRUDENTIAL ASPECTS RELATED TO THE REASONING OF THE JUDICIAL DECISIONS

The motivation of a court decision is not a matter of volume, but a matter of essence, of content, which must be clear, concise and concrete, in accordance with the evidence and the documents in the file[1].

Cannot be considered as lack of objectivity and impartiality the synthetic manner of analysis of the defense invoked by one of the parties.

Even in the case in which there were certain inconveniences of the judicial reasoning, it is necessary to make possible the deceleration of the fundamental and complementary arguments invoked to support the issued decision.

The court must present legal reasoning and to answer the *de facto* and *de jure* aspects subjected to the legal debate.

The reasoning of a judicial decision raises an issue of content, being relevant the consistency of the judicial analysis and the relevance of the arguments brought by the court in supporting the decision, and not a matter of quantity.

The quality of a reasoning and the compliance with the requirements stated by the legal provisions is not determined by the volume of the arguments, but by their legal value and the correctness of the reasoning on which the solution is based on.

Equally, it should be borne in mind that the obligation of the judge to motivate his judgment, as required by the legal provisions, implies the need to provide a specific statement of each end of the

[1] Decision of the High Court of Cassation and Justice, No 3283/28 October 2014, Section 2 civil.

application and each of the criticisms formulated, rather than responds in detail to each of the arguments put forward by the parties in support of, respectively, the alleviation of the claims or criticisms invested in them. It is necessary for the court to examine and give a reasoned answer to the essential factual and legal issues that come to the cause of the judgment[1].

The clear articulation of the legal reasoning based on the legal arguments and the highlighting of the internal logic that led to the adoption of the solution constitute mandatory elements that define the jurisdictional act and give it a force of conviction and constitute a guarantee against arbitrariness[2].

The simple dissatisfaction of the party regarding the solution given, the failure of the court to draw up the defense formulated by the party, are matters that cannot be assimilated to a lack of justification, (...) the court not being compelled to answer each argument separately, – a logico-judicial synthesis that reflects the response to all the criticisms invoked being enough.

The arguments of the court must represent a link between the facts and the rules of law on which the adopted solution is based.

The fact that the judge interprets the elements of the factual base in a different manner than the one agreed by the party, their relevance not being equivalent with a non-reasoning…[3].

The reasoning of a judicial decision represents an essential element, a guarantee of the impartiality of the judge and the quality of justice.

Also, the motivation represents the premise of the performance of the judiciary control through the means of appeal stated by the law.

The compulsoriness for the reasoning of the judicial decision represents a requirement of the fair trial, in the meaning of Art 21 Para 3 of the Romanian Constitution and Art 6 Para 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

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[1] Decision of the High Court of Cassation and Justice, No 1471/18 October 2017, Section 2 civil.

[2] Decision of the High Court of Cassation and Justice, No 1759/23 November 2017, Section 2 civil.

[3] Decision of the High Court of Cassation and Justice, No 820/6 April 2016, Section 1 civil.

During each judicial procedure, the parties have the right to present to the judge their observations and arguments and to request the court to examine them effectively.

The right to a fair trial can be considered effective only if the observations of the parties are fairly examined by the court.

In this meaning, the European Court on human rights has stated that the court has the obligation to efficiently examine the means, arguments and evidences in order to evaluate their pertinence[1].

If the court does not analyze the evidence that has been administered, it does not specifically set out the material and procedural elements of the case in the case before the court, then the pronounced solution is a purely formal matter, not supported by the reasons preceding the device, is a violation of the right to a fair trial.

The reasoning of a decision shall comprise the arguments for which the reasons invoked by the parties were either kept or removed, the state of affairs and the legal grounds which formed the opinion of the court regarding the given solution.

Another significant element is that the arguments of the court invoked supporting the solution must relate to the defenses of the parties and to the legal incident provisions, on the contrary the decision not being legal.

The quality of a judicial decision depends on the quality of the reasoning, which must reflect the compliance of the judge with the principles stated by the European Court of Human Rights, by the decisions of the Constitutional Court and by those of the High Court of Cassation and Justice regarding the appeals in the interest of the law and the solving of certain matters of law.

The solving of head of claim or of the reasons invoked by the means of appeal represent an essential guarantee, allowing the justice seeker to be sure that his claims have been efficiently examined.

The obligation of the judge to prove in writing his decision, for having accepted the claims of one party and for rejecting the other, for what he accepted or rejected an evidence, why he applied a particular rule of law or gave it a certain interpretation, is an essential obligation whose breach leads to the abrogation of the judgment. The reasoning shall be specific, the simple affirmation that a fact results from the

[1] Case *Albina v Romania*, published in the Official Gazette of Romania, No 1049/25 November 2005.

evidences, without detailing the evidences, cannot be considered as a reasoning. The judge shall motivate the rejection of an evidence, the statement that it is inconclusive is not enough; if he has to choose between multiple contradictory evidences, he cannot consider as conclusive a single evidence, but he must present the reasons which led him to this conclusion[1].

The proper reasoning of the decision means, in the same time, the guarantee that the court judgement was not arbitrary, and, from this perspective, it represents a component of the right to a fair trial. Also, the reasoning must be accessible, given that the recipients of the decision are first of all the parties, and the legal style used shall be clear, precise, with a logical and normal succession of the ideas and arguments.

The considerations, representing the justification of the solution adopted by the court, shall state the analysis and arguments of the court for the case subjected to trial, and not different opinions and points of view expressed in the doctrine (the reference to doctrine being made every time necessary, during the deliberations, prior to the adoption of the solution).

In exchange, the considerations could refer, in order to emphasize a constant jurisprudence of the court in a certain matter, to other decisions ruled in the same matter, as well as references to decisions in the interest of the law which oriented the practice in this matter (or decisions relevant for solving the case, decisions of the Constitutional Court, of the Court of Justice of the European Union or of the European Court of Human Rights)[2].

The reasoning shall not contain inappropriate statements, because, according to Art 99 Let s) of the Law No 303/2004, the use of inappropriate statements in the content of the judicial decisions represents a disciplinary offence, the legal provisions above mentioned do not refer to the establishment of a judicial control of the judicial decisions but sanction the judge for a certain behavior.

The total lack of reasoning of the judicial decisions also represents a disciplinary offence [Art 99 Let r) of the Law No 303/2004].

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[1] Mihaela Tăbârcă and Gheorghe Buta, *Codul de procedură civilă comentat și adnotat*, 2nd Edition (Bucharest: Universul Juridic, 2008), 702-703.

[2] Viorel-Mihai Ciobanu and Marian Nicolae, *Noul Cod de procedură civilă comentat și adnotat*, 1st Volume – Art 1-526 (Bucharest: Universul Juridic, 2013), 925.

In relation to Art 99 Let r) of the Law No 303/2004 the Court has stated that it does not sanction the judge for his interpretation or application of the law, but it states as disciplinary offence his non-compliance with the provisions of the law, Constitution, international treaties in the area of human rights to which Romania is party, by sanctioning the total lack of reasoning of the judicial decision, in considering the obligation stated by Art 21 of the Constitution and Art 6 of the ECHR for the courts in relation with the right to a fair trial, to reason all decisions. This non-compliance has led to the conviction of the Romanian state by the European Court on Human Rights, so that the statement of the disciplinary offence above-mentioned is circumscribed to the general purpose of the law[1].

For the case in which the judge drafting/reasoning the decision did not participated in the debates and deliberations, the guarantees mentioned by the Constitution and the law for the protection of the right to a fair trial, for the insurance of an impartial justice, performed in the name of the law, are merely declarative instruments, without efficiency and useless. In other words, the entire regulation regarding the independence of justice, the rules of criminal or civil procedure about solving the cases, the need to perform a motivated act of justice, shall have no legal effects if the judicial decision which "states the law" is drafted by a person who is not a judge in the case, thus who is a stranger for the jurisdictional procedure, for the deliberative act which led to the adopted solution and thus, to the act of justice.

The reasoning of the judicial decision is inherent to the case judge, expressing his independence and cannot be transferred to a third party.

The reasoning does not only represent the premise of a good understanding of the decision, but also the guarantee of its acceptance by a justice seeker, who will obey the act of justice with confidence that it is not arbitrary. It represents a key element of the judicial decision, a strong guarantee of the judge's impartiality and of the quality of the act of justice, as well as a premise of the correct performance by the superior court of the attributions of judicial control of legality and solidity.

[1] Decision of the High Court of Cassation and Justice, No 161/27 March 2018, published in the Official Gazette of Romania, Part 1, No 467/6 June 2018.

However, if the judgment was drafted/motivated by a person other than the judge of the case, the justice seeker is deprived of these guarantees[1].

According to the ECHR's jurisprudence, the extent of the reasoning shall depend on the diversity of the means it can take in court as well as on legal provisions, customs, doctrinal principles and different practices regarding the observance of sentences and judgments in different states. In order to answer the requirements of a fair trial, the reasoning should emphasize that the judge has truly examined the key elements brought to him.

The reasoning of the decisions of the High Court of Cassation and Justice solving matters of law shall mandatory comprise a deep study of other matters of law, in order to answer the one subjected to analysis, contributing to quality judgments leading to increasing public confidence in the act of justice and ensuring legal certainty.

The exigency of reasoning demands the coherent and effective presentation of the judge's critical examination to support the solution stated by the operative part of the judgment.

The reasons shall be in line with the operative part, on the contrary the decision creating confusion, the solution of the court remaining unknown.

In drafting the reasoning, the judge shall be consistent and principled, avoiding the contradictions, the vague and imprecise reasons.

The High Court of Cassation and Justice has stated that the obligation to reason a decision shall be understood as a logical system, being meant to explain the decision, which does not mean an exhaustive answer to all the arguments invoked by the party, nor to ignore them, but an expression of the fundamental arguments which, by their content, are suspected of influencing the solution[2].

The establishment of the mandatory feature for the solutions given to matters of law decided through the appeal in the interest of the law or for the solutions given to certain matters of law, or for the decisions of the Romanian Constitutional Court does not interfere with the independence of a court.

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[1] Decision of the High Court of Cassation and Justice, No 33/23 January 2018, published in the Official Gazette of Romania, No 146/15 February 2018.

[2] Decision of the High Court of Cassation and Justice, No 1954/30 May 2015, Section 2 civil.

CONCLUSIONS

The appropriate reasoning of the judicial decisions, seen as guarantee for the independence of judges, contributes in the achievement of an independent, efficient and credible legal system, requirement necessary for the principles of the state of law.

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THE PRINCIPLE OF PRIORITY OF THE EUROPEAN UNION LAW COMPARED TO THE NATIONAL LAW IN THE TAX FIELD

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Abstract: *The state has the power to tax, respectively the state shall create a taxation system to assure the establishment of the public incomes to the state in the amounts necessary to cover estimated public expenses. In the process of establishing taxes and duties, the state has to comply with a series of principles established by law, principles that shall govern the national tax law, and their compliance assures a coherent, fair and efficient policy in accordance with the law rules applicable in the matter.*

In their turn, these principles are subordinated to the principles in the matter regulated at the European Union level, principles which include the principle of priority of enforcement of the European law, principle who has no express consecration in the European primary law, but this comes from the practice and the decisions of the European Union Court of Justice. In Romania, the principle of priority of the European Union law is expressly dedicated in the Constitution.

Key words: *tax law principles, fiscal policy, the principle of priority of enforcement of the European law, taxation system, national tax law*

INTRODUCTION

By his accession to the European Union in 2007, Romania has assumed the obligation of harmonisation of the national law with the European Union law, meaning that process of alignment of the national

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legislation to the requirements imposed by the regulations of the European Union law. But the harmonization of the national legislation is only a complementary measure, the accession of Romania to the European Union involving a substitution of the national law by the European Union law, as a consequence of the principle of priority of the European Union law.

The Lisbon treaty does not bring major changes in the tax domain. A new provision is added to article 58 EC (current art. 68 TFEU), allowing some Member States to impose tax restrictions on the circulation of capitals in the relationships with third countries. Another potentially important change is that at the end of art. 93 EC (current art. 113 TFEU), the phrase" (…) in the term established at art. 14" was replaced with "(…) and to avoid the deformation of competition", which means that indirect taxes have to be harmonised to the extent necessary to the operation of the domestic market and also to assure equal competitive conditions on the domestic market. We cannot say that such equal competitive conditions were not already necessary for the functioning of the domestic market previously to the entry in force of the Lisbon treaty. Furthermore, the order of articles 94 and 95 EC is reversed (current articles 114 and 115 TFEU), but this does not change anything in the tax domain: a unanimous decision is still necessary for any measures adopted at the EU level, both for direct and indirect taxes.

1. The principle of priority of enforcement of the European law has no express consecration in the European primary law, but this comes from the practice and the decisions of the European Union Court of Justice.

The competence of the Court to issue a decision, with preliminary title, concerning the interpretation of the treaties and the validity and interpretation of the documents adopted by the institutions, bodies, offices or agencies of the Union is established by the Treaty on the functioning of the European Union, respectively by art. 267 of the Treaty. When such a matter is brought in front of a national court, the national court can request to the Court to rule on this matter if a decision in this regard is considered necessary to issue a judgement. In the on-going cases in front of a national court, whose decisions are not subjected to an appeal in the domestic law, when such matter is raised, the Court has to decide as soon as possible.

By the procedure of preliminary questions, they want to reach two main objectives:

- To assure a unitary interpretation of the Union law and its homogenous enforcement by the national courts of the Member States. Thus, the risk of occurrence of a non-unitary practice within the Union is reduced;
- To protect the rights of natural and legal persons by granting the possibility to obtain the enforcement of the Union legislation by the national courts.

The national court does not have to promote the request for preliminary action when:

- The matter to be clarified is not relevant and the answer to that matter cannot affect the solution of the case;
- The question addressed is identical from the material point of view with a question that has already been the object of a preliminary decision in a similar case[1];
- The court establishes that the correct enforcement of the European law is so obviously imposed that there is no place for any reasonable doubt[2].

The procedure of preliminary questions is not a contentious one. It is a procedural intermediary stage in a dispute carried on in front of a national court. This procedure appears when there is the question of interpretation or appreciation of the validity of the European Union law in front of the national court, addressed with a dispute. Based on the answer received on behalf of the Court, the national court (the sending court) will adopt a solution in the main dispute it was addressed with.

The European Union Court of Justice can be addressed by a ruling of a national court. The latter has to describe the *de facto* situation that generated the dispute and also the parties' statements. The preliminary question has to be formulated clearly and accurately indicating the problem of interpretation of the European legislation. The literature pointed out that it can be about a difficulty of interpretation of the European rule or about a possible contradiction between the national rule and the European one[3].

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[1] Cauza Cilfit, C.283/81, https://curia.europa.eu/jcms/upload/docs/application/pdf/2009-05/tra-doc-ro-arret-c-0283-1981-200802159-05_00.pdf, accessed on 03.04.2019.
[2] Cosmin Flavius Costaș, Drept fiscal, (Bucharest: Universul Juridic, 2016), 30.
[3] Cosmin Flavius Costaș, op. cit.,31.

The preliminary decision issued by the Court has a binding power for the sending court and also for the courts that will judge such case in the ways of appeal. The role of such decision is to offer an interpretation of a rule of European law and, by this, to clarify or define, where necessary, the meaning and the extension of the rule, the way in which it has to be understood or in which it should have been understood and enforced since its entry in force. "The rule interpreted in this way can and has to be enforced by courts also for the judicial relationships that were born and were established before the issue of the judgement concerning the request for interpretation, if, on the other hand, the conditions are met, conditions allowing the addressing to the competent courts of a dispute regarding the enforcement of such rule"[1].

In Romania, the principle of priority of the European Union law is expressly dedicated in the Constitution. The regulation of this principle is found in art. 148 para.2, stating that: "following the accession, the provisions of the constitutive treaties of the European Union, as well as the other binding community regulations, have priority compared to the contrary provisions from the domestic laws, subject to complying with the provisions of the accession document".

The substitution of the national law by the European Union law supposes a transfer of competences, from the national to the European Union level. The substitution can be total or partial, according to which we distinguish:

- The exclusive competence of the European Union;
- The shared competence of the European Union with the Member States;
- The exclusive competence of the Member States.

In the tax matter, the competence belongs to the Member States. But the tax domain has direct implications in the operation of the single market, especially regarding the indirect taxation and the taxation on the mobility of businesses. In such context, it is appreciated that the Member States are placed in a tax competition and are also "targeted by

[1]Cauza Denkavit Italiana, C.69/71, http://www.ier.ro/sites/default/files/traduceri/61979J0061_rezumat%20IER.pdf , accessed on 02.04.2019.

phenomena of erosion of the taxation base, including tax evasion, which is apposed by restrictive rules"[1].

In its capacity of guarantor of the single market, the Commission is authorised to verify the tax legislation of the Member States in order to identify possible limitative rules[2].

The European Union Court of Justice plays an important part in the protection of the single market, having the possibility to censor the prejudicial tax competition practices of the Member States. In this regard, it was appreciated that "The Case law of the Court brings forward a series of (European Union) law-specific tools and it is not impregnated by the tax literature in itself, but by the logic of the domestic market"[3]. On the other hand, the Court has constantly stated that competence of the states regarding direct taxation (taxation of natural and legal persons). We exemplify by case Finanzamt Koln Altstadt v. Roland Schumacker, where, for settling, Court stated that "in the current state of (community) law, the matter of direct taxes does not fall under the European competence and does not diminish the obligation of the states to express its recognised competences by complying with the (community) law"[4].

By the case law of the Court of Justice, a series of principles of the European tax law were featured, such as: the principle of priority of the European Union law compared to the national law; the principle of subsidiarity, the principle of non-discrimination**,** the principle of protection of legitimate trust and the principle of judicial security, the principle of equivalence and the principle of the efficiency, the principle of tax neutrality, the principle of loyal cooperation, the principle of proportionality.

2. The principle of priority of the European Union law compared to the national law is the object of the analysis that we are

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[1] Ioana Maria Costea, Fiscalitatea europeană. Note de curs, (Bucharest: Hamangiu, 2016), 88.

[2] A.D.Dumitrescu, „"Conceptul de impreviziune şi impactul acestuia asupra securităţii economice", *Revista Studii de Securitate publică*, vol. 4, numărul 2(14)/ (aprilie – iunie 2015): 45- 51.

[3] D.Triantafyllou, „La doctrine fiscale sous l'empire du marche interieur: vers une coordination de la fiscalite directe dans la Communaute europeene", *Revue de Droit Fiscal* 24 (2006), 1.

[4] http://ier.gov.ro/wp-content/uploads/rezumate-cjue/61993J0279.pdf, accessed on 02.04.2019.

going to make. Of course, we consider the implications of the principle in the tax matter.

In the case Costa v. Enel, the Court laid the bases of this principle, pointing out that the new judicial order, the European Union one, is an independent one and its enforcement has priority compared to the national one. Referring to the provisions of the Treaty of establishing the European Economic Community (Rome Treaty – 1957), the Court concluded that "the transfer operated by states, from their domestic judicial order to the benefit of the community judicial order, of the rights and obligations corresponding to the provisions of the Treaty, has as consequence a final limitation of their suzerain rights, in relation with which a subsequent unilateral document, incompatible with the notion of Community, cannot have priority"[1].

In this case, they discussed the matter of "subsidies granted by states" in tax matter, the Court deciding that one of the desiderata of the treaty is the progressive elimination of the existing subsidies and the avoidance, under any form, to establish new subsidies, in the domestic business of the states, subsidies allowing the direct or indirect encouragement to a great extent of the enterprises or of the products and threatening to even jeopardize the competition.

In another case, Finanzamt Köln-Altstadt v. Roland Schumacker, the Court pointed out that "article 48 of the treaty has to be interpreted that it can limit the right of a Member State to establish the conditions and rules of taxation of the incomes obtained on its territory by a national of another Member State, to the extent in which this article, regarding direct taxes, does not allow that a Member State should treat less favourably a national from another Member State who, making use of his/her right of free movement, performs an activity paid on the territory of the first state, compared to a national citizen who is in the same situation"[2]. In other words, the Member States of the European Union can exert their prerogatives that are recognised only by complying with priority with the European Union law.

Most often, to explain the principle of priority of the European Union law compared to the national one, reference is made to the

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[1] https://curia.europa.eu/jcms/upload/docs/application/pdf/2009-05/tra-doc-ro-arret-c-0006-1964-200802145-05_00.pdf, accessed on 05.04.2019.

[2] http://ier.gov.ro/wp-content/uploads/rezumate-cjue/61993J0279.pdf, accessed on 04.04.2019.

principle of "loyal cooperation", provided in art. 10 of T.C.E., stating that the Member States have to repeal the national rule incompatible to the community law and, up to that moment, the states have to leave such national decision not enforceable[1]. In this regard, we mention case Simmenthal, in which settling the European Union Court of Justice decided that: "The national judge, having among his/her competences the role to enforce the provisions of the community law, has the obligation to assure the full effect of such rules, leaving, if necessary, not-enforced, his/her own authority, any provision contrary to the national law, without having to request or to wait for its prior elimination by legislative way or by any constitutional procedure"[2].

We consider that in this regard, we have to mention that a domestic rule contrary to a European Union rule cannot be invalidated by the European Union Court of Justice, which only has the competence to establish that the domestic rule of a Member State does not comply with the European Union law. As a consequence, such rule will no longer have effects, the obligation to repeal the rule belonging to the competent bodies of such state. Until its repeal, the case judge will enforce the principle of priority of the European Union law, will ignore the national rule and will enforce the European Union rule, without waiting for the domestic rule to be eliminated from the national[3].

CONCLUSIONS

We establish that the impact of the European law in tax matters is powerful both from a legislative and case law point of view. That is why the literature said that the tax law appears as having a more and more significant European component.

The States maintain the competence to introduce, remove or adjust the taxes. The Member States are free to choose the taxation system they consider the most appropriate, provided that it complies with the EU rules.

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[1] Augustin Fuerea, *Drept comunitar european. Partea generală* (Bucharest: Allbeck, 2004), 163 and foll.

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EUROPEAN UNION – POLICIES IN THE AREA OF EDUCATION

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Abstract:

Every state or union of states must always relate to the future, and the future in a world under rapid changes refers to the adjustment to new opportunities. The complete valorization of the potential can only be achieved through education. Education represents for each society aiming a durable development one of the strategic objectives. The policies in the area of education represent a priority also at the level of the European Union, the basic principles being established from the very beginning. They have the role to insure and develop the competitivity and productivity on labor market, because the level of quality of education is decisive for the perspectives and chances of success in life for young people.

The current study aims a brief analysis of the EU's position in the area of the general policies in education and the objectives aimed to be fulfilled until 2025 through the establishment of the European Education Area.

Key words: *education; objectives; policies; strategies; competitivity; European Union.*

INTRODUCTION

The economic and financial crisis revealed major deficiencies both in the European Union's economy, as well as in that of each Member State, questioning how society will evolve. In this context the strong link between economic and social policies, and especially those concerning education, was emphasized.

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Anticipating and managing change in a society based on cohesion implies, among other things, ensuring access to education for all members of society. Developing Europe's productivity depends on increasing innovation and human capital formation.

According to the Council of Europe "the education and training plays a crucial role in solving most of the socio-economic, demographic, environmental and technological challenges that Europe and its citizens are facing today and in the years to come"[1].

THE ROLE OF EDUCATION REFLECTED IN THE REGULATIONS OF THE EUROPEAN UNION

Education policies are not a current desideratum of the European Union, but since the 1957 Treaty of Rome it has been established that education is an element of development.

It was only through the Maastricht Treaty[2] that education came within the competence of the Union, stating in Article 126 that "The Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity".

The education policies had the following objectives:

- developing the European dimension in education, particalarly through the
- teaching and dissemination of the languages of the Member States;
- encouraging mobility of students and teachers, inter alia by encouraging the academic recognition of diplomas and periods of study;

[1] See in this meaning, the Conclusions of the Council of 12 May 2009 establishing a strategic framework for European cooperation in the area of education and training ("ET 2020") published on 28 May 2009 in the Official Journal of the European Union, C 119/6 .

[2] Maastricht Treaty available at https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf, accessed on 21 April 2019.

- promoting cooperation between educational establishments;
- developing exchanges of information and experience on issues common to the education systems of the Member States;
- encouraging the development of youth exchanges and of exchanges of socio-educational instructors and supporting the participation of youth in the democratic life of Europe;
- encouraging the development of distance education.

The importance of the policies in the area of education was emphasized also by the Lisbon Treaty[1], whose Art 165 states that "The Union shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organization of education systems and their cultural and linguistic diversity". Para 2 of Art 165 reiterates the objectives established by the Maastricht Treaty.

The right to education is considered as a fundamental right according to the *Charter of fundamental rights of the European Union*[2], which in Art 14 states that: "(1) Everyone has the right to education and to have access to vocational and continuing training; (2) This right includes the possibility to receive free compulsory education; (3) The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right".

According to the European Pillar of social rights[3], "Everyone has the right to quality and inclusive education, training and life-long

[1] Lisbon Treaty available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016ME/TXT&from=EN#d1e35-1-1, accesed on 20 April 2019.
[2] The Charter of fundamental rights of the European Union was published in the Official Journal of the European Union on 26 October and available at https://www.europarl.europa.eu/charter/pdf/text_en.pdf .
[3] Proposal for an Interinstitutional Proclamation on the European Pillar of Social Rights (2017/C 428/09).

learning in order to maintain and acquire skills that enable them to participate fully in society and manage successfully transitions in the labor market".

OBJECTIVES OF THE GENERAL EDUCATION POLICIES

In 2009 the Council of Europe[1] stated that the European cooperation in education must comprise the education and training systems as an ensemble, for the perspective of life-long learning. This desideratum of life-long learning "should be seen as a fundamental principle for the entire framework, which is designed to cover the learning in all its contexts – either formal, non-formal or informal – and at all its levels: from education for preschools and schools to higher education, education and training and adult education".

A series of objectives was established in this context, namely:

1. Practical achievement of life-long learning and mobility for trainees;
2. The improvement of quality and efficiency of education and training;
3. Promoting equity, social cohesion and active citizenship;
4. Stimulating creativity and innovation, including the entrepreneurial spirit, at all levels of education and training.

The deadline of these objectives was settled for 2020, establishing in the same time the methods and referential criteria for their achievement. The progress registered at the end of each established cycle shall be analyzed both by the Commission, as well as by the Member States.

In November 2017 at the social summit held in Goteborg, the European Commission presented a communication[2] stating the vision of a European Education Area to be achieved until 2025.

[1] Council conclusions of 12 May 2009 on a strategic framework for European cooperation in education and training ("ET 2020") published on 28 May 2009 in the Official Journal of the European Union, C 116/6.

[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Strengthening European Identity through Education and Culture [COM (2017) 673].

This European Education Area should have the following objectives:

- Turning the mobility into a reality for everyone: the expansion of the participation during the program Erasmus+ and the European Solidarity Corps, the expansion of the participation and the establishment of an EU student card allowing a new mean of registering academic data;
- Initiating a new process based on the Bologna process, preparing the ground for mutual recognition of higher education and school diplomas;
- A higher collaboration in the development of education programs: providing education systems that insure the essential knowledge and skills in today's world;
- Improving foreign languages learning: aiming the insurance that until 2025 all European youth finishing secondary education shall have a good knowledge of two foreign languages, besides their native language;
- Stimulating life-long learning: increasing the percentage of the persons involved in life-long learning activities of 25% until 2025;
- Integrating innovation and digital competences into education: promoting innovative and digital training and preparing a new Digital Education Action Plan;
- Teacher support: Allowing more teachers to participate in Erasmus+ and eTwinning and providing policy guidance on their professional development;
- Creating a network enabling European world-class universities to work together across borders and set up a European and transnational governance school;
- Investment in education: the use of the European semester to support the structural reforms for the improvement of the education policy through EU financing instruments and establishing a reference point for the investments in education to 5% of the gross domestic product (GDP);
- Preserving the cultural patrimony and promoting a feeling of European culture and identity: the development – using the rhythm 2018: European Year of Cultural Patrimony – a Cultural European Agenda and the drafting of a Council recommendation on common values, inclusive education and European dimension of teaching;

- Strengthening the European dimension of Euronews so that there is a channel to provide independent, high-quality information with a pan-European perspective.

On this occasion, the working methods that will allow these objectives to be achieved were also established.

Until 2025, the education policies shall represent the object of the analysis of the Commission and the Member States during the summit to be organized in Sibiu, Romania, in May 2019.

CONCLUSIONS

The Union is a union of values as enshrined in Art 2 of the Treaty on European Union and education, training and culture are essential for the transmission and promotion of common values.

The Rome Declaration of March 2017[1], the EU leaders engaged themselves to achieve "*a Union in which youth receive the best education and training and where they can study and find jobs throughout the continent*".

Globalization, digital revolution, dynamic working models and socio-demographic evolutions offer new opportunities and challenges for European youth who must face them using their skills acquired through the national education systems.

Investing in people stimulates innovation, productivity and competitiveness, helping to overcome labor shortages in rapidly changing labor markets.

A high-quality education for all shall help Europe to achieve its economic and social objectives[2].

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[1] The Rome Declaration is available at: https://www.consilium.europa.eu/en/press/press-releases/2017/03/25/rome-declaration/, accesed on 25 April 2019.

[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - School development and excellent teaching for a great start in life [SWD (2017)165].

2. Lisbon Treaty.
3. Charter of Fundamental Rights of the European Union.
4. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Strengthening European Identity through Education and Culture [COM (2017) 673].
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THE CONCEPT OF ENVIRONMENTAL DAMAGE

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Abstract:

The definition of environmental damage is the answer to the question whether the environment as a whole is a subject of law and can be included in the category of victims of the damaging deed, which implies the need to reconsider the concept of the holder of the subjective right.

The concept of "environmental damage" is a relatively recent phrase, used in doctrine and jurisprudence, by adapting the general traits of prejudice, as an element of civil and contractual liability, to environmental conditions.

The doctrine uses the term "ecological damage" from a terminological point of view, given the term "dommage écologique" used in French literature.

Key words: environmental damage; injury; civil liability; environmental protection; victim.

INTRODUCTION

The definition of environmental damage is the answer to the question whether the environment as a whole is a subject of law and can be included in the category of victims of the damaging deed, which implies the need to reconsider the concept of the holder of the subjective right[2].

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[2] Ion Dogaru and Pompiliu Drăghici, *Drept civil. Teoria generala a obligatiilor, editia 2,* (Bucharest: C.H.Beck, 2014*)*, 481.

1. THE CONCEPT OF "ENVIRONMENTAL DAMAGE"

The concept of "environmental damage"[1] is a relatively recent phrase, used in doctrine and jurisprudence, by adapting the general traits of prejudice, as an element of civil and contractual liability, to environmental conditions.[2]

The doctrine uses the term "ecological damage" from a terminological point of view, given the term "dommage écologique" used in French literature.

In the Romanian legal literature, some authors[3] use the expression "*environmental damage*" which represents "*the whole of the natural elements and those created by human activities in interaction and interdependence, determining the conditions of existence of man and of society as a whole*", but most authors do reference to "environmental damage"[4].

Concerning the quality of injured person, two distinct aspects were considered in the doctrine, namely: the direct victim is the environment, with all its inappropriate[5] elements, as "environmental goods" [6] or man is prejudiced, because the damaging consequences of polluting actions/inactions affect it and affect its existence[7].

In order to solve the civil liability[8], it should be pointed out that in the ordinary law there can be no question of repair beyond the direct and certain damages, while in the environment, where the origin of the damage can be removed and consist, for example, in the accumulation of chronic or diffuse pollution, and its certainty can not be approximated, the classification of various pollution damages has been imposed in

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[1] The name was first used by Michel Despaux in *Droit de l'environnement*, (Paris: Litec, 1980), to highlight the characteristics of indirect damage resulting from environmental damage.

[2] Lacrima Rodica Boilă, *Raspunderea civilă contractuală*, (Bucharest: C.H. Beck, 2016), 508.

[3] Boilă, *Raspunderea civilă contractuală*, 508; D. Marinescu, *Tratat de dreptul mediului*, (Bucharest: Ed. All Beck, 2003), 5.

[4] E.M. Pătrăuș, *Răspunderea civilă pentru dauna ecologică. Teză de doctorat*, (Cluj-Napoca: Facultatea de Drept Cluj-Napoca, 2004), 113-155.

[5] See G. Martin, „La responsabilité civile pour les dommages a l'énvironnement et la Convention de Lugano", în *Revue Juridique de l'énvironnement*, no. 2-3(1997): 14-15.

[6] In this regard, see J. Carbonnier, *Droit civile, Les biens*, (Paris: PUF, 1978), 206.

[7] Boilă, *Raspunderea civilă contractuală*, 509.

[8] Denisa Barbu, *Drept procesual penal. Partea generala*, (Iasi: Lumen, 2015), 112.

several categories: isolated ecological damage, collective ecological damage, ecological damage to the planet.[1]

Thus, in the case of the first two categories of damage, it is possible to speak of certain damage, and the victims are predictable and, by virtue of their status as subjective rights holders, have access to justice; in the case of the latter category, damages are hard to relate to the facts that generated them to speak of their direct nature, while asking the question who is the holder of the subjective right to promote the action in court[2].

Regardless, environmental damage is the damage caused to people and property by the environment in which they live[3], from where we can deduce that the environment is considered to be the cause and not the victim of the damage[4].

We also consider it necessary to specify the characteristic features of environmental damage in order to clarify the idea of designating the responsible person and ordering him to pay damages, namely:

a) the repairable environmental damage is any damage suffered, which may be direct or indirect, so-called damage by ricochet[5];

b) the certainty of the damage caused by environmental pollution;

c) the serious and irreversible nature of environmental damage.

Regarding indirect damage, liability is incurred for the damage suffered under art. 5 lit. e from the law. The "polluter pays" rule applies to all environmental damage, both direct and indirect, guilty or non-

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[1] Dogaru and Drăghici, *Drept civil. Teoria generala a obligatiilor*, 482.

[2] Dogaru and Drăghici, *Drept civil. Teoria generala a obligatiilor*, 482.

[3] M. Despax, *Droit de l'environnement,* (Paris: Litec, 1980), 1036.

[4] Law no. 137/1995 in Annex I on environmental protection.

[5] Pătrăuș, *Răspunderea civilă pentru dauna ecologică. Teză de doctorat,* 67-70. In the study, the author presents several classifications of ecological damage:

a) depending on the mode of production: direct and indirect damages;

b) according to their object: damages to the environment, property and/or person or economic loss;

c) in relation to the nature of the damage: damages of primary and secondary origin;

d) depending on the way of repair: reparable damages in kind or by monetary equivalent;

e) according to their cause: contractual and non-contractual damages;

f) depending on the possibility of being foreseen: foreseeable and unpredictable damage;

g) depending on the duration of their occurrence: instantaneous or successive damage.

guilty products, for the purpose of sanctioning destructive, polluting actions, repairing or preventing serious and irreversible damage[1].

In the classic doctrine of civil law, basically, only direct damage is considered repairable, and the causal link between the unlawful act of the responsible person and the damage is necessary[2].

In the case of environmental damage, the situation is much more complex, because ricochet damage is the direct and immediate consequence of direct environmental damage, which can lead to the polluter's liability only when establishing a necessary link with the deed.

The existence of environmental damage is the basis for engaging the polluter's responsibility, regardless of his or her psychological attitude towards the deed and its consequences, its direct or indirect character, to guarantee full reparation, if that is possible[3].

The extension of reparation to indirect damages has been substantiated in the legal literature by the provisions applicable to contractual liability, according to which: "(...) *damages must only include what is a direct and necessary consequence of the non-fulfilment of the obligation*", which leads to the possibility of a broad interpretation of the notion of indirect damage also applicable in the field of tort liability, which is why in our legal literature it was stated that "...*it expresses the exigency of a sufficient causal link characterized to remove the possibility of liability, stretching across the chain of events that occurred as a result of the damaging deed, would imply a virtually no fault of responsibility*[4]."

As far as engaging in tort/delict, it must be stressed that the damage must be certain, which is both direct, current and unambiguous, and future, but sure[5].

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[1] Boilă, *Raspunderea civilă contractuală*, 511. For example, the discharge of toxic waste into rivers and seas, emissions of toxic gases into the atmosphere, climate change, etc., which seriously endanger the lives and health of people, their goods and properties.

[2] L. Pop, "Synthesis attempt of the evolution of the main theories on the basis of tort law civil liability", in *SUBB, Jurisprudentia Series*, no. 2(1986): 217.

[3] Boilă, *Raspunderea civilă contractuală*, 513.

[4] M. Eliescu, *Răspunderea civilă delictuală,* (Bucharest: Ed. Academiei, 1972), 95.

[5] L. Pop, *Tratat de drept civil. Obligațiile,* vol I., *Regimul juridic general*, (Bucharest: C.H. Beck, 2006), 73.

CONCLUSIONS

In the field of environmental protection, the certainty of environmental damage has a clearer interpretation, with a forward-looking legal liability, which includes, besides actual damages, the future ones.

In this context, the certainty of injury is analysed by the sufficient probability of production under certain environmental conditions[1].

In terms of liability for environmental damage, it is important to determine whether it is possible to predict with certainty what the evolution of the damage will be in time to assess the culpability of the conduct of the responsible person. In such situations, it is questionable whether the guilty person can be accused of having been guilty, even though he has not been able to anticipate such consequences in order to take the necessary measures to prevent and eliminate them[2].

As such, liability for damages is committed independently of the subjective attitude of the responsible person[3].

For "losing a chance"[4], the liability for environmental damage has certain peculiarities.

Regarding the serious and irreversible nature of ecological damage, the irreparable and irreparable consequences for the existence of life on earth[5] must be mentioned.

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[1] Boilă, *Raspunderea civilă contractuală*, 514.

[2] Boilă, *Raspunderea civilă contractuală*, 515.

[3] Article 95 of Law 137/1995 expressly provides for the objective character of this liability, given that the environmental damage includes not only the direct or indirect harmful, foreseeable or unpredictable consequences for man and his property, but also certain relationships in the environment, by affecting ecological processes until life on earth disappears.

[4] Hanly v. Mitchel (Hantyl) St. Cir. Feb. 27 1972, 34ERL, 13.134, with notes by R.W. Findley, D.A. Ferber, *apud*. Pătrăuș, *Răspunderea civilă pentru dauna ecologică. Teză de doctorat*, 72. In the present case, the US Court of Appeal granted $ 5 million in damages, the cost of land reclamation, and $ 1.5 million for lack of profit through the loss of land use as a result of the finding of land contamination of the applicant's property with solid cyanide by a neighbour who deposited waste on his land.

[5] Boilă, *Raspunderea civilă contractuală*, 516.

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CONSIDERATIONS OF SETTLEMENT OF THE EXEMPTION OF NON-CONFIDENTIALITY RELATING TO ARBITRATION JUDGMENTS

Daniela LAMEŞ [1]

Abstract:

The study presents an insight into the history of arbitration from antiquity and the Middle Ages to the present, leading to the evolution of commercial arbitration litigation. We present the secular contribution of the arbitration institution to the development of private justice in Romania, taking into account the context in which it has developed or is currently being developed. We emphasize the correlation between the Romanian normative provisions, the treaties, the international agreements and the settlement of the arbitral cases having as main, contractual, the will of the parties in the case. We consider the argumentation, motivation and interpretation of the exceptions of unconstitutionality to be important in the current Romanian legal context, which leads to the observance of the principle of unity and compulsory force of the application of the constitutional provisions. We present in this article the way in which judicial precedents are used when there is no clear provision of normative regulation. We propose: Establishment of a public institution for the consolidation of private justice in Romania and amendments to the provisions of the fundamental law on the unconstitutional exception.

Key words: *arbitration; Constitutional Court; fundamental law; force; settlement; decision; litigation; exception.*

INTRODUCTION

We have studied and presented the evolution of arbitration both nationally and internationally by referring to legal deeds and acts that have laid the foundation stone in its progressive historical development until the contemporary period. This exposure produces an awareness of

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the role and importance of private justice, predominantly commercially inclined.

The theme is of interest due to its contribution to the development of the arbitration institution, giving us an overview of the doctrine and jurisprudence regarding the settlement of the arbitral trials. By excellence we refer to the arbitration procedure in the debating phase on the grounds of raising the objection of unconstitutionality. We present aspects of some decisions given by the Constitutional Court, as well as the appeal of an arbitral decision. Also, the correlation between the constitutional norms, the normative acts in force and the arbitral decision, which is carried out according to the agreement between the parties, is obvious, but with the observance of the legal norms in force.

Arbitration has millenary origins, regulating for a long history the commercial relations between persons or states that did not find a common legal language in settling disputes regarding non-observance of contracts concluded between the parties.

The first historical testimonies of arbitration are found in: The Bible in Solomon's Judgment "You chose me forever to rule your people and judge your sons and your daughters,"[1] in the judgment of Paris in Ancient Greece when Paris decides to whom the apple is claimed, given that no settlement could be reached without arbitration.

In antiquity, according to Domitus Ulpian, justice was considered to be the [2]"constant and perpetual desire to give everyone what they owe," an opinion valid until today, perfectly fitting the characteristics of arbitration.

In the Middle Ages, in commercial arbitration, freedoms rules of disputes were established freely, considered to be independent of the authority of the nobleman at the time[3]. In this respect, the medieval mercator appeared, lex being admitted as the sole source of normative editing, regulating relations between traders.

In view of the normative evolution of the states, lex Mercatoria is gradually being replaced by the national laws of each state. International

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[1] "The Book of Wisdom of Solomon", Chapter IX, paragraph 7, in *The Bible* (The Bible and Mission Institute of the Romanian Orthodox Church: Bucharest, 2005), 974.
[2] Domitius Ulpian. *Topics*.Citatepedia .ro.
[3] A. C. Cutler, *Private Power and Global Authority: Transnational Commercial Law in Global Political Economy* (Cambridge University Press: Cambridge, 2003), 108.

needs to be able to judge a cause or a commercial litigation between two parts of two different states. These require the issuance of new normative rules. In this respect, the business sphere took the form of a traders' law labeled by some authors as "new lex mercatoria."

In the fifteenth century, precisely in 1563, the commercial jurisdiction of Paris was established, perceived as a form of progress in arbitration, as it implemented principles that over time had not been obsolete. Through this form of commercial justice, judges and consuls were established, but also their specific competencies. In 1789, following the French Revolution, arbitration retains only consular jurisdiction under the control of the commercial tribunal.[1]

The 20th Century for Commercial Arbitration Tribunals brings real progress as the arbitration system is clearly outlined by the application of internal rules, as appropriate, by international law, allowing the parties involved to establish rules that base the settlement of cases.

The historical evolution of arbitrary rules in Romania is intertwined with the commercial norms being found in the *Rules of Vasile Lupu, the Code of Caragea, the Code of Calimach, and the Organic Regulations. In 1859 they were first introduced as a replica of the provisions of the French Commercial Code of 1807*, called the *Commerce Catalogue of the Romanian Principalities. Regulations are also contained in the Romanian Commercial Code of 1877, the Law of the Court of Cassation and Justice of 1887 amended in 1912 - regarding the settlement of commercial appeals against arbitral decisions.*

We can say that since 1865, by adopting the *Civil Procedure Code* - Book IV About arbitrators, arbitration acquires a clear legal form in Romania. It is completed in the year: 1900, 1948 and in 1993, the last normative act produces amendments to the Civil Procedure Code by Law 59/1993. The major difference is provided by the New Civil Procedure Code, republished and updated according to Law 134/2010 published in the Official Gazette no. 247/10 April 2015 introducing clear regulations in Chapter VI About arbitration, and international arbitration and the effects of arbitration awards are regulated in a separate chapter, Chapter VI.

[1] Ciutrin Horia, *Applications of a New Mercatorial Lex in International Arbitration*, (Juridice In Law We Trust. 12/02/2013).

Currently, arbitration is defined as a convention between parties applied by "persons who have the full capacity to exercise rights, may agree to settle by arbitration the patrimonial disputes between them, apart from those concerning rights over which the law does not allow to make a transaction.[1]

We affirm that in Romania arbitration gains ground being used on an increasingly large scale in the commercial system. We consider that at the domestic and international level, we can find arbitrary practices with historical gravity and prestige in solving the cases, which makes private justice to look for the future with confidence, with its own rules, simple procedures, which will solve the cases with speed and efficiency.

The 21st Century clearly outlines international reference institutions, such as the International Court of Arbitration of the International Chamber of Commerce - ICC Paris; established in London, the International Court of Arbitration in London - LCIA, is one of the most important arbitration institutions, which provides UK-based arbitration services; we find arbitrary courts specializing in maritime law, for example in London was founded The London Maritime Arbitrators Association – The London Maritime Arbitration Association, which has become the most important center of maritime arbitration worldwide, and the practical referees members of the association enjoy a global recognition of their impeccable reputation in conducting this activity. "[2]

Due to the refusal to execute arbitrary rulings in 1958, a convention was signed by which 140 states that are part of the United Nations joined or ratified the international arbitration treaty. Romania has adhered to the Convention by implementing the norms of this international normative act in Romania by Decree no. 186 / 10.06.1968 (Official Bulletin No. 19 / 24.07.1961), 3 years from the date of adoption - 10.06.1958.

At the 1958 New York Convention, we note that a large number of countries have joined the ratification process, which has not been repeated by the ratification of the 1960 Strasbourg Convention.

Taking into account the evolution and tendencies of the judicial settlement of disputes at the level of the European Union states, we find

[1] *Online Dex*. Arbitration.

[2] Mihai Marcel Gabriel, *Particularities of the Arbitration Clause in Maritime Arbitration* (Juridice In Law We Trust, 30.09.2017).

the existence of different legal systems and the laws and codes adopted that have reduced the role of jurisprudence.

As an example, the Romanian law system does not recognize the precedent as a source of law, and the judge in the given judgment applies the law, which leads to a unit of jurisprudence and binding force.

The requirement of unity is also found in the application of the Romanian constitutional provisions where, according to art. 126 para. (3) "The High Court of Cassation and Justice ensure the unitary interpretation and application of the law by the other courts according to its competence".[1]

The interpretation and uniform application of the law is also provided by the New Civil Procedure Code in Art. 514 which regulates the courts that can rule on "the legal issues that have been solved differently by the courts".[2]

In the case of an arbitration litigation according to art. 613 par. (4) "the decision of the court of appeal by which the action for annulment is adjudicated shall be subject to appeal"[3], stating that the abolition of an arbitral award shall be made through the action for annulment of art. 608 [4]NCPC.

Thus, the legislator creates the framework for the interpretation of the applicable laws by providing binding and general force to the decisions of the Constitutional Court according to art. 147 par. (4) of the Constitution, "the decisions of the Constitutional Court are generally binding and have power only for the future."[5]

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[1] *The Romanian Constitution.*art. 126 para. (3).
[2] *The new Civil Procedure Code*, art.514..
[3] *The new Civil Procedure Code*, art. 613 par. (4).
[4] *The new Civil Procedure Code*, art. 608.
[5] *The Romanian Constitution.*art. 147 par. (4). In its original form, adopted at the meeting of the Constituent Assembly of 21 November 1991, it was published in the Official Gazette of Romania, Part I, no. 233 of November 21, 1991 and enters into force after its approval by the national referendum of 8 December 1991. Modified and completed by the Law for the Revision of the Romanian Constitution no. 429/2003, republished by the Legislative Council. See: Law on the Revision of the Romanian Constitution no. 429/2003 was approved by the national referendum of 18-19 October 2003 and entered into force on 29 October 2003, the date of its publication in the Official Gazette of Romania, Part I, no. 758 of 29 October 2003 of the Constitutional Court Decision no. 3 of 22 October 2003 to confirm the outcome of the national referendum of 18-19 October 2003 on the Law for the Revision of the Romanian Constitution.

Arbitration litigation is settled according to art. 541 par. 2. The NCPC, the litigants and the competent arbitral tribunal may establish procedural rules derogating from common law, provided that such rules are not contrary to public policy and to the mandatory provisions of the law.[1]

In conclusion, at national level, we have a legal unity in resolving all disputes, whether of a state jurisdiction or arbitration litigation. Legal rules also have binding force in arbitration litigation, even if the basis of settlement is the will of the parties. The condition is to observe the legal rules in force where the parties choose to carry out the arbitration process with the freedom to establish derogatory principles from common law.

The role of the Constitution regarding the maintenance of normative unity is as we have shown in the paragraphs above. To have the fundamental law status in relation to the other normative acts: organic laws, ordinary laws, decisions, emergency ordinances, normative acts issued by central and local administrations, decisions / decisions issued by the courts, whether they are based on their issuance legal norms containing elements of unconstitutionality.

Constitutional legal protection requires safeguards, called upon to ensure the primacy of the constitution, namely the general control of the implementation of the constitution, the fundamental duty to observe the constitution and the constitutional control of the laws[2]. In this sense, the constitutional control of the laws has as its function the verification of the conformity of the laws and all the normative acts in force that are based on the fundamental law.

The aspects of the unconstitutionality exception that intervene in the settlement of the commercial arbitration decisions are regulated in art. 146 letter d) of the Constitution of Romania, where the attributions of the Romanian Constitutional Court, decides on exceptions of unconstitutionality regarding laws and ordinances, brought before the courts of law or commercial arbitration; the exception of unconstitutionality may also be raised directly by the People's Advocate[3];

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[1] *The new Civil Procedure Code,* art. 541 par. (2).

[2] Ion Guceac, Academy of Sciences of Moldova, Institute of Legal and Political Research, *Constitution at Millennium Cross* (SE Editorial Poligraphic Company - Central Printing House: Chisinau, 2013), 373. See Ion Muraru, *Constitutional Law and Political Institutions* (Bucharest, 1993), 73.

[3] *The Romanian Constitution.*

and Art. 29 - 33 of the amended and updated Law 47/1992 on the functioning of the Constitutional Court[1], which states in para. (1) that the arbitration tribunals may raise exceptions of unconstitutionality on a normative act, which is related to the settlement of the case at any stage of the dispute and object of dispute[2]. Also, the legislator in art. 29 par. (2) states that these exceptions may be raised by both the arbitral tribunal and the parties' request.

In legal and normative practice, exceptions are divided according to their subject-matter: procedural exceptions, substantive exceptions and exceptions according to the nature of the rule invoked.

In order to understand the exception of unconstitutionality we will expose the classification of procedural exceptions based on art. 246 par. (1) and paragraph (2) of the NCPC[3] where the legislator classifies procedural exceptions into: relative exceptions that may be invoked by the party requesting an interest and absolute exceptions that may be raised by the arbitral tribunal or the parties at issue at any stage of the trial.

Specifically, in line with the civil procedure code, the absolute exceptions refer to the violation of public policy: exclusive material and territorial jurisdiction, lack of interest, general lack of competence, lack of interest, lack of procedural capacity to use. The second category, the exceptions relating to the breach of rules protecting the interests of the parties, are as main components: territorial lack of competence and certain cases of recusal.

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[1] Law no. 47/1992 on the organization and functioning of the Constitutional Court, *Official Monitor* no. 807 of 3 December 2010; with subsequent amendments Law no. 168/2018 for amending and completing the Law no. 47/1992 on the organization and functioning of the Constitutional Court, *Official Monitor* no. 595 of 12 July 2018.

[2] Law no. 47/1992 on the organization and functioning of the Constitutional Court, *Official Monitor* no. 807 of 3 December 2010; with subsequent amendments Law no. 168/2018 for amending and completing the Law no. 47/1992 on the organization and functioning of the Constitutional Court, *Official Monitor* no. 595 of 12 July 2018, art. 29 par. (1).

[3] *The Civil Procedure Code*, Law 134/2010, republished *Official Monitor* 247 of April 10, 2015, rectified in *Official Monitor* no. 234 of 30 March 2016 as amended by Law no. 17/2017 *Official Monitor* nr. 196 of 21 March 2017. See: Art. 246 par. (1) and (2), (1) Absolute exceptions are those alleging breaches of public policy rules. (2) Relative exceptions are those which allege breach of rules that protect the interests of the parties above all.

We note that the legislator considers that exceptions to public order can be invoked at any time during the arbitration process provided the condition provided in Art. 29 par. 3) whereby the cases subject to arbitrary proceedings ,, The exceptions to the provisions found to be unconstitutional by an earlier decision of the Constitutional Court cannot be considered as objects of exception.[1]

In order not to have the state of unconstitutionality: the laws, ordinances and normative provisions on the basis of which arbitration litigation is required, it is necessary and obligatory according to the Decision of the Constitutional Court of Romania no. 766/2011[2] to be in force.

Laws, ordinances and legal provisions do not take effect after the expiration of their validity and are subject to constitutional control. The Court's intervention in the appreciation of the constitutionality of some legal norms which have ceased to exist is contrary to its role and functions established by the Constitution and to the principle of non-retroactivity of the law.

Therefore, the exceptions of unconstitutionality raised in violation of the provisions of Article 23 (1) [now Article 29 paragraph (1)] of Law no. 47/1992, republished, are, according to paragraph (6) (5)] as inadmissible, as follows: they had to be rejected by the court itself by a reasoned decision, without any further notification to the Constitutional Court.[3]

As a result, only acts of a legislative nature may be subject to constitutional control, not acts of an administrative nature, which are subject to legality control by special laws such as the law of administrative[4] litigation in state courts.

The provisions of art.146 letter d) of the Constitution corroborated by the Law no. 47/1992 on the organization and functioning

[1] Law no. 47/1992, art. 29 par. (3).

[2] Decision no. 766 of 15 June 2011 on the objection of unconstitutionality of the provisions of art. 29 par. (1) and Article 31 (1) and (3) of the Law no. 47/1992 on the organization and functioning of the Constitutional Court, published in the *Official Gazette* no.549 of 03.08.2011.

[3] Decision no. 766 DIN June 15, 2011, See: Chapter II paragraph (1) On the merits of the exception of unconstitutionality.

[4] Law no. 554/2004, Updated 2019 by Law 212/2018 for amending and completing the Law on administrative contentious no. 554/2004 and other normative acts, published in *Official Monitor* 658 of 30 July-2018

of the Constitutional Court, the Constitutional Court Decision no. 766/2011 states that it is the only competent authority in the matter of constitutionality control, without excluding any sharing in this respect with the courts of common law.

The same above-mentioned Constitutional Court Decision on the exception of unconstitutionality, which deals with legal rules that are no longer in force, is interpreted as an interpretation in the jurisprudence of the European constitutional courts, namely: Germany, Italy, Hungary, the Czech Republic , Poland or France.

European countries consider the basis of regulatory provisions or jurisprudential guidelines, the constitutional courts which "considered more important the substantive analysis of the criticized provisions in order to eliminate those that do not meet the constitutional imperatives than the establishment of a purely formal procedural criterion would lead to terminating the process. „[1].

The Romanian legal doctrine, more precisely in the Romanian constitutional jurisprudence, as well as the European constitutional jurisprudence, treats unitarily through the same legal reasoning the exceptions of unconstitutionality that are found in the norms of public order reaching a unitary legal opinion by which the legal norms must be in force in order to produce legal effects and correspond to constitutional imperatives. According to art. 15 corroborated with article 21 regarding the principle of non-retroactivity of the laws of the Romanian Constitution.[2]

By regulating the normative object of the constitutionality control, we consider that in building the admissibility status, the raising of the unconstitutionality exception in the case of arbitral cases must be related to the settlement of the case subject to judgment at any stage of the litigation. Also, the law, the ordinance, the provision applied to it,

[1] Decision no. 766 DIN June 15, 2011, See: Chapter II paragraph (4) The substantive issues of the objection of unconstitutionality.

[2]*Constitution of Romania*: Art. 15) 1) Citizens enjoy the rights and freedoms enshrined in the Constitution and other laws and have the obligations laid down therein. (2) The law has only the future except for the more favorable criminal law or contravention law, see Art. 21 Anyone can address justice to defend their rights, freedoms and legitimate interests. (2) No law may preclude the exercise of this right. 3. The parties shall have the right to a fair trial and to settle the cases within a reasonable time. (4) The special administrative jurisdictions are optional and free of charge.

should be in force and the unconstitutionality should not be established by a previous decision of the Constitutional Court.

By examining the procedure for resolving the unconstitutionality exception in commercial arbitration judgments, it is essential to identify the types of acts issued by the Constitutional Court in view of their effect on the laws and ordinances in force.

The Constitutional Court must be notified by the parties or it can notify its self. According to article 11 of paragraph (1) lit. d) Of Law no. 47/1992 Constitutional Court has the power to issue decisions or to issue opinions with the majority vote, decide on the exceptions of unconstitutionality regarding the laws and ordinances, bring before the courts of law or commercial arbitration, as well as those directly raised by the People's Advocate.[1]

Decisions on the Constitutional Court's exceptions of unconstitutionality may be the rejection or the finding of a normative act in force. If the objection of unconstitutionality is rejected, it is communicated to: the court which has referred the Constitutional Court or the People's Advocate. If the unconstitutionality of a provision, decree or law is found to be communicated: to the Government, to the two Chambers of Parliament, to the authorities involved and to the court which has referred the Constitutional Court or the judicial body on which the case is located.

The effects of unconstitutionality decisions of the Constitutional Court are found in art. 147 paragraph (1) of the Constitution of Romania, these refer to the legal norms in force which cease to have legal effects through the Court's decision "The provisions of the laws and ordinances in force, as well as those of the regulations, found as unconstitutional, cease their legal effects at 45 days from the publication of the Constitutional Court's decision if, within this interval, the Parliament or the Government, as the case may be, disagree with the unconstitutional provisions of the Constitution. During this period, provisions found to be unconstitutional are legally suspended.[2]

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[1] Law no. 47/1992 on the organization and functioning of the Constitutional Court. M. Of. no. 807 of 3 December 2010; with subsequent amendments Law no. 168/2018 for amending and completing the Law no. 47/1992 on the organization and functioning of the Constitutional Court. M. Of. no. 595 of 12 July 2018 - Article11 (1) lit. d.

[2] *The Romanian Constitution*. Art. 147 para. (1).

Also, article 147 of the Constitution registers the unconstitutionality of the laws on their promulgation by the Parliament. It is obliged to reconsider the provisions that are the subject of the unconstitutionality and to agree with the decision of the Constitutional Court.

In the case of a treaty, or an international agreement, according to art. 147 (3), Article 146 (b) it cannot be the subject of an objection of unconstitutionality. The treaty or international agreement found to be unconstitutional cannot be ratified.[1]

Regarding their decisions and their effects in finding the state of unconstitutionality, it is mandatory for the Constitutional Court to be notified by the arbitral tribunal in our case, by a distinct conclusion in its original form, which states: the court's opinion on the exception, the points of view of the parties and the solution of the court hearing the case.

Thus, according to the provisions of Article 29 paragraph (4) of Law no. 47/1992, according to which, in the event of the lifting of the exceptions of unconstitutionality before the Commercial Arbitration Court, the Constitutional Court is ordered by the court in front of which has raised the objection of unconstitutionality, by a conclusion that will include the views of the parties, the court's opinion on the exception, and will be accompanied by the evidence provided by the parties. If the exception has been raised ex officio, the conclusion must be substantiated, including the parties' submissions and the necessary evidence.[2]

We find in the jurisprudence of the Constitutional Court in art. 1 of the Decision no. 3 of February 9, 2010[3], the case that concerns the settlement of the objection of unconstitutionality under art. 147 lit. d) of the Constitution, with the purpose of: transmitting the files, documents, their registration and filing the file before the Court.

For a better understanding of the research conducted in this study, we will present the Decision of the Constitutional Court of Romania no.

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[1] *The Romanian Constitution*. Article 147 (3).

[2] Law no. 47/1992 updated, art. 29 paragraph (4).

[3] Decision no. 3 / 9.02.2010, Constitutional Court of Romania, Decision on the constitution and the content of the files referring to exceptions of unconstitutionality in respect of which the Constitutional Court is notified pursuant to Article 146 letter d) of the Constitution, art. 1.

100 of 7 March 2017 regarding the provisions of art. 613 paragraph (4) of the Civil Procedure Code, in which one of the judges makes a separate opinion regarding the admissibility of the objection of unconstitutionality in contradiction with the rejection of the rejection of the exception.

Arbitrary rulings have as their purpose the settlement of appeals against the appeals of the courts by which the actions for annulment have been dismissed. The Court notes that the arbitral tribunal cannot re-examine the case, since "the arbitral decision confirmed by the decison of the Court of Appeal represents the completion of the arbitration proceedings in which the parties have benefited from all the guarantees offered by it".[1]

The decision of the Court in the present case has a separate opinion on Art. 129 of the Romanian Constitution, which states that the exception of unconstitutionality is groundless because the case remains governed by the provisions of the arbitration agreement. "Therefore, the appeal is judged only on the assumption that the action for annulment is admitted, because a new legal situation arises, the litigation will no longer be governed, in principle, by the arbitration convention - with the conditions provided by art. 613 par. (3) lit. b) of the Code of Civil Procedure".[2]

Any appeal shall be directed against the solution provided for in the judgment, in accordance with the provisions of Art. 641 par. (1) in conjunction with art. 483 par. (1) of the New Code of Civil Procedure, which means that any party to the arbitral proceedings may bring an action to the court of appeal if they are dissatisfied with the arbitral decision or address to the Constitutional Court the finding of the unconstitutionality of the arbitration decision.

The Constitutional Court holds in the operative part of Decision no. 100 of 7 March 2017 *that the legislator has the power to adopt regulations of a general nature, of a special or derogatory character* according to art.129 of the Constitution.

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[1] Decision of the Constitutional Court of Romania no. 100 of 7 March 2017 M. Of. 7 July 2017 on the objection of unconstitutionality of the provisions of art. 613 par. (4) of the Code of Civil Procedure, Judge Mona Maria Pivniceru made a separate opinion, in disagreement with the rejection of the exception, point 36.

[2] Decision of the Constitutional Court of Romania no. 100 of March 7, 2017, Separate Opinion.

As a *separate, unique opinion*, different from the solution adopted, the arbitral decision is considered not to be subject to appeal. The exception to unconstitutionality is distinct from the arbitral award, which is governed only by the provisions of the arbitration agreement. The inadmissibility of the appeal in the above case is motivated by the application of different legal treatment to the actions for annulment previously pronounced by the Constitutional Court[1]. It is taken into account that the judgment is subject to appeal only if it has as its object the admission of the action, considered to be arbitration.

I have presented in the above case the constitutional part, in order to understand how the judges deliberated but also the legal logic in the decision making by the Constitutional Court. These are the legal mechanisms by which they deal with cases submitted to the Court with reference to arbitration awards issued by private courts. By their essence, according to the arbitration rules, they have the obligation, besides the will of the parties in the trial, to observe the legal norms in force and, last but not least, the fundamental law of Romania Constitution.

Interpretations and opinions separated from the point of view of the unconstitutionality objection found in the Constitutional Court's case-law on arbitrary rulings call into question whether arbitration courts are limited to the exercise of appeals. We appreciate that the constitutional court argues and states that the legislator has this exclusive attribute.

Analyzing the jurisprudence of the Constitutional Court regarding strictly raising the exceptions of unconstitutionality in the arbitration judgments, we consider that a bill proposes to bring a constitutional amendment in the art. 129 that the arbitration courts should be mentioned by the courts, with the following wording: "Against court decisions and arbitration awards, the interested parties and the Public Ministry may exercise the remedies, according to the law."

Thus the constitutional text has the certainty that the separate opinions will disappear, the regulation being practical and will fluidize the legal system. The argument can lead to the modification of the Romanian Constitution in Chapter VI Judicial Authority. The legislator can extend the scope of constitutional lawmaking to the Romanian Private Courts, currently regulated only by the NCPC.

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[1]See: Decision no. 755 of 16 December 2014, published in *the Official* Gazette of *Romania*, Part I, no. 101 of 9 February 2015, paragraph 23.

The arbitration procedure is currently considered as a contractual mechanism, not a form of justice. We can ask ourselves about the existence of public order issues, how we identify them, how we do justice, contractual limits, and how we delimit the constitutional concept. The legislator considers arbitration and the right of access to justice through art. 21 through par. (1) (2) and (3), art. 126 para. (1) and Article 146 (D). By its very nature, the legislator considers the arbitral tribunal to be a court. In this respect, Decision no. 395/2006 of the Constitutional Court, "The Court holds that the legal provisions governing arbitration do not contravene the provisions of the Constitution regarding the courts".[1]

CONCLUSIONS

Proposals for constitutional amendment lead to the statute of private justice in Romania, through clear constitutional rules on institutionalized arbitration tribunals.

We propose the establishment of a National Arbitration Regulatory Authority with the profile of a public institution under the coordination of the Government of Romania, with normative regulatory attributions in the field of institutionalized arbitration. I believe that the authority set up, according to the above concept and the Ministry of Justice, has a collaboration report on the legislative and arbitration rulings. Arbitral rulings have the force of a judgment, they are final, binding and enforceable, and the legislator and the jurisprudence of the Constitutional Court assimilate the decisions of the arbitral courts to the judiciary.

Arbitration decisions, even if they are based on the will of the parties through the conclusion of the compromise clause, will have greater credibility via the citizens, which will lead to the relief of the state courts, and the remedy will be fully regulated, this way separate opinions will never emerge on the high exceptions of unconstitutionality.

[1] Decision no. 395/2006 regarding the rejection of the unconstitutionality exception of the provisions of art. 340, art. 3401, art. 341, art. 342 and art. 3596 of the Code of Civil Procedure, as well as of art. 13 par. 3 and 6 of Decree-Law no. 139/1990 on the chambers of commerce and industry in Romania.

The reality of the issue is the way in which it can be regulated and constitutionally regulated - the introduction of an action on the remedy for the objection of unconstitutionality in the arbitral awards.

We have found from the study of constitutional doctrine and from the jurisprudence of the Constitutional Court different opinions supported and motivated in the Court's decisions. This can only be avoided by amending some articles of the Constitution, by stating in special laws, or drafting for approval a framework law of arbitration that would impose on Romanian private justice clear rules without unambiguous interpretations or motivations of arbitral proceedings.

Thus, we will have normative unity, in arbitral judgments, under the Romanian legal provisions, in the exceptions of unconstitutionality. This unity of law enforcement must not affect the will of the parties in the case, the rules being the only legal framework to be observed regarding the lifting of exceptions of unconstitutionality in arbitration cases.

I consider it appropriate to regulate arbitration through a framework law. The existence of a law in the field of arbitration is mandatory for the organization and functioning as an autonomous administrative authority. The legislator by the provisions of art. 117 paragraph (3) of the Constitution clearly states that "autonomous administrative authorities may be established by organic law".

In the present study we analyzed the jurisprudence presented from the perspective of constitutional law, regarding the arbitration award decision in view of the rejection of the exception of unconstitutionality. I consider that the only way to resolve the arbitral tribunal's decisions is the action for annulment under the NCPC and the Rules of Arbitration.

In my opinion, the appeal cannot be brought against an arbitral lien. The appeal can only be made in respect of cases pending before state courts, and the arbitration tribunal is not part of the state justice system. In this respect, the request for referral to the Constitutional Court in the case in which an arbitral decision is made by the arbitration tribunal or, as the case may be, by the parties.

The subject investigated on a legislative, normative and constitutional level approached various aspects regarding the role of the constitution in society, which over time in history reflects the way in which the elements of unconstitutionality were solved in the arbitration decisions.

In this sense, we analyzed the theoretical elements, tangling the practical elements, highlighting the juridical-practical evolution through the methods of legal research: the systemic approach in the normative constitutional analysis, the interconnection by using the comparative jurisprudence method of the constitutional decisions, in arbitration judgments and historical method. Thus, we highlighted the evolution of the arbitrator, his importance in solving the disputes from the perspective of the international impact.

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5. Decision no. 3 / 9.02.2010, Constitutional Court of Romania, Decision on the constitution and the content of the files regarding the exceptions of unconstitutionality in respect of which the Constitutional Court is notified under Article 146 letter d) of the Constitution. Article 1. https://www.ccr.ro/uploads/PDFisiere/h3_10.pdf.

THE TERRITORIAL CHANGES OF THE EUROPEAN COUNTRIES REGARDED AS A DIMENSION OF CONSTITUTIONAL LAW AFTER ROMANIA´S INTEGRATION INTO THE EUROPEAN UNION

Daniela LAMEŞ [1]

Abstract:

The state territorial changes in Europe are a factor of borderline renewal but also for the cohesion of the newly formed nations. The inalienability of the territories, the self-determination, the state and administrative organization of the newly formed states contradicts the separatist elements that endanger the rule of law, the constitutions, the nations, etc. The international recognition of the new territorial-juridical formations by the rule of law community but also recognition from the: UN, EU, CIS. Fundamental laws play an important role in the state's territorial developments in the contemporary world. Settlement of disputes that had as their starting point the territorial and ethnic disputes over the last decade in the European continent.

Key words: *territory; constitution; self-determination; ethnic; treaty; population; separatism.*

INTRODUCTION

The map of Europe has been configured over time by state territorial changes, the birth or disintegration of peoples or nations, the geopolitical interests of the great powers. These factors led to the modification of the borders, to the formation of some states, but also to the elaboration or modification of their fundamental laws so that the societies had a well-defined legal organization regime in the context of each historical period. Thus, the authors V. Popa, I. Munteanu and V. Mocanu consider the national space of a state to be "a part of the national

[1] **Arbitrator Dr., Permanent Court of Institutionalized Arbitration.**

territory, in which the power[1] is exercised uniformly," which hints at the need of the territorial limits regarding the organization both administrative and state.

After the integration of Romania into the European Union, the opinion of some lawyers was suggested that this would be a new formal-legal formation established[2] at the opposite pole of Europe, but also from the formally legal point of view is the Commonwealth of Independent States. In the opinion of author Geamanu C. who defines the confederation as "an association of several states, each of which remains a subject of international[3] law". As a peculiarity, the author Ion Guceac considers as a main feature of constitutional law the international treaty (called the nonfederal[4] pact), not the constitution as a fundamental law characteristic of the rule of law. We consider the definition given by the author Andronevici C. to be true, by which the confederation is a union of states usually created by international treaties in which each state retains its independence.[5]

The Romanian Constitution regulates in art. 3 paragraph (1) the inalienability of the Romanian territory, in paragraph (2) the borders of the country, in paragraph (3) the territorial organization from the administrative point of view and in paragraph (4) it is stated that on the territory of the Romanian state foreign population cannot be displaced or colonized[6].

Territory is the material premise of the existence of the state and the nation, the three elements being in close interdependence. Constitutional author Deleanu Ion considers that the state's formula in his unity is constituted by three notions: territory, state power and

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[1] V. Popa, I. Nunteanu and V. Mocanu, *From centralism to centralization,* (Chişinău: Cartier, 1998), 44.

[2] Dragoş Chilea, *European Union law. Course Notes,* (Constanta: Muntenia & Leda, 2001), 374.

[3] Grigore Geaman, *Contemporary international law,* Vol. I. (Bucureşti: E.D.P., 1975), 376.

[4] Ion Guceac, *Elementary constitutional law course,* Vol.I. (Chisinau: Advertising, 2001), 277.

[5] C. Andronovici, *Public international law*, (Iaşi: Graphix, 1996), 224.

[6] *The Romanian Constitution* amended by the Law on the Revision of the Romanian Constitution no. 429/2003 published in the Official Gazette no. 767 of October 31, 2003 http: // www DocumentsandSettings / USER / Sintact Legislation (consulted 24.01.2019).

population[1], and jurist Ionescu C. notes that there is "a unity of the territory, the population and the people[2]" in concrete states as is the case with Romania. We conclude that the achievement of this trinity
above generates a certain type of society by ensuring the functioning of the rule of law by elaborating fundamental laws that contain provisions for the legal fixation of the fundamental norms.

The last decade in Europe has produced some state changes and territorial changes; although on the old European continent it could be thought that nothing can be changed or replaced. In view of the European Union's space, we affirm that nowadays there is a territorial space that offers economic stability and free circulation to the countries that are part of these new border movements that have felt their presence. Some of them have been internationally recognized, others being in breach of international and state law are questioned as legality.

Yugoslavia was the state located on the Balkan Peninsula of Europe. This federal state disintegrated after 1991 forming the following sovereign states: Bosnia and Herzegovina, Croatia, Montenegro, the Republic of Macedonia, Serbia and Slovenia. On May 21, 2006, Montenegro's population decided with 55.4% of the votes separating from Serbia, and the union virtually ceased to exist on June 3, 2006, when Montenegro officially proclaimed its independence[3]. Serbia, the Member States of the European Union and the permanent members of the UN Security Council have recognized all the independence of Montenegro[4].

On February 17, 2008 Kosovo officially becomes the Republic of Kosovo declaring independence from Serbia. It is a territory partially recognized as a sovereign state of 108 UN member states, but Serbia does not even recognize the independence and sovereignty of the Republic of Kosovo.

The Kosovo region has, over time, legitimized its actions on two levels: one ethnic and the other in the history of this region as a cause for

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[1] Ion Deleanu, *Constitutional law and political institutions*, Vol II. (Bucharest: Europe Nova, 1996), 480.

[2] C. Ionescu, *Political Institutions and Constitutional Law*, (Bucharest: Juridica, 2004). 442.

[3] https://ro.wikipedia.org/wiki/Muntenegru (consulted 23.01.2019)..

[4]*The Battle of Kosovo Polje (1389), a moment of Romanian history in the Balkans,* https://cersipamantromanesc.wordpress.com/2014/04/30/batalia-de-la-kosovo-polje-1389-o-clipa-de-istorie-romaneasca-in-balcani/ (consulted 20.01.2019).

dispute between the Serbian and Albanian people, these being both peoples living in the province's territory of Kosovo. The Serb party legitimizes its supremacy on historical bases - the Kosovo Battle of 1389[1] and the Albanians consider ethnic origin to descend to the Albanian people since antiquity. At present, both Serbs and Albanians are struggling to assert their national identity. The Kosovo Declaration of Independence has an Advisory Opinion to the International Court of Justice on its compliance of February 17, 2018, invoking the principle of self-determination according to art. 73 of the UN Charter[2].

The UN General Assembly Resolution 1514 (XV)[3] on granting independence to former colonial countries, non-governmental populations outlines defines three options that the respective populations have for self-government: 1) the formation of a new state; 2) free

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[1] *The Battle of Kosovo Polje*.

[2] *Unitede Nations Charter*, June 26, 1945 Issuer: The Unitede Nations Organization , Published in The Official Gazette of 26 june 1945, art. 73 "Members of the United Nations who have or who assume responsibility for the administration of territories whose peoples have not yet reached a full degree of self-government recognize the principle that the interests of the inhabitants of these territories have primacy. They accept as a sacred mission the obligation to fully promote the well-being of the inhabitants of these territories within the framework of the international peace and security system established by this Charter, and to this end: a. To ensure, with due respect for the culture of the peoples concerned, the progress of their political, economic, social and educational backgrounds, their fair treatment and their protection against abuse; b. to develop their capacity to self-govern, to take due account of the political choices of these peoples, and to assist them in the progressive development of their free political institutions, according to the specific conditions of each territory and of its people; with their different degree of development; c. to strengthen international peace and security; d. to promote constructive development measures, to encourage research work to cooperate with each other and, in appropriate cases, with specialized international bodies to effectively achieve the social, economic and scientific goals outlined in this Article; e. to regularly transmit to the Secretary-General, subject to the limitations that security requirements and constitutional considerations may impose, statistical information and other technical information on economic, social and educational conditions in the territories of which they are responsible , other than the territories to which Chapters XII and XIII apply. http://www.anr.gov.ro/docs/legislatie/internationala/Carta_Organizatiei_Natiunilor_Unite_ONU_.pdf (consulted 02.01.2019).

[3] *Declaration on the Granting of Independence to Colonial Countries and Peoples*. Adopted by General Assembly resolution 1514 (XV) of 14 December 1960. http://www.un.org/en/decolonization/declaration.shtml (consulted 12.01.2019).

association with an independent state; 3) integrity in an independent state.

Resolution 2625 (XXV)[1] of the General Assembly refers to the safeguard clause which can be interpreted as meaning that any state whose government represents the entire nation, without discrimination, by equality, can enjoy the protection of territorial integrity and internally, self-determination is manifested through participation to state governance.

Kosovo had to be an internationally recognized state of affairs that had taken place. Five Member States of the European Union, Cyprus, the Hellenic Republic, Slovakia, Spain and Romania have refused to recognize the independence of the state.

It is timely that from 01.01.2019 to 10 years after the declaration of independence of the Republic of Kosovo its borders and Albania will disappear, a measure that worries Serbia but creates strong political and economic ties with Albania.

The Republic of Albania is a parliamentary democracy governed by the constitution amended in 1998. The Constitution provides in Art. 3 "The independence of the state and the integrity of its territory, the dignity of the person, rights and freedoms, social justice, constitutional order, pluralism, national identity and heritage, religious coexistence, coexistence and understanding of Albanians are the foundations of this state, which has the duty to respect them and to protect[2] them. "We observe from the wording of art. 3 that Albania, in addition to the integrity of the territory, attaches great importance to the national identity and heritage but also to the Albanian coexistence and understanding. It does not mention whether Albanians are just those who are part of Albania's territorial boundaries or refer to Albanians everywhere.

Analyzing the territorial characteristics, we can see that the Albanian population tends towards unification through these economic and political steps taken early in the year 2019. To observe art.8 of the

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[1] 2625 (XXV) October 4, 1970. *Declaration on priniples of international law concerning friendly relations and cooperation among states in accordance with the character of the United Nations,* https://documents-ddsny.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement (consulted 12.01.2019).

[2] *The Constitution of the Republic of Albania*, approved by referendum on 22 November 1998 and amended on 13 January 2007, art. 3 https://www.osce.org/albania/41888?download=true (consulted 22.01.2019).

1998 Constitution amended to clearly regulate the position of the Albanian state on the population located in Romania with special emphasis on citizens who live, work or are outside the state of Albania as follows: ,, 1) The Republic of Albania protects the national rights of the Albanian people who live outside its borders. 2) The Republic of Albania protects the rights of its temporary or permanent residents to reside outside its borders. 3) The Republic of Albania provides assistance to Albanians who live and work abroad to maintain and develop their ties to the national cultural heritage[1].

Serbian officials believe that "this decision violates UN Resolution no. 1244 of 1999 which provides for respect for the territorial integrity of Yugoslavia. Meanwhile, Yugoslavia no longer exists as a unitary state, as such enactment quoted superfluous and only for this reason was not repealed, because Russia has always used its right of veto whenever the question abolishing the judgment in question. The gesture of the two states is not accepted by Serbia, Macedonia, Montenegro, and Greece, where the Albanian minority works and lives. In Belgrade, the general view is that the decision of the two countries represents a big step towards the creation of the Great Albania[2].

On August 26, 2008 Abkhazia and South Ossetia are recognized by Russia as independent states that were part of Georgia. South Ossetia in November 1993 drafted its own Constitution.

Slovenia and Croatia on 4 November 2009 reach an agreement to present their own arguments regarding their territorial dispute before a Hague arbitration tribunal. The territorial dispute between the two countries refers to 13 square kilometers of uninhabited territory and Slovenia's maritime access to the international waters of the Gulf of Piran[3]. After the year 1991 when the two countries seceded from Yugoslavia concern appears about the border demarcation dispute between Slovenia and Croatia, the dispute brought before the Court of Justice of the European Union since the Slovenian government refused to implement the Permanent Court of Arbitration at The Hague. As the decision was not implemented, the EU Treaty allows states to sue the

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[1] *The Constitution of the Republic of Albania,* art. 8.

[2] Valentin Vioreanu, *Se schimbă harta Europei: De la 1 ianuarie nu va mai exista graniță*, https://www.capital.ro/se-schimba-harta-europei-de-la-1-ianuarie-nu-va-mai-exista-granita.html (consulted 20.01.2019).

[3] Vioreanu, *Se schimbă harta Europei*.

state violating the above-mentioned international normative act. Croatia withdraws its consent to resolve the conflict through the Hague Arbitration Court. Slovenia started the proceedings before the European Commission. The international court solved the issue in 2017, and the final decision was that Slovenia would benefit from uninterrupted access, a verdict Croatia refused to implement.

The Constitution of the Republic of Slovenia was adopted in 1991 but underwent several revisions last in 2013, being based on the Slovenian right to self-determination. In art. 4 it is mentioned that Slovenia is a "unitary and indivisible state[1]" and art. 5 of the Constitution guarantees that "within its territory, the state protects human rights and fundamental freedoms,[2]

Croatia declares its independence from the Federal Republic of Yugoslavia in June 1991, being recognized by the Member States of the European Union and the United Nations. The constitution adopted in 1990 was subsequently amended many times; an important aspect from the perspective of the new Croatian state refers to the borders of the country, thus the amendments made in 2013 art. 8 "The borders of the Republic of Croatia can only be amended on the basis of a decision of the Croatian Parliament[3]," therefore any act amending these borders is null and void if the Croatian Parliament has not taken a decision in this respect.

Territorial disputes between Croatia and Slovenia, irrespective of the verdicts given by the International Court of Justice or The Hague Arbitration Court, solutions are not implemented because Croatia has not yet respected the International Court of Justice's ruling.

At present, an increase in the inter-state relations is the territorial factor between the existing states of problems of self-determination, ethnicity, the establishment of borders and problems of territorial inviolability.

In the field of contemporary international public law there are some ways of territorial change of states as we have shown in the

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[1] *Constitution of the Republic of Slovenia*. Official Journal of the Republic of Slovenia no. 47/13 of 31 May 2013. Art.4 http://codex.just.ro/Tari/Download/SI (consulted 25.01.2019).

[2] *Constitution of the Republic of Slovenia*. Art.5.

[3] Elena Simina Tanasescu, *Constitution of the Republic of Croatia. 2013. Constitutions of the States of the World.* Article 8 https://constitutions.files.wordpress.com/2013/02/croatia.pdf (consulted 27.12.2018).

previous paragraph. In recent years Romania has been involved in two situations concerning legal and territorial claims in the case of the 17 km on the delimitation of the territorial sea, the areas of the continental shelf, but also the establishment of the exclusive territories of Romania and Bulgaria, a territorial space existing in the Black Sea, to which both countries have openness. The negotiation process between the two states began in 1994. According to MEDIAFAX, in 2015, the famous jurist Bogdan Aurescu said that "Romania and Bulgaria are - fully committed to finding a solution - and cannot talk about the lack of progress. It is our duty to negotiate and find a solution[1]. "

The issues concerning the negotiations have been discussed, and a bilateral agreement will be reached. We have to recognize that negotiations and discussions on state borders on a territory is a matter for the borders of those states involved in the real and correct determination of their borders.

The author, Ion Guceac, considers that "the border consists of a line drawn between different points on the face of the globe, separating the territory of a state from the territory of another state, out of the open sea, in height - from the cosmic space, and in the depth - up to the limits where modern technical means allow its exploitation[2], therefore, based on the Final Act of the Conference on Security and Co-operation in Europe, signed and elaborated in Helsinki on August 1, 1975, the inviolability of the borders by respecting the territorial integrity of states, peaceful settlement of disputes[3], obliges the signatory states to resolve disputes and territorial problems arising through discussions, negotiations, agreements, the conclusion of treaties or even the settlement by referral to the international tribunals so as to avoid any solution that would harm the states in Europe.

The legal framework by which the borders are established is laid down in the fundamental law of Romania art. 3 par. 2 "The frontiers of the country are established by an organic law, observing the principles

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[1] Mihai Cătălina, ,, Aurescu: We will stimulate the process of delimitation of maritime spaces between Romania and Bulgaria, Mediafax.ro. Bucharest, February 19, 2015. See https://www.mediafax.ro/politic/aurescu-vom-impulsiona-de-de-implementare-a-spatiilor-maritime-intre-romania-si-bulgaria-13853046 (consulted 19.02 .2019).

[2] Ion Guceac, *Elementary constitutional law course*, Vol. I. (Chisinau: Advertising, 2001), 277.

[3] Final Act of the Conference on Security and Cooperation, elaborated in Helsinki on 1 August 1975, published in the Official Bulletin no. 92 of 13.08.1975.

and other generally accepted norms of international law[1]". In conclusion, Romania respects both national and international norms in which it has the status of active participant as the holder of the signing of international treaties and conventions.

Establishing territorial lines between states has been the cause of disputes and litigations that have taken place over the centuries. Romania vs. Ukraine wanted, claimed and disputed the territory called the Serpent Island because it represented an important bastion in the Black Sea basin by defining the continental shelf and the exclusive economic zone. The existing process between Ukraine and Romania was referred to the International Court of Justice in The Hague with the object of "delimiting the continental shelf and exclusive economic zones that are spaces beyond the state territory, in which they have a legal regime very close to the border the 12 nautical miles of the territorial sea of Romania[2]. The Court recognizes the sovereign right and jurisdiction of Romania for a continental shelf area and an exclusive economic zone of 9700sqm by the judgment of the International Court of Justice pronounced on 03.02.2009 on "Maritime Delimitation in the Black Sea, Romania vs. Ukraine. The dispute was settled in a peaceful way in accordance with international regulations, which led to the drawing of the equidistance lines between the two states, the delimitation of the continental shelf and the reinstatement of Romania in the exclusive economic zone[3].

The stability of the territory is attested by the emergence of the state border that has been evolving since the 11th century reaching the contemporary state where the limits of the state are strictly delimited. We subscribe to the opinion of author Stelian Scăunaş who considers that "the current international public law enshrines the fundamental principle of the right of peoples to dispose of them"[4].

It is important to note the correlation between the territorial integrity of the state and the self-determination of the peoples, but at the

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[1] *The Romanian Constitution*, amended by the Law on the Revision of the Romanian Constitution no. 429/2003, published in the Official Gazette no. 767 of 31 October 2008, art. 3, paragraph 2.

[2] Documents written and submitted by Romania to the International Court of Justice in the process of delimitation in the Black Sea. htpp: //www.mae.ro/index.php. (consulted 12. 12. 2018).

[3] *Serpent Island: A favorable decision for Romania*. Htpp: //www.dw-eorld.de (consulted 29.10.2018).

[4] Stelian Scaunas, *International public law*, (Bucharest: All Beek, 2002), 308.

same time we see the clear delimitation between the self-determination of peoples and separatism, which has created over time real conflicts between states, recognition or non-recognition of states that formed self-determination. The demarcation line between the two processes is a very fine one, often difficult to determine with pros and cons with or without recognition from United Nations or other international forums or even de facto recognition, , and "de jure" individually of the new states formed by the states already existing in their fullness through their existential maturity.

An example of a state in Europe is the Kingdom of the Netherlands - the Netherlands that owned the Netherlands Antilles as an autonomous political structure. Between June 2000 and April 2005, popular consultations took place to define the future status of each island. The four options that could be voted were: closer ties with the Netherlands; stay in the Netherlands Antilles; transformation into an autonomous country in the Netherlands (special status); independence[1].

In the constitutional doctrine, the territory of the states is considered to have an inalienable character, which is why we support the opinion of the author Stelian Scăunaş who added that "the impenetrability of the territory, which would consist in the prohibition on the territory of a state to exercise its commanding power in another state[2].

On October 10, 2010, the Netherlands Antilles are dissolved, with Sint Maarten and Curaçao becoming independent states in the Kingdom of the Netherlands. And Bonaire, Saba and Sint Eustatius became special municipalities in the Netherlands.

These physical regions are not part of Europe, but from a legal point of view the above-mentioned territories were part of the Netherlands.

At the boundary between separatism and self-determination, we have the situation of the Crimean Peninsula, a disputed territory that was hardly part of Ukraine, but which on 18 March 2014 is annexed by Russia as two separate entities, the city of Sevastopol and the Crimean Republic of 84 and 85 federal subjects of Russia. This is not recognized by most countries and is often not reflected in the maps. On March 17 - the Autonomous Republic of Crimea and the city of Sevastopol declares

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[1] *Netherlands Antilles*, https://ro.wikipedia.org/wiki/Antilele_Olandeze (consulted 17.01.2019).

[2] C. Ionescu, *Political Institutions and Constitutional Law*, (Bucharest: Juridica, 2004), 442.

its independence from Ukraine as the Crimean Republic, a movement declared illegal by Ukraine and a majority of the international community, although with recognition from Russia.

The purpose of separatism is to damage political, constitutional economic unity and to break down a unitary state with a negative charge compared to the process of self-determination of peoples that does not affect territorial unity, is fully supported by the people representing a mass movement, does not constitute a purpose in itself but a way of expressing national interests and has a progressive character.

Looking at Europe's territorial changes in the last decade, it is difficult to detach, objectively view and analyze: culture and tradition, the development of the peoples from an ethnic point of view, but also the new state organizations that are based on the process of self-determination or in the cases of the division of peoples separatism. In our opinion, we find this in the case of Crimea versus Ukraine.

State organization involves the tendency to create the state of acquiring a territory. I have presented opinions of outstanding legal specialists who make it possible to understand the importance of the state territory and its legitimacy by issuing, by their fair thinking, the link between the three elements: territory, population and state power. This triad cannot exist without legal normative framing through the fundamental law of each state but also at international level through the conclusion of agreements and treaties.

We have noticed that the process of self-identification of territories with the population includes the territorial consciousness, which is why we tried to present in this study the connection between the peoples' struggle to self-determination, territory and the ethnic population. The self-identification of the ethnos with the territory we found during the Kosovo conflict.

Within the unions of states, we consider that the territorial indicator is of overwhelming importance, and the integration process taking place within the European Union are new forms of creation of super state bodies that lead to the real movement of the states in Europe towards economic and free unification but with the preservation of the state identity, the territorial and national sovereignty, the normative framework and the fundamental laws of each individual state.

The demarcation of the state border is an important element for the European States, which is aimed at solving peacefully the territorial

disputes that belong to the states. At international level, disputes are resolved through inter-state discussions, negotiations leading to the conclusion of bilateral agreements or treaties. If the issues go beyond these situations, we can start at the same level, in our case at European level, litigation by the International Court of Justice in The Hague or the International Court of Arbitration, which have as binding decisions to be respected for the States Parties in the cases which concerned the state territory, their frontier lines, the territorial sea, the exclusive economic zone or the disputes regarding the establishment of the continental shelf.

CONCLUSIONS

In this paper I have studied and presented the importance and the role of legal and territorial changes accompanied by the normative particularities of the fundamental laws that constitute the legal framework that any lawful state finds itself as a normative foundation. We have approached a wide range of rules on state law, the opinion of well-known lawyers on how the constitutions of states according to the nation's priorities what is the state, what role does the nation have, as is regulated in its own right from the state territory. These aspects have been highlighted by methods used in legal research to present the complex legal phenomenon that has been dealt with in this study with regard to territorial changes and regulations that are found in the fundamental norms of states, but also the solutions that any state of law can instrumentate to resolve territorial disputes peacefully.

Thus, we used the logical juridical method as a rational method by which we presented the positions expressed in the field of constitutional law and the public right of remarkable authors of constitutional law and public law: Deleanu I., Geamănu G., Guceac I., Popa V ., Scăuna S.. By the historical method we have analyzed the essence and form that over time the territory, nation, state and their fundamental laws have evolved in the legal doctrine. We compared the evolution in the European Union with the constitutional systems characteristic of the states that had to solve the territorial disputes using the peaceful way, bringing to the fore the way of settlement: discussions, negotiations, agreements and bilateral treaties, and finally the settlement of the litigation by the international courts.

The balance, stability and national interests of states must take into account the general interest by undeniably preserving the integrity and inviolability of peoples, and self-determination is a complex process to exist only in cases of genuine legitimacy.

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AGAIN, ABOUT THE CONSULTATIVE REFERENDUM. PROS AND CONS

Ramona DUMINICĂ[1]
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Abstract:

The current article has as starting point the initiative of the President of Romania to organize a consultative referendum simultaneously with the elections for the European Parliament. In this context, we are reiterating the debates about the pros and cons for such a referendum.

For certain theoreticians and politicians, a referendum is the political miraculous solution or an easy mean to perform the fundamental reforms the society keeps requiring. On the other hand, the referendum is seen as a mean of weakening the representative government. Starting from these divergent points of view and accepting that the role of the referendum in modern democracies is controversial, the current paper pleads for a moderate approach.

The institution of the referendum must be rationally used to avoid transforming it in a simple mean of manipulating the will of the people, but to be truly an element of political and social balance.

Key words: *consultative referendum; advantages; disadvantages; effects of the referendum; procedure for the consultative referendum.*

INTRODUCTION

In literature, it has been stated that the referendum represents the procedure by which the people is associated in the decision-making process, the classical model being the direct participation of the electoral body in legislation[3]. The legislations of different world states and the

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[3] D. C. Dănişor, *Drept constituţional şi instituţii politice, Teoria generală*, 1st Volume, (Bucharest: C. H. Beck Publ.-house, 2007), 100.

doctrinaires differentiate between multiple types of referendum[1], among which is the consultative referendum. This is used when the electorate expresses its will in relation to a certain issue, when by its opinion, does not compel the authorities to make a certain decision[2].

Such referendum shall be organized in our country on 26th May 2019 simultaneously with the elections for the European Parliament and shall subject to the opinion of the electorate two subjects representing, in our opinion, two fundamental issues for the existence of the rule of law and especially for the good functioning of justice, namely: the prohibition of amnesty and pardon for offences of corruption and the probation of adopting by the Government of emergency ordinances in the area of offences, penalties and judicial organization, corelated with the right of other constitutional authorities to directly notify the Constitutional Court regarding these ordinances.

1. THE MAIN REFERENDUMS HELD IN ROMANIA AFTER 1989

In our country, the institution of referendum is stated by Art 2 Para 1, Art 73 Para 3 Let d), Art 90, Art 146 Let i) and Art 151 Para 3 of the Constitution, as well as by the Law No 3/2000 on the organisation and conduct of a referendum. According to Art 2 Para 1 of the Law No 3/2000, a referendum constitutes form and direct means of consultation and expression of the will of the Romanian sovereign people.

The referendum as form of direct intervention of the electorate in the decision-making has been used in Romania after 1989 for:

- In 1991 for the adoption of the Constitution;
- In 2003 for the adoption of the revision of the fundamental law;
- In 2007 for the introduction of the uninominal majority scrutiny;
- In 2007 for the impeachment of the Romanian President;
- In 2009 for the limitation of the number of MPs from 471 to 300 and the transformation of the bi-cameral Romanian Parliament into a unicameral Parliament;
- In 2012 for the impeachment of the Romanian President;

[1] Ramona Duminică and Andra Puran, "Consultative referendum debates on the referendum held in Romania in 2009", in vol. *Aktualne problemy referendum* (Zielona Góra, Poland, 2016), 175-184.
[2] J. F. Aubert, "Le referendum populaire", *Revue de droit suisse*, no 5(1972): 481.

- In 2018 - referendum amending article 48 of the Romanian Constitution.

Regarding the consultative referendum on the 22nd November 2009[1], held in our country simultaneously with the first tour of the presidential elections, we note that even ten years after its organization there have not yet been any concrete effects, as we have shown on other occasions, its results being at the level of a simple official and national survey because, according to the current laws, a referendum based on Art 90 of the Constitution is merely consultative, not forcing the state authorities to adopt decisions in accordance with the will expressed by the electorate.

Finally, in our country, were held multiple local referendums, usually having as object the modification of the territorial limits of the territorial-administrative units.

2. ABOUT THE PROCEDURE OF THE CONSULTATIVE REFERENDUM[2]

According to Art 90 of the Constitution, the Romanian President, after consulting the Parliament, may ask the people to express, by a referendum, its will regarding matters of national interest. In such situation, we are in the presence of a consultative referendum.

In consensus with the constitutional provisions, the matters subjected to a referendum and its date shall be established by the Romanian President, by decree, obviously with the compliance of the condition of previous consultation with the Parliament, as expressly stated by Art 15 Para 1 Let c) of the Law No 3/2000 on the organization and carrying out of the referendum.

Regarding the procedure of the consultative referendum initiated by the Romanian President, the Constitutional Court ruled by its Decision No 567/11 July 2006 that it implies two steps: the consultation of the Parliament and that of the people, who expresses his will regarding matters of national interest which are emphasized by the President.

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[1] For a complete analysis, see also: R. Dumitru (Duminică), „Rezultatele referendumului din 2009 – fundament al unei viitoare revizuiri a Constituţiei?", in *Revista de Ştiinţe Juridice* No 1(2011): 119-131.

[2] Duminică and Puran, "Consultative referendum debates on the referendum held in Romania in 2009", 175-184.

The consultation of the Parliament is made by a letter addressed to it by the Romanian President. The address follows all the stages of the normal legislative procedure or of the special emergency procedure, in front of the Chambers reunited in a joint session. After the debates, which take place in a joint session of the Chambers, they must express an opinion regarding the referendum initiated by the President, by a decision adopted with the vote of the majority of the present MPs.

Though the consultation of the Parliament is a constitutional obligation of the Romanian President, its opinion is not mandatory for the President. By Decision No 567/11 July 2006, the Constitutional Court has stated that if this consultation is not fulfilled, the President shall not be able to proceed to the initiation of the referendum.

Therefore, given that the President is not held by the content of the Parliament's opinion, we consider that we are in the presence of a simple phase of procedure without substance.

Still, the Parliament's opinion can be firstly justified by the fact that the Parliament must be officially notified regarding the matter of national interest which it ignored and secondly, to offer it the possibility to accept the President's opinion, case in which the referendum becomes useless. This is why the Parliament's opinion is not that relevant, and to insist in organizing a referendum when the Parliament has adhered to the initiative represents a senseless act and thus a diversion of competency[1].

Within the second stage, the citizens are called to answer *Yes* or *No* on the matter of national interest subjected to referendum, deciding with the majority of the votes valid throughout the state.

According to Art 4 of the Law No 3/2000, shall have the right to participate in a referendum all Romanian citizens aged 18 years until the day of the referendum, except the mental ill persons placed under interdiction, as well as the persons convicted by a definitive decision to the loss of the electoral rights.

The referendum shall be validated if at least 30% of the number of the persons registered on the permanent electoral list have attended, while its result shall be validated if the validly expressed opinions

[1] R. Dumitru, *Rezultatele referendumului din 2009 – fundament al unei viitoare revizuiri a Constituţiei?*, in Legal Sciences Magazine No 1/2011, p. 122.

represent at least 25% of the persons enlisted on the permanent electoral lists[1].

3. THE ADVANTAGES OF THE REFERENDUM

An inventory of the national and international specialized literature in the area of referendum, determines us to state that, unfortunately, the number of theoreticians who declared themselves as pro referendum is significantly lower than the opponents of this institution.

In identifying the arguments for the referendum, we will firstly refer to the legislation and experience of states with a long-standing democracy.

The most interesting point of view regarding the role of the referendum in supporting democracy belongs to the former French president Vincent Auriol: "*The referendum maintains a direct connection between the nation and its representatives; it encourages the political education of the citizens, it encourages them to vote for texts and ideas; it supports the understanding of the issues related to the prosperity of the state and the personal interest; it maintains the public activity and civil spirit. It provides the law their entire force. It supports the defeat of the residence and the removal of obstacles*"[2].

Starting from these affirmations, it has been emphasized that such conditions are necessary for the procedure to be a success, namely: the citizens' education regarding their involvement in the decision-making process at the level of the state's policy, the ascertainment of the force they have in this way and civic accountability, essential for the existence of democracy[3].

Also, it has been stated that "*only the direct participation – an explicitly public activity – is the most efficient form for civil education in democracy. The political-educational influence of the participation has been underlined a million times after Rousseau, Mill and Tocqueville*

[1] Art 5 of the Law No 3/2000 on the organization and conduct of the referendum published in the Official Gazette No 84/24 February 2000, with subsequent modifications and amendments.
[2] Vincent Auriol *apud* L. F. Uşvat, "Pro sau contra referendumului", *Revista de drept public*, No 3(2008): 65.
[3] Uşvat, "Pro sau contra referendumului", 65.

have suggested for the first time that the best means to learn democracy is to practice it"[1].

Another argument invoked by the supporters of the referendum consists in the fact that the most important indicator of the civil health of a nation is given by the degree of participation of the citizens in the political life. Also, the referendum is considered by its legal nature an instrument in the service of democracy, "the only institution of control which can prevail from a title of democratic legitimacy"[2].

4. THE DISADVANTAGES OF THE REFERENDUM

On the other hand, the opponents of the referendum are more numerous than its followers.

Thus, as it has been mentioned that the referendum is not and has never been that untouchable horizon of democracy, not it is not the "specific sign of a modern and civilized political life"[3]. The referendum is "useless and dangerous"[4], clearly having more disadvantages than advantages, and the main arguments brought against it are: the referendum does not represent a progress of democracy; it represents a danger for the rule of law; finally, its development is perceived independently from the state-nation[5].

The referendum does not represent a progress of democracy because it does not know the fundaments of the democratic decision-making process. In such a process, the making of any decision, regardless of its importance, involves, if it aims to be democratic, a phase of deliberation and debate, and for a referendum these phases are missing. The democratic decision-making process is listed in the

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[1] Benjamin R. Barber, *Strong Democracy: Participatory Politics for a New Age*, (Berkeley: University of California Press, 1984), 235-236 *apud* Uşvat, "Pro sau contra referendumului", 66.

[2] Jean-C. Cabanne, "Referendum et légitimité", in *Referendum et démocratie*, (Toulouse: Presses de l'Universite des sciences sociales de Toulouse, 1998), 72 *apud* Uşvat, "Pro sau contra referendumului", 66.

[3] H. Roussillon, "Contre le referendum!", *Pouvoirs – Revue francaise d'etudes constitutionnelles et politiques* No 77(1996): 181-193.

[4] Francis Hamon, *Referendumul, studiu comparativ* (Paris: LGDJ, 1995); Michèle Guillaume-Hofnung, *Le Référendum* (Paris: PUF, coll. "Que sais-je?", nº 2329); Gérard Conac and Didier Maus, *Ce viitor are Referendumul?*, (Paris, STH, 1990); Olivier Duhamel, "Argumente împotriva referendumului", Le Monde, 10 December 1989.

[5] Roussillon, "Contre le referendum!", 186.

conception of a "long" political time, while the referendum, like the survey, instantly emphasizes its feature, if not ephemeral, successive and partial sincerity[1].

Regarding the argument that the referendum represents a danger for the rule of law it has been stated that "democracy does not represent the authority of the many, but that of the law, with the referendum not allowing in its deep logic the instalment of an authority admitting the compliance with the rule of law"[2].

5. OUR OPINION

In what it regards our opinion, we shall not join the supporters, nor the opponents of the referendum, our opinion, being moderate, in the meaning of the rational use of the referendum. It must not be turned in a simple means of manipulating the will of the people, knowing the fact that demagogy, he manipulation of the public opinion, the exploitation of the passive passion of citizens are elements frequently used by the initiators of referendums, but it truly must be an element of political and social balance.

Regarding the referendum to be held on the 26th May 2019, we consider that until this moment the Romanian electorate was not informed about the themes subjected to consultation. The subjects, of a real importance for the Romanian democracy were debated just by a few populist messages, of electoral campaign, having as purpose the wining of the vote and not a real reform of justice.

Obviously, knowledge refers to information, but it does not result in the fact that the informed person is also a knower in that area and may express a valid opinion. Expression your opinion in a referendum regarding a fact of extreme importance for democracy and the rule of law is something different than expressing a vote. The issue subjected to referendum should always be very simple. The modern electorate is exposed exclusively to a series of unilateral messages, their impact depending on the funds made available by the partisans[3].

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[1] Roussillon, "Contre le referendum!", 186.
[2] Roussillon, "Contre le referendum!", 189.
[3] See also: Dumitru (Duminică), "Rezultatele referendumului din 2009 – fundament al unei viitoare revizuiri a Constituţiei?", 124.

The citizen cannot wonder, but only by chance can find answers. He is exposed to all verified means of manipulation and to others in testing. The means in which the electorate in briefed has been described as an on-line model to process the information. It has been called the "driver's impressions", which refers to the fact that most voters process information in the same time in which they are exposed to them. The effect is that the voter quickly forgets the very information and memorizes a summary evaluation. The citizen receives only the mark of a value judgment to which he has participated too little or not at all[1].

Thus, a major vice in the referendum is the insufficient knowledge by the citizens of its background, derived from a precarious political, social and legal education. This disadvantage is noted also by one of the greatest French constitutionalists, Maurice Hauriou, who mentined that "The truth is that the management of a referendum requires the existence of a population whose civic education be more developed than for the functioning of the electoral regime…it would be dangerous to start with less trained citizens (…)"[2].

Also, we need to consider that if the electorate in expressing its opinion faces a real alternative or is placed in front of a "blocked vote". This aspect brings to debate the structure of the questions. In front of the answers on the bulletin, the people do not have a third option, but will be compelled to choose between the two alternatives of the governors' will.

The doctrinaires[3] have raised the question if this aspect can be considered as a major vice of the institution or is the only means to get an answer? It has been showed that "giving the people the possibility to fill in the answers would generate chaos, which would paralyze the procedure, but with only two options one can also speak of the free expression of sovereignty? Sure, there is the possibility to not participate in the voting, but this passivity is against the democratic values, won with difficulty. A solution to get out of the yes-no alternative would be to formulate more answers, but there is no certainty of a coherent and real outcome. Analyzing the typical situation with the two types of response that we usually offer, we do not appreciate this as an attack on the foundation and purpose of the institution but invoke the practicalities of

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[1] Valentin Constantin, "Referendumul şi ficţiunea democraţiei directe", *Studia Universitatis Babeş-Bolyai*, no 4(2009): 3.
[2] Maurice Hauriou, *Précis de droit constitutionnel*, (Paris: 1929), 550.
[3] Uşvat, "Pro sau contra referendumului",71.

the procedure. The people must relate to the question and answers as stated by the authorities, under the reserve of being explicit and transient. Regardless the answer, it implies an instantaneous solution".

On the same note, the answer of the electorate shall vary from a historic moment to another, depending not only on the socio-economic context.

The doctrine considered that the apparent legitimacy of a prior decision adopted as effect of such a referendum-plebiscite can be overthrown in any subsequent moment. The people are free anytime to express any opinion and to change any opinion once stated, without any limits to this freedom. This is the essence of the consultative referendum, but also the great danger it represents[1].

The answer by "yes" and "no" for a referendum initiated by the President cumulated with the date for the European Parliament elections, shall precisely be equivocal. Some of the respondents shall answer by "no", symbolically separating themselves from the personality of the initiator, while others will choose "yes", adhering to the opinion of the promoter. As such, we shall be in the presence of two types of adhesion, some to the persona and some to the matter.

Not least, we need to mention that the referendum has more of a symbolic value, than a real consultation of the citizens. The agenda is not set by the citizens, but by its initiator, the President. The simple information of the citizens does not mean an appropriate recognition of the subject proposed for consultation. As such, we can appreciate that the referendum does not satisfy most of the public opinion, but in a small measure, because the "simple gathering of the individual preferences could generate overall consequences that deny the individual's intentions"[2].

CONCLUSIONS

Despite the controversial experiences, even unfortunate ones, including the consultative referendum of 2009, whose effects are yet expected, our country is not exempted from organizing a new

[1] Ioan Muraru and Simina Elena Tănăsescu, *Drept constituţional şi instituţii politice*, (Bucharest: C.H. Beck Publ.-house, 2006), 141.
[2] Giovanni Sartori, *Teoria Democraţiei Reinterpretată*, translation by Doru Pop (Iaşi: Polirom Publ.-house, 1999), 119.

referendum. It is to be seen if, indeed, the referendum to be held on 26 May 2019 shall truly be an instrument in the service of democracy and legitimacy or shall be limited to be a simple and miraculous political solution for the easy achievement of the fundamental reforms our society requires, the politicians passing the decision and responsibility over the people, or, worse, shall be used as a simple instrument for manipulation of the result of the Euro parliamentary elections.

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THE BIRTH OF THE CRIMINAL ACT FOR SERIAL KILLERS

Cătălin BUCUR [1]

Abstract:

What could determine an individual to commit murder? What are the causes and under what conditions the transition to the criminal act itself is performed, a delicate moment that marks the overcoming of the initial condition of the individual after the potential offender, in order to reach the final qualification: offender.

The evolution of specialized criminology to general criminology has often been under the guise of fiery ideas. Confrontations of opinions have played a positive role, propelling the theories that have imposed scientifically, creating new trends of scientific thinking but also generating controversy from which criminology has gained.

Key words: *crimes; causes; criminal act; individual; criminology; orientations*

INTRODUCTION

What could determine an individual to commit murder? What are the causes and under what conditions the transition to the criminal act itself is performed, a delicate moment that marks the overcoming of the initial condition of the individual after the potential offender, in order to reach the final qualification: offender.

The evolution of specialized criminology to general criminology has often been under the guise of fiery ideas. Confrontations of opinions have played a positive role, propelling the theories that have imposed scientifically, creating new trends of scientific thinking but also generating controversy from which criminology has gained.

The vast majority of criminological doctrines have focused on the causality of the criminal phenomenon, the history of criminology being one of the etiological models[1].

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Thus, in time, were shaped different orientations such as: the biological orientation, the psycho-psychological orientation, the sociological orientation.

1. DOCTRINAL GUIDELINES

1.1. The biological orientation

The biological orientation refers to those conceptions attributing an organic sublayer to the delinquent behavior, trying to prove the existence of specific bio-anthropic features differentiating the killer from the innocent.

The creator of the anthropological criminology, Cesare Lombroso, is the one who, according to his own statements, gave "a more organic body to the conclusions floating in the air, still undiscovered"[2], his theory having its origins in the evolutionist theories of Dawin, in the phrenology works of Frederick Joseph Gall (1758-1828), in the studies of physiognomy of J.K. Lavater (1741-1801), in the concepts of Charles Morel over the role of the human species degeneracies[3].

Finding its development in the main work of Lombroso, "L'uomo delinquent" (1876), his theory emphasizes the hypothesis of the atavistic evolution according to which the features of the primitive man may emerge in some persons as "anatomic" stigmas (skeletal or cranial box malformations, bilateral asymmetry, massive jaws, certain anomalies of ears, eyes, hands, nose legs), list completed by the epileptic degeneracy and other physiological, conformational or psychological anomalies. When a person suffers from several anomalies, especially atavistic ones, he is considered to be a "born killer", with strong criminal inclinations which cannot be neutralized by the positive environmental influences.

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[1] Rodica-Mihaela Stănoiu, *Introducere în criminologie* (Bucharest: Academy Press, 1989), 47

[2] Cesare Lombroso, "Discurs la deschiderea celui de-al VI congres de antropologie criminologică", *Archives d'anthropologie criminelle*, 1906, 665-677, quoted by Jean Pinatel in the volume Pierre Bouzat et Jean Pinatel, *Traité de droit pénal et de criminologie*, 3rd Tome, *Criminology*, 173

[3] Charles Morel, *Traité des dégénérescences de l'espèce humaine* (Paris, 1857)

Based on the classifications of E. Kretschmar, the bio-typological current represents the modern version of criminal anthropology; in his paper "*Physique et character*", Kretschmar identifies the following types:

- Leptosome or asthenic (vertical constitution, fragile osteo-muscular system);
- Athletic (good muscular development);
- Picnic (horizontal constitution, short);
- Dysplastic (with different bodily malformations) and reaches the conclusion that, on the one hand there is a relative equal distribution of the types identified within the criminal field and, on the other hand, there is a certain correlation between the constitutional type and the type of offence. Sheldon[1] identified the endomorphic-viscerotonic type (development of internal organs), the mesomorphic-stomatotonic type (muscular development) and ectomorphic-cerebrotonic type (development of cerebral bark and intelligence).

1.2. Psychiatrically-psychological orientation

This orientation groups criminal theories which have in common the concept of "criminal personality", as theoretical base explaining the causality of the criminal phenomenon, the psychological study of the "normal" perpetrator developing in the first decades of the 20th century with the passage of the anthropological-criminological school to the second plan. The psychological orientation was stimulated by the publication of the works of Sigmund Freud and his successors.

The father of psychoanalysis, Freud states the fact that the difference between criminal and non-criminal is placed somewhere at the level of the superego, in the area of self, without major differentiations. The antisocial organic pulses and criminal tendencies of the individual would be present in all individuals, hidden deep down in his personality, controlled and mastered by each other. The difference between the criminal and non-criminal would be due to an incapacity of overcoming the Oedipus complex. Freud also refers to the notion of "complex of guilt", while Etienne de Greef[2] uses concepts as "defense/sympathetic

[1] William Herbert Sheldon, *The varieties of human physique* (New York: Harper, 1940), idem *Varieties of delinquent youth* (New York: Harper, 1949)
[2] Etienne de Greeff, *Introduction à la Criminologie* (Bruxelles, 1946)

instincts", the phases of the tempered consent, of the stated sentiment and the crisis.

Pinatel[1] underlines a different idea, namely the one according to which there is a simple difference of degree between the criminal's personality and the personality of the non-criminal, as well as between the categories of perpetrators. Only the sum of the perpetrator's qualities provides the personality with a certain feature and a certain orientation.

1.3. Sociological orientation

The sociological approach, unlike the biological and psychological approaches (which prioritize the endogenic etiology), focuses on the analysis of the exogenic causes, absolutizing the socialization process of individuals[2].

E. Sutherland[3] has created the theory of "differentiated associations" according to which the delinquent behavior is taught, as well as any other by a system of communication with other persons, while the "theory of imitation" stated by Gabriel Tarde[4] refers to a law of repetition in three forms: vital (heredity), physical (flexuosity) and social. Thorsen Sellin reveals the main cause of criminality in the "cultural conflict", the delinquency rate being proportional with the number of contradictions between values, norms of a group and legal norms, while other sociologists have tried to identify the genesis of criminality in different areas of the social complex (A. Cohen, F. Ferracuti, M. Wolfgang, R. Merton, R. Cloward and L. Ohlin, W. Reckless, T. Hirshi).

Following a logic direction in determining each element forming the criminal complex, after a doctrinaire generic determination of the causes related to the criminal's persona (either endogenous or exogenous), it is necessary to approach the causes related to the individual in the social and physical environment, some criminologists claiming that "the individual and the environment are the essential causes in the genesis of crime".

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[1] Jean Pinatel, "Les formes cliniques du crime et les applications qui en découlent en ce qui concerne l'appréciation de l'état dangereux", *Travaux du XVI, Cours international de criminologie*, Paris, 1948

[2] Gheorghe Nistoreanu and Costica Paun Nistoreanu, *Criminology* (Bucharest: Europa Nova, 2000), 102

[3] Edwin Sutherland, *Criminology* (Philadelphia, 1924)

[4] Gabriel Tarde, *Legile sociale* (Bucharest: Cultura Nationala Press, 1924)

The investigation of the causes of crimes takes place in two important moments:

- When analyzing the criminal act from a "static" perspective when, based on the individual crimes prior committed shall be emphasized the causes and conditions contributing in the commission of those offences;

- With the commission of the offence, when it is examined through dynamics – criminodynamics (proceed to the offence).

Thus, we can do a double differentiation between the individual, hereditary, physical and physiological, psychological and social causes, and on the other hand between the economic, demographic, cultural and political factors and the causes of the offence as an individual act. Regarding the hereditary causes, C. Lombrosso sees the criminality as a hereditary fatality through the transfer of the physical and psychical features from parents to children, while Traian Pop sees it more as a transfer of "good or bad moods, inclinations, influences" with different predominant elements, heredity thus being susceptible of alteration.

The natural and physiological causes related to bodily aspects: body conformation, body dimensions, malformations and state of senses. Thus, T. Pop explains the atavism as being that phenomenon which generates the reemergence, in today's individuals, of the instincts, physiological and psychological features of the primitive man, instincts characterizing the criminal. Therefore, he becomes incapable of adjusting to the conditions of the contemporary society. The explanations of the criminal act through physiological factors aims also the research in the area of endocrinology in the glandular area, especially the influences of the glandular secretions over the physiological system leading to behavioral modifications for certain individuals.

The psychological causes start from certain aspects of the criminal's personality. A special role is played by the temper and character, with Pinatel stating: "Murder is a human act, and murders are humans, as well as non-murders, but they differentiate from others because the murder is the expression of a difference in degree, quantitative, not qualitative, being a difference of degree between the murders' psychic and that of non-murders"[1].

It has been raised the question "why killers do not stop after the murder, neither for the fear of public opprobria, nor for the fear of

[1] Jean Pinatel, *La criminologie* (Paris: Les éditions ouvrières, 1979)

imminent penalty?". Some answered that the absence of precaution, of self-control, of inhibition represent the basic features of the killer, while others stated that there are certain features that outrun those mentioned above, namely: aggressivity, egoism, affective indifference, mental unstableness, together offering the killer that "state of danger" (term loaned from psychiatry and used by clinic criminology referring to, as emphasized by Garafalo, the threat to commit murder and the incapacity of the delinquent to adjust to social life presenting a state similar to "fever").

Social causes represent those external elements related to environment, setting their mark on the manner of reaction of the individual. Either we are talking about familial influences, of the group of vicinity, school or workplace, of socialization as social process, not necessarily psychological, of social training and stigmatization, all these can be considered as explanatory factors of the murder.

The theory of stigmatization states that "the main factor of deviance and delinquency, is not the criminal act and its author, as seen by traditional criminology, but the process by which society applies the label of convicted, deviant or delinquent to individuals and the manner in which these individuals react to this stigmatization". Among the exterior causes which impulse the evolution to murder, a special role belongs to the victim, in some cases, aspect revealed relatively late, because for a long time, the study of the criminal phenomenon started and focused on the "criminal".

2. THE VICTIM OF THE AGGRESSION ACT (CRIMINAL)

The criminological researches proved the existence of a complex relation between the perpetrator and victim, ascertaining that in the criminal act, the contribution of the victim cannot be excluded from the area of a complex causal model. Thus, the term of "victim" has registered several meanings:

a) A human being sacrificed to a deity or a preference (of sacrifice) during a religious ritual;

b) A person or an object harmed or destroyed as effect of triggering an intense emotional state;

c) A person suffering from an event, circumstances, diseases, accident etc. or as effect of his own faults.

In a broader sense, each individual can be (and is to a certain extent) a victim: we are all victims of the secondary effects of civilization, of pollution, of the rhythm of life, we are all potential victims of traffic or labor accidents, some of us auto-victimize ourselves though exaggerate consumption of alcohol, smoking, by ignoring a food elementary discipline etc. but we can be victims of actions (conscious, voluntary) performed by some of other fellow men: delinquents. In relation strictly to the term "victim" we shall take into consideration exclusively the suffering individual, harmed or directly or indirectly destroyed by the action (or inaction) of another person. The statute as victim refers to the action of a victimizing agent who, usually, is the perpetrator (but not every victimizing agent is a perpetrator, as not every harmed, destroyed or morally or physically degraded person shall be considered a victim).

Deriving from criminology, the science analyzing the criminogenic element, the relation between perpetrator and victim, under the aspect of various functionalities, the victimology develops the relations between victim and perpetrator, explaining the consequences of victimization, stating the procedures and means of recovery and victimogene prevention. By aggressive actions, practically, the victim's identity is established by the perpetrator, who aims the persecution of the victim and bases his activity on the complex of guilt, which determines a heavy psychical load.

Larousse Dictionary defined the term "victimology" as being a branch of criminology, dealing with the victim's criminality, crimes or offences, as well as by their psycho-social statute. It originates from the Latin "*victima*", which refers, according to Emile Littre[1], to "a human being offered to divinity, to be sacrificed for someone's passions or interests, the one who's own passions are funeral or whose virtue becomes fatal; the one who suffers" or, according to Larousse Dictionary, "the person murdered or injured; the person who lost in war, a catastrophe, an accident; the person or group suffering from someone's hostility, own actions or events, the human being offered as sacrifice to a deity".

[1] Emile Littre was a French philosopher known especially for the work "Dicționarul limbii franceze".

The first author using the term "victimology" is F. Westham in the work "The show of violence" in 1948: "We shall never understand the psychology of the assassin if we do not understand the sociology of his victim. What we need is a science of victimology" (Fattah, 1967), while H. von Hentig, seen as a true parent of victimology, stated that "Most crimes are driven against a determined person, against his life, property or sexual freedom. For practicalities, the latter visible manifestation of human energy preceding a social undesirable result is the criminal act, the author being the criminal who is responsible for this act. Different degrees and levels of stimulation and reaction, the complex game of forces acting one upon the other are as simple as practicable", by concluding that the victim has his own share of participation in the criminal act committed against his persona. Before debating the idea of the existence of a true science, the victimology, studies were drafted and published, von Hentig being the one who established an appropriate framework for this new discipline, by stating three large concepts of the research:

a) The concept "criminal-victim", which underlines the fact that depending on the circumstances, the same person can successively be a victim and a criminal;

b) The concept of "latent victim" refers to a certain predisposition of a person to attract criminals (age, excessive naivety, displayed fatalism);

c) The specific relation "criminal-victim" aims a certain type of preexistent relations between the criminal and the victim, leading to a certain reciprocity studied by Ellenberger: a neurotic relationship (especially for parricide), a psycho-biological relationship (mutual attraction between two complementary constitutional types; i.e. prostitute-pimp etc.), a genetic relation (based on similar heredity).

Ernst Seelig considers that "generally, the victim represents a replaceable cause of the offence, which becomes a specific cause since a determinant feature of the victim instigates to an offence", while M.E. Wolfgang states the existence of a "catalytic victim" who may provoke, precipitate or ease the commission of an offence.

According to V. Stanciu "since if not all perpetrators are guilty, nor all the victims are innocent", the two features characteristic for the statute of victim being sufferance and injustice, the perpetrator becomes an actor during the criminal trial, while the victim is nothing but a spectator, "the

choir from the Greek tragedy", these two representing a true psychological couple "of conscious, unconscious or subconscious manner".

From a legal perspective, among the first legislations recognizing the victim as such, is the Criminal Procedure Code of the Russian SFSR (current Russian Federation), which defines the victim of an offence as "the person to whom the offence has caused a moral, physical or patrimonial prejudice", but there is no Civil Code stating a scientific definition of the victim. The legal practice defines the victim as being the harmed party suffering a loss or a prejudice after the commission of an offence, hence the person who shall suffer the negative consequences of the offence".

Anthropologically, the concept of "victim" has known a real evolution from the perspective of its meaning and, implicitly, of the social reaction. Thus, it started from the moment in which the victim made his own justice, aiming to survive; it followed the moment in which, due to the development of the social structure and its evolution towards a clan and tribe, the collective responsibility and response represents the law governing the victim-criminal relation. With the emergence of the "Greek miracle" (5-6 centuries BC), the responsibility becomes personal, and the collective response is institutionalized, transforming into justice (the starting point was a private justice, then a joint to move towards a state justice, the victim evolving from the main actor of the conflict, a simple witness of a judicial procedure whose focus point is the perpetrator). The conclusion of this short itinerary is that the position of the victim is tributary to the interests of the social group to whom it belongs.

What is regrettable, but explainable, is the fact that from the couple perpetrator-victim, the latter one is the less heard. In fact, the justice examines the past (the offence, the prejudice) for the purpose of establishing the fate of the criminal and, to a smaller extent, of the victim. The deceased victim represents, irrevocably, the past. The surviving victim who carries the wound deep buried in memories is nothing else but another witness, another creditor for the perpetrator or the state, his physical or psychical wound being taken into consideration as a calculating basis for a material solution. This because justice is preoccupied by "the person within society". The victim raises a specific legal issue which is partially solved only at the end of the trial. The rest is

no longer judicial. The rest is just…philosophic. Justice does not know transcendence, it acts based on a determined criminal policy, and the philosopher criminologist-victimologist must think about the victim's situation from the perspective of the human dignity, as respect for himself and for the other, as accumulation of the human being, resulted from his free actions in relationships and in a climate of equality, accumulation transcending the material aspect of the limited life. If the jurist considers that there is a guilty person (the perpetrator) and an innocent (the victim), from a criminological perspective, the offence is studied both as a social phenomenon, as well as an individual phenomenon, stating the existence of a trinomial formed by the perpetrator, the victim – collective, direct or indirect – and the direct victim (the harmed individual).

The author, the victim and the situation represent a unique structure, between whose elements there are no borderlines without denaturizing this assembly.

The criminal, the victim and the pre-offence situation are three components so tight between them that it is impossible to understand the criminal by making an abstraction of the others. Thus, the separation of the criminal from the victim and the isolated study of the first, shall decrease the value of the results obtained as a mosaic of factors and features difficult to study in a dynamic and global process. Determining how stimuli act on the inclinations and predispositions of crime to defeat moral resistance forces, and how these transition conditions are conditional, will have to occupy a central place in the dynamics of the homicidal act of serial killers[1].

According to these theories, the criminal is seen as a primitive being, dominated by instincts, who is directly exteriorized, without any internal filter to stop them. The absence or deficiency of the "superego" are in general explained by poor education. Hijazi criticizes these theories, stating that the killers are not that different from the average individuals. Even if they are extremely aggressive or sadistic, they do not have a different behavior than normal individual throughout their lives. As it shall be ascertained from the examples presented during the next chapter, these are the things for most serial killers. In fact, only the commission of hetero-aggressive acts is the one differentiating them from the others. Up next, Hijazi considers that it is wrong to consider the

[1] Etienne de Greeff, *Introduction à la criminologie* (Paris: Van den Plank, 1946)

absence, weakness or severity of inhibition as being static features of the personality. Is more rational to be seen as very dynamic features, changing, transforming and depending on circumstances, stimuli and victims. The arguments in favor of this opinion are:

- The force and intensity of inhibition in an individual shall vary depending on his type, race, sex, social condition or victim's professional position. This explains why some serial killers were deprived of inhibition when it came to some people but abstained in relations with other people;

Thus, Jack the Ripper killed only prostitutes; Fritz Honka recruited his victims whose only "fault" was of being shorter than him (162 cm); most sexually driven killers killed only young women etc.

- The force and intensity of inhibition to a certain individual, in relation to a certain murder, vary depending on the possibility of justifying the act when he sees in murder the only possibility to remove an obstacle or to achieve an ideal, when he moves to performing the offence. This is one of the plausible explanations for the absence of empathy and mercy of the offenders towards their victims, residing in the process of the desensitization process they went through, process which eliminates the guilt, remorse or moral inhibitions.

Thus, by denigrating the victim, killers reach the conclusion that their gruesome actions are justified and the choice of the "object" of victimization as legitimate. When the victim is seen as without value, as something inferior to human, as a target for hostility or as an outlaw deserving to be mistreated, acts of cruelty and wilderness become possible.

Some victims ease the evolution towards a criminal act, because their characteristics, attitude or behavior provide the possible killer with efficient reasons, allowing him to justify the action or to run from the feelings of guilt related to this action and to diminish the anxiety and internal conflicts which could, eventually, make his existence "a living hell" (thus, Joseph Kollinger sacrifices human lives, reasoning that God has given him "the task" to destroy mankind; Ghenadi Mikasevici labeled his own killings as "an war against adulterous women").

The persons who, through their qualities or behavior, offer the killer with reasons of justification and self-legitimacy (see the above-mentioned examples) are predisposed to become the victims of a criminal aggression than the ones who do not provide such reasons. Usually, serial

killers do subtle differentiations between their "targets" and the ones who do not fit in their aggression. They tend to see their victims as the individuals providing means of justification or self-legitimation for their actions. The representatives of victimology claim that there is a process of reflection, through which the victim replaces the criminal. The prior culpability of the selected victim, which makes the criminal see himself as a victim, the feeling of insecurity suffered by him, represent important elements easing the offence, allowing the potential offender to justify his action, offering it with a feature of legitimacy and justice[1].

There are crimes whose tragic ending is conditioned by the victim's attitude and behavior. In such cases, the victim may hamper the commission of the offence, may turn its ending in his favor or may interrupt the commission of such a serious offence.

CONCLUSIONS

Each society faces the criminal phenomenon which lately has an increased ascendant trend. Psychological and psycho-socially, the incrementation of the criminal rate determines the intensification of the feeling of insecurity, generally felt by individuals, but especially but those with a high possibility of becoming a victim or a higher degree of victim vulnerability.

Thus, society and the judicial authorities empowered with solving such cases have been preoccupied with serial crimes. From the perspective of an ordinary individual, a citizen, a criminal is the person who has murdered another person by cruel means. In exchange, the serial killer causes multiple such crimes by using the same cruel methods each time, sometimes leaving a clue on the murder scene.

The serial killer murders also from psychological reasons, the specialists ascertaining that either a childhood or youth trauma, affecting that person for life, lead to the performance of crimes using the same typology. We can take any random example: a dead victim is being found, a dead body, in a train station having the neck cut and without legs. The victim is being found on Sunday morning, then, after a week another victim is being found and so on for several months. The first emergence of the two-three persons killed in the same way, determines the police to consider that an active serial killer must be found, trialed

[1] Stănoiu, *Introducere în criminologie*, 51

according to the law and imprisoned for many years, in some stated being sentenced to life imprisonment or even death penalty. The police are trying to control criminality, even if it does not always succeed.

After all, serial killers are people who, for their own fault or for the fault of the family or others, have come to commit multiple crimes. They become and have always been a real danger to society. The phenomenon of serial killers has been and will be present in society, but the question is how society can manage this phenomenon. However, for field specialists such as criminologists, from a psychological point of view, serial killers will always be an interesting subject that will be a challenge.

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

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Abstract:

The origins of the science of Roman law are closely related to traditional religious practices. In the old era, it was reduced to knowing forms, kept secret by pontiffs, like religious rites. It is in fact the consequence of the confusion existent between ius, honestum and fas. Therefore, both the juridical consultations, and the religious ones were strictly provided individually and confidentially, considering the secret contents thereof, with a view to maintain the influence of a closed caste over population. All this period, when it was perpetuated a tradition taken over from prestate period, lasted until the year 301 before Christ, under the name of sacred or religious jurisprudence.

Keywords: *roman law; religious practices; legal science; pontiff ; origins.*

INTRODUCTION

For several centuries, the pontiffs have known the pomp days[2] 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.[3] 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.[4] The

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[2] Days when trials were judged.

[3] Hanga Vl., Bucharest: *Borough of seven cholines*, 1951, 185.

[4] Girard Fr., *Histoire de l'organization judiciare des Romains* (Paris: Arthur Rousseau, 1901), 13.

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.

The origins of the science of Roman law are closely related to traditional religious practices. In the old era, it was reduced to knowing forms, kept secret by pontiffs, like religious rites. It is in fact the consequence of the confusion existent between ius, honestum and fas. Therefore, both the juridical consultations, and the religious ones were strictly provided individually and confidentially, considering the secret contents thereof, with a view to maintain the influence of a closed caste over population. All this period, when it was perpetuated a tradition taken over from prestate period, lasted until the year 301 before Christ, under the name of sacred or religious jurisprudence.[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

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*.[4] 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*.[5] The religions was present in all aspects of social life, it

[1]E. Molcuţ and D.Oancea, *Roman Law* (Bucharest, 1993), 60.
[2] J.L.Strachan-Davidson, *Problems of the Roman criminal law* (Oxford: Clarendon Press, 1912), 1.
[3] Strachan-Davidson , 3.
[4] Rüpke Jörg, (coord.), *A companion to Roman religion* (Blackwell Publishing, 2007), 7.
[5] *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

was not limited to temples and feasts.[1] 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.[2]

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.[3] There was, mainly during the period of Republic, a religious freedom, but this does not mean that there is no strict supervision of cults.

In order to understand Roman religious one shouldn't ignore the two legends: of foundation of Rome and of first kings. The dam sent by Marte to nurse the two twins prefigure the warrior vocation of Romans. Pursuant to the defeat of Albans, Romulus and Remus decided to found a town on such places, where encountered and raised.[4] 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.[5] 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,

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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.

[1] Jörg Rüpke (coord.) , *quoted work*, p.5.

[2] Plinius, *Naturalis Historia*, 3,69-70.

[3] Dion, 47,18.

[4] Livius Titus, *Ab urbe condita* (Bucharest: Minerva, 1976), 14.

[5] Livius Titus, vol.I, p.14 and Plutarh, *Romulus*, III-XI.

killed him saying: *all those who dare to jump over the walls built by me to die like this*.[1]

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.[2] Similarly, *during every critical moment of its history, Rome will be disquieted, thinking that it feels the pressure of a blast. As on its birth, it didn't taste peace neither with men nor with Gods. This religious anxiety will put a pressure on his destiny. It is easy, too easy to oppose it to an apparent good consciousness of Greek boroughs. However, Athena had known crimes as well: on the origin of the power of Tezeu is the suicide of Egeu*.[3]

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.[4]

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

[1] 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.
[2] Grimal Pierre, *Roman civilisation* (Bucharest: Minerva, 1973), 16.
[3] Grimal, 16.
[4] Mircea Eliade, *History of faith and religious ideas* (Bucharest: Scientific, 1992), 106.

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.[1] The guard of public sanctuaries was generally incumbent upon magistrates. When, exceptionally, other individuals were appointed as well, who neglected their duties, a capital crime was committed.[2] 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.[3] 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.[4] 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.[5] Consequently, the legal works consider capital crime the introduction of new divinities and related ritual practices.[6]

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[1] Val. Max., 1,1,13.
[2] Cicero, *Pro Rabirio*, 2,7.
[3] Cicero, *De legibus*, 2,8,19.
[4] Livius Titus, 4,30; 25,1,7,5.
[5] Dion, 25,36.
[6] *Digeste*, 48,19,30.

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

On Romans, as the ideal was represented by the regularity of annual cycle in the ordered development of seasons, any anomaly represented a crisis situation in the relation with gods.[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

[1] Eliade Mircea, vol.II, 107.
[2] Eliade Mircea, vol. II, 109.
[3] Eliade Mircea, 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 Mircea, vol. II, 226.

Dionis.[1] In this respect, it was foreseen that noone, in the company of more than four individuals, men or women (two men and three women), will participate to sacred rites, but with the approval of praetor and Senate. The manner of investigating the case and of punishment are presented to us by Titus Livius. However, the recounting must be performed under the reserve that, despite its erudition, similar to its ancestors, he does not consider history a science, therefore, he does not feel forced to always consider the historical truth. *Ab urbe condita* contains in fact three kinds of texts (of analysis, rhetoric and literary). The accuracy of text depends however on the source of inspiration; similarly for the transmission of details.[2] The certification of this law[3] 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[4] 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

[1] Eliade Mircea, vol. II, 126, uses the phrase of *nocturne orgy mysteries*.
[2] Walsh P.G., *Livy: His Historical Aims and Methods* (Londra: Cambridge University Press, 1967), 150 and 235.
[3] Pagan Victoria Emma, *Conspiracy Narratives in Roman History* (University of Texas Press, 2004), 51-53.
[4] 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.

well as the rewarding of informers. The conspirators were judged by extraordinary courts. The foreigners were judges as well, since conspiracy was considered a crime against state. Although there were some doubts related to the accuracy of data provided, it is clear that Aebutius and Hispala were the informers of consul Postumius.[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.

[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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DISPOSAL OF MEDICAL SAFETY MEASURES AND INSURANCE MEASURES BY THE PRELIMINARY CHAMBER

Denisa BARBU[1]

Abstract:

The Preliminary Chamber Judge is not a judge of instruction as prescribed by the Romanian inter-war criminal procedural law or the French criminal procedural law, having no competence in collecting the evidence, discovering the author of the offense or the participants in it or analysing the merits of the accusation or to bring defendants to court.

The analysis of the comparative law reveals that although the source of inspiration for the Chamber of the Preliminary Chamber is found in the German and Italian Penal Procedure Code, the national procedural rule of the preliminary chamber resulting from the CCP amendment is of little similarity with the institution of the preliminary chamber by art. 199-204 of the German Code of Criminal Procedure, respectively with the institution of the preliminary hearing (preliminary udienza) provided by art. 418-425 of the Italian Code of Criminal Procedure.

In the literature, safety measures are defined as "criminal law penalties consisting of preventive coercive measures aimed at removing a state of danger generating acts provided by the criminal law". These safety measures can also be ordered during the criminal proceedings, without the condition of criminal liability of the author of the offense.

Safety measures are: temporary medical treatment, medical hospitalization, a ban on taking up a job or exercising a profession, a special confiscation, a large confiscation.

Key words: secular confiscation; medical hospitalization; sanctions; extensive confiscation; medical treatment.

INTRODUCTION

In the literature[1], safety measures are defined as "criminal penalties consisting of preventive coercive measures aiming at the

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elimination of a state of danger generating acts provided by the criminal law".

These security measures can also be ordered during the criminal proceedings, without the condition of criminal liability of the author of the offence.[2]

Safety measures[3] are: temporary medical treatment, medical hospitalization, a ban on taking up a job or exercising a profession, a special confiscation, a large confiscation.

These measures may be ordered if two conditions are fulfilled, for requiring medical treatment and for temporary medical hospitalization: the condition of the suspect/defendant, the existence of a state of danger[4].

The disease state, even the one caused by the chronic consumption of alcohol or other psychoactive substances, is not defined by itself, being applicable in the provisions of art. 109 C.C. and 110 C.C.[5]

The competent body, depending on the stage of the criminal proceedings, is: the judge of rights and freedoms; the Preliminary Chamber Judge; the court.

Regardless of the security measure requested by the prosecutor, the judge of rights and freedoms/the judge of the preliminary chamber/the court will analyse the request only after performing a forensic psycho-legal expertise.[6]

2. THE PROCEDURE FOR TAKING THE MEDICAL MEASURES BY THE PRELIMINARY HEARING JUDGE

The prosecutor's request shall be filed with the competent court, which shall set a time limit for the trial: within 5 days of registration, in the case of medical treatment, immediately upon medical treatment.[7]

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[1] C. Bulai and B. Bulai, *Manual de drept penal. Partea generală*, (Bucharest: Universul Juridic, 2007), 614.
[2] According to art. 107 par. 3 C.C.P.
[3] Art. 108 C.C.P.
[4] N. Volonciu, s.a., *Codul de procedura penala Comentarii pe articole,* (Bucharest: C.H. Beck, 2017), 558; the state of danger must be concrete and current.
[5] Volonciu, *Codul de procedura penala. Comentarii pe articole,* 558.
[6] Volonciu, *Codul de procedura penala. Comentarii pe articole,* 561.
[7] These terms are recommended, and there is no sanction to overcome them.

The trial takes place in the council chamber, in the presence of the suspect/defendant and the lawyer elected ex officio, the latter having to be present throughout the proceedings, even if the suspect/defendant is not present in court.[1]

The participation of the prosecutor is mandatory and the measures are available after hearing the suspect/defendant, which can be brought with a referral order.

Hearing him/her can also be done at the medical institution where he/she is hospitalized if his/her arrival is not possible.

The solutions are: admission or rejection, when there are no indications that prefigure the conditions required by the law for the application of a safety measure[2].

The pronouncement is made by reasoned conclusion, which can be appealed within 5 days from pronouncement by formulating an appeal[3].

The litigation does not suspend the execution.

We note that these measures do not have a certain amount of time for which they can be taken, with the time being restored by the suspect/defendant's recovery or improving his/her health[4].

3. LIFTING THE TEMPORARY MEDICAL INTERNMENT OR REPLACING IT WITH MEDICAL TREATMENT

This measure can be lifted when: the suspect/defendant has recovered; there has been an improvement in the state of health that removes the state of danger for public safety[5].

The lifting of the measure is at the request of the prosecutor; the specialist doctor; of the suspect/defendant; of a member of his/her family.

The measure will be lifted on the basis of a forensic expertise that will satisfy the two conditions mentioned above.[6]

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[1] Volonciu, *Codul de procedura penala. Comentarii pe articole,* 561.
[2] Volonciu, *Codul de procedura penala. Comentarii pe articole,* 561.
[3] According to art. 425[1] C.C.P.
[4] According to 425 para. 2 C.C.P.
[5] I. Neagu and M. Damaschin, *Tratat de drept procesual penal. Partea* 1, (Bucharest: Universul Juridic, 2015), 669.
[6] Neagu and Damaschin, *Tratat de drept procesual penal. Partea* 1, 669.

Jurisdiction

During the criminal investigation, the judge of rights and freedoms, in the preliminary chamber stage, is the judge of the preliminary chamber, and in the trial phase, the court, the provisions of art. 248 par. 1 C.C.P. completing the provisions of art. 571 C.C.P. which confers an alternative jurisdiction on the court in whose jurisdiction the health unit is located[1].

The procedure is that provided by art. 571 C.C.P., on the referral, the judge or the court pronouncing by the conclusion. Solutions are enforceable upon delivery, subject to appeal within 5 days of pronouncement[2].

4. THE JURISDICTION OF THE PRELIMINARY CHAMBER JUDGE IN RESPECT OF PRECAUTIONARY MEASURES

The precautionary measures are "*procedural measures of a real nature which have the effect of rendering unavailable the movable and immovable assets belonging to the suspect/defendant or the civilly liable party with a view to special confiscation, extensive confiscation, execution of the punishment of the fine or legal costs or covering civil damages*".[3]

According to art. 252-254 C.C.P., there are three categories of precautionary measures: seizure itself; mortgage marking; garnishment, with the mention that mortgage marking and garnishment are considered special forms of seizure[4].

The precautionary measures are provisional in order to prevent the destruction/disposal of the goods.

By hiding = it means any manoeuvre to lose physical control of a good, in order to lose its trace[5].

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[1] M. Udroiu, *Procedura penala. Partea generala,* (Bucharest: Hamangiu), 706.
[2] Udroiu, *Procedura penala. Partea generala*, 706.
[3] Neagu and Damaschin, *Tratat de drept procesual penal. Partea* 1, 654.
[4] Neagu and Damaschin, *Tratat de drept procesual penal. Partea* 1, 654.
[5] Volonciu, *Codul de procedura penala. Comentarii pe articole,* 567.

Destruction = dismantling goods into component parts so they can no longer be tracked[1].

Alienation = passage of a good through sale, donation from the patrimony of the criminal prosecution to other people's property[2].

Avoidance = removal from judicial control by any means other than above.

Jurisdiction

In the course of the criminal prosecution, the prosecutor is ordered by a reasoned ordinance in fact and according to art. 286 par. 1 let. d of C.C.P.;

In the course of the preliminary-ruling procedure, the Preliminary Chamber judge has a reasoned decision;

During the trial, the court, through reasoned conclusion.[3]

One aspect to be considered in relation to the precautionary measures is that stated in Decision no. 19/2017 of the ICCJ, which stated that "*when the precautionary measures are instituted in criminal proceedings, it is not necessary to indicate or prove or individualize the goods on which the precautionary measure is established*".

In the contestation of seizure ordered by the preliminary chamber judge or by the court by way of termination, only the way in which the measure was enforced can be challenged by the same judicial body that has ordered it.

This way of contestation is complemented by the provisions of art. 250 paragraph 8 C.C.P., according to which, after the final judgment, the decision can be challenged under civil law, only on how it was accomplished. The prosecutor's presence in the civil court is considered necessary.

In the case of the precautionary measures taken during the preliminary hearing or the trial, the doctrine[4] has shown that these are carried out by the bailiffs[5].

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[1] Volonciu, *Codul de procedura penala. Comentarii pe articole,* 567.
[2] Volonciu, *Codul de procedura penala. Comentarii pe articole,* 567.
[3] Udroiu, *Procedura penala. Partea generala,* 709.
[4] M. Udroiu, *Procedură penală. Partea generală. Noul cod de procedură penală*, (Bucharest, 2014), 603; Volonciu, *Codul de procedura penala. Comentarii pe articole,* 573, A. Zarafiu, *Procedură penală. Partea generală. Partea specială*, (Bucharest, 2014), 246.
[5] Art. 7 let. 3 of Law no. 188/2000 on bailiffs (Of. M. no. 738 of 20 October 2011).

With this view, we disagree, as the bailiff does not work without being paid, and in practice, if these measures were taken by the court by way of termination, it determines which bodies put them into execution: prosecutors; ANAF; criminal investigation bodies[1] or puts them into execution by taking steps to do so[2].

We think that the court or the chamber judge should enforce the provisions on precautionary measures even when taken in the court/preliminary chamber, so even the prosecutor is no longer in office, since the file is already in court[3].

The return of things

Immediate repair measures[4], characterized by the reparation in kind of the material damage caused by the offense[5], are considered.

The return of things is a procedure whereby the restitution of property is ordered to the property of the injured person/or other person who has been unjustly taken from his/her possession or holding[6].

The conditions[7] for ordering restitution must be met cumulatively: the things raised by the suspect/defendant or any person who has received them to keep them are the injured person or other person or have been unjustly taken from possession or possession thereof; the return of things does not make it more difficult to establish the facts and the fairness of the case[8].

In this case, the person to whom the goods were returned has the obligation to keep them until the case is finally settled.

Jurisdiction

During criminal prosecution, the jurisdiction belongs to: the prosecutor[9], the judge of rights and freedoms[1].

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[1] According to art. 574 C.C.P.
[2] Art. 553 par. 4 C.C.P.; art. 253 par. 4 C.C.P.
[3] Udroiu, *Procedura penala. Partea generala*, 729.
[4] V. Dongoroz et alii, *Explicații teoretice ale codului de procedură penală român. Partea generală, vol. 1*,(Bucharest: Academiei Publishing House, 1975), 342.
[5] Neagu and Damaschin, *Tratat de drept procesual penal. Partea* 1, 666.
[6] Udroiu, *Procedura penala. Partea generala*, 742.
[7] Art. 255 C.C.P.
[8] Neagu and Damaschin, *Tratat de drept procesual penal. Partea* 1, 666.
[9] When he dispose of himself.

At the preliminary chamber stage, the judge hearing the application for a preliminary ruling: ex officio, from the superior court.

At the trial stage: the court hearing the case[2].

Litigation

The procedural act ordering or refusing the return of things may be challenged with litigation, cf. art. 250 C.C.P., applied similarly.

Thus, the prosecutor's order may be appealed to the judge of rights and freedoms, the conclusion of which is not subject to any appeal.

The conclusion of the preliminary chamber judge/court can not be challenged, only the way of accomplishment can be challenged[3].

We believe that the rights of people who have not been cited are injured, and from this perspective these provisions are criticized.

Peremptory writ[4]

It is a written procedural act of a constraint which includes an order given to the criminal investigation bodies of the judicial police or public order bodies to bring before the judicial body a person to be heard or whose presence is necessary[5].

The issuing judicial organs are:

- in the course of criminal prosecution, the criminal prosecution body by ordinance;
- in the course of the trial, the court by the conclusion[6];
- in the course of the preliminary ruling procedure, the Preliminary Chamber Judge may, by way of conclusion, consider

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[1] When called upon to rule on restitution by way of appealing against the act by which it was disposed the removal of objects, cf. art. 255 par. 1 II thesis, reported to art. 250 par. 1 C.C.P.

[2] Volonciu, *Codul de procedura penala. Comentarii pe articole,* 581.

[3] Udroiu, *Procedura penala. Partea generala,* 610; Udroiu, *Procedura penala. Partea generala,* 743.

[4] Gh. Neacşu and V. Pătulea, "Consideraţii privitoare la emiterea şi executarea mandatelor de aducere", in *Dreptul* no. 9(2003): 163-178; I. Rusu, „Executarea mandatului de aducere. Opinii critice. Propunere de *lege ferenda*", in *Dreptul* no. 6(2004): 188-196; G. Potrivitu, „Discuţii în legătură cu mandatul de aducere", in *Dreptul* no. 2(2006): 209-212.

[5] Volonciu, *Codul de procedura penala. Comentarii pe articole,* 615; Udroiu, *Procedura penala. Partea generala,* 770.

[6] Art. 265 alin. 7 C.C.P.

whether a preventive measure is being considered ex officio or on request[1].

CONCLUSIONS

The procedural measures are defined as "*criminal law institutions which consist of certain personal or real deprivations or constraints determined by the conditions and circumstances in which the criminal proceedings are conducted*" [2].

Another definition[3] is that the procedural measure is the means of coercion by which the judicial body ensures that the parties and other persons participating in the trial participate in their procedural obligations and guarantees the execution of the punishment and the repair of the damage caused by the offense.

From the two definitions we can draw a more synthetic one: procedural measures are legal means of depriving or restricting fundamental rights and freedoms by which the judicial bodies ensure the normal conduct of the criminal trial, the enforcement of the sanctions applied and the repair of the damage caused by the crime or prevent committing other deeds[4].

It follows from this definition that the procedural measures are subsidiary to the main activity[5].

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CONSIDERATIONS REGARDING THE WAY THE CONSTITUTIONAL COURT'S DECISIONS APPLY IN DIFFERENT STAGES OF THE TRIAL

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Abstract:

While the first court pronunced the decision taking into consideration the decision nr.895/2015 of Constitutional Court, being well known that the decisions issued by the Constitutional Court are binding and take effect starting the date of their pubication in the Official Gazette, in the appeal, the courthouse did not consider the decision while stating that the article declared unconstitutional must be essential for the resolution of the appeal.

Key words: *Decision 895/2015 of the Constitutional Court.*

INTRODUCTION

This analysis is based on a real situation which was the subject of the cases pending before the Pitesti Court and the Argeş Courthouse as the appeal court. The object of the action was the contestation brought against the executotion acts executed at the end of 2015 in the execution file no. x / 2015 by BEJ P.M. (the endorsement of enforced enforcement, the conclusion for the determination of the enforcement costs and the completion of the examination of the request for expertise).

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The contestant stated in the reasoning of the contestation that the institution voluntarily started to pay the enforceable titles invoked by the bailiff's orders (Civil Court No. Y / 2013 issued by the Argeş Tribunal and Decision No. Y / 2015 of the Pitesti Court of Appeal) and in the summons of execution, in compliance with the provisions of art. 622 of the Civil Procedure Code.

As to comply, Decision 26/2014 was issued, in which the corresponding salary rights were calculated as the difference between the basic salary resulting from the application of sentence Y / 2013 and the salary payable, for the periods written down, in the contents of the sentence mentioned above.

It has been shown that in the present case special laws were applied, namely Law 356/2013 regarding the state budget for 2014, according to which in 2014 the payment of the executory titles is made in the amount stipulated by GEO no. 92/2012 by paying for the payment of equal quarterly installments, GEO 103/2013 on the remuneration of staff paid out of public funds in 2014 and other measures in the field of public expenditure, subsequently Law 186/2014 regarding the state budget for 2015 according to which payment of the amounts stipulated in paragraph (1) lit. h) and par. (3) letter b) of its content shall be carried out in 2015 in staggered manner, according to the provisions of art. 35 paragraph (1) of Government Emergency Ordinance no. 83/2014 on the remuneration of staff paid out of public funds in 2015, as well as other measures in the field of public expenditure.

In accordance with the decision Y/2015 issued by the Court of Appeal of Pitesti, the director of the institution issued Decision 284/2015, which found that the restoration under Law 330/2009 was started as of 01.01.2010 and Law 284/2010 starting with 01.01.2011, taking into account the basic salary in December 2009 established in accordance with the provisions of Law 221/2008 approving the GO No.15 / 2008, a decision that was already enforced because some of the salary differences were already calculated and granted, the court not requiring the contestant to restoration of the employees based on the Law 63/2011 starting with 13.05.2011. The court ordered the contestant only to pay the salary differences between the actual rights received and those due by applying Law 63/2011 for the period 13.05.2011-21.10.2013.

Thus, according to GEO nr.83/2014 on the remuneration of staff paid out of public funds in 2015, as well as other measures in the field of public expenditure, the payment rescheduling procedure suspends lawfully any enforced enforcement procedure. The rationality behind payment staggement is based on the idea of maintaining a reasonable proportionality between the gradual execution of payments made by court judgments and the economic stability of the state, as the Government recognizes the obligation to pay and performs it in the prescribed manner and does not undermine the substance of the rights . It is appreciated by the contestants that the conditions imposed by art. 663 of the NCPC, respectively, the existence of a certain, liquid and exigible claim related to the special laws, which stipulates that as long as the rescheduling payment is operated, the claim is not chargeable.

By civil sentence no. Z / 2018 pronounced by the Pitesti Court it was accepted the request filed by contestant X in contradiction with the intimate S.L., the execution documents issued in the forced execution file x / 2015 of BEJ P.M. (ie the conclusion of the forcible enforcement, the conclusion for the determination of the enforcement costs and the conclusion of the expert's request) and the demand for the costs being rejected. In order to decide this, the court upheld the appeal against enforcement as being also formulated against the declaration of enforceability of the enforced enforcement in court at the date of publication of the decision no. 895/2015 of the Constitutional Court, which is why the complaint concerning the aforementioned decision appears to be well founded. Against this sentence the parties have declared the appeal.

In the appeal, the intimate requested the admission of the appeal on the ground that the court of first instance unlawfully terminated the enforceability of enforceability under Decision No. 895/2015, without raising the objection of unconstitutionality to the parties, I consider that this decision is not appliable in the present case. The court considers that for Decision no. 895/2015 of the Constitutional Court to have effects on the cases under trial, the article declared unconstitutional must be essential for the resolution of the appeal, meaning that the courts have been invested with the verification of the lawfulness of the forcible enforcement. In the forced execution phase, from the interpretation of art. 713 par. (3) The NCPC states that all nullity of whatever nature may be invoked by the parties under the penalty of deferment only within the

period within which the challenge may be exercised and the court observes that the contestant did not invoke the unlawfulness of the concluding consent issued by the executor the court points out that it is excluded that the unlawful endorsement of forced execution by a bailiff before the publication of the decision of unconstitutionality is ruled out of its own motion can not be considered as a ground for „public order".

The courthouse upheld the intimate appeal, annulled the sentence and dismissed the appeal as being unfounded, the decision being final. The present article is a commentary susceptible to interpretation in relation to the ex officio invocation by the court of exceptions of unconstitutionality.

Thus, I appreciate that the court of appeal did not judge the case in relation to the provisions of Decision no. 895/2015 by which art. 666 of the NCPC regarding the enforcement of forced execution by the bailiff was declared unconstitutional.

In view of the decision in question, I would like to point out a brief revision of the history that led to the referral to the Constitutional Court.

By Law no. 138/2014 for amending and completing the Law no. 134/2010 on the Civil Procedure Code, as well as for the amendment and supplementation of related normative acts it was reintroduced the obligation to vest with enforceable fomula any other executory titles other than court sentences, the activity of the adjudication being given to the bailiffs within the jurisdiction of the court of law call where the debtor is located or where the real estate is located.

The Bucharest Courthouse - The Civil Section IV ordered, by the Decree of December 9, 2016, in File no. 13.765 / 299/2016, the notification of the High Court of Cassation and Justice, based on art. 519 of the Code of Civil Procedure, with a view to issuing a preliminary ruling to untie the question of the law regarding "the timely application of the provisions of art. 666 par. (2) of the Code of Civil Procedure - in the form in force prior to their amendment by the Government Emergency Ordinance no. 1/2016 for the amendment of the Law no. 134/2010 on the Civil Procedure Code, as well as related normative acts, approved with amendments and completions by Law no. 17/2017 - regarding the endorsement of forced execution given by the bailiff after the decision of the Constitutional Court no. 895 of December 17, 2015, published in the Official Gazette of Romania, Part I, no. 84 of February 4, 2016, prior to the publication of this decision, a matter referred to the

petition as a ground for nullity by a challenge to enforcement filed before the courts after the publication of Decision no. 895 of December 17, 2015 ".

Therefore, paragraph 28 of the recitals of the Decision[1] states that "With regard to the effects to be given to the present decision, the Court finds that during the period of validity of a legislative act, it enjoys the presumption of constitutionality, so that the decision will not apply in respect of enforced enforcement procedures until the date of its publication, but instead apply to the enforcement appeals against the enforcement of the enforcement order by the bailiff in court at the date of publication of this decision, such as and those in which the objection of unconstitutionality was invoked until the abovementioned date. Also, with the publication of the Constitutional Court's decision, the legislature, under Article 147 (1) of the Constitution, has the obligation to agree the entire procedure for enforcing enforced enforcement with the provisions of the Constitution found to be infringed by this decision, therefore implicitly, by the Constitutional Court's decision, whose considerations and provision are generally binding[2] and consequently to comply with constitutional requirements. Until the adoption of the appropriate legislative solution, as a consequence of the present decision to admit the unconstitutionality exception, the Court finds that the courts should apply directly Article 21 (3), Article 124 and Article 126 paragraph 1) of the Constitution, thus becoming competent to consent to forced execution (see mutatis mutandis, regarding the direct application of the Constitution, Decision no.186 of November 18, 1999, published in the Official Gazette of Romania, Part I, no. 213 of 16 May 2000, or Decision No 774 of 10 November 2015, not published until the date of this Decision). Therefore, from the date of publication of this decision, the power of the bailiffs to consent to forced execution ceases. "

According to art. 147 paragraph 4 of the Romanian Constitution, the decisions of the Constitutional Court of Romania are generally binding ex nunc, applying to all subjects of law and as a consequence and Decision no. 895/2015 was to be taken into account at

[1] On 04.02.2016 it was published in the Official Gazette no. 85/2016 Decision no. 895/2015.

[2] See Decision no.1 of 10 January 2014, published in the Official Gazette of Romania, Part I, no.123 of 19 February 2014, par.77

the time of the court's judgment, all the more so as the first instance correctly invested had applied it at the time of the judgment X / 2017.

This way we can see how a new stage is emerging regarding the carrying out of the forced execution activity since GEO no.1 / 2016, in which case the legislator, in this case, the Romanian Government has understood to comply with the constitutional requirements imposed by the Court's decision, occasion with which the provisions of art. 666 of the Code of Civil Procedure have changed in the sense that the enforcement of forced execution will be ordered by the court under the terms of the law, art. VII of the Ordinance stipulating "Whenever a normative act provides for the enforcement of the enforcement titles and / or the enforcement of the forced execution by the bailiff, they shall be enforced after the enforcement of the execution by the court has jurisdiction according to the law, without the need for an enforceable form of investment. "This provision ensures compliance with the principle of the right to a fair trial, as the forced execution stage is regarded as an integral part of a process of enforcing executory titles.

The impartiality and neutrality of the bailiff in solving the demand with which he is invested are essential elements in the analysis of his role in terms of the circumstances in which he is seized by the creditor and not by both parties involved. The Court, on the premise that the activity of the executor is limited only to execution of acts of execution, considered that the prerogative of empowering the bailiff with the consent of the forced execution is inconsistent with art.21 para. (3) and art. 124 of the Constitution, found violation of the right to a fair trial.

Regarding the case of the analysis, we appreciate the fact that the court of first instance decided to admit the contestation of enforcement with the taking into account of Decision no.895 / 2015, so that the court of appeal then stated that in this case, could take effect. It is necessary that the person who has a pending appeal contesting the court should have pleaded that the bailiff's decision was unlawful but the contestant had no way of formulating this contestation regarding the unlawfulness of the bailiff's decision, since the constitutional filter was filed after the challenger filed an appeal against enforcement against file no. x / 2015, so that in the present case I consider that the conditions set out in the recitals of the Constitutional Court have been met, the case concerned the challenge to enforcement and was pending before the first

hearing at the date of publication of the RCC Decision no. 895 of 17.11.2015, the case being registered on 14.10.2015.

Moreover, taking into account the fact that on 11.06.2018 the Constitutional Court opposed to the objection of unconstitutionality of the provisions of art. I p.37 [with reference to art. 402 of the Code of Civil Procedure] and point 58 [with reference to Article 497 of the Code of Civil Procedure] and Art. III pt. 3 [referring to art. XVIII1 of Law no. 2/2013] of the Law amending and completing the Law no. 134/2010 on the Code of Civil Procedure, as well as for amending and completing other normative acts, objection formulated by the High Court of Cassation and Justice - United Sections. The objection of unconstitutionality was admitted, in this way the Constitutional Court, stating that "Art. 147 par. (4) of the Constitution is, as far as procedural rules are concerned, of immediate applicability, with a sanctioning character. Therefore, in interpreting this constitutional text in relation to the rules of civil procedure, the Court finds that it applies to both pending and future situations, the scope of Art. 147 par. (4) of the Constitution cannot be conditional on the fact that the civil trial was started before or after the publication of the Constitutional Court's Decision no. 369 of May 30, 2017.

Moreover, the Court notes that it consistently states in its judicial practice the constitutional effects of its decisions (ex, Decision No 62 of 18 January 2007, published in the Official Gazette of Romania, Part I , No 104 of 12 February 2007, Decision No 223 of 13 March 2012, published in the Official Gazette of Romania, Part I, No 256 of 18 April 2012, Decision No 895 of 17 December 2015, published in the Official Gazette of Romania Part I, No. 84 of 4 February 2015, paragraph 28, or Decision No 51 of 16 February 2016, published in the Official Gazette of Romania, Part I, No. 190 of 14 March 2016, paragraph 52), meaning in which in paragraph 32 of Decision no. 369 of 30 May 2017 expressly established its constitutional effects on pending cases. Considering the constitutional dimension of the Constitutional Court's approach, it is clear that the courts can not eliminate the effects of the Constitutional Court's decision explicitly indicated in its body, because it would violate the exclusive jurisdiction of the Constitutional Court, instead replacing the obligation to apply them appropriate manner in the cases with which they are invested.

In this context, the Court points out that the High Court of Cassation and Justice does not have jurisdiction to rule on the effects of the Constitutional Court's decision or to give binding rulings that contravene the decisions of the Constitutional Court (see Judgment of the Constitutional Court No. 206 of April 29, 2013 , published in the Official Gazette of Romania, Part I, No. 350 of June 13, 2013, or the Decision of the High Court of Cassation and Justice - The Criminal Law Enforcement Unit No. 1 of 8 February 2018, published in the Official Gazette of Romania, Part I, No. 329 of April 16, 2018, stating that "The effects of the decisions of the Constitutional Court cannot be interpreted in the law enforcement process by other state institutions, since it is its exclusive competence in the matter. Therefore, courts should not interpret but apply that decision in a manner consistent with its considerations in the case brought before the court, as fully as possible in the present case ") and, in this way, expressly or implicitly, refute, alter or limit their effects. Otherwise, the spectrum of the unconstitutionality of the interpretation given either to the effects of the Constitutional Court's decision or to the legal norm in violation of the Constitutional Court's decision will become actual, with the consequence of restoring, for the future, the constitutional court the generally binding effect of its decision "

It can therefore be observed that the High Court of Cassation and Justice[1] has conditioned the application of the Constitutional Court's decision to start the civil process after its publication[2]. Moreover, the challenger requested the annulment of the declaration of enforceability of the enforcement ordered by the bailiff, and the Constitutional Court's decision had to be applied immediately by the court, irrespective of the degree of jurisdiction of all the cases under that incidence, ex officio, even if the exception had not been raised by the contestants. Although the constitutional control ordered by the Constitutional Court is one prior to the promulgation of the law, the Court speculates the theory that the effects of the cessation of the law by its repeal are different from the law being declared unconstitutional.

[1] See the Decision of the High Court of Cassation and Justice no. 2/2019, which takes almost entirely the recitals of the Decision 454 issued by the Constitutional Court

[2] Decision of the High Court of Cassation and Justice no. 52 of 18 June 2018 was published in the Official Gazette of Romania, Part I, no. 609 of July 17, 2018.

CONCLUSIONS

The role of the Constitutional Court is the guarantor of the supremacy of the Constitution. In the above-mentioned case, given the facta pendentia character of the case and the fact that the Constitutional Court is the only constitutional jurisdictional authority in Romania, it has a plenitude of jurisdiction in this field. The court must no longer interpret the effect of the decision, but only apply it in a manner consistent with its considerations. The erga omnes objectivity of the Court's decisions implies the obligation of all authorities to apply the Court's decisions exactly to the concrete situations in which the articles that have been declared unconstitutional affect. The goal is to respect the very purpose of the objection of unconstitutionality.

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CONSIDERATIONS ABOUT HUMAN DIGNITY IN THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT

Izabela BRATILOVEANU[1]

Abstract:

The current Constitution of Romania includes two mentions on human dignity: as supreme value [art. 1 par. (3)] and as a limit of freedom of expression [art. 30 par. (6)].

This study analyzes the jurisprudence of the Constitutional Court so far, which has been given the creative role of developing this concept. From a constitutional point of view, human dignity has two inherent dimensions, namely, the relations between people, which aim at the right and obligation of people to be respected, and, correlatively, to respect the fundamental rights and freedoms of their peers and the relationship of man with the vegetal or animal environment to be appreciated from the perspective of the level of civilization reached.

The Constitutional Court has retained its inalienable character and the social connotation of the concept that requires respect and protection in social relations.

Key words: *human dignity; supreme value; Constitutional Court; jurisprudence; Objekt-Subjekt-Formel (the formula of consideration as an object or subject).*

INTRODUCTION

Human dignity has a long history as a subject of philosophical and theological analysis, but a short history in terms of constitutional[2] value which begins after the end of the Second World War as a "kind of manifesto of a new era of peace and democracy"[3]. As a reaction to the implementation by the Nazis of an ideology of "racial superiority" with

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[2]In this regard Aharon Barak, *Human dignity: The constitutional value and the constitutional right* (Cambridge: Cambridge University Press, 2015), 49.

[3]Catherine Dupré, *The age of dignity: Human rights and constitutionalism in Europe* (Oregon: Hart Publishing, 2015), 12.

the purpose of enslavement and genocide on a collective scale[1], since the mid-20th century, the term is included in the normative regulations adopted at national and international level. The disapproval by the German people of the horrors committed by the Nazis during the conflagration led to the incorporation of human dignity in Article 1 par. (1) of the German Basic Law (1949), according to which *"Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. "*

The need to achieve the legal framework of the evolution towards the rule of law, both democratic and social, led to the elaboration of the current Constitution of Romania, adopted in the sitting of the Constituent Assembly of 21 November 1991 with 414 votes for and 95 votes against. The current constitution came into force after its approval by the national referendum of 18 December 1991. On 18 September 2003 was adopted the Law for the Revision of the Romanian Constitution no. 429/2003 which was approved by the national referendum of 18-19 October 2003 and entered into force on 29 October 2003, the date of the publication in the Official Gazette of Romania of the Decision of the Constitutional Court no. 3/2003 for the confirmation of the outcome of the national referendum. The Constitution of Romania was republished in the Official Gazette of Romania, Part I, no. 767 of 31 October 2003, the texts being renumbered.

Par. (3) of Art. 1 of the Constitution of Romania expressly provided the supreme values, thereby breaking the purely positivist tradition: *"Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values and shall be guaranteed*". At point 1 of the Law no. 429/2003 it was provided the addition to this paragraph of the phrase "*democratic traditions of the Romanian people and the ideals of the Revolution of December 1989*."[2] The fact that human dignity is the

[1]Milton Lewis, "A brief history of human dignity: ideea and application", in *Perspectives on human dignity. A conversation*, ed. Jeff Malpas and Norelle Lickiss (Springer: Dordrecht, 2007), 98.

[2]On the consequences of constitutionalization of democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, see Dan Claudiu Dănișor, *Constituția României comentată. Titlul I. Principii generale* (Bucharest: Universul Juridic, 2009), 77-83.

supreme value of the State places the human at the centre of the state and legal edifice"[1], thus reversing the relation of individual - political power of the totalitarianism.

Dignity is a limitation of the freedom of expression in art. 30 par. (6) of the Fundamental Law, which states that *"Freedom of expression shall not be prejudicial to the dignity, honour, private life of a person, or to the right to one's own image."*

2. THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF ROMANIA

In one case, the Constitutional Court partially admitted the objection of unconstitutionality formulated and found that the provisions of art. I point 8 of the Law for amending and supplementing the Government Emergency Ordinance no.155/2001 on the approval of the stray dog management programme, as approved by Law no. 227/2002, are unconstitutional. Decision no. 1 of 11 January 2012[2] is important for the theme dealt with because on that occasion the Constitutional Contentious Court held that, from a constitutional perspective, *human dignity involves two inherent dimensions, namely the relations between people and the human relationship with the vegetal or animal environment.* The Court considered that the first dimension concerns people's right to have their fundamental rights and freedoms respected, with the correlative obligation to respect the fundamental rights and freedoms of others, while the second dimension involves, with reference to animals, the moral responsibility of people to care for these creatures in such a way to illustrate the level of civilization attained; the two dimensions must be observed cumulatively.

Therefore, in terms of the first dimension of human dignity, the State has both positive and negative obligations (to intervene in support of the fundamental rights and freedoms of citizens and to refrain from harming them), and the other citizens have negative obligations (not to commit actions likely to affect the fundamental rights and freedoms of their peers).

[1]Dan Claudiu Dănișor and Gheorghe Dănișor, "Demnitatea omului: valoarea supremă a statului român," in *Revista de Ştiinţe Juridice* 1(2004): 5.
[2]Published in the Official Gazette of Romania, Part I, no. 53 of 23 January 2012.

In the case, the Constitutional Court noted the lack of predictability of the provisions of Law no. 1/2012, contrary to art. 1 par. (5) of the Constitution, as it did not provide for a priority order of solutions for the management of stray dogs, euthanasia should be applied only as a last resort, or of clear and precise procedures to be followed by public authorities in the field; or, the use of an inappropriate legislative technique has finally brought a prejudice to human dignity, established as the supreme value by Art.1 par. (3) of the Constitution.

By Decision no. 74 of 7 March 2002[1], the Constitutional Court circumscribed the scope of the concept of human dignity only to individuals. In this case, the object of the exception of unconstitutionality was constituted by the provisions of Art. 2 point 1) of Law no. 61/1991 on the civil penalty of certain deeds of violation of social coexistence norms, of public order and peace[2] that states: *"Shall constitute a contravention any of the following acts committed, unless they are committed in such circumstances that, according to the criminal law, be considered offences: 1) committing in public places obscene deeds, acts or gestures, perpetration of insults, abusive or vulgar expressions, threats, acts of violence against persons or their property, which may disturb public order and peace or provoke the indignation of the citizens, or prejudice their dignity and honour or public institutions."* The author of unconstitutionality exception stated that the legal provisions criticized are not compliant with art.30 par. (6) and (7) of the Constitution because dignity and honour are exclusive attributes of natural persons, as legal persons cannot benefit from the protection of the values provided by this article in the constitutional text. The Constitutional Court admitted that art. 2 point 1) of Law no. 61/1991, as republished, includes some drafting inaccuracies when referring to the possibility that reprehensible acts may damage the dignity of public institutions and it delineated the concept of human dignity from other forms of dignity, holding that "*as the sense of honour or dignity is characteristic of the individual, the same can be said of the fame and the reputation of an institution or public authorities*", and therefore the phrase *"dignity and honour of public institutions"* does not contravene constitutional provisions *"as it subscribes to the scope of par.*

[1]As published in the Official Gazette of Romania, Part I, no. 283 of 26 April 2002. In the same direction is Decision no. 476 of 10 May 2012, published in the Official Gazette of Romania, Part I, no. 465 of 10 July 2012.
[2]Republished in the Official Gazette of Romania, Part I, no. 387, of 18 August 2000.

(6) and (7) of the Constitution, which enshrine the limits of freedom of expression."

In another case, the author of the unconstitutionality exception sustained that the employer's obligation to conclude a written employment contract violates the principle of equality of rights and of freedom of trade and limits the right to work. In the recitals of the delivered decision[1], the constitutional contentious court has shown that the employer and the employee are objectively in different situations, as determined by the legal status, by the specific rights and duties within the employment relationship. With regard to the criticism of unconstitutionality with regard to the principle of equality of rights, the Court held that establishing a different legal treatment is objectively and rationally justified. By Decision no. 1109/2009, the Court held that "*the fundamental rights and freedoms of the citizen are constitutional values based on human dignity and the free development of human personality […], rights of which only individuals benefit*," while "*the rights of legal persons [...] are established based on the legal incorporation documents which determine their appropriate legal capacity to achieve their goals*". It is worth highlighting the fact that, according to the Constitutional Court, human dignity is not the sole foundation of fundamental rights and freedoms, as this role is also fulfilled by the free development of human personality. Therefore, the fundamental rights and freedoms with regard to the general freedom of action of the person find their support in the free development of personality (its active side), the general rights of the personality in the free development of personality correlated with human dignity, and the other fundamental rights and freedoms in the human dignity[2]. We appreciate that fundamental rights and freedoms are individually intended to achieve a certain aspect of human dignity, without though exhausting its content.

Human dignity, as supreme value, can serve the Constitutional Court with regard to the derivation of fundamental rights and freedoms which are not expressly included in the constitutional text, following the

[1]Decision no. 1109 of 8 September 2009, as published in the Official Gazette of Romania, Part I, no. 678 of 9 October 2009.

[2]Kinga LL. Zakariás and Károli Benke, "Demnitatea umană în jurisprudenţa instanţelor constituţionale din Germania, Ungaria şi România", in *Buletinul Curţii Constituţionale* 2(2012): 59. For a presentation of this supreme value, see also Ioan Muraru and Marian Nasty Vlădoiu, „Protecţia demnităţii omului ca valoare constituţională", in *Annales Universitatis Apulensis, Series Jurisprudentia* 10(2007): 256– 61.

model of other constitutional courts[1]. Thus, for example, in Decision no. 418 of 18 July, 2005 on the unconstitutionality of the Law on Reproductive Health and medically assisted Human Reproduction[2], the Constitutional Court underlined the fact that upon elaborating the legislation in this matter, the legislator should take into consideration not only the values referred to, namely the right to life and physical and mental integrity(Art. 22 of the Constitution) and the right to intimate, family and private life (Art. 26 of the Constitution), *"but also to the one enshrined in the provisions of Art. 1 par. 3) of the Constitution, according to which "Romania is a state of law [...] where human dignity [...] represent supreme values [...]"".*

The Constitutional Court included in the content of human dignity the protection of the right to image and private life in Decision no. 12 of 22 January 2013[3]. In this case, one of the criticisms of unconstitutionality regarded the obligation of the provider or distributor of audiovisual media services to broadcast the text of the sanctioning decision issued by the National Audiovisual Council (C.N.A.), thus publicly and irreversibly assuming the guilt and prejudicing its image, before the court has delivered a final and irrevocable decision on the lawfulness of the certificate of findings. The Constitutional Court has determined that the manner in which the sanction is to be enforced is adapted to the specific means by which the offence was committed, in the sense that it had as immediate effects the damaging of fundamental moral values, such as human dignity, and consequently being fully justified "*for the sanction consisting in the dissemination of the text of the sanctioning decision to*

[1]See in this regard, David Kretzmer, "Human dignity in israely jurisprudence" in *The concept of human dignity in human rights discourse,* ed. David Kretzmer and Eckart Klein (The Haugue: Kluwer Law International, 2002), 161-75. The author states that the fundamental law of Israel does not provide for fundamental rights and freedoms that are protected by most constitutions because in that country religious political parties have constantly used their strategic position in Knesset (Unilateral Parliament Israeli State) for the adoption of religiously motivated legislation or to prevent legislative changes on religious grounds. In a series of decisions, the Constitutional Court included in the content of human dignity fundamental rights and freedoms which were not expressly included in the fundamental law, such as: equality of rights, freedom of conscience, freedom of expression, right to strike, religious freedom, the right to a fair trial, the right of minors not to be subjected to corporal punishment, the right to information of patients.

[2]Published in the Official Gazette of Romania, Part I, no. 664 of 26 July 2005.

[3]Published in the Official Gazette of Romania, Part I, no. 114 of 28 February 2013.

be immediately enforced by vigorous, firm and fast action, in order to produce its intended effect: awareness of committed offences and highlighting the moral values affected".

By Decision no. 72 of 23 February 2016[1], the Court held that "*the general right of personality, of which essential component is the name of the individual, finds its ultimate foundation in the concept of human dignity, as regulated by art. 1 par. (3) of the Constitution*"[2]. On this occasion the Constitutional Court pointed out that establishing a validity period of the identity card is justified by the necessity of updating these data, especially the facial image modifications, thus constituting a way of preventing identity theft, consequently it does not have the meaning of violation of human dignity, but respect and protection thereof[3].

In Decision no. 415 of 14 April 2010[4], the Court held that "*the free development of human personality and human dignity, values enshrined in art. 1 par. (3) of the Constitution, cannot be conceived without respect and protection of private life*." In this decision it was stipulated that the obligation provided for by the law to publish the declarations of assets and interests on the websites of the entities where the persons, according to the legal provisions, have the obligation to publish them, as well as their transmission to the National Integrity Agency (A.N.I.) violates the right to respect and protection of private life by objectively and reasonably exposing, in an unjustified manner, the data on the wealth and interests of persons who are lawfully required to publish these declarations on the website.

References to human dignity are also included in Decision no. 1576 of 7 December 2011[5]. The authors of the objection of unconstitutionality argued that the provisions of Art. 18 of the Law on the approval of the Government Emergency Ordinance no. 80/2010 for supplementing Article 11 of Government Emergency Ordinance no. 37/2008 on the regulation of financial measures in the budgetary sector are prejudicial to the constitutional provisions that enshrine human dignity and the free development of the human personality as supreme

[1]Published in the Official Gazette of Romania, Part I, no. 362 of 11 May 2016

[2] In the same direction, the Decision no. 96 of 28 February 2013, published in the Official Gazette of Romania, Part I, no. 165 of 27 March 2003.

[3] Dignity characterizes the human person in his uniqueness. See Jean Marie Pontier, "Avant-propos", in *La dignité*, ed. Jean Marie Pontier (Paris: PUAM, 2003), 12.

[4]Published in the Official Gazette of Romania, Part I, no. 294 of 5 May 2010.

[5] Published in the Official Gazette of Romania, Part I, no. 32 of 16 January 2012.

values because it suspends rights granted to some persons by virtue of their special contribution to the Revolution of 1989. Furthermore, they stated that a number of people who were ostracized during the communist regime - military personnel from the royal army, veterans of war, political prisoners and politically persecuted magistrates - were rewarded or honoured by the state, which was possible only due to the contribution of those who had fought in the Revolution of December 1989, consequently, their deprivation of the rights provided for by Law no. 341/2004 is likely to prejudice human dignity.

On the occasion of this decision, the Court held that "*human dignity is an inalienable attribute of the human person, a value that imposes on every member of the society the behaviour of respect and protection of the other individuals and the prohibition of any humiliating or degrading attitude towards people", in other words, "each individual is held to recognize and respect in any other human being the attributes and values that characterize him as a human being."*

The Constitutional Court enshrines the inalienable character of human dignity and the social connotation of the concept that requires a conduct of respect and protection in social relations.

In the case, the Constitutional Court refused to include in the content of human dignity the right to grant pecuniary benefits due on moral grounds. Thus, the Court held that *"the gratitude and respect for certain persons, for their particular contribution to the development of society, should not be referred to the content of art. 1 par. (3) of the Constitution, the source thereof is rather found in the very moral obligation of the entire society to manifest its gratitude towards these people. In conclusion, although the moral foundation of granting these benefits, arising from the gratitude towards those who, through their own sacrifice and their contribution, led to the fall of the communist regime and the establishment of democracy, it is undeniable but it does not represent, according to the Constitution, an obligation to regulate the state in this respect, and there is no way to speak of the existence of a fundamental right to obtain indemnities by virtue of the quality of a Noticeable Fighter by Special Deeds during the Romanian Revolution of December 1989 ".*

Furthermore, the Court held that human dignity can serve to establish a positive obligation for the State "*an obligation to intervene […] in the sense of providing the material resources necessary for life, to*

the extent that the lack thereof is likely to reduce their lives at a level that cannot be considered appropriate to any human being". Therefore, it is a guarantee of human dignity, as a supreme value, granting particular protection to people living in material conditions inappropriate to any human being. In the specialty literature, it was reasonably pointed out that "the principle of dignity cannot be considered without the protection of certain social rights. Then it is about the protection of human being in its essence or in its existence. We cannot let a man die of hunger, cold or sickness, and we not recognize his equal belonging to humanity at the same time. Thus we protect the minimal, non-random living conditions".[1] Universality and dignity become the point of arrival, in the sense that we start from the extreme poverty situation in order to achieve dignity. Recognition of the other as our equal means treating him with respect in a feeling of solidarity. Dignity condemns indifference in favour of an obligation of reciprocity[2]; as it has been said, "it is sufficient for the other not to live as a human being, so that the man in me feels denied, devoid of the respect that is owed to him".[3]

Along this line of thinking, the Constitutional Court, by Decision no. 1594 of 14 December 2011[4], noted that the regulation of an increased protection for vulnerable persons who, in addition to disability, are in difficult family situations or do not have the material resources to satisfy a minimum standard of living, is in accordance with the declared spirit of the Social Assistance Law no. 292/2011, namely the respect of human dignity and the establishment of equal opportunities.

In the light of the aforementioned, we cannot acquiesce the opinion of the Constitutional Court, expressed in Decision no. 321 of 20 November 2001[5], according to which "*the provisions of Art. 1, par. (3) of the Constitution, which guarantee, inter alia, "human dignity" […] are not related to the obligation to pay tax on income from pensions and are therefore not relevant in the case.* "We admit, along with other authors, that this obligation relates to human dignity, but, in principle, its

[1] B. Mathieu, "L'acces au logement", in *La pauvreté saisie par le droit*, ed. Dominique Gros and Simone Dion-Loye (Paris: Le Seuil, 2002), 215.
[2] Xavier Bioy, *Le concept de personne humaine en droit public: Recherche sur le sujet des droits fondamentaux* (Paris: Dalloz, 2003), 736.
[3] Jeanne Hersh, *Les fondements des droits de l'homme dans la conscience individuelle* (Paris: La documentation française, 1989), 81.
[4] Published in the Official Gazette of Romania, Part I, no. 909 of 21 December 2011.
[5] Published in the Official Gazette of Romania, Part I, no. 101 of 5 February 2002.

regulation does not violate human dignity, does not affect the human character of the individual, nor does it treat it as a mere object, the reason for its establishment being to finance public spending[1].

In another case, the Constitutional Court considered that the new way of calculating the pension that did not allow the state social security pensioners whose rights previously established were higher than the estimated average score according to the new regulation to benefit from measures of increase, by re-correlation, does not harm human dignity "since the previously established pension rights are not prejudiced, are not reduced, and the established pensions reflect in terms of the amount, the limited possibilities in relation to existing resources in a given period"[2]. It is worth pointing out that human dignity allows the renunciation to a formal approach to equality in favour of substantial equality. The Constitutional Court has also examined the constitutionality of the provisions of Art. 168 par. (3) and (4) and of art. 180 par. (2), (5) and (6) of Law no. 19/2000 on the public pension system and other social security rights in relation to art. 1 par. (3) of the Constitution, according to which "the human dignity [...], justice [...] represent supreme values and shall be guaranteed" and by Decision no. 225 of 10 September 2002[3] , noting that these provisions "not only do not infringe the legal provisions invoked by the authors of the exception but, on the contrary, they give them expression".

By Decision no. 735 of 24 October 2006[4], the Constitutional Court rejected the exception of unconstitutionality of the provisions of art. 161 par. (2) of the Law no. 19/2000 on the public pension system and other social security rights and art. 1 and art. 4 of the Government Emergency Ordinance no. 4/2005 regarding the recalculation of pensions in the public system deriving from the former state social insurance system. According to art. 161 par. (2) of the Law no. 19/2000, "*If, for a certain period of time, the salary rights are not recorded in the*

[1] Zakariás and Benke, "Demnitatea umană în jurisprudenţa instanţelor constituţionale din Germania, Ungaria şi România", 59.
[2] Decision no. 103 of 26 March 2002, as published in the Official Gazette of Romania, Part I, no. 301 of 8 May 2002. In the same direction, Decision no. 426 of 13 November 2003, as published in the Official Gazette of Romania, Part I, no. 76 of 29 January 2004.
[3] Published in the Official Gazette of Romania, Part I, no. 751 of 15 October 2002.
[4] Published in the Official Gazette of Romania, Part I, no. 30 of 17 January 2007.

employment record book, the insured person may present supporting evidence of certification. Otherwise, the salary rights taken into account shall be considered to be equal to the gross minimum wage in force in that period in question". The author of the exception of unconstitutionality argued that these provisions create some sort of discrimination between persons who have entered their salary in the employment record books and those who fall within the legal hypothesis, the latter receiving "*lower pensions than they would be due to, a fact which prejudices the right to retirement, while at the same time infringing the principle of respect for human dignity"*. The Court has shown that the way of determing or recalculating pensions does not impair human dignity and does not contradict the concern of the State to increase the quality of life because, according to Art. 180 par. (7) of the Law no. 19/2000, in any situation in which from the operations of re-correlation or recalculation of the previously established pensions would result a lower amount than the one which is currently paid, the advantageous amount shall be maintained.

The human person must live in satisfactory material conditions for his/her dignity to be respected[1]. Therefore, by Decision no. 277 of 24 June 2004[2], the Constitutional Court has stated that the legal consecration of compulsory home exchange has not affected the human dignity or the rights and freedoms of citizens guaranteed by the constitutional provisions of art. 1 par. (3), because the tenant is not required to make such an exchange in case of non-compliance with the minimum requirements of Art. 24 par. (1) and (2) of the G.E.O. no. 40/1999 on the protection of tenants and the establishment of rent for the dwelling spaces[3].

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[1] In this respect, the French Constitutional Council has set as a constitutional objective "*the possibility for any person to have a decent home*" pursuant to art. 10 and 11 of the Preamble to Constitution of 1946 and the principle of protecting human dignity (CC., 94-359 DC, 15 January 1995, Diversitatea habitatului). For further developments, see Mathieu Moiret-Chartan and Raphaël Thebault, "La possibilité pour toute personne de disposer d'un logement décent, objectif à valeur constitutionnelle" in *La dignité*, ed. Jean Marie Pontier (Paris: PUAM, 2003), 48.

[2] Published in the Official Gazette of Romania, Part I, no. 722 of 10 August 2004. In the same direction Decision no. 499 of 4 October 2005, published in the Official Gazette of Romania, Part I, no. 1036 of 22 November 2005.

[3] Art. 24 of G.E.O. no. 40/1999 provides: *"(1) The tenant shall not have to move if the dwelling offered to him in exchange is not provided with the living space and the number of rooms to which he is entitled according to this Emergency Ordinance or than*

In several cases, the Constitutional Court has held that a pecuniary procedural penalty imposed by a court on the head of a public authority with the purpose to ensure the enforcement of a judicial decision shall not affect his human dignity[1]. Therefore, the head of the public authority is not reified, the human dignity imposing him to execute the court decision.

The Constitutional Court, by Decision no. 778 of 12 May 2009[2], considered that the exemption from payment of judicial stamp duties for actions and applications, including for the exercice of appeals, with regard to the establishment and granting of compensation for damages to honour, dignity or reputation of an individual, as provided for by art. 15 letter f1) of Law no. 146/1997 on the judicial stamp duties "*was a specific way of legal protection of the attributes of the human personality referred to - characterized in art. 1 par. (3) of the Constitution as representing supreme values*", thus ensuring access to justice, unconditional of the payment of a stamp duty, to persons injured by the use of insulting expressions, calumniations or denigration; consequently, it noted that the repeal of Art. 15 letter f1) of Law no. 146/1997 contravenes human dignity.

A positive obligation of the State to defend human dignity is the incrimination of prostitution and pimping. The individual should be treated as a subject of law, not as an object. The human body must not be transformed into commodity, and the individual must respect his/her own dignity and the dignity of his fellow human beings.

Thus, by Decision no. 74 of 11 June 1996[3], the Constitutional Court ruled that "*tolerance of prostitution is a serious prejudice to*

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those who are rented to him or better living conditions than those he has in the dwelling where he is about to move of. (2) The tenant may not be required to move to an insalubrious dwelling or accept a home without the necessary facilities - kitchen, bathroom, toilet, - as provided for in the lease contract from which he is moved out".

[1] Decision no. 1479 of 8 November 2011, published in the Official Gazette of Romania, Part I, no. 59 of 25 January 2012, Decision no. 206 of 6 March 2012, published in the Official Gazette of Romania, Part I, no. 254 of 17 April 2012, Decision no. 453 of 8 May 2012, published in the Official Gazette of Romania, Part I, no. 410 of 20 June 2012 published in the Official Gazette of Romania, Part I, no. 465 of 6 July 2009.

[2] Published in the Official Gazette of Romania, Part I, no. 465 of 6 July 2009.

[3] Published in the Official Gazette of Romania, Part I, no. 144 of 25 February 2002. In the same sense, Decision no. 483 of 29 May 2007, published in the Official Gazette of Romania, Part I, no. 130 of 27 February 2003, Decision no. 893 of 16 October 2007, published in the Official Gazette of Romania, Part I, no. 764 of 12 November 2007,

human dignity, knowing that the person practising prostitution is in a condition of inferiority characteristic of the one who sells himself. To this aspect is added the humiliating situation, a consequence of the public contempt to which these people are subjected everywhere, particularly because prostitution is condemned by public, secular or religious morals". In presenting the reasons, the constitutional court stated that the Romanian legislature considered that for the prevention and combating of prostitution it is not sufficient to incriminate only the pimping, but also the prostitution. In Decision no. 21 of 24 January 2002[1], the constitutional court established that *"the incrimination and sanctioning of the acts of prostitution and pimping in the Criminal Code of 1968 represents the fulfilment of the obligation assumed by the Romanian state by Decree no. 482/2005 for adhesion to Convention [the Convention for the Suppression of the Traffic in Persons and the Exploitation of Prostitution of Others], which provides that the parties to this Convention have decided to punish any person who, in order to satisfy the passions of another person, lures, attracts or exhorts to prostitution another person, even with his/her consent, or exploits the prostitution of another person, even with his/her consent. The Preamble to the Convention states that "prostitution and the evil that accompanies it, trafficking in persons for prostitution are incompatible with the dignity and value of the human being and jeopardize the welfare of the individual, the family and the community"".*

In Decision no. 298 of 8 July 2003[2], the Court held that the incrimination of insult and defamation is one of the guarantees of human dignity. Subsequently, by Decision no. 62 of 18 January 2007[3], the Constitutional Court found the unconstitutionality of the provisions of

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Decision no. 563 of 3 May 2011, published in the Official Gazette of Romania, Part I, no. 422 of 16 June 2011.

[1] Published in the Official Gazette of Romania, Part I, no. 144 of 25 February 2002. IN the same direction, see Decision no. 483 of 29 May 2007, published in the Official Gazette of Romania, Part I, no. 130 of 27 February 2003, Decision no. 893 of 16 October 2007, published in the Official Gazette of Romania, Part I, no. 764 of 12 November 2007, Decision no. 563 of 3 May 2011, published in the Official Gazette of Romania, Part I, no. 422 of 16 June 2011.

[2] Published in the Official Gazette of Romania, Part I, no. 581 of 14 August 2013.

[3] Published in the Official Gazette of Romania, Part I, no. 104 of 12 January 2007. This decision has been extensively commented in the specialty literature. See in this respect Dan Claudiu Dănişor and Sebastian Răduleţu, "Comentariul Deciziei Curţii Constituţionale nr. 62 din 18 ianuarie 2007", in *Curierul Judiciar* 3(2007): 4-24.

Art. I point 56 of Law no. 278/2006 for amending and completing the Criminal Code, as well as amending and supplementing other laws, the part referring to the repealing of art. 205, 206 and 207 of the Criminal Code. On that occasion, the Court held that *"Parliament cannot proceed to the elimination of criminal legal protection of constitutional values, such as [...] the human dignity. The freedom of the Parliament to regulate in these cases is exercised by regulating the conditions for the criminal liability of antisocial deeds which prejudice the values provided and guaranteed by the Constitution"*[1].

Therefore, the Court considers that if human dignity is consecrated as supreme value in art. 1 par. (3) of the Constitution, the legislator shall have to protect it by means of criminal law. On the same line of thinking, the competing voice states that the defence of dignity, honour and reputation must be performed through all the means of protection provided by the legal system "*the fulfilment of protection being the rule in this matter and, therefore, finding its application, to the extent that the constitutional text does not expressly provide that one or other of the forms of liability is incidental"*. We consider that it has been rightly argued in a separate opinion that *"The fundamental law does not establish the legal means by which the protection of different social values must be achieved; this is left to the appreciation of the legislator, who must determine in the light of the frequency, severity and consequences of certain antisocial deeds, which are the legal means by which the protection of different social values can be achieved, including the appreciation of the degree of social danger of certain deeds, which must be incriminated and fought against by the application of criminal sanctions"*.

One of the functions of the supreme values is the limit of the limit of the state's right to restrict the exercise of certain rights or freedoms, a function performed by human dignity in Decision no. 108 of 2 November 1995[2]. The Constitutional Court rejected the exception of unconstitutionality of the provisions of Art. 325 of the previous Criminal Code (*Spread of obscene material*). In the case in question, the Court considered that although the notions of "*public morality*" and "*good*

[1] In the same direction Decision no. 64 of 9 February 2017, published in the Official Gazette of Romania, Part I, no. 145 of 27 February 2017.

[2] Published in the Official Gazette of Romania, Part I, no. 9 of 17 January 1996.

morals" have variable content in space and time, there is a limit to the tolerance of manifestations whose breach is inadmissible in the sense that they can never be offensive to human dignity through aggressive vulgarity, lubricity and scabrosity. Limiting the right to free expression on the grounds of public moral defense can only be made if public morality is consistent with human dignity[1].

It is also worth mentioning Decision no. 346 of 10 March 2011[2] in which the Court ruled on the constitutionality of the provisions of Art. 642 par. (2) of the Law no. 95/2006 on health reform that establishes civil liability for malpractice medical staff, namely *"negligence, recklessness or insufficient medical knowledge in the exercise of the profession"*. On that occasion, the Court refused to admit that the dignity and free development of human personality may have the effect of relieving accountability for damages caused by fault to other people.

The Constitutional Court held that human dignity, guaranteed by art. 1 par. (3) of the Constitution "*dominates the entire value system as a supreme value*". Human dignity reflects a certain type of society that post-communist states aim to promote and protect, as a founding value that brings together aspirations such as freedom, peace, democracy and tolerance[3]. Thus, in Decision no. 669 of November 12, 2014[4], the Constitutional Court interprets freedom of religious consciousness in accordance with human dignity, assigning it the imperative of tolerance, to "*exclude, in principle, actions and behaviors that spring from a certain attitude of belief or philosophical conviction non-religious to be subject to sanctions that the state provides for such conduct, regardless of the motivations of faith of the persons concerned*".

The Constitutional Court takes over from the jurisprudence of the German Constitutional Court the formula of the object or subject (Objekt-Subjekt-Formel) which it has recently applied in Decision no. 498 of July 17, 2018[5]. In the Court's view, the patient's consent to the

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[1] Dan Claudiu Dănişor, *Drept constitutional şi instituţii politice. Vol. I. Teoria generală* (Craiova: Sitech, 2006), 630.
[2] Published in the Official Gazette of Romania, Part I, no. 364 of 25 May 2011.
[3] Dupré, *The age of dignity: Human rights and constitutionalism in Europe*, 88.
[4] Published in the Official Gazette of Romania, Part I, no. 59 of 23 January 2015.
[5] Published in the Official Gazette of Romania, Part I, no. 498 of 17 July 2018. For a presentation of the case law of the German Constitutional Court, see Laure Jeannin, "Le principe de dignité en droit allemand" in *La dignité de la personne humaine. Recherche*

processing of his medical data within the electronic health file "*must be free, which can't be stimulated by offering possible medical or other (economic) advantages, because in this case, would be to indirectly vicious*" and thus "*to the situation in which man would have be treated as an object, disregarding the subjective principles that characterize the human being, which is contrary to human dignity*". In addition, by forcing the patient to consent to the processing of medical data, the state employee compromises his own dignity. Consequently, the Court held that the State's obligation to regulate a normative framework that respects human dignity should not place the employee of the state in a position to oblige or impose the patient to consent, even if the two categories of subjects "at the subjective level do not realize that they violate their own dignity"; in doing so, the state avoids the individual's reification.

CONCLUSIONS

The Constitution of Romania (Article 1 paragraph (3)) lists the dignity of man among the supreme values that he guarantees, the Constitutional Court having the role of developing the concept. The content of human dignity is not a pre-established one, nor could it be. It has a high degree of abstraction that must be concretized by interpretation.

So far, the Constitutional Court has not developed extensive jurisprudence on this matter, as the Federal Constitutional Court of Germany has done.

The Constitutional Court has held that constitutionally, human dignity has two inherent dimensions: 1) the relations between people, which aim at the right and obligation of people to be respected and, in correlation, to respect the fundamental rights and freedoms of their peers; and 2) the relation of man to the environment, appreciated from the perspective of the level of civilization reached. The two dimensions of human dignity must be observed cumulatively.

Human dignity, alongside the free development of human personality, is the foundation of the citizen's fundamental rights and freedoms, and can also serve to derive other fundamental rights and freedoms which are not expressly included in the constitutional text. The

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sur un processus de juridicisation, ed. Charlotte Girard and Stéphanie Hennette-Vauchez (Paris: Dalloz, 2005), 158-75.

constitutional court has retained its inalienable character and the social connotation of the concept that requires respect and protection in social relations. More recently, the Court has taken over from the jurisprudence of the Federal Constitutional Court of Germany the formula of consideration as an object or subject in the analysis of the violation of human dignity.

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CONSIDERATIONS ON STATE POWER AND THE MODE OF ITS IMPLEMENTATION

Oleg TANASE[1]

Abstract:

By its nature, the democracy, as a concept, signifies the power that emanates from the people and belongs to it; but at the same time, the people have entrusted this power to be achieved by the state, which, by virtue of a good and efficient activity, has divided its power.

In these circumstances, the state organized on the principle of the separation of powers in the state, ranks with the rule of law, with all the effects of functionality: state-citizen, citizen-state, responsibility and mutual constraint.

Key words: *state of law; state power legal constraint; legal liability; state authority.*

INTRODUCTION

When defining a definition of a thing or phenomenon from the field of law, the constitutive elements of the definition should not be viewed separately, but in connection and interdependence with other constitutive elements of the whole system of law. This link is the true and proper functioning of the law.

This condition is explained by the different perception of things and/or phenomena, as well as the "value of the terms" used in the presentation of the definition. This involves in-depth studies on the current perception of things and/or phenomena in a particular social community, as well as the essential changes that take place in society, within the power and in democracy.

Since the power of *lato sensu* is the ability to act or to achieve something, the political power is the exercise performed in a social community by individuals or groups of people; and this exercise is done through political means and actions, through which community

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governance takes place, aiming the achievement of the predetermined objectives and the proposed goals.

The concept of state power involves the authorities as management institutions, the authorized persons, mentioned state or government agents, as well as the superiority of a certain area or in relation to someone, the existence of subordination through certain means. In this respect, it is necessary to discuss the issue of the composition of the participants in the power, as well as the content thereof.

Therefore, we would generally consider that power involves the same structural elements specific to any legal relationship.

If we are talking about the power of the state of law then this presupposes the lack of subordination of the participants to power, but on the contrary a position of equality, an exact determination of behavior, an extension of mutual rights and duties.

Under these conditions, the state power takes on a legitimate form of activity, being called upon to observe rules and procedures of legality, imposing a reciprocity of duties.

The fundamental considerations of state power are also found in the philosophy of Thomas Hobbes, who described the power as the means in the hands of the person, aiming the collection and obtaining of the benefits of the future, and subordination of the person is not an imperative condition. At the heart of the research it was pointed out that private interests should not be placed, but the interests and existence of man, which give the possibility of identifying the natural traits and social life[1].

Such an analysis is also found in contemporary research[2].

Such a concept of subordination is sketched in St. Augustine's work, in which he analyzed a new way of understanding of human society by placing the citadel of God above and against the citadel of man[3].

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[1]https://studfilosed.ru/otvety-k-vstupitelnomu-ekzamenu-po-filosofii/133-uchenie-t-gobbsa-o-gosudarstve.html#vtem.

[2] David Beetham, *The legitimation of power*, (Basingstoke: Macmillan Education, 1991), 43.

[3] https://www.historia.ro/sectiune/portret/articol/sfantul-augustin-viata-si-opera.

If we pursue the concept of „*power for and in purpose of*", we exclude the criterion of *stricto sensu* subordination, and we highlight a bridge between power, participants in power, and people from a particular social community.

This state of affairs generally attributes to power a social character, and to the *"power"* in the rule of law - rules of legality. The rule of legality - requires compliance with the fundamental law and other norms existing in the state entity, and this exigency concerns all state institutions and bodies, all legal entities of public or private law and all citizens.

At the same time, power in the rule of law generates certain constraints, which involve a limitation, an ability to exercise simultaneously and in the same time certain functions, contradictory attributions through their character and nature.

The state of incompatibility, in legal language, is a manifestation of legal constraint, aimed the proper functioning of the rule of law, not having the objective of prejudicing the person, of the authority or in general of the state entity, but on the contrary ensures a functional and transparent activity in accordance with the spirit of the law.

This activity, theoretically, when we talk about competition and the development of power relations, would highlight a certain conflict situation.

What is a conflict? "The complex psychosocial phenomenon, the conflict, Cristea Dumitru considers, derives from the actual or perceived incompatibility between the parties' purposes, values, norms or motivations.[1]"

The state of conflict, whether it is noticeable by the social community, named the outside or the inner state, which apparently can not be perceived by the social group, involves opposite interests and goals.

The internal state of conflict, for example, can be expressed by the resistance, the opposition of the subordinate toward the power.

However, resistance can only arise in the conflict between the participants in the report. If hypothetically it is assumed that power exists in the absence of a conflict, then if the subordinate performs freely and voluntarily the tasks of power and acts to achieve the goals of power,

[1]http://libruniv.usarb.md/xXx/reviste/confbib/articole/2006_3/39-43%20conf_3-2006.PDF.

then it is necessary to note the deference between the scientific notion of power and the meaning of power in the practical way .

Consequently, the conflict is a competition that is contradictory to objectives, goals, their realization leads to the emergence of a conflict situation, or in relation to judicial proceedings is the situation of litigation.

Under these circumstances, achieving the goal has the effect of involving a process of solving the problem. This involvement is manifested in the form of the passage from the conditions, which determined the problem, in obtaining the result.

The result can be achieved through thinking. Thus, the ability to think is an inherent ability of man, whereas the willingness of consent is in the hands of man and social communities..

Persons participating in the power report, both, the governed one and governors in a particular social community, are recognized as having the following features:

- Ability to think;
- The will;
- Social character.

From these traits, as well as considering the subjects involved in the power relationship, there is a degree of superiority in the action of power, with some resources, including political, material, and ideological ones.

This mechanism also applies to power in the status of law or the power of law in the rule of law.

The European Court of Human Rights considers that the principle of the rule of law, mentioned in the preamble to the Convention, is "an element of the common spiritual heritage of the member states of the Council of Europe" and refers to the Convention as a whole. This principle of the rule of law has in particular justified the Court's requirement of adequate protection against arbitrary interference by the public authorities (*Engel and others v. Netherlands* from June 08, 1976, *Klass and others v. Germany* September 06, 1978, *Malone v. UK* from August 02, 1984 etc.).

The rule of law generates institutions for the protection of the individual, sets certain standards of matter and "reaction" procedures.

One way of responding to certain harmful acts and deeds is, for example, the motion of censure - which produces both legal effects and

political effects (the withdrawal of the trust of the executive having such consequences), being legal acts. If the motion of censure is adopted, the Prime Minister immediately submits the Government's resignation to the head of state. By adopting the motion of censure, Parliament's trusted mandate ceases and the executive is dismissed. It follows that the mandate of trust has not only the significance of the executive, but also of the necessity to enjoy the support of the parliamentary majority, through which it has been formed, during its entire mission. When this support, and therefore the trust it assumes, no longer exists, the adoption of the censure motion creates the possibility that, by forming a new executive, the balance between the legislative and the executive power will be restored. Thus, the motion of censure is the legal instrument by which Parliament can withdraw the trust awarded to the executive[1].

The rule of law constituted the culmination point of the constitutionalization of the political system. This means that politics must be circumscribed to a legal norm that specifies the limits of action. Given the intrinsic link between the state and the law, the evolution of the public power is accompanied by the evolution of the legal system[2].

On a certain date, the Constitutional Court has stated with principle value "that political accountability is based on the concept of the rule of law and democracy and refers to the responsibility of the holders of a political mandate. The presumption of innocence, provided by Article 21 of the Constitution as a principle in a criminal proceeding, is inapplicable to political responsibility.[3] "

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[1] The Decision No. 4 dated April 22, 2013 of the Constitutional Court, p. 71 for the control of the constitutionality of the Decrees of the President of the Republic of Moldova no. 534-VII of 8 March 2013 on the resignation of the Government in respect of the maintenance of the Prime Minister-dismissed by a motion of censorship (for suspicions of corruption) from March 8, 2013 until the formation of the new Government, and no. 584-VII of April 10, 2013 regarding the nomination of the candidate for the post of prime minister (Session No.10a / 2013),79.

[2] Alexandru Tanase, Rodica Secrieru, Lilia Rusu, Maria Strulea and Natalia Vilcu-Bajurean, *Compendium of the jurisprudence of the Constitutional Court of the Republic of Moldova*, (Romania, 2017), 11.

[3] The Decision No. 4 dated April 22, 2013 of the Constitutional Court, p. 77-79 for the control of the constitutionality of the Decrees of the President of the Republic of Moldova no. 534-VII of March 08, 2013 on the resignation of the Government in respect of the maintenance of the Prime Minister-dismissed by a motion of censorship (for suspicions of corruption) from March 8, 2013 until the formation of the new Government, and no. 584-VII of April 10, 2013 regarding the nomination of the

Thus, the foundation of power, including in the rule of law, is the duty to observe the laws, the subordination of all, especially the state, toward the norms of law. But these are defining elements of the rule of law and highlight the preeminence of the law.

In the conditions in which a will is imposed, without considering the preeminence of the law, it is no longer possible to speak about the power of law, but eventually an act that works to the detriment of the power of law.

In one sense, Begali V.N indicated that power is based on the charisma of the leader.[1]

In time, what in another opinion underlines that the philosophy of law offers the possibility of perceiving the reality of the law, objective and subjective determination, material and ideal, material and moral, individual, interconfessional, private and collective, social and biological, human and divine, and accountability, fairness and equality, legal and illegal, limitation of human rights and interests.[2]

These doctrinal opinions are capable of identifying some essential characteristics of the dominant subject, the causes and circumstances that enable it to be dominant in power relations, and the way to achieve the power.

Without challenging the significance of certain attributes of power, we will maintain that, depending on the situation, for the achievement of the power are use any available resources and allowing the power or the holder of the power to dominate: the administrative abilities, the attributed powers, etc. The empowered investiture of the person can be based on the authority of the dominant person (the authority contributes to the perception of his/her facts as being correct, done in accordance with the law) and the managerial skills that allowed him/her to obtain a certain right.

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candidate for the post of prime minister, Session No.10a / 2013, (Official Monitor no. 97-103 from May 03, 2013), 71.

[1] V.N.Begali, "Conceptual foundations of charismatic political leadership" in *Almanac of Modern Science and Education* № 6, (Moscow, 2013), 73.

[2] G. I Ikonikova and V.P. Leashenko, *The philosophy of law*, (Moscow, 2011).

CONCLUSIONS

Power in the rule of law signifies a force of law, a domination of the law, involves ab initio a subordination of the state to the law, a subordination of power toward the law, and in essence ensures the existence of the available means by the effect of the law, which allow to the law to oversee and intercede on policy options with abusive tendency.

Under these conditions, power and the rule of law enshrine a series of safeguards, which are called upon to give respect for the rights and freedoms of man as their holder, as well as the reporting of state, state authorities, state or public agents within the borders of law.

The achievement of state power also implies a guarantee of the functioning of democracy, of political pluralism, the assurance of the freedom of opinion and of expression, the exercise of the right of association, being at the same time the restriction of the state power to intervene in opinion, association, which are inalienable elements of the rights proclaimed by the Universal Declaration of Human Rights, enshrined in the Constitution of any state of law.

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CASE-LAW

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CONSIDERATIONS ON THE SUMMONING OF THE GENERAL MEETING OF SHAREHOLDERS

Dragoș-Mihail DAGHIE [1]

Abstract:

Pursuant to Article 111(1) of Law No 31/1990, the Ordinary General Meeting of Shareholders must be convened at least once a year within maximum 5 months as of the end of the financial year.

Article 111(1) of Law No 31/1990 provides for the legal duties of the Ordinary General Meeting.

The date must be set so as to comply with the minimum period of 30 days from the summoning date provided for in Article 117 of Law No 31/1990. These are public order provisions and cannot be amended by the shareholders through the Articles of Incorporation. The second summoning of the Ordinary General Meeting must also comply with the period of 5 months laid down in Article 111.

Key words: *General Meeting; summoning; meeting*

I. INTRODUCTORY CONSIDERATIONS

Pursuant to Article 111(1) of Law No 31/1990, the Ordinary General Meeting of Shareholders must be convened at least once a year within maximum 5 months as of the end of the financial year.

Article 111(1) of Law No 31/1990 provides for the legal duties of the Ordinary General Meeting.

The date must be set so as to comply with the minimum period of 30 days from the summoning date provided for in Article 117 of Law No 31/1990. These are public order provisions and cannot be amended by the shareholders through the Articles of Incorporation. The second

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summoning of the Ordinary General Meeting must also comply with the period of 5 months laid down in Article 111.

II. SUMMONING

A company's Extraordinary General Meeting is convened, according to its name, under extraordinary circumstances[1], which impose an urgent and important decision most of the time concerning the amendment of the company's Articles of Incorporation[2].

A company's Ordinary General Meeting is summoned in accordance with Articles 117[3] and 119 of Law No 31/1990[4].

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[1] High Court of Cassation and Justice, Commercial Section, Judgment No 1204/2006: *"The fact that some resolutions (point 5 to 20) should have been formally taken within the Extraordinary General Meeting, pursuant to Article 113 of Law No 31/1990, cannot result in the annulment of the Ordinary General Meeting since all conditions required for an extraordinary general meeting have been fulfilled, namely the quorum (participation of 93.85% of the share capital), with voting exceeding ½ of the share capital*".

[2] St.D. Cărpenaru, *Tratat de drept comercial român [Treaty of Romanian Commercial Law]*, (Bucharest: Universul Juridic, 2009 (quoted hereinafter as *Treaty 2009*)), 368.

[3] High Court of Cassation and Justice, Commercial Section, Judgment No 150/24.01.2008: "*Article 117 of Law No 31/1990 imperatively lays down the manner in which the General Meeting is summoned, starting with the persons who may conduct the summoning, the date for the convening of the meeting, the manner of publication and summoning depending on the type of shares and by reference to the Articles of Incorporation and the proposals for amendment of the Articles of Incorporation*".

[4] In this regard, see St.D. Cărpenaru, *Tratat de drept comercial român [Treaty of Romanian Commercial Law]*, second revised and supplemented edition (Bucharest: Universul Juridic, 2011 (quoted hereinafter as *Treaty 2011*), 382 and the following; M. Ionaş-Sălăgean, *Scurte consideraţii teoretice şi practice privind convocarea adunărilor generale ale societăţilor comerciale pe acţiuni [Brief Theoretical and Practical Comments on the Summoning of General Meetings of Joint-Stock Companies]*, in R.D.C. No 6 (2007): 16 and the following; I. Schiau, *Drept comercial [Commercial Law]*, (Bucharest: Hamangiu, 2009), 252 and the following; V. Nemeș, *Drept comercial. Curs universitar* [*Commercial Law. University Course*], (Bucharest: Universul Juridic, 2011), 218 and the following; C. Cucu, C. Bădoiu, C. Haraga, *Dicţionar de Drept comercial [Dictionary of Commercial Law],* (Bucharest: C.H. Beck, 2011): 185 and the following (quoted hereinafter *Dictionary*); N. Dominte, *Organizarea şi funcţionarea societăţilor comerciale [Organization and Operation of Companies]*, (Bucharest: C.H. Beck, 2008), 117 and the following; Gh. Piperea, *Societăţi comerciale, piaţă de capital. Acquis comunitar [Companies; Capital Markets. Acquis Communautaire]*, (Bucharest: All Beck, 2005 (quoted hereinafter as *Companies*), 119 and the following; Gh. Piperea, *Drept comercial [Commercial Law]*, volume I (Bucharest: C.H. Beck, 2008 (quoted hereinafter *Course*), 177 and the following; S. Angheni, M. Volonciu, C. Stoica, *Drept comercial [Commercial Law]*, fourth edition (Bucharest: C.H. Beck, 2008), 141 and the following.

Pursuant to Article 117 of the Companies' Law, the Board of Directors or the Managing Board summons the Ordinary General Meeting whenever necessary[1].

The Board of Directors and the Managing Board must comply with the provisions of Article 111 of Law No 31/1990, which provide for the obligation of the summoning of the Ordinary General Meeting of Shareholders at least once a year within maximum 5 months as of the end of the financial year. Therefore, the Ordinary General Meeting must be summoned at least once a year, at the latest in May, the month following the end of the previous financial year.

The Board of Directors or the Managing Board must summon the Ordinary General Meeting as a matter of urgency if the number of internal auditors cannot be supplemented by replacement with alternate members or there is no internal auditor in office, as provided for by Article 162(2) of Law No 31/1990.

Furthermore, the Board of Directors or the Managing Board must summon the General Meeting immediately at the request of the

[1] Prior to the amendments implemented by Law No 441/2006, the directors were the parties who summoned the Ordinary General Meeting. High Court of Cassation and Justice, Commercial Section, Judgment No 163/16.01.2007: "*the company's directors ... must summon the General Meeting of Shareholders pursuant to Article 117 of Law No 31/1990*"; High Court of Cassation and Justice, Commercial Section, Judgment No 3165/17.10.2007: "*As regards the infringement of the legal provisions related to the rules concerning the bodies with powers to summon the Ordinary Meeting of Shareholders, it is found that Notice No 105587 of 5 May 2005 of the Trade Registry Office has confirmed the capacity of B.E. as director, while the appellant - claimant has not provided any contrary evidence regarding the replacement (revocation) of the director prior to the summoning of the Ordinary General Meeting of Shareholders. As regards the conditions for the summoning of the meeting, the court has examined, within the limits of the referral of the compliance with the principle of availability to the court of first instance, the criticisms on this matter, which only refer to the publication of the summons in the Official Gazette of Romania. Such evidence is deemed to exist, while the proof of payment for publication is conclusive in this regard*"; High Court of Cassation and Justice, Commercial Section, Judgment No 334/31.01.2006: "*The provisions of Article 117 of Law No 31/1990 provide for the summoning of the General Meeting by the directors in compliance with the provisions of the Articles of Incorporation. The summons must mention the place and date of the meeting, the agenda and explicitly all the issues that will be discussed during the meeting*"; High Court of Cassation and Justice, Commercial Section, Judgment No 4048/11.12.2007: "*The provisions of Article 117 of Law No 31/1990 impose on the directors of a company the obligation to summon the General Meeting subject to terms and in compliance with the periods provided for by the law and the Articles of Incorporation*"; High Court of Cassation and Justice, Commercial Section, Judgment No 720/05.03.2009: "*Pursuant to Article 117 of Law No 31/1990 on commercial companies, the General Meeting shall be summoned by the directors whenever necessary*".

shareholders representing, individually or together, at least 5% of the share capital or less, if the Articles of Incorporation so provide and if the request includes matters which come within the duties of the Meeting, pursuant to the provisions of Article 119(1) of Law No 31/1990[1]. A special provision in this regard, which derogates from the provisions of Article 119(1) of Law No 31/1990, is Article 243(11) of Law No 297/2004 on the capital market. It provides that the summoning of the General Meeting at the request of the major shareholders of the company must be mandatorily conducted by the directors if the request includes matters which come within the duties of the Meeting so that the shareholders could convene, upon the first or second summoning, within maximum 60 days as of the date of the request. The term "major shareholder" is defined in Article 2(1) point (1) of Law No 297/2004 as follows: a major shareholder is the natural person, legal entity or group of persons acting concertedly and holding directly or indirectly at least 10% of the share capital of a company or voting rights or interests which allow for a significant influence on the decision-making process within the General Meeting or the Board of Directors, as appropriate. Thus, in the case of joint-stock companies whose shares are traded on the capital market, the Board of Directors or the Managing Board must summon the Ordinary General Meeting at the request of the shareholders representing 10% of the share capital or voting rights[2].

Apart from this mandatory summoning[3], the Board of Directors

[1] Shareholders which hold preference shares with priority dividends and without voting rights cannot resort to the provisions of Article 119(1) of Companies' Law as they have no right to vote in these meeting, but may attend them pursuant to Article 95(1)(b) of Law No 31/1990. The wording of Article 95(1)(b) of Law No 31/1990 was amended by point 42 of Article I of Law No 441/2006, published in the Official Gazette of Romania No 955 of 28 November 2006, its previous wording being: "*b) the rights acknowledged to shareholders which hold ordinary shares, except for the right to attend and vote, based on this shareholding, in the General Meetings of Shareholders*". For a contrary point of view, see M. Pascu, L. Pârvu, *Convocarea adunării generale a asociaţilor de către instanţă [Summoning of the General Meeting of Shareholders by the Court],* in R.D.C. No 4 (2005): 62-69.

[2] Also see T. Prescure, N. Călin, D. Călin, *Legea pieţei de capital. Comentarii și explicaţii [Capital Market Law. Comments and Explanations]*, (Bucharest: C.H. Beck, 2008, 10 and the following, 378 and the following; C. Duțescu, *Legea privind piaţa de capital. Comentariu pe articole [Capital Market Law. Comments by Articles]*, (Bucharest: C.H. Beck, 2009), 8 and the following, 653 and the following (quoted hereinafter *Law*).

[3] Another circumstance under which the summoning of the Extraordinary General Meeting is mandatory is the one provided for by Article 153^{24}(1) and (2) of Law No

or the Managing Board may summon the Ordinary General Meeting whenever it considers that a meeting must be held for a decision within the competence of the Ordinary General Meeting to be made.

Under exceptional circumstances, the Supervisory Board may summon the Ordinary General Meeting pursuant to Article 153^9(2) of Law No 31/1990 if the company's interests so require[1].

If the Board of Directors or Managing Board fails to summon the Ordinary General Meeting, it may be summoned by the company's shareholders authorized under a judgment handed down by the court with jurisdiction in the area where the company's registered office is located, pursuant to Article 119(3) of Law No 31/1990[2].

The directors' failure to act in this regard is also sanctioned by Article 137^2(3) of Law No 31/1990, which provides for the possibility for any interested party to refer such matter to a court of law, so that the court designates a person in charge of summoning the Ordinary General Meeting of Shareholders, who will carry out the necessary appointments, if the directors fail to meet their obligation to summon the General Meeting[3].

The internal auditors who are under such obligation may also summon the Ordinary General Meeting pursuant to Article 164^1(2) of Law No 31/1990. Thus, if a shareholder submits a complaint to the

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31/1990. Under such circumstances, if the Board of Directors or the Managing Board finds that, as a result of the losses established in the annual financial statements approved pursuant to the law, the net assets of the company, determined as difference between total company assets and total company debts, have diminished to less than half of the subscribed share capital, it must immediately summon the Extraordinary General Meeting to decide whether the company needs to be dissolved. The Articles of Incorporation may establish that the Extraordinary General Meeting should be summoned even if the net assets diminish by less than the limit provided for in paragraph (1), with this minimum level of net assets being set by reference to the subscribed share capital.

[1] An exceptional case of this kind is regulated by Article 164^1(3) of Law No 31/1990.

[2] Only the shareholders representing, individually or together, at least 5% of the share capital or less, if the Articles of Incorporation so provide and if the request includes matters which come within the duties of the Meeting may summon the Meeting pursuant to the provisions of Article 119(3). High Court of Cassation and Justice, Commercial Section, Judgment No 798/28.02.2008; High Court of Cassation and Justice, Commercial Section, Judgment No 614/10.02.2011 in Săptămâna Juridică No 15 (2012): 17.

[3] The interpretation of Article 119(1), (3) and Article 137^2(3) of Law No 31/1990 reveals that the provisions of Article 137^2(6) refer to any other interested person who is not a shareholder since, if that person were a shareholder, then the Ordinary General Meeting could be summoned only subject to the provisions of Article 119(1) and (3).

internal auditors in respect of actions which must be examined by the internal auditors and that compliant is submitted by the shareholders representing, individually or together, at least 5% of the share capital or less, if the Articles of Incorporation so provide, then the internal auditors must verify such complaint. If they find that the complaint has grounds and is urgent, they must summon the General Meeting immediately and present their findings. Otherwise, they must discuss the complaint in the next meeting. The General Meeting must decide on the matters included in the complaint.

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NEW CHANGES IN CONTRAVENTIONAL MATTERS OF THE TRAFFIC CODE

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Abstract:

The Government Emergency Ordinance no. 195/2002 regarding the traffic on public road – Traffic Code – has undergone a series of adaptations and changes over time imposed by the technological and society evolution. In 2018 and 2019 the Traffic Code has been modified to cover the lacunas and to ensure traffic safety.

Key words: *road transport; legislative changes; tightening of sanctions; clear regulations.*

The new provisions in the Traffic Code[4] call for increased attention from drivers, pedestrians, cyclists and managers on driver activity and the state of the vehicles in the fleet. There were introduced regulations regarding the medical units authorized for the specialized medical examination, completions were made to the old provisions, provided the exact procedure for carrying out the medical expertise in an authorized healthcare unit, modifications were made to the provisions concerning the withdrawal of the driving license when it is found that the person is unfit to drive, thus adding new contraventions. At the same time, through Law no. 203/2018 regarding the measures to increase the

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[4] Law no. 345/2018 for the modification and completion of Government Emergency Ordinance no. 195/2002 on the circulation on public roads, published in Official Gazette no. 4/03 January 2019

efficiency of the payment of the fines[1], have been abatable the provisions of art. 109 paragraphs 5-8 and 120 paragraph 2.3, also modifying the provisions of art. 109 paragraph 4. The object of the provisions of this law is the contravention fines imposed to natural persons by the founding officers within the bodies that have implemented the series of unique records of the contravention minutes and the way of taking over and transmitting in the computer system the data necessary for the creation of the electronic debt title.

The Traffic Code was also modified by Law no. 8/2019[2], adopting by this Government Emergency Ordinance no. 9/2009[3] regarding the completion of art. 103 of Government Emergency Ordinance 195/2002, by adding paragraph 8.

Some of the new amendments introduced by Law no. 345/2018 refer to the healthcare units authorized to carry out a specialized examination in order to obtain or extend the car card.

In Article 22 (3), a new point (d) shall be inserted after point (c), with the following wording: "d) performing a specialized medical examination upon sending the doctor, under the conditions of paragraph 6."

In Article 22, paragraphs 4 to 6 are amended and shall have the following content:"(4) The medical examination of the applicants referred to in paragraph (3) letters a) and b), as well as of the drivers of motor vehicles, agricultural or forestry tractors or trams shall be carried out in approved healthcare establishments, existing at each county level, which have the obligation to highlight them.

Alin (5) of the same article, compared to the old regulation, concerns an additional publicity obligation, in this sense the list of authorized healthcare establishments is established and updated by order of the Minister of Health, which is published in the Official Gazette of Romania, Part I, and on the Ministry of Health website.

Extension of the persons obliged to have a medical examination when it was found that a driver of a motor vehicle, agricultural or forestry tractor or tram, registered or cared for by a physician, presents medical conditions stipulated in the ordinance of the Minister of Health is

[1] Published in the Official Gazette no. 647/27 July 2018
[2] Published in the Official Gazette no. 14/7 January 2019
[3] Published in the Official Gazette no. 126/2 March 2009

also emphasized within the 6th paragraph of Article 22, this obligation being the responsibility of any doctor, not just the family doctor. By the provisions of the law amending the Traffic Code, it is expressly stated the content of the referral ticket to an authorized healthcare unit, specifying the diagnosis and the contact details of the medical unit in which the sending doctor is going to work, record this in the medical record of the driver, compared to the previous regulation, where only the obligation of requesting the authorized medical unit is required to perform the necessary specialized examination.

Article 22 paragraph (6) of the final sentence states that "the referral note shall be communicated to the driver immediately, by any means of communication provided by Law no. 134/2010 on the Civil Procedure Code, republished, as subsequently amended and supplemented ", and on the basis thereof, within 3 working days from the communication, the person holding a driving license is obliged to present himself at the authorized medical unit to perform the specialized medical examination".

Against the old provisions of O.U.G. no. 195/2012 by the amendments of 2019, a supplement to Article 22 was added, adding, after paragraph 6, four alienations in which the exact procedure for making the medical expertise is provided in a healthcare facility authorized according to the law.

At the first of these alienated cases, 6^1, it is stipulated that "in the situation where the approved healthcare unit, after carrying out the required examination, establishes that the person holding a driving license is ill medical to drive a vehicle, agricultural tractor or forestry or tram, it is obliged, within one day from the date of the finding, to communicate the result of the examination to the traffic police in whose territorial jurisdiction the unit operates, to the dispatching doctor and to the person declared unfit from the medical point of view to drive a vehicle, agricultural or forestry tractor or tram. If the person holding a driving license is declared fit for medical treatment, the approved healthcare facility shall, within 15 days of the finding, communicate the outcome of the examination to the dispatching doctor".

Thus, following the modifications, it was imposed - when it is established by the authorized medical unit that the person holding a driving license is medically ill - the obligation to communicate the result of the examination to the traffic police within one day from the date of

the finding , against the phrase *immediately* used by the legislator in the previous regulation. At the same time, the obligation to communicate this result is also provided to the sender doctor.

It is also foreseen in par. 6^2 as if, within 30 days from the date of delivery of the referral note under the conditions of par. (6), the dispatching doctor is not notified by the authorized medical assistance unit of the outcome of the examination, he is obliged to communicate to the traffic police on the territory of which he carries out his / her activity, the name, surname and personal numerical code of the person in evidence or care and the information that it has been sent to appear for a medical examination in accordance with the provisions of paragraph (6).

In par. 6^3 it is pointed out that, on the date of receipt of the communication provided in para. 6^1 sentence I or, as the case may be, 6^2, the traffic police withdraw the driving license of that person, making a reference to it in the records of retained driving licenses and sanctions imposed on drivers of vehicles, agricultural or forestry tractors or trams. The ordered measure shall be immediately communicated to the driver referred to in paragraph (6).

Under Art. 22 par. 6^4 it is stipulated that the person who holds a driving license, declared unfit for medical reasons to drive a vehicle, agricultural or forestry tractor or tram, is no longer entitled to drive from the date of communication of this fact by the traffic police under para. (6^3). Within a maximum of 3 working days from this date, the driver is required to appear at the police station to hand over the driving license with a view to withdrawing it until the end of the cases for which the measure was taken. "

In the par. 8 of art. 22 there are two modifications, namely: the driving license will be withdrawn by the traffic police if the person, after the examination, has been declared psychologically unfit, eliminating the condition of the medical unfitness, and widening the scope of these provisions towards the persons are in possession of a driving license for a vehicle, agricultural or forestry tractor or tram, in comparison with the provisions before Law no. 345/2018 in which only vehicles and trams were provided.

Also, by the provisions of art. 97 paragraph 4 a new amendment was introduced, whereby the driving license was ordered by the police in the case when it is found that a person is ill medical to drive a vehicle, agricultural or forestry tractor or a tram, or in case , within 30 days from

the date of dispatch of the referral note, the medical dispatcher is not notified by the approved medical unit of the result of the examination or if it is found that the person is psychologically unwilling to drive vehicles, agricultural or forestry tractors or trams. A clear delimitation of the reasons for the withdrawal of the driving license was thus achieved.

Also in the matter of contraventions were made modifications, at art. 102 paragraph 1 point 40 provided that it represents a contravention and shall be sanctioned with the fine provided in the fourth class of sanctions the failure by the doctor to fulfill the obligation to issue a referral note to an authorized medical unit for a medical examination when it is established that a driver of a vehicle, agricultural or forestry tractor or tram, registered or cared for, presents medical conditions stipulated in the order of the minister of health or when he is a dispatcher doctor, if he is not notified within 30 days the healthcare unit on the result, does not communicate to the traffic police in the territorial range of the activity, the name, surname and personal numerical code of the person under his or her care, and the information that he was sent to present for a medical examination.

Also in contravention matters, art. 105 of the Traffic Code was completed with point 30, which stipulates that the failure of the authorized medical unit to fulfill the obligation to communicate within the term stipulated in art. 22 par. (6^1) the fact that the person is unfit to drive a vehicle, agricultural or forestry tractor, or tram, to the traffic police on whose territory it is operating, as well as the dispatcher doctor.
EGO no. 195/2002 was also amended by the provisions of Law no. 203/2018[1], art. 109 paragraphs 5-8 and 120 paragraph 2.3 being abrogated and the provisions of art. 109 paragraph 4 being modified, having the following content: The model of the record of the finding of contravention shall be established by order of the minister of internal affairs, which shall be published in the Official Gazette of Romania, Part I. By the provisions of Law no. 203/2018 was also introduced the title of electronic claim that includes, according to Article 13, paragraphs 1 and 2, a set of information taken from the process-verbal of contravention handed or communicated to the offender, as well as other information: the unique record of the process -verbal of contravention; the date of the contravention report; the date on which the report of the offense was handed over or communicated to the offender; identification data of the

[1] Published in Official Gazette no.647/25 July 2018

offender; the amount of the payment representing the amount of the fine imposed; the amount of the payment representing half of the minimum fine provided for by law; the date up to which half of the minimum fine provided by the law can be paid; the unique account IBAN; the legal basis for the application of the sanction; the record of the offense report.

Also, the provisions of art. 111 paragraph 8 of the Traffic Code provides that in the case of suspension of the driving license for a specified period with the issue of a 15 days replacement driving license, suspension of the right to drive begins either from the expiry of the validity period to provide replacement, either from the time of submission of the replacement evidence by the driver to any traffic police unit on one of the days of the period of validity.

If the authority issuing the driving license notifies the court immediately, as amended by Law no. 9/2019 for the adoption of the EGO 9/2009[1] regarding the completion of art. 103 of the Traffic Code, by introducing paragraph 8, the authority issuing the driving license shall dispose by order the suspension of the exercise of the right to drive vehicles, suspension which operates until the final decision of the court, the holder of the driving license being obliged to present to the police unit on the territory of which he resides, has his residence or residency within 5 days from the order's delivery, in order to deliver it.

CONCLUSIONS

With the latest amendments to the Traffic Code, the legislator tried to fill existing gaps in the old legislation by introducing more precise regulations. Though it has not gone far from these last changes, to the Ministry of Internal Affairs shall be considered to be insufficient, by working on new projects to tighten the rules in the field.

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ABOUT THE LAW APPLICABLE FOR THE PARENTAL AUTHORITY

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Abstract:

In the current context of multiplying and diversifying family relationships with an international element, this article brings into question conflicting rules in the field of parental authority.

The parental authority represents the main judicial mean for child protection and reunites the rights and obligations of the parents towards the child's persona and assets.

Regarding the applicable law, the Romanian Civil Code states that in this area is applicable the Hague Convention of 1996 on the jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children.

Therefore, the object of the current paper is represented by the analysis of the provisions stated by Chapter 3 ("Applicable law") of this Convention.

Key words: *child; parental responsibility; extraneity; conflictive norm; the Hague Convention of 1996 on parental responsibility.*

INTRODUCTION

Today, living, working or studying in a foreign country has become a normality.

In a society in which individuals move free, there are a lot of families formed by persons from different states of the European Union

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or from outside it. Currently, there are almost 16M international couples throughout the EU[1].

Also, regarding the Romanian citizens, the studies have revealed that in 2017 a quarter of a million Romanians have migrated towards other states for the satisfaction of different financial, professional or family needs. From the total number of Romanian emigrants, approximately 85% are persons aged between 15-64 years old, economically active and at the right age for founding a family and procreation[2].

In this context, it is important the clarification of the aspects related to the law applicable for the measures for child protection. During the current study, we shall stop only at the parental authority presenting an international feature. Art 2611 of the Romanian Civil Code states that the law applicable in such cases shall be established according to the Convention on the on the jurisdiction, applicable law, recognition, enforcement and co-operation in respect of parental responsibility and measures for the protection of children, adopted at the Hague on 19 October 1996 and ratified in Romania by Law No 361/2007[3].

1. THE CONVENTION ON THE PARENTAL RESPONSIBILITY (Hague, 1996). AREA OF APPLICATION

By the ratification of this convention, our country applied the Decision 2003/93/EC of the Council authorizing the Member States, in the interest of the Community, to sign the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children – Convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children[4], as well as the Decision 2008/431/EC of 5 June 2008 authorizing certain Member States to ratify,

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[1] See also: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/civil-justice/family-law/overview-family-matters_en.

[2] Ciprian Iftimoaei and Ionuţ Cristian Baciu, „Analiza statistică a migraţiei externe după aderarea României la Uniunea Europeană", *Revista Română de Statistică - Supliment* No 12 (2018), 166.

[3] Published in the Official Gazette of Romania, Part 1, No 895/28 December 2007.

[4] O.J. No 48/21 February 2003, pp. 1-2; see also: https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=celex:32003D0093.

or accede to, in the interest of the European Community, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children and authorizing certain Member States to make a declaration on the application of the relevant internal rules of community law[1] – convention on jurisdiction, applicable law, recognition, enforcement and cooperation in respect of parental responsibility and measures for the protection of children[2].

The Convention states common norms in relation to the states outside the EU signing the Convention and aims the improvement of the protection for children found in international situations. The purpose of this convention is the avoidance of conflicts emerging between different national legal systems.

As mentioned by Art 1 of the Convention, its area of application comprises: to determine the state whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child; to determine which law is to be applied by such authorities in exercising their jurisdiction; to determine the law applicable to parental responsibility; to provide for the recognition and enforcement of such measures of protection in all contracting states; to establish such co-operation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

The Convention expressly states in Art 4 the areas for which the Convention shall not apply: the establishment or contesting of a parent-child relationship; decisions on adoption, measures preparatory to adoption, or the annulment or revocation of adoption; the name and forenames of the child; emancipation; maintenance obligations; trusts or succession; social security; public measures of a general nature in matters of education or health; measures taken as a result of penal offences committed by children; decisions on the right of asylum and on immigration.

This list is limitative, which means that any other aspects related to the parental responsibility and child protection which are not included

[1] Aida Diana Dumitrescu, "Subsidiarity principle in the context of harmonizing national legislation with european law of securities", in *Uniformizarea dreptului. Efecte juridice şi implicaţii sociale, politice şi administrative* (Iaşi, 2014), 594-596.

[2] O.J. No L 151/11 June 2008, pp. 36–48; see also: https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:32008D0431.

here, shall be subjected to the Convention. The reason for the elimination from the area of application of the Convention of certain areas consists either in the fact that they do not refer to the child protection, or that are the object of other conventions, as the case of the adoption or the obligation for maintenance[1].

2. THE NOTION OF "CHILD" AND THE NOTION OF "PARENTAL RESPONSIBILITY" FROM THE PERSPECTIVE OF THE CONVENTION

2.1. The notion of "child"

The exact definition of the term "child" has a practical importance from the perspective that, certain legal provisions referring to legal institutions applicable in the area of child protection, establish different protective measures whose application is determined by the age or other elements of the civil status[2].

Etymologically, the term "child" originates from the Latin *infans* which means "who does not speak". *Infans* for the Roman law is what we call today a toddler (a small child). Today, the term of child has a broader meaning[3], being defined by Art 1 of the Convention of the United Nations[4] as "every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier".

In the same meaning are the provisions of the Law No 272/2004 on the protection and promotion of the rights of the child[5], which defines the child as being "a human being below the age of 18, who has not acquired full capacity of exercise, according to the law". Therefore, according to our legislation, it results that two conditions must be met cumulatively, namely: the person did not attain the age of 18 years and

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[1] In the same meaning, see also: Dragoș-Alexandru Sitaru, *Drept internațional privat* (Bucharest: C.H. Beck Publ.-house, 2013), 238.

[2] For a wider analysis of the term "child" in both legislation and doctrine, see also: Andreea Drăghici, *Protecția juridică a drepturilor copilului*, (Bucharest: Universul Juridic, 2013), 9-24.

[3] Françoise Dekeuwer-Défossez, *Les droits de l'enfant* (Paris: Éditions Presses Universitaires de France, 1991), 3.

[4] Ratified in Romania by Law No 18/1990, published in the Official Gazette of Romania, Part 1, No 314/13 June 2001.

[5] Republished in the Official Gazette of Romania, Part 1, No 159/5 March 2014.

the capacity of exercise. According to Art 38 Para 2 of the Civil Code, the person shall attain majority at the age of 18 years.

A quite comprehensive doctrinal definition of the notion of child is the following: "a child means every person who based on his national legislation, did not attain the age required to become responsible for his actions in a well determined area"[1]. The legal age for the majority is different for each state, in some cases depending on the sex or of other important legal institutions, such as marriage, the capacity to conclude agreements, the right to vote etc.[2].

Given that all the differences existing between the legal systems and to avoid confusions, the Hague Convention offers a clear clarification of the notion of "child".

Thus, Art 2 of the Convention states that its provisions shall be applied for children from the moment of their birth and until the attainment of the age of 18 years. Therefore, given that its provisions do not differentiate, we consider that its area of application shall cover also the protection of the children with full capacity of exercise before the age of 18 years, for instance by marriage.

As regards the conceived but unborn child, the Convention is clear in the sense that it only refers to the born child.

2.2. The notion of "parental responsibility"

As main form for the protection of the minor, the institution of the parental authority is stated in our legislation by the Civil Code[3] and by the Law No 272/2004 on the protection and promotion of the rights of the child.

Art 483 of the Civil Code states the guidelines for this institution, by identifying its content, the principles governing it, as well as the rules for its performance.

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[1] Luke T. Lee and John M. Paxmaa, „Preganancy and abortion in adolescence, a comparative legal survey and proposals for reforms", *Columbia Human Right Law Review*, 6th Volume, No 2 (1970).

[2] Lee and Paxmaa, „*Preganancy and abortion in adolescence, a comparative legal survey and proposals for reforms*".

[3] The Civil Code has renamed the institution of the parental protection (thus called by the provisions of the Family Code) as the parental authority. For details, see: Drăghici, *Protecția juridică a drepturilor copilului*, 195-196.

From the analysis of Art 483 and 487 of the Civil Code, we can define the parental authority as being the main legal means for child protection gathering the rights and duties of the parents towards the person and assets of the child, including in the relations with the third parties so that to insure the proper growth of the child, his physical, mental, spiritual and moral development.

The Hague Convention uses the notion of parental responsibility. Art 1 Para 2 of the Convention legally clarifies the notion, by stating that "(…) the term 'parental responsibility' includes parental authority, or any analogous relationship of authority determining the rights, powers and responsibilities of parents, guardians or other legal representatives in relation to the person or the property of the child". Therefore, the meaning given by the Convention is wider than what this institution represents according to our legislation. Thus, its provisions shall apply to the parental authority, as well as to all the other measures for child protection, regardless of the source of the parental authority (relation of kinship, guardianship, curatorship or other similar institution), except the adoption.

3. THE LAW APPLICABLE FOR PARENTAL RESPONSIBILITY

The area of the application of the parental responsibility, as resulted from Art 1-4 and 16-18 of the Convention, includes the following institutions:

- The attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the State of the habitual residence of the child (Art 16 Para 1);
- The attribution or extinction of parental responsibility by an agreement or a unilateral act, without intervention of a judicial or administrative authority, is governed by the law of the State of the child's habitual residence at the time when the agreement or unilateral act takes effect (Art 16 Para 2);
- The extent of the parental authority, especially if it aims only the person and assets of the child or only the person of the child, as well as the duration of the protection;

- The legal relations between the parent and the child, more exactly the parental rights and duties;
- The exercise of the parental responsibility (Art 3 Let a) and Art 17);
- The situations for total or partial restriction of the parental responsibility, as well as its delegation (Art 3 Let a));
- The situations for modification, withdrawal or cessation of the parental responsibility (Art 16 and Art 18).

For the case in which the Romanian law[1] is applicable as *lex causae*, then the area of application of the laws established by the Convention shall comprise the loss from parental rights.

Hence, according to Art 16 Para 1 of the Convention the attribution or extinction of parental responsibility by operation of law, without the intervention of a judicial or administrative authority, is governed by the law of the state of the habitual residence of the child. In exchange, the attribution or extinction of parental responsibility (authority) by an agreement[2] or a unilateral act[3], without intervention of a judicial or administrative authority, is governed, according to Art 16 Para 2, by the law of the state of the child's habitual residence at the time when the agreement or unilateral act takes effect.

The following paragraphs of Art 16 solves the mobil conflict between the laws in two special cases. Thus, the parental responsibility existing according to the law of the state of residence shall be maintained also after the relocation of the residence to another state. But, for the situation in which the child's habitual residence changes, the attribution of the full parental responsibility to a person who has not yet been invested with this responsibility is stated by the law of the state of the new habitual residence.

Regarding the performance of the parental responsibility, according to Art 17 of the Convention, it is governed by the law of the state of the child's habitual residence. If the child's habitual residence

[1] Mara Ioan, Aida-Diana Dumitrescu and Ion Iorga, *Drept civil, Teoria generală a obligațiilor* (Bucharest: Universul Juridic, 2011), 222-237.

[2] The agreement can refer, for instance, to the agreement concluded between parents about the tutelage of the child in a divorce.

[3] A unilateral act can be, for instance, a testamentary provision by which the parent appoints, in case of his death, a protector for his child.

changes, it is governed by the law of the state of the new habitual residence.

Regarding Art 18 of the Convention, it does not state a conflictual norm, but it establishes that "The parental responsibility referred to in Article 16 may be terminated, or the conditions of its exercise modified, by measures taken under this Convention".

An exception from the application of the law on the child's habitual residence is found in Art 19 of the Convention, which states that the validity of an act concluded between a third party and another person who would be entitled to act as the child's legal representative under the law of the state where the transaction was concluded cannot be contested, and the third party cannot be held liable, on the sole ground that the other person was not entitled to act as the child's legal representative under the law designated by the provisions of this chapter, unless the third party knew or should have known that the parental responsibility was governed by the latter law.

So, the lack of the quality as the child's legal representative in concluding a transaction with a third party is subjected to the law governing the place of conclusion of the transaction if the following two conditions are met[1]: the quality as the child's legal representative shall be stated by the law governing the place of conclusion of the transaction; the third party was of good-faith, in the meaning that he was not aware of the lack of the quality as legal representative; the transaction has been concluded between persons present on the territory of the same state.

CONCLUSIONS

The provisions stated by Chapter 3 ("Applicable law") of the Hague Convention shall apply even if the law mentioned by it belongs to a non-contracting state. The conflictual norms mentioned by this chapter enjoy a universal application, without requiring the condition for reciprocity.

Therefore, the Romanian administrative and legal authorities have the obligation to apply the conflictual norms stated by Art 15-19, regardless if the law to which these norms refer to is the law of a Contracting State or not.

[1] Sitaru, *Drept internațional privat*, 244.

Regarding the choice of law, as rule, it has been removed by Art 21 Para 1. As exception, Art 21 Para 2 states that if the law applicable according to Art 16 is that of a non-contracting state and if the choice of law rules of that State designate the law of another non-contracting state which would apply its own law, the law of the latter state applies. If that other non-contracting state would not apply its own law, the applicable law is that designated by Art 16. Thus, only in the case of the conflictual norm stated by Art 16, it is accepted the choice of law of a second degree between two non-contracting states of the Convention. However, if the law of this non-contracting state is not known as applicable, the law applicable shall be the one mentioned by Art 16, thus returning to the rule, namely to the waiving of the choice of law.

Not least, we mention that the application of the law stated by Chapter 3 of the Convention can be denied if this application would obviously be contrary to the public order governed by the Romanian international private law, by always considering the superior interest of the child.

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CONSIDERATIONS ABOUT THE INTERDICTION OF ACTS ON AN UNOPENED INHERITANCE LEGAL SUCCESSION PROCEDURE

Emilia MATEESCU[1]

Abstract:

According to the Civil Code, the acts of an unopened inheritance succession are those manifestations of will, having as their object any rights to an unopened inheritance, the acceptance, renunciation, alienation or promise of rights that may be acquired in the opening of the inheritance procedure.

In the context of social evolution, constitutional liberalism and European Community legislation or national legislation from some European countries, the prohibition, that is interdiction of acts on an unopened succession finds no convincing foundation to be maintained within the Romanian law.

By highlighting the current lack of the legal basis concering the interdiction as well as the reasons why this ban should be reconfigured, we hope to contribute to an adaptation of the Romanian legislation in the direction of the Romanian constitutional modernism and to that of the community legislation.

Key words: *unopened succession; pact; liberalism; interdiction act on an unopened succession; heir*

INTRODUCTION

The death of a person and the destiny of the deceased's patrimony have been of interest to society since antiquity, and the old more evolved Roman legislations have ruled that the patrimony is to be passed from the deceased to the heirs for reasons of protecting the bloodline or legal protection of material possessions by heirs of the deceased's goods[2].

Pacts (legal acts) on future successions were forbidden by Roman law because they supposedly forbade the future deceased person the right

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[2] In this regard, see: Emil Molcuț, *Private Roman Law* (Bucharest: Universul Juridic, 2004), 147

to freely dispose of his/her possessions before death and those by which a presumptive heir renounced the inheritance because it was considered, first of all, that he/she would also abandon the relative relationship (kinship) that united him/her with the one whose inheritance was to be given up, a fact which was considered impossible and immoral. At the same time, the abandonment of an unopened succession seemed to have no object and the convention was considered s being immoral[1].

The modern law of the European states reflected differently the point of view upon the pacts over an unopened succession. Thus, in the Germanic system[2] and in several states[3] in Europe it has been permitted to conclude legal acts on unsettled succession while in the French, the Romanian and other similar laws[4], they were forbidden with rare exceptions resulting more from the legal interpretation of the way concerning the regulatory framework. Since 2007, France has waived the interdiction of a declaration of non-acceptance of the unopened succession in favor of one or more persons[5].

In our law, the old laws either did not sanction or forbid pacts concerning the unopened successions. The 1864 Civil Code by Art. 965 and art. 702 prohibits the acquiescence/agreements or renunciation regarding the succession of a living man, or of any rights that he/she may have on such a succession, even if with the consent of the person whose succession in question is previously given.

JUSTIFICATION AND CONCLUSIVENESS OF INTERDICTION

Interdiction of acts on an unopened succession has found over time more justifications. The most well-known of these ones refers to the view that such an act would trigger the wishing for death idea in

[1] Dan Chirică, *Treaty of civil law. Successions and liberalities* (Bucharest: C.H. Beck, 2014), 378

[2] For Germany, see: https://e-justice.europa.eu/content_succession-166-de-ro.do

[3] For Poland and Estonia, see: https://e-justice.europa.eu/content_general_information-166-pl-ro.do?member=1, https://e-justice.europa.eu/content_general_information-166-ee-ro.do?member=1

[4] For Italy, see: https://e-justice.europa.eu/content_general_information-166-it-ro.do?member=1

[5] https://e-justice.europa.eu/content_general_information-166-fr-ro.do?member=1

connection with the person whose inheritance it is about[1]. The opinion was embraced by doctrine[2] with the motivation that such a desire is immoral.

Opinions have been expressed that, by concluding the acts of an unopened succession, the rules of legal succession would be violated and the rights of the heir who cannot be totally disinherited would be violated. It has also been argued that heirs should be protected against their own temptation to alienate potential rights from another person's patrimony. A more convincing argument would be that, on the one hand, by concluding a contract on his succession, the future *de cuius* loses the inalienable freedom to test and, on the other hand, can no longer return to the contract with the agreement of the co-contractor[3].

None of the above opinions is convincing in order to justify the ban in the Romanian legislation.

The premises from which each of the opinions start from are either obsolete or false.

Thus, the assumption that the death desire in connection with the person whose succession is under discussion is false. There is no evidence that could lead to such a conclusion. On the other hand, the Civil Code regulates contracts where such a desire may occur with greater certainty. This is the case for a lifelong maintenance contract, life annuity, lifetime usufruct or life insurance. It is at least surprising that the Romanian legislation forbids a legal act with a moral motivation, but it raises other legal acts that are due to their way of regulation to lead to the death desire of the person to whom the debtor or maintenance debtor is bound.

We consider that the complete interdiction of acts on unopened successions with the same motivation (immorality) is abusive and devoid of the purpose for which the right appeared.

Thus, in the case of a declaration of renunciation of an unopened succession by an heir, the opinion of immorality on the ground of the death desire of the person whose succession is under discussion is not

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[1] In this regard, see: Francisc Deak, *Treaty about the law of succession* (Bucharest: Universul Juridic, 2002), 289

[2] Gabriel Boroi, Liviu Stănciulescu, *Civil law institutions* (Bucharest: Hamangiu, 2012), 603

[3] For a broad view of your opinions see: Chirică, *Treaty of civil law. Successions and liberalities*, 380

justifiable because the one who renounces the succession of another does so precisely because he/she wants to be alienated/separated form the succession and the future of the deceased person for his/her internal /personal reasons.

Limiting the person's freedom to declare oneself as being an alien to an unopened succession with an outsider motivation towards any reality is in contradiction with the liberal principles of law, according to which the legal norm is intended to protect the rights and freedoms of a person whenever they are violated. Unlike, in our case, the legal norm limits the person's freedom to declare and delimitate from the future inheritance succession of another person towards whom he/she wishes to be considered as an alien.

Therefore, at present, the legal norm does not protect the freedom of the person to declare oneself as an alien to an unopened succession, but, on the contrary, creates an unjustified restriction under the conditions of art. 53 paragraph 1 of the Romanian Constitution[1]. In fact, there is no immorality on which the legal norm restricts the freedom of the person, because it can not be assumed that the person who declares that he/she wants to be an alien to an unopened succession could also want that person's death while he has no benefit from the eventual death, in connection to whose succession he/she wants to be an alien.

Neither the other arguments justify convincingly the interdiction of acts on an unopened succession, since the rules of legal succession and the rights of the heirs who cannot be totally disinherited could be bypassed successfully by all the contracts with long-life character of patrimony alienation.

The argument that, by concluding a succession contract, the future *de cuius* would alienate the right (freedom) to test which are inalienable is at least phantasmagoric. What is passed through a successor contract is not the freedom to test but the ownership rights of a variable-content patrimony at the time of the succession. No constitutional provision establishes the inalienability of such a right.

As a matter of fact, modern rights, such as the right to test, seek legal protection for the owner against a possible violation of his/her right

[1] The exercise of certain rights or freedoms may be restricted only by law, and only if it is necessary, as appropriate, to: protect national security, order, health or public morals, citizens' rights and freedoms; conducting criminal instruction; preventing the consequences of a natural calamity, of a particularly severe disaster or sinister disaster.

by others. When it comes to restricting the right granted to a holder this can only be done under the conditions of Art. 53 of the Constitution to defend a right or freedom belonging to a citizen, other than the one whose rights or liberty are restricted.

In other words, it can not be justified - from a constitutional point of view - the restriction of the right to contract by acts between living people in respect of his/her own unopened succession on the grounds that another right would be protected (the right to test as an ultimate will) belonging to the same holder. The justification would have existed if the rights of another citizen, who could have been affected by an act on the succession unopened for the future *de cuius*, were protected.

Considering the provisions of art. 44 of the Romanian Constitution we consider that no one can be affected by the way the owner of the property right on his patrimony understands to have as long as the rights of others are not affected. Eventual heirs of the future of cuius can not rely on their rights at the time of concluding the convention because they do not exist as long as the succession is not open. The State or other natural or legal persons do not have any right that might be affected by the exercise of the right of disposal, as a component of the right of private property, by the future of *de cuius*.

In addition to the lack of constitutionality of regulating the interdiction of acts on an unopened succession, the lack of conformity of the provisions of the national law with the Community provisions may be added.

Thus, by art. 3 par. 1 lit. (b) of Regulation (EU) No. 650/2012 of the 4th of July 2012 on jurisdiction, applicable law, the recognition and enforcement of court orders and the acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession is defined as "pact on a future succession" which means an agreement including an agreement resulting from reciprocal wills that create, modify or terminate, with or without counter-benefit, rights on the patrimony or future patrimony of one or more persons who are parties to the agreement. In art. 22 and 25 of the same community act, which regulates the possibility of choosing the law applicable to the pact on a future succession and the effects of that choice.

Thus, through community law it has already regulated the rightness of acts on a future succession, including both unilateral acts and bilateral or multilateral acts.

Considering the provisions of art. 20 of the Constitution on the priority of Community law in the matter of fundamental rights to internal laws, we consider that maintaining the interdiction of acts on an unopened succession can not find any basis in the Civil Code.

In addition to the arguments set out above, we will further analyze the legal context of the Civil Code that governs the ban that is the subject of our analysis.

REGULATION AND FUNCTIONALITY OF INTERDICTION. EXCEPTIONS

The normative context in which the interdiction appears is set up by several provisions in the Civil Code.

The rule established by art. 1657 of the Civil Code provides that any good may be freely sold if the sale is not forbidden or limited by law or by any convention or will.

Article 1227 of the Civil Code provides that a contract is valid even if, at the time of its conclusion, one party is unable to fulfill its obligation, unless otherwise provided by law.

By art. 1230 of the Civil Code, it is stated that, unless otherwise provided by law, goods belonging to another person (a third party) may be the subject of a benefit, the debtor being obliged to procure them and to pass them on to the creditor or, as the case may be, obtain the consent of the third party. If the obligation is not fulfilled, the debtor is liable for the damages caused.

The provisions of art. 1747 and 1754 of the Civil Code governs the possibility of selling an open inheritance, that is to say, a succession patrimony remaining after the death of the holder and art. 1228 of the Civil Code states that the object of the contracts may also be a future good.

So the general rule is that all goods can be sold freely except for legal, conventional or testament interdictions. Future and other goods may be traded and, in the event of a seller's breach of contractual obligations, he/she is contractually liable to the buyer. The right to collect an open legacy can be sold.

An analysis of the above legal provisions would indicate that the object of the conventions may also be the right to an unopened succession, even if it is considered as a possible entitled right.

However, Art. 956 of the Civil Code regulates the interdiction under the title of the legal acts on the unopened inheritance, stating that unless otherwise provided by law, an absolute nullity shall be given to legal acts relating to possible rights over an inheritance unopened yet, such as the acts by which the inheritance is accepted or renounced for it before it is opened, or the acts by which it alienates or promises the alienation of certain rights that may be acquired by the opening of the inheritance.

Thus, without being interested in the subjective position of the parties, the legislator sanctions *de plano* with the absolute nullity the following acts: the legal acts concerning possible rights[1] upon an unopened inheritance, the acts accepting or giving up an unopened inheritance and the acts through which one alienates or promises the alienation of certain rights that may be acquired in the opening of the inheritance.

However, through art. 956, the Civil Code provides for an exception to the interdiction, i.e. situations where the law provides otherwise.

In other words, although the general rule is the freedom of conventions and the free movement of goods, the Civil Code establishes the exception to the general rule, namely the interdiction of acts on an unopened succession, in order to set an exception to that interdiction, that is the validity of some forbidden acts, in certain situations.

The exceptions are as follows:

- The early renouncement done by the heirs who cannot be totally disinherited to the right to demand the reduction of a liberality/donation.

According to art. 1091 par. 4 the final thesis of The Civil Code is presumed to be a donation for the alienation to a descendant or a privileged ascendant or to the surviving spouse if the alienation was made with the reservation of usufruct, use or occupancy, or in exchange

[1] There is no unanimous definition of possible rights, some authors seeing that it is an imperfect right that lacks a constituent element, being undergoing training and others considering it as a law recognized by law but nonexistent at the outset of the legal situation, see in this regard: Marian Nicolae, *Civil law. General Theory volume. II. Theory of civil subjective rights* (Bucharest: Solomon, 2018), 46

for life-time maintenance or a life-time annuity. The presumption operates only in favor of descendants, privileged ascendants, and the surviving spouse of the deceased if they have not consented to alienation.

In other words, even during the life of the future *de cuius*, the heirs who cannot be totally disinherited may manifest their will with regard to the possible rights to which they would entitled from the unopened succession of *de cuius*. This manifestation of will is allowed by the Civil Code, although it represents a pact on an unopened succession, an early renouncement of the inheritance opening to the right to demand the reduction of liberality.

- Continuation of the contract with the heirs in the case of the death of a partner regulated by art. 1939 of the Civil Code according to which the company contract may stipulate that at the death of an associate the company shall continue with law with its heirs. This convention concluded during the lifetime of *de cuius* has as its object the fate of the succession rights in its unopened succession. According to art. 1940 of the Civil Code, if it has been stipulated that the company will continue to operate with the remaining associates, the associate or, as the case may be, his/her heir has the right only to his/her part or to his/her author, according to the situation of the company, at the time the event occurred. He/she does not participate in the rights and he/she is not bound by the subsequent obligations except to the extent that they are the necessary consequence of the operations made prior to this event.

- The partition of goods for the ascending degree in the form of the donation permitted by art. 1161 of the Civil Code according to which the partition can be achieved by donation or by will, in compliance with the forms, conditions and rules provided by the law for these legal acts. The partition made through donation can only concern the present goods.

The ascendant partition of goods concluded in the form of the donation is the clearest act on an unopened succession since it explicitly contains all the elements of such a pact, namely the explicit intention to create potential rights from an unopened succession.

- The precipitation clause regulated by art. 333 of the Civil Code according to which by matrimonial convention it can be stipulated that the surviving spouse takes over without paying, before the division of the inheritance, one or more of the common assets, held in joint property or co-ownership. The precipitation clause may be stipulated for the benefit of either spouse or only in favor of one of them.

Therefore, there is still the regulation of a case regarding a legal act between the living parties concerning the possible rights to an unopened inheritance by which the fate of certain goods is established before the inheritance procedure is opened.

It does not fall within the category of exceptions the assignment by title of one of the heirs to pay an obligation from the inheritance liability regulated by art. 1155 par. 3 lit. d) of the Civil Code, whereas in this hypothesis the future heir is entrusted with an obligation[1]. Or, the interdiction covers exclusively the rights (eventual or future ones) that may be acquired at the start of the inheritance procedure.

CONCLUSIONS

We appreciate that in a system of liberal law, the duty of the law and the legislator is to ensure that right-holders have the choice of several legal procedures to exercise their rights.

The existence within the legislation of legal norms restricting the option of rights holders without a constitutional justification is likely to distort the trust of individuals in the legal norms. Thus, the existence of a legal restriction on the way of forbidding acts on an unopened succession naturally determines the recipient of the legal norm to try to bypass it by concluding other acts leading to the same purpose.

From here, there will be more tendencies in the behavior of lawful subjects: that any rule of interdiction may be bypassed by another rule of law having the same purpose as the first rule; the one according to which many rules of interdiction law are enacted without any rational reason and according to which there is unnecessary inflation of the norms of law as long as the rights can not be reapplied or there are no multiple possibilities to exercise the rights, which creates a mistrust in the whole system of law[2].

The interdiction of acts on a future succession should be reconfigured in the Romanian legislation and transformed into a useful legal procedure made available to law subjects.

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[1] For another opinion, see: Laurențiu Valentin Dragu, *Limitations of the Right of Dispensation on Inheritance, Doctoral Thesis* (Bucharest, 2010), 17, published on the web page file:///C:/Users/Emilia/Downloads/56536509-Dragu-Laurentiu-Valentin-Limitele-Dreptului-de-Dispozitie-Asupra-Mostenirii.pdf

[2] Given the psychological tendency of individuals to generalize a phenomenon.

There are national European laws[1] governing the pact on a future succession as a legal instrument of a real use made available to the person whose succession is concerned. They combine the rules of the contract matter with the rules of the will to create the possibility of the patrimony and at the same time protecting both the ownership right and the will of the owner. An argument in support of our view is given by the evolution of the French law which regulated the possibility of the declaration of renunciation of the unopened succession. So the very main source of inspiration for our legislation has come to the conclusion that it is necessary to partially remove the ban.

We appreciate that the Romanian legislation must evolve comparing to the antique way of thinking and adapt to the level of modernity of our society. The assumption that the recipient of a pact on a future succession may wish the death of the successor to whom it is being discussed is false and it is based on a mistaken belief that for successive rights individuals would be liable to commit crimes.

Instead of a ban, liberal legislation and adapted to modernity should provide the individual with a legal instrument capable of transmitting property with the possibility of unilateral denunciation by the future *de cuius* for situations of unilateral denunciation, or other similar situations, such as not providing the co-contractor of those needed to live up to on the day of death. At the same time, the Convention may provide for the unilateral right to withdraw from the Convention of either Party. On the other hand, giving up and accepting the succession of a living person should be regulated as a possibility available to any person.

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