UNIVERSITY OF PITESTI
FACULTY OF ECONOMIC SCIENCES AND LAW

Journal
LEGAL AND ADMINISTRATIVE STUDIES
STUDII JURIDICE ŞI ADMINISTRATIVE

Year XVIII, No. 1 (20) – 2019

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

Publishing House C.H. BECK
Bucharest 2019

Journal
LEGAL AND ADMINISTRATIVE STUDIES
e-ISSN: 2344-6900
ISSN-L: 1583-0772
No.1 (20), Year XVIII, 2019

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

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

Publishing House
C.H. BECK SRL
Address: Str. Serg. Nuţu, no. 2, Sector 5, Bucharest
Tel.: 021/410.08.47
Fax: 021/410.08.48
E-mail: **redactie@beck.ro**
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e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (20), Year XVIII, 2019, pp. 7-28

DISCIPLINARY LIABILITY OF A RETIRED JUDGE ON THE EXAMPLE OF SELECTED COUNTRIES

Beata STĘPIEŃ-ZAŁUCKA [1]

Abstract:

The problems of the judiciary, in some countries, seem to have recently become an important dilemma of constitutional law. Despite the doctrinal discussion, there are no uniform positions in this respect. One such issue is the issue of retired judges, who at the end of their judicial careers still remain judges, but in a retired state. Such regulations can be found in many countries around the world. This raises a wide range of issues, including the proper conduct and behaviour of such judges. Under the rules of many countries in force in this area, such judges are still subject to what is termed disciplinary responsibility and may be held liable for offences committed outside the service, as well as for those committed in the course of the service. The author looks at these solutions and tries to present a model of retired judges' liability. She presents examples from several countries and refers them to the current legal status in Poland. Its considerations may be universal in nature and may serve as a point of reference for other legal systems.

Key words: *Judiciary; retired judges; liability; disciplinary responsibility.*

1. Administration of justice is one of the basic tasks of the judicial authorities. Currently, the judicial authorities represent a full-grown-up structure of the judiciary, with various courts of varied jurisdiction, in

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which the offices are held by judges. A judge – as it is often indicated – is one of the legal professions, considered by some to be the highest within the hierarchy of the legal professions, although their organisational role should rather be perceived from the perspective of a civil servant than a profession. Acting as a judge means having the judicial authority at hand, because the activities consist mainly in administering justice. As a model, a judge acts on behalf of the society and is a public official. The legal status of a judge is a combination of professional relationship and official relationship, whereas the latter is related to the exercise of the state powers (judicial authority). In their operations judges are independent, and the sole limitation of their actions is imposed by the binding laws. The decisions (judgements) issued by judges may be basically challenged only by way of appeal to a court of a higher instance. The judicial instances are, therefore, a guarantee of the due implementation of the citizens' right of access to court, among other things. It is also important for the very status of a judge, which is related, for example, to one of the attributes of independence of that professional group, namely the impossibility to move a judge to another position.

The current legal regulations applicable to the profession of a judge in the particular countries are included in the acts of law of the highest rank, both international and domestic. Also important are the so called good practices or codes of ethics, which affect the legal status of a judge in the particular countries. Basically, all of the regulations refer to the guarantees enabling proper holding of an office by a judge, and that is to be a guarantee of the citizens' right to court. As to the principle, being a judge – on various continents and in various countries – means the necessity of abiding by the same values at work and outside of work[1].

The lawyers from all over the world have been thinking about how to affect the conduct of judges so that they could fulfil the social expectations by way of their behaviour[2]. Within the current European

[1] Cf. M. Dakolias, „Court Performance Around the World: A Comparative Perspective", *Yale Human Rights and Development Journal* No 1 (1999): 87-142.

[2] M. Siwek, „Prawa i obowiązki sędziego [Rights and duties of the judge]", *Studenckie Zeszyty Naukowe* No 13 (2006): 37.

judicial space, based on dialogue and mutual acceptance of court judgements, the values in the issuing of judgements must comply with certain standards. There is no doubt that the ethical and legal standards of judges conduct are currently affected by the regulation of the Council of Europe and the European Union (particularly the so called soft laws established by the Council of Europe) as well as the adjudications of the European Court of Human Rights and the European Court of Justice.

Improper conduct of a judge, both during the service and outside of it, may lead to removing a judge from their office. The particular legislators apply various solutions in that regard, but it must be explained that the office of a judge is generally so structured in the respective countries that the given person holds the office for a lifetime, regardless of whether they still adjudicate or not. Therefore, particularly in the context of judges who are no longer active in their office, interesting seems to be the problem of their liability for improper conduct, which infringes the interest of the service. The subject will be analysed in this paper.

2. The principle binding in modern democracies is that the office of a judge is held from the moment of appointment to the first judicial position to the death of the judge, although the employment relationship of a judge during their professional career is subject to various changes. In a model situation, in many legal systems, as soon as a judge reaches a specific age, considered to be the maximum limit for adjudication activity, the judge retires or is moved into inactive state, which does not obviously refer to those legal systems, which do not provide for such transformation of the professional status of a judge. In both cases the professional relationship of a judge basically expires at the moment of their death. Death is, then, a typical and statistically the most frequent reason for the expiry of the professional relationship of a judge. In practice there are, however, situations in which, at a certain stage of the judicial career, the judge may not further hold the office.

The considerations should start from emphasising the fact that nobody is obliged to hold the office of a judge on a lifetime basis. Every judge may, therefore, resign from the office, and their employment

relationship is terminated by law. In practice this happens when a judge chooses another model of their professional career, not only in a legal profession. The freedom of employment is, indeed, one of the constitutional freedoms, regulated in many countries on the constitutional level, although in various ways. Basically, this has the nature of a subjective right or freedom. The modern constitutional provisions in their literal content seem to depart from the subjective method of perceiving work, and tend to treat it as a freedom. Similarly, the international law does not provide for the "right to work" as a subjective right, but accentuates the "free selection of work" (e.g. Article 6 of the International Covenant on Economic, Social and Cultural Rights[1]). The right to select and pursue a profession exceeds the traditionally understood employment relationship and covers also the pursue of profession in another form. In the Polish law, it results for example from the contents of Article 65.1 of the Constitution, which provides that every person is free to select and pursue a profession and choose their place of work[2]. Each judge, including a retired judge, may, therefore, resign from their office.

Other cases of termination of the professional relationship of a judge are often related to the offences committed by a judge within the service and outside of it. The solutions are based on a paradigm, in accordance with which a judge holding their office must possess specific competencies and predispositions, also of moral nature[3]. A special organisational role of judges in the administration of justice and objective disputes resolution justifies the introduction of some solutions in the respective legal systems which differentiate the legal status of judges from that of the regular citizens, including also other legal professions.

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[1] International Covenant on Economic, Social and Cultural Rights, opened for signature in New York on 19 December 1966.

[2] A. Sobczyk and K. Kulig, [in:] Konstytucja RP, t. 1, *Komentarz [Constitution of the Republic of Poland, vol. 1, Comments]* eds. *M. Safjan and L. Bosek* (Warszawa: 2016), art. 65, §. 1-7, Legalis.

[3] J. N. Barr and T. E. Willging, „Decentralized Self-Regulation, Accountability, and Judical Independence Under the Federal Judicial Conduct and Disability Act of 1980", *University of Pennsylvania Law Review* No 1423 (1993): 25 et seq.

The special solutions include the means of holding judges liable[1]. Nevertheless, this does not exempt judges from the duty to abide by the legal order, and what is more – in many cases – the principles of conduct are stricter by way of establishing certain legal standards which must be complied with by a judge holding the office[2]. Although in many legal systems judges may not be subject to criminal liability due to the immunity granted to them, there is an extensive system of disciplinary courts within the judiciary, which is to ensure control over the proper performance of duties by a judge and the conduct of a judge outside of the judicial functions, among other things.

In that light, doubts may arise with regard to the fact that in many legal systems there are special regulations applicable to the removal of a judge from their office, resulting in the termination of the professional relationship with a judge[3]. Generally, the termination of a professional relationship with a judge may result from sentencing a judge for a crime, or imposition on them of a disciplinary penalty in the form of removal from office. Nevertheless, various legal systems have differing approaches to those issues. Basically, sentence for a crime or a disciplinary offence is not equivalent to removal from office as for that purpose an additional decision of a certain body within the judiciary or other powers is needed. Moreover, not every crime or disciplinary offence qualifies for inclusion of the removal from office as one of the sanctions, resulting in the termination of the employment relationship with a judge. To that end, a certain gravity of the illegal act is needed, so

[1] Cf. F. Contini and R. Mohr, „Reconciling Independence and Accountability" in *Judicial Systems, Utrecht Law Review* No 2 (2007): 26-43.

[2] A. Le Sueur, „Developing Mechanisms for Judicial Accountability" in the *UK, Legal Studies, No 1-2* (2004): 73-98; R Cooke, „Empowerment and Accountability: the Quest for Administrative Justice", *Commonwealth Law Bulletin* No 18 (1992): 1326.

[3] Such solutions are also characteristic of other public authorities. For example, in Poland, as a result of the ruling of the State Tribunal, the President of the Republic of Poland may be dismissed from office (Art. 25.3 of the State Tribunal Act).

that further holding of an office by the given judge would breach the interest of the administration of justice[1].

3. If must be noted that judges – as to the principle – are not liable for their acts in the same way other citizens are. They are subject to disciplinary liability. Disciplinary liability is a legal liability related to repression. This means that disciplinary penalties are imposed which are supposed to be an inconvenience to the penalised person[2]. The inconvenience is not a purpose in itself, because disciplinary liability is to serve the proper performance of public duties by the persons subject to such liability[3]. A breach of legal duties which result from the affiliation to a specific professional group is a reason for being liable, particularly if the respective professional group – in accordance with the statutory provisions – is supposed to perform the public tasks assigned to them[4]. The liability also applies to judges[5], who as a professional group administering justice are treated by the legislature of most of the democratic countries in a special manner[6]. The disciplinary liability of judges refers mainly to the impairment of the dignity of their office, or other breach of the binding legal order. Such liability results mainly from the high requirements as to the moral standards to be represented by the judges. With their conduct, judges should not breach the law or impair

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[1] L. W. Abramson, „Judicial Disclosure and Disqualification: The Need for More Guidance", *Justice System Journal* No 3 (2007): 301-308.

[2] P. Skuczyński, *Status etyki prawniczej* [Status of legal ethics], (Warszawa: 2010), 11.

[3] G. Appleby and A. Blackham, „The Shadow of the Court: The Growing Imperative to Reform Ethical Regulation of Former judges", *International & Comparative Law Quarterly* No 3 (2018): 510-511.

[4] S. Dumitrache, „Some Considerations on Disciplinary Liability Overlapping Criminal Liability", *Judicial Tribune* No 2 (2011): 186 et seq.

[5] W. Kozielewicz, *Odpowiedzialność dyscyplinarna sędziów, prokuratorów, adwokatów, radców prawnych i notariuszy [Disciplinary liability of judges, prosecutors, advocates, solicitors and notaries]*, (Warszawa: 2016): 128.

[6] U. Hochschild, „Müssen Richter mit persönlichen Konsequenzen rechnen? [Do judges have to reckon with personal consequences?]", *Neue Richter Vereinigung Info* No 2 (2012): s. 18-20; M. Gleeson, „Judging the Judges", *Australian Law Journal* No 53 (1979): 330.

the public trust in the judicial authorities (Article 1 of the *Global Code of Ethics for Judges*)[1]. Public trust in the judicial authorities as well as the moral respect for and integrity of the administration of justice is – as it seems – the matter of the highest importance in a modern democratic society (see the preamble to the *Bangalore Principles of Judicial Conduct*)[2].

In the present times, the issues of the disciplinary liability of judges have already gained a certain tradition and are regulated by legal acts, which is related to the principle of irremovability of judges recognised in democratic states on the constitutional level. As an example, in France the issue is regulated by the Act on the Status of Judges of 1958, in Germany – the Act on Judges of 1972, in the USA – the *Judicial Conduct and Disability Act* of 1980, in Australia – the *Judicial Complaints Act* of 2012, in Hungary – the Act No. CLXII of 2011 on the Status and Remuneration of Judges. In Poland the basis for liability is the Act – the Law of Organisation of Common Courts of 2001, in reference to the judges of common courts, provincial administrative courts and military courts, the Act on the Supreme Court, in reference to the judges of the Supreme Court and the Supreme Administrative Court, and in the Act on the Status of the Constitutional Court Judges, in reference to the judges of the Constitutional Court. The Polish law does not provide for disciplinary liability in reference to the judges of the Constitutional Court. The other judges, including the retired ones, are subject to disciplinary liability for their offences[3]. Also important in that regard are the *soft law* acts, which make precise the provisions of the acts[4] if their legal nature is not explicit.

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[1] E. Handsley, „Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power", *Sydney Law Review* No 20 (1998): 183 et seq.

[2] G. Appleby and S. Le Mire, „Judicial Conduct: Crafting a System that Enhances Institutional Integrity", *Melbourne University Law Review* No 38 (2014): 41 et seq.

[3] Cf. J. R. Kubiak and J. Kubiak, „Odpowiedzialność dyscyplinarna sędziów [Disciplinary liability of judges]", *Przegląd Sądowy* No 4 (1994): 67 et seq.

[4] See also *G.* Weeks, *Soft Law and Public Authorities. Remedies and Reform* (Oxford-Portland (OR): 2016), 97.

4. The consequences of disciplinary offences differ in the perception of the respective legislators. In the German law, there are for example the provisions of § 24 of the German Act on Judges, reading that the professional relationship with a judge expires as a consequence of them being sentenced to imprisonment of at least one year for a wilful offence, sentenced to imprisonment for a wilful offence related, as an example, to high treason, threat to the democratic constitutional state, espionage, or threat to external security, depriving of the right to act in public functions, or loss of fundamental rights in accordance with Article 18 of the German Constitution (the solution provides that anyone who abuses the freedom of expression, and specifically the freedom of press [Article 5.1], freedom to teach [Article 5.3], freedom of assembly [Article 8], freedom of association [Article 9], the secrecy of correspondence by post and telecommunication [Article 10], right to property [Article 14] or right to asylum [Article 16a] for fighting against the free democratic order, loses the listed fundamental rights. The loss of such rights and the scope of the loss are adjudicated by the Federal Constitutional Tribunal)[1]. The German law also provides for a disciplinary penalty in the form of removal from office (§ 64.2 of the German Act on Judges).

On the other hand, the French law provides that any breach by a judge of their duties against the state, honour or dignity of the profession is a disciplinary offence (Article 43 of the Act on the Status of a Judge of 1958), whereas one of the sanctions is the removal from office (Article 45.2 of the Act on the Status of a Judge of 1958). The French law also provides for a sanction in the form of allowing resignation from the function and termination of the fulfilment of duties, if a judge is not entitled to retirement (Article 45.6 of the Act on the Status of a Judge of 1958). Basically, sanctions may not be merged, although the removal from office may be accompanied by a ban on holding a judicial office in

[1] A. Höland and N. Zeibig, „Fairness bei Kündigungen des Arbeitsverhältnisses durch Arbeitgeber [Fairness in the event of termination of the employment relationship by the employer]“, *WSI-Mittelungen* No 5 (2007): 249 et seq.

the future, for the period of the subsequent five years (Article 46 of the Act on the Status of a Judge of 1958)[1].

The American law provides for the *impeachment* procedure with regard to judges, among other things. The judges of both the Supreme Court and the lower instance courts remain in their office as long as their behaviour is irreproachable. The American constitution provides that charges may be brought against a judge, for example, for treason, bribery or other high crimes and misdemeanours (Article II.4 of the Constitution of the United States of America). The constitution does not, however, include any interpretation what should be understood by the terms used in the determination of the *impeachment* basis. The only exception is Article III.3 of the Constitution, reading that treason against the United States may only be in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court[2]. The penalty may take the form of removal from office.

Similar solutions have also been applied by the Hungarian legislator. Conviction of a judge for a crime, failure to take an oath, decision of a disciplinary court on removal from the profession, irregularities in preparing declarations of financial interests, or failure to undergo medical examination confirming further capability to hold an office by a judge, are only some of the reasons for removal from the

[1] Cf. J. Joly-Hurard, „La responsabilité civile, pénale et disciplinaire des magistrats [Civil, criminal and disciplinary liability of judges]", *Revue internationale de droit compare* No 2 (2006): 439-475.

[2] J. Jaskiernia, „Zagadnienie podstaw do wszczęcia procedury impeachment przeciwko urzędnikom federalnym w prawie i praktyce ustrojowej Stanów Zjednoczonych [The issue of the grounds for initiating the impeachment procedure against federal officials in the law and political practice of the United States]", *Ruch Prawniczy Ekonomiczny i Socjologiczny* No 4 (1975): 119-135; J. E. Pfander, „Removing Federal Judges", *University of Chicago Law Review* No 74 (2007): s. 1227 et seq.

office, in accordance with the provisions of the Act of 2011 on the Status and Remuneration of Judge (Article 90)[1].

Also the Polish law provides for the mechanism of removal of a judge from their office. Pursuant to Article 180.2 of the Constitution of the Republic of Poland, removal of a judge from office, suspension in holding the office, transfer to another seat or to another position against their will, may only take place by way of a court decision and solely in the cases determined in an act of law. Whereas, the acts of law determine the detailed principles of removing from office. The Law of Organisation of Common Courts of 2001 provides in the contents of Article 68.2 that a valid judgement of a disciplinary court providing for removal of a judge from their office, and a valid adjudication by a court of a punitive measure in the form of deprivation of public rights or a ban on holding judicial positions, results by law in a loss of office and position by a judge, and the employment relationship with the judge expires at the moment the judgement or adjudication come into force. Removal from office is one of the disciplinary penalties (Article 109.1.5 of the Law of Organisation of Common Courts of 2001). A judge is informed about the termination of the employment relationship by the Minister of Justice (Article 72 Law of Organisation of Common Courts of 2001)[2]. Such penalty once being imposed, results in the lack of possibility of re-appointment of the penalised person to holding a judicial office (Article 109.4 of the Law of Organisation of Common Courts of 2001)[3]. The situation is similar as regards the removal from office of the Supreme Court judges, as the Act on the Supreme Court provides for such a

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[1] Zob. S. Christophersen Haugen, „The Hungarian Judiciary: A Guardian in Need of Rescuing?“, *A study of judicial independence in Hungary since the transition to democracy in 1989* (Bergen: 2014): 73 et seq.

[2] T. Ereciński and J. Gudowski and J. Iwulski, [in:] *Prawo o ustroju sądów powszechnych. Ustawa o Krajowej Radzie Sądownictwa. Komentarz [Law on the system of common courts. Act on the National Council of the Judiciary. Comments]*, (Warszawa: J. Gudowski, 2009), 248 et seq.

[3] I. Hayduk-Hawrylak and B. Kołecki [in:] I. Hayduk-Hawrylak and B. Kołecki and A. Wlekińska, *Prawo o ustroju sądów powszechnych. Komentarz [Law on the system of common courts. Comments]*, (Warszawa: 2017), 299.

disciplinary penalty (Article 75.1.5 of the Act on the Supreme Court). Further, the Law of Organisation of Military Courts provides for a removal from office as a disciplinary penalty and, additionally, adjudicating the penalty of removal from office, the disciplinary courts may also apply to the competent authority for deprivation of the penalised person of the officer's rank (Article 39.2 of the Law of Organisation of Military Courts). As regards the Constitutional Court judges, removing them from the office and deprivation of the status of a judge during the term take place as a result of sentencing the Court judge with a valid court judgement for a wilful offence prosecuted by public indictment, or wilful fiscal offences, or a valid disciplinary decision on removal of the Court judge from their office (Article 18.1.3–4 of the Act on the Status of the Constitutional Tribunal Judges). Similarly, though separately, regulated is the removal from office of a retired judge, which – in accordance with Article 36.1.2–3 of the Act – takes place as a result of sentencing a retired judge of the Court with a valid court judgement for a wilful offence prosecuted by public indictment, or wilful fiscal offences, or a valid disciplinary decision on depriving the retired judge of the Court of their status. In both cases, the loss of the status is adjudicated by the General Assembly by way of a resolution (Articles 18.2.2 and 36.2 of the Act on the Status of the Constitutional Tribunal Judges).

As a supplement within the Polish law there must be mentioned the recently passed provisions of Article 121a of the Law of Higher Education and Science. Section 4 of the article reads that an employment contract of an academic teacher being a judge of the Constitutional Court, the Supreme Court or the Supreme Administrative Court who lost the office of a judge or lost the right to retirement expires, except for the situation of resigning from the office of a judge or the right to retirement. This means that apart from the sanction of removal from office as a result of a crime or disciplinary offence, the legislator has also provided an additional sanction for the professional group in the form of expiry of the employment relationship in higher education. The solution raises serious doubts, particularly because the reasons for removal of a judge from their office must not be identical as the reasons for which the termination of an

employment relationship with an academic teacher would be justified. It is not, as it might be conceived, a proportionate measure, and might be perceived as non-compliance with the standard of a democratic state of law expressed in Article 2 of the Constitution, particularly if the provision is to be understood such that each removal from office will automatically lead to the expiry of the employment relationship of an academic teacher. The *ratio legis* of such solution is not understandable. The introduction to the act of such a solution, which – as it may be assumed – is to contribute to the protection of the autonomy and independence of a judge who additionally hold a position in higher education (Article 121a.1–2 of the Law of Higher Education and Science), becomes at the same time a mechanism of getting rid of academic teachers in relation to their removal from the office as judges. Not every reason of removal from office must justify the removal from a post in higher education. If the removal from office occurs, for example, due to the loss of the Polish citizenship by a judge, there would be no reason for which the employment relationship of that person in higher education would have to expire automatically. After all, employment of a foreigner in the higher education system is allowed.

There are also other reasons for the termination of an employment relationship with a judge. Highly interesting might be such legal regulations which forbid judges to undertake specific types of employment. For example, such solution is provided in the French law, determining that former judges cannot act as attorneys at law, notaries public or court enforcement officers in the area of the jurisdiction of the court where they used to hold the office for the period of at least 5 years (Article 9.1 of the Act on the Status of a Judge of 1958). There are some legal systems where removal from office is also related to the matter of citizenship of a given judge. So, there are solutions, in accordance with which the professional relationship of a judge expires on the date of their loss of citizenship of the respective country, for example Article 68.3 of

the Law of Organisation of Common Courts of 2001[1], or the provisions of § 21.1.1 of the German Act on Judges.

Generally – in accordance with the respective domestic regulations – the judges who are no longer in active service, do not stop being judges. The only difference is that they have an inactive status. This means that remaining among the judiciary, the retired judges must also subordinate themselves to the principles of the judiciary powers. One of the manifestations of the status is the subjection of judges to disciplinary liability.

5. The disciplinary liability of judges who have retired and are no longer active is based on the assumption that they are still remaining in service, only the nature of the service has changed as a result of the retirement. A retired judge must still abide by the rules applicable to their professional group. They must remain impeccable[2], otherwise their negative conduct could impair the good name of the administration of justice and the interest of the judicial service[3]. It is inconceivable that judges, also the retired ones, grossly breach the law by way of their conduct or commit ethical offences. Particularly the latter context – the ethics – seems to support the need of applying very high moral requirements to retired judges. After all, senior judges should be the persons from whom we may expect the most, as they are supposed to be models for the younger generations[4].

The catalogue of disciplinary actions applicable to retired judges is not basically different from the catalogue applicable to the active

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[1] I. Hayduk-Hawrylak and B. Kołecki, *Law on the system of common courts. Comments*, 168-169.

[2] M. Laskowski, „Ustawowe pojęcie „nieskazitelności charakteru" [Statutory concept of "impeccable character"]", *Prokuratura i Prawo* No 6 (2008): 53.

[3] A. Korzeniowska-Lasota, „Odpowiedzialność dyscyplinarna sędziego w stanie spoczynku [Disciplinary liability of retired judge]", *Studia Warmińskie* No 49 (2012): 288.

[4] L. Da Ros, „Judges in the Formation of the Nation-State: Professional Experiences, Academic Background and Geographic Circulation of Members of the Supreme Courts of Brazil and the United States", *Brazilian Political Science Review* No 1: 102-130.

judges. The specific legal provisions refer mainly to the offences in professional service and impairment of the dignity of the office. Legal regulations do not always include separate provisions applicable to the liability of retired judges. In such cases the regulations apply accordingly. To provide a few examples: the provisions of the French act refer to an impairment by a judge of their duties, honour, discretion and dignity of the profession (Article 43 of the French Act on the Status of a Judge)[1]. The German law refers to a beach of professional duties (§§ 38–43 of the German Act on Judges)[2]. In Hungary, the regulations refer to a breach of professional duties, and the lifestyle which impairs the respect for the administration of justice (§ 105 of the Hungarian Act No. CLXII of 2011 on the Status and Remuneration of Judges). In the American law there is a reference to *good behaviour*[3], similarly as in the Australian law, which refers to the conduct of a judge[4]. The Polish law refers to maintaining the dignity of a judge (Article 104.1. of the Law of Organisation of Common Courts, Article 33.2 of the Act on the Status of the Constitutional Court Judges). Such constructed duty to maintain the dignity of a retired judge is a modified duty to avoid anything which could impair the dignity of an active judge. The statutory regulations provide templates in that regard for the respective codes of conducts or good principles, such as the Polish *Collection of Good Ethical Principles for Judges and Associate Judges*, a breach of which may be qualified as a disciplinary offence if it is at the same time assessed with regard to the statutory provisions determining the basis and the scope of the disciplinary liability of judges.

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[1] G. Canivet and J. Joly-Hurard, La responsibilite des juges ici et ailleurs [The responsibility of judges here and elsewhere], *Revue International de Droit Compare* No 4 (2006): 1054 et seq.

[2] O. Kissel and H. Meyer, *Gerichtsverfassungsgesetz. Kommentar [Court Constitution Act. Comment]*, (München: 2015), 178.

[3] B. Hamm and B. S. Esplin, „The Boundaries of "Good Behavior" and Judicial Competence: Exploring Responsibilities and Authority Limitations of Cognitive Specialists in the Regulation of Incapacitated Judges", *The Journal of Law, Medicine & Ethics* No 2 (2018): 514-520.

[4] Appleby and Blackham, *The Shadow of the Court…*: 509 et seq.

Also important for the disciplinary liability is that a retired judge bears disciplinary liability for impairing the dignity of the office at the time they have served actively in the office. Retirement is of no importance with regard to the possibility of a judge being held liable for any acts committed during active service, regardless of the date of disclosing the act or instigating the disciplinary procedure, which is limited basically only with the time-barring of the disciplinary penalty. Such solution in the Polish law results directly from the contents of Article 104.2 of the Law of Organisation of Common Courts, reading that for impairment of the dignity of judge after retirement and impairment of the dignity of the judge office during the service, a retired judge is subject to disciplinary liability.

A disciplinary penalty may be imposed on a judge for an offence of discipline. The catalogue of the penalties must be adjusted to the current professional status of a judge, and refer to the retirement of a judge. Basically, the penalties may differ from the ones imposed on active judges. Indeed, one may not move a retired judge to another position. The catalogue of penalties should be determined in an act of law. The essence of disciplinary liability in the case of judges is that, for example, a permanent termination of the employment relationship against the will of the judge may take place solely based on a disciplinary decision, which is an extremely important guarantee of the independence of judges. Penalties must be specifically determined, and the disciplinary proceedings may not be arbitrary. Otherwise, such solution would interfere with the constitutional principle of independence and irremovability of judges.

Regulations binding in that regard in Poland provide that the following penalties that may be imposed on retired judges for an offence: 1) admonition, 2) reprimand, 3) salary reduction, 4) suspension of salary increase (indexation), 5) deprivation of the right to retirement along with right to salary (Article 104.3 of the Law of Organisation of Common Courts, Article 34.2 of the Act on the Status of the Constitutional Court Judges – the latter, however, does not comprise the suspension of salary indexation in the catalogue of penalties). Adjudication of a respective penalty is vested in the disciplinary court, which should maintain the

balance between the type of offence and the type of penalty. The scope of penalty depends, of course, on many aspects of the given disciplinary case. It should mainly be related to the gravity of offence subject to disciplinary proceedings – lower in the event of a culpable but minor omission in professional activities and higher in the event of the most serious offence, namely committing a punishable illegal act. Worth mentioning is the fact that the penalty of depriving a judge of the right to retirement, which is equivalent to removing a judge from their office, is practically applied to a disciplinary act of a judge which bears the attributes of a wilful offence. Such offence not only disqualifies a judge, from whom an impeccable character is required, but also undermines the trust of the citizens in the administration of justice.

6. A specific thing in the disciplinary liability of judges, including retired judges, is that disciplinary courts for judges operate within the national judiciary structures. In the current state of affairs in Poland, an important role in that regard has been entrusted to the Disciplinary Chamber operating at the Supreme court, which handles the disciplinary cases of the judges of the Supreme Court, the cases resulting from the appeals against the judgements of the disciplinary courts of first instance (and these would be the disciplinary courts at the courts of appeal for the common court judges), or cases related to disciplinary acts which bear the attributes of wilful offences prosecuted by public indictment, or wilful fiscal offences, or cases in which the Supreme Court applies for consideration of a disciplinary matter indicating the offence (Article 110.1 of the Law of Organisation of Common Courts of 2001). It must be added that for military court judges the disciplinary court of first instance would be the disciplinary court at the district military court (Article 39a.1.1 of the Law of Organisation of Military Courts). As regards the administrative court judges, the disciplinary court of both instances (in different membership) is the Supreme Administrative Court (Article 48.1 of the Law of Organisation of Administrative Courts). On the other hand, a Constitutional Court judge is liable before the same Court (Article 34.1 of the Act on the Status of the Constitutional Court Judges).

It must also be added that a retired judge may be subject to criminal liability. If an act bears the attributes of an offence, the disciplinary court handles the case *ex officio* with regard to the permit for subjecting a judge to criminal liability. Moreover, the court may issue a decision allowing that a judge is subject to criminal liability, which is a consequence of the judicial immunity (Article 80.1 of the Law of Organisation of Common Courts of 2001)[1]. In that regard, puzzling is the provision of Article 105.1 of the Law of Organisation of Common Courts, which in non-regulated matters does not include a reference to the legal regulations on the immunity of active judges, which may be interpreted as the absence of immunity of retired judges. That would be an unadvisable interpretation, as retired judges are subject to all of the regulations applicable to active judges, which may be applied to the status of a retired judge, including the standards regulating the immunity of judges. The respective duty in that regard results for the legislators from the provisions of the Constitution, reading that a judge may not be subjected to penal liability or imprisoned without a prior consent of the court specified in the act. A judge may not be detained or arrested, except when caught in the act of committing an offence, if the detainment is essential for ensuring the proper course of proceedings. The president of the court having territorial jurisdiction is immediately notified about the detainment, and they may order immediate release of the detained judge (Article 181 of the Constitution)[2]. Undoubtedly, the immunity must also apply after the judge retires from their office. As it has been indicated in the doctrine, that is to protect a judge active in issuing judgements against the anxiety related to the possibility of being harassed in the future with charges outside of the control of a disciplinary court that could verify the legitimacy of the charges. A broad understanding of immunity as regards the time-span, is to prevent the so called chilling

[1] I. Hayduk-Hawrylak and B. Kołecki [in:] I. Hayduk-Hawrylak and B. Kołecki and A. Wlekińska, *Prawo o ustroju sądów powszechnych. Komentarz [Law on the system of common courts. Comments]*, (Warszawa: 2015), 196.

[2] B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz [Constitution of the Republic of Poland. Comments]*, (Warszawa: 2009), 805.

effect, i.e. the building of anxiety in a judge which could prevent them from issuing judgement in compliance with the methods of conduct of judges in a state of law. The very risk of being held liable in the future, without verification of charges by a disciplinary court, may result in such an effect[1]. So the structure of the legal system in which it clearly results from the contents of the legal regulations that a retired judged avails of the immunity must be supported. The regulations must provide that a retired judge may not be detained or subjected to criminal liability without the permit of a competent disciplinary court. This also refers to the judges of the Supreme Court, as the immunity issue has been regulated in a similar manner in the Law of Organisation of Common Courts of 2001 and in Article 55 of the Act on the Supreme Court. It seems, however, essential that the Law of Organisation of Common Courts of 2001 and the Act on the Supreme Court include the same solution as may be found in the provisions of the Act on the Status of the Constitutional Tribunal Judges (Article 37), such that there are no doubts in that regard.

7. In the light of the above, it must be emphasised that the disciplinary liability of a judge may result in their loss of office, along with all of the privileges related thereto. The cases of removing judges from their offices are often related to the offences committed by a judge within the service and outside of it. The solutions are based on a paradigm, in accordance with which a judge holding their office must possess specific competencies and predispositions, also of moral nature[2]. A special organisational role of judges in the administration of justice and objective disputes resolution justifies introduction of some solutions in the respective legal systems which differentiate the legal status of judges from that of the regular citizens, including also other legal

[1] Por. K. Szczucki, [in:] Konstytucja RP, t. 2, *Komentarz [Constitution of the Republic of Poland, vol. 2, Comments]*, eds. M. Safjan, L. Bosek (Warszawa: 2016), art. 181, §. 13, Legalis.

[2] J. N. Barr and T. E. Willging, „Decentralized Self-Regulation, Accountability, and Judical Independence Under the Federal Judicial Conduct and Disability Act of 1980“, *University of Pennsylvania Law Review* No 1423 (1993)

professions. The special solutions include the means of holding judges liable[1]. Nevertheless, this does not exempt judges from the duty to abide by the legal order, and what is more – in many cases – the principles of conduct are stricter by way of establishing certain legal standards which must be complied with by a judge holding an office[2].

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[1] Cf. F. Contini and R. Mohr, „Reconciling Independence and Accountability in Judicial Systems", *Utrecht Law Review* No 2 (2007): 26-43.

[2] A. Le Sueur, „Developing Mechanisms for Judicial Accountability in the UK", *Legal Studies* No 1-2 (2004): 73-98; R Cooke, „Empowerment and Accountability: the Quest for Administrative Justice", *Commonwealth Law Bulletin* No 18 (1992): 1326.

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No.1 (20), Year XVIII, 2019, pp. 29-38

THE ARTIFICIAL INTELLIGENCE AND LAW: A BRIEF INTRODUCTION

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Abstract:

Today the digital technologies speak with the strongest voice possible, being impossible to resist to its strength: informatics is present on mobile phones, on smartphones, on computers and laptops. In fact, today we have more than 4 billion people with internet access, meaning that Internet and its possibilities are part of daily life.

In this regard, we must remember – from history – that a "daily-life technology" becomes not only a social and economic engine, but a legal one too. In today's world internet and its technologies are part of legal system. Because the Artificial Intelligence is the supreme form of Internet, we need to make some analyses about the consequence of this technology on legal practices and legislations.

Key words: *Internet; Artificial intelligence; Law; Transformations; Adaptation; New Paradigm.*

INTRODUCTION

Today the digital technologies speak with the strongest voice possible, being impossible to resist to its strength: informatics is present on mobile phones, on smartphones, on computers and laptops. In fact, today we have more than 4.38 billion people with internet access (from a

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world population of 7.7 billion)[1], meaning that Internet and its possibilities are part of daily life (56% of world population). Statistics underline that the main economic forces – as continent – have 89% of Internet connections (North America) and 87% (Europe): leading on digital technologies means a strong advance, impossible to be covered by region in the next decade (Asia has 51%, Africa is just on 37%).

In this regard, we must remember – from history – that a "daily-life technology" becomes not only a social and economic engine, but a legal one too. In today's world internet and its technologies are part of legal system: court cases are on internet; parliamentary meetings are online; Facebook is an online platform for strong cases and the posts on this site have legal consequences, etc.

In such development comes the Artificial Intelligence, being the supreme form of Internet action inside – and with – the human world. Despite the fact not everything is understood on this new form of intelligence, it exists and it influence our lives: because of that we need to examine it more.

1**.** We are all surrounded by modern interconnected devices. Those devices have access to the entire world, and they are as small as your palm. Just a few centuries ago, the ability to talk to someone thousands of miles away or produce a clear image of China while you are living in the United States was considered to be witchcraft. It is almost magical for people back then to think that it is possible for a group of people to talk face-to-face without being physically together. Now, these superpowers are taken for granted. Not many people can appreciate such wonders these technologies have brought to our lives. Technological advancement has brought us very far indeed. We made things a lot easier for us, for we are both social and lazy creatures[2].

This description underline in fact the dimension of human advance in last century: from a telephone operated from a manual center

[1] https://www.internetworldstats.com/stats.htm, consulted on 26 of June 2019.

[2] Sachin Ramar, *Artificial Intelligence. How it changes the future* (Independent Publishing: 2019), 2.

to a digital form of message and ideas. In fact, the message of science reached today every house and for individual progress any person can use the main humanity's library: the Internet[1]. Today is possible to have access to any scientific idea from every country, being just a matter of cost if you will implement the new/best ideas described in online texts (articles, books, power-point presentation, etc.).

Such big library forced states, universities and tech companies to increase the researches on computer sciences, robotics and to develop a new kind of technology named Artificial Intelligence.

What is Artificial intelligence? Briefly, this form of intelligence – human being are intelligent too – has some characteristics similar to human intelligence such as planning, problem-solving, knowledge representation, motion, learning, and many other things. There are two main types of Artificial Intelligence (AI[2]): narrow AI, and general AI.

Narrow AI is found in computers. These AIs learn and are taught to how to carry out specific tasks without being programmed explicitly how to do so. A perfect example is the vision-recognition systems in self-driving cars or the AIs that works behind the curtain that delivers advertisement on websites that are relevant to viewers based on their search history and internet activities. These AIs are called narrow AI because they can only learn or taught how to do a specific task. Narrow AIs can do many things such as interpreting video feeds from surveillance drones or mundane tasks such as organizing personal and business documents. They are capable of responding to customer's questions and coordinating with other AIs to book a hotel room at the right price and location. They have also been used in advanced

[1] We create daily 2.5 quintillion bytes of data on Internet, https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/, consulted on 26 of June 2019.

[2] Common shorting of the concept; we'll use it alternatively.

applications such as spotting potential cancer tumors in X-rays, detect wear and tear in elevators or flagging inappropriate contents online[1].

On the other hand, general AI is an entirely different entity. It has the same adaptable intelligence found in humans, unlike narrow AI that can only learn to do one thing. This flexibility allows general AIs to build spreadsheets, give you a haircut, and drive without crashing into people. This is the sort of AIs displayed in Terminator the movie. So far, though, it does not exist yet and AI experts are still debating whether it will ever be a reality[2].

In some works specialists describe a third form, ASI – Artificial Super-Intelligence, an intellect that is much smarter than the best human brain in practically every field, including scientific creativity, general wisdom and social skills; the scientists are not agree on the time where this form will be totally available.

2. However, the emergence and proliferation of these new technologies has not occurred within the bounds of traditional organizational, ethical and regulatory systems. We have reached an inflection point, where we need to pursue new business models and normative frameworks to underpin these fast-developing technologies[3].

3. Because the new digital technologies and especially Artificial Intelligence are emerging out by leaps and bound and contributing in the automation of processes at industrial and corporate levels, some argue that the state of employment is at risk; however, others argue that it will bring innovation in products and services and hence new possibilities of employment. Unemployment means labour law and economics; for our text the first dimension of transformation will be relevant.

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[1] Cédric Beaulac and Fabrice Larribe, *Narrow Artificial Intelligence with Machine Learning for Real-Time Estimation of a Mobile Agent's Location Using Hidden Markov Models*, International Journal of Computer Games Technology, Volume 2017, 58.

[2] Sachin Ramar, *Artificial Intelligence. How it changes the future* (Independent Publishing: 2019), 3.

[3] Marcelo Corrales, Mark Fenwick, Nicolaus Forgo, *Robotics, AI and the Future of Law* (Springer Singapore: 2018), 14.

We must note that the transformations brought by Internet and digital technologies are considered as a new industrial revolution – the fourth one. The fourth industrial revolution involves not only fundamental technical and economic changes; the role of humans within the world of work is also subject to constant change.

All over the world, employee representatives have realized that new challenges are in store for employees from all professional and social classes because of robotics and the computerization of the workplace[1].

Some specialists consider that trade unions will pay particular attention that no "lost generation" is left behind and that there are no mass dismissals caused by the introduction of AI; unions will advocate for further training, advanced training and retraining of employees. Trade unions remain the main player to fight for employees' rights (e.g. avoid dismissals, more training to achieve digital literacy, better working conditions), and they will expand their constituency by also representing the increasing number of freelancers in the Gig Economy. Social security for freelancers, especially low-payed crowdworkers, will be a big problem. Finally, the lawmakers will have to introduce new forms of employee representation structures to avoid their slow decline caused by decreased trade union membership and fewer employees in a company, so the required thresholds can no longer be reached[2].

4. Connected with labour law is financial law, mostly its part of taxation. Some specialists considers that is necessary to create a new tax on robots.

The idea to impose a tax on robots has been developed in several countries such as the US, Switzerland and France. ... The main function

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[1] Emilie Ducorps-Prouvost, *Labor law and the challenges of Artificial Intelligence*, https://www.soulier-avocats.com/en/labor-law-and-the-challenges-of-artificial-intelligence-2nd-part-of-a-trilogy, consulted on 26 of June 2019.

[2] Gerlind Wisskirchen, *How Artificial Intelligence impacts labour and management*, Seminar in Mainz, 25 of May 2018, p. 7, https://www.cec-managers.org/wp-content/uploads/2018/06/Script-keynote-speech-Wisskirchen-AI.pdf, consulted on 26 of June 2019.

of a tax on robots would probably be of a budgetary nature. Bearing in mind that many states levy taxes on employees' wages and therefore anticipate a strong decrease of tax revenue connected to this specific base, taxing robots would help compensate for a massive loss of public revenue[1].

Although a "robot tax" still lacks accurate technical content, there are already many issues related to the design of such a tax. The first one is the identification of the person who should be liable to pay this tax: while the owner (either legal or economic) of the robot seems to be the obvious taxpayer, some academics go as far as to wonder whether robots could (or should) be considered as autonomous tax subjects. Would this tax be deductible from the base of other taxes? .... Many issues will also arise in the international arena. It seems clear that isolated initiatives will create distortions in international tax competition. ... From a technical perspective, the question will also arise whether this tax should be characterised as "income tax" to the extent that the use of robots would help employers save remuneration costs. This theoretical issue is not without practical implications: if this were to be the case, then one might argue that treaties on the elimination of double taxation should be applicable where several countries intend to levy concurrent taxes on the same robots. The question whether the notional income which would be subject to tax is "income from employment" or "other income" under existing tax treaties is also a tricky one… and the answer may well dramatically affect the allocation of taxing rights between states[2].

5. Another important issue is related to morality, wherein the concern is related to the ethics of intelligent machines which bring up the

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[1] Jan Schwindling, Gerlind Wisskirchen, Daniel Gutmann, *Artificial intelligence and robotics: from a labour and tax perspective*, https://cms.law/en/INT/Publication/Artificial-Intelligence-and-Robotics-From-a-Labour-and-Tax-Perspective**,** consulted on 26 of June 2019.

[2] Jan Schwindling, Gerlind Wisskirchen, Daniel Gutmann, *Artificial intelligence and robotics: from a labour and tax perspective*, https://cms.law/en/INT/Publication/Artificial-Intelligence-and-Robotics-From-a-Labour-and-Tax-Perspective**,** consulted on 26 of June 2019.

issue of safety. A lot of major enterprises (like Google, Facebook, Amazon, IBM, Baidu etc.) are in the race of developing intelligent machines but how can it be ensured that they will not be used for warfare purposes. Ethical concerns about robotic technology have garnered much attention, especially in the context of how it may be used for military engagements. Understandably, there is much trepidation about whether, and in which circumstances, robots should be used in war[1].

Morality on Artificial Intelligence means an ethics of machines, combined with an ethics of human users.

Machine Ethics is one of the most important issues considered when dealing with the future of Artificial Intelligence. In the literature, another concept – Ethical Artificial Intelligence – is also used instead of Machine Ethics. As general, Machine Ethics is focused on research works trying to find appropriate answers for the problem scope: the consequences of the behaviours, which are shown by machines to humans and other machines. In detail, research works done in this scope are based on the idea of defining ethical rules to prevent from any possible dangerous – harmful results (especially for the humankind) caused by intelligent systems[2].

Speaking about machine ethics we must also remember the Isaac Asimov law's on robotics:

First Law: A robot may not injure a human being or, through inaction, allow a human being to come to harm.

Second Law: A robot must obey orders given it by human beings, except when such orders conflict with the First Law.

Third Law: A robot must protect its own existence as long as such protection does not conflict with the First or Second Law.

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[1] Jason Borenstein and Ronald Arkin, Robots, Ethics, and Intimacy: *The Need for Scientific Research*, in Don Berkich, Matteo Vicenzo d'Alfonso (editors), *On the Cognitive, Ethical, and Scientific Dimensions of Artificial Intelligence* (Springer Switzeland: 2019), 299.

[2] Utku Kose, Ibrahim Arda Cankaya, Tuncay Yigit, *Ethics and Safety in the Future of Artificial Intelligence: Remarkable Issues*, https://www.researchgate.net/publication/326252493, 3, consulted on 26 of June 2019.

However well these laws fit into Asimov's works, they are unlikely to suffice in the event that we have fully capable AI machines in the way he imagined them in his opus. AI has a great problem today: it doesn't appear on the same time and at the same level in every country; meaning that the main technological powers will be able to use it in their political purposes, influencing not only the results on elections, but the legislation after created.

The main problem for national legal systems will be not to regulate the AI use inside their own borders, but to create an effective legal framework able to defend state and citizens against Malicious Use of Artificial Intelligence from other less friendly states.

It is difficult to not see that the human brain is not adapt to the Internet information explosion of the last decade; can we presume it will be more adapt to the use of Artificial Intelligence in economy, politics, education, art, etc? We can consider that the future of humanity will be described by the proportion between the ethics and the Artificial Intelligence daily use; if machines will lead the social framework (without an effective control) the humans will be dominated by the AGI and ASI.

In any case, the new proportion between AI and ethics must be express by laws – in fact, by new chapter in national Constitutions. Only that level of regulation will be able to give a correct impulse to this new relation; a secondary level of legislation will not respond to desiderate and will be rapidly overtaken by the use of the Artificial Intelligence.

CONCLUSION

Today's information revolution should be considered as a set of constraints and possibilities that transform or reshape the environment of people's interaction and their social-political-economic institutions.

Whereas, over the past centuries, human societies have been related to information and communication technologies (ICT), but mainly dependent on technologies that revolve around energy and basic resources, current societies are increasingly dependent on ICTs and furthermore, on information and data as a vital resource. This

dependency triggers some basic novelties in terms of complexity and legal enforcement, which impact pillars of the law and democratic processes by reshaping the balance between resolution and representation, as well as the right of the individuals to have a say in the decisions affecting them[1].

Today the national legal systems are in the middle of changes; because they are in the first line of Artificial intelligence transformation – no matter the people effective opposition will be, the new realities will change the society and – as consequence – the laws. If labour and tax law will be influenced earlier, the constitutional dimension will need to regulate at the end the new complex social framework, respecting and promoting ethics to the higher level reached on history.

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LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (20), Year XVIII, 2019, pp. 39-50

THE MINORITY CONCEPT IN INTERNATIONAL AND NATIONAL REGULATIONS

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Abstract

Minority is one of the concepts whose crystallization and evolution has given rise to several challenges, because, viewed from a historical perspective, it has only been treated in a way to be identified and treated so that the solutions applied to it correspond to the interests of the majority .

Keywords: *identity; minority; ethnicity; language; religion.*

INTRODUCTION

The definition of the minority concept has been the subject of doctrinal concerns, determined, among other things, by the evolution of

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the regulations in the field, since the minority groups to whom the provisions for which they are intended are known[1].

If, in the first period, international documents explicitly targeted certain ethnic or religious minorities, the regulations, as they became general, determined the necessity of adopting a definition of the concept of minority, and as a result of the extension of both the preoccupations, as well as regulations, the pressure exerted increased in order to undertake steps to ensure a precise and consistent understanding of the concept[2].

Approaches to the definition of the minority concept and the way in which those directly involved relate to it were different, starting from the opinions that such a definition would not be necessary, by formulating opinions that expressed doubts about its necessity or utility, and reaching those that were delimiting the content of the minority concept by using the adjectives: national, ethnic, linguistic or religious that accompanied it[3] or that it should have been viewed from the point of view of common sense[4].

The tendency to oppose the idea of defining the minority concept was promoted by those states that did not agree with the idea of granting minority rights on their territory, fearing the legal and political consequences which could possibly have resulted in a clear definition[5]. Thus, the acceptance of the provisions of some international documents could be avoided and they could enjoy the freedom that the unilateral interpretation of the concept would have given them.

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[1] I. Diaconu, *Minorities in contemporary international law* (C. H. Beck: Bucharest, 2009), 94.

[2] Diaconu, *Minorities in contemporary international law*, 94.

[3] G. Alfredsson, Council of Europe, *Report on Equality and non-discrimination: minority rights* (Strasbourg, 1990), 8.

[4] Diaconu, *Minorities in contemporary international law*, 94.

[5] It is noteworthy that some international documents such as the International Covenant on Civil and Political Rights (Article 27) or some adopted within the CSCE / OSCE condition the application of these regulations to the acceptance of national, ethnic, linguistic, cultural, religious, (hence their recognition).

THE DEFINITION OF THE MINORITY CONCEPT IN INTERNATIONAL REGULATIONS

In the Advisory Opinion of July 31, 1930, regarding the emigration of the Greek-Bulgarian communities based on the conventions concluded at the end of the war between the two countries, the Permanent Court of International Justice ruled that: *"the principle of classification regarding the notion of community within the meaning of articles of the Convention (...) resides in the existence of a community of persons living in a given country or locality which have a race, religion, language and own traditions and are united by the identity of this race, this religion, this language and these traditions in a sense of solidarity, in order to preserve their traditions, to maintain their cult, the cult of providing their children with instruction and education according to the genius of their race, and to help each other"*[1].

In 1950, the UN Subcommittee on the Prevention of Discrimination and the Protection of Minority Rights proposed the following definition: *"the term minority includes only those non-dominant groups of the population who possess and wish to maintain their ethnic, religious or linguistic traditions stable, of the rest of the population. Such minorities must adequately include a sufficient number of people to develop such features. Members of such minorities must be loyal to the state whose citizens are"*[2].

In a study on the rights of persons belonging to minorities, the mentioned subcommittee's rapporteur defined the minority as: *"a numerical group inferior to the rest of the population of a state in a non-dominant position, whose members - citizens of the state - possesses, from the point of ethnically, religiously or linguistically view, different characteristics from those of the rest of the population and which even implicitly exhibit a sense of solidarity in order to preserve their culture, religion or language"*[3].

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[1] Diaconu, *Minorities in contemporary international law*, 96.
[2] Diaconu, *Minorities in contemporary international law*, 96.
[3] Diaconu, *Minorities in contemporary international law*, 96.

Also in the Subcommittee, in 1985, the following definition was proposed: *"a group of citizens of a state which is a numerical minority is in a non-dominant position in that state, having different ethnic, religious or linguistic characteristics from those of the majority of the population and who have the sense of solidarity between them, motivated even implicitly by a collective will of survival and whose purpose is to achieve equality of fact and law with the majority"*[1].

In another report drafted in 1993 on facilitating peaceful and constructive settlement of minority issues, the special rapporteur defined the minority as *"any group of persons residing in a sovereign state, represents less than half of the national society population and whose members have in common features of an ethnic, religious or linguistic nature that distinguish them from the rest of the population"*[2].

Despite the many attempts by the special rapporteurs to impose a definition in the reports of the UN Subcommittee on the Prevention of Discrimination and the Protection of Minority Rights, the Human Rights Commission did not accept any of the proposed definitions on the grounds that they were not subject to adoption by the Member States in known forms, convention or recommendation, to give it legal significance[3].

In a Convention Project on Minorities, presented by the Commission for Democracy through the Law of the Council of Europe in 1993, the concept of minority designated *"a numerical group inferior to the rest of the population of a State whose members have the nationality of that state, religious or linguistic differences other than those of the rest of the population and are animated by the will to preserve their culture, traditions, religion or language"*[4].

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[1] Diaconu, *Minorities in contemporary international law*, 97.
[2] Diaconu, *Minorities in contemporary international law*, 97.
[3] Diaconu, *Minorities in contemporary international law*, 97.
[4] Diaconu, *Minorities in contemporary international law*, 97.

Also in 1993, in a document of the Council of Europe annexed to Recommendation 1201 of the Parliamentary Assembly of the Council[1], the following definition was proposed: *"for the purposes of this Convention, the term national minority designates a group of persons from a state, who: reside in the territory of this state and are state citizens) have long, solid and lasting connections with that state; c) have specific ethnic, cultural, religious or linguistic features; d) they are sufficiently representative, although they are less numerous than the rest of the population of that State or of its region; e) are animated by the will to keep together which constitutes their common identity, especially their culture, traditions, religion and language"*[2].

Neither in the Framework Convention on the Protection of Minorities[3], adopted by the Council of Europe in 1995, was provided a concrete definition of the minority concept, but the conventional text refers to its mother tongue, its own culture and traditions, religion, access to information in its own language as the main defining elements of a minority group, and retains the criterion of self-identification, as it refers in some of its provisions to persons belonging to minorities who traditionally or substantially live in certain areas, which implies the territorial criterion, of residence, not of citizenship[4].

The Advisory Committee and the Committee of Ministers of the European Council agreed that, in the absence of a definition of the national minority concept in the text of the Convention, States-Parties should have the obligation to delimit the scope of application of its provisions and the task of formulating such definitions in national legislation, stipulating that these definitions should not be arbitrary but

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[1] Additional Protocol Project to the European Convention on Human Rights, on persons belonging to national minorities.

[2] Diaconu, *Minorities in contemporary international law*, 98.

[3] It was adopted in Strasbourg on 1 February 1995 and entered into force on 8 February 1998. Romania ratified the Convention by Law no. 33/1995, published in Of. Gazette No. 82 of May 4, 1995.

[4] Diaconu, *Minorities in contemporary international law*, 102.

resonate with the general principles of international law and with the general principles entered in the Convention[1].

In adopting a definition, the most complicated issue is the tendency to exclude from the minority concept, and implicitly from the benefit of the protection provided by international standards, certain ethnic, linguistic or religious groups. As a result, there have been formulated proposals for definitions that exclude foreigners, refugees, stateless persons, immigrants legally residing in a state[2], because under national or international law provisions on these categories of persons they should not benefit from the status of persons belonging to minorities[3].

We consider such an interpretation to be restrictive, since Article 27[4] of the International Covenant on Civil and Political Rights does not refer to citizens, but to persons, which means that it is a fundamental right of human, not of the citizen.

From a comment on Article 27[5] made by the Human Rights Committee, it results that persons wishing to be protected must not necessarily be citizens of that State, thus reiterating the general view of the Covenant, set out in Article 2, in the sense that all rights entered in the Covenant must be exercised by all persons who are in the territory of a state party and are under its jurisdiction, except for the rights expressly granted to citizens, such as political rights.

Consequently, the Committee concludes that states parties do not preserve the exercise of the rights provided for in Article 27 only to those persons of their nationality who, by their specific ethnic, linguistic,

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[1] C. F. Popescu and M-I. Grigore-Rădulescu, *Legal protection of human rights* (Bucharest: Universul Juridic, 2014), 65.

[2] Diaconu, *Minorities in contemporary international law*, 102.

[3] Diaconu, *Minorities in contemporary international law*, 103.

[4] See, in the same sense, Articles 14 and 26 of the same Covenant

[5] According to art. 27 of the International Covenant on Civil and Political Rights: *"In countries where there are ethnic, religious or linguistic minorities, the persons belonging to these minorities can not be deprived of the right to share their own life with the other members of their cultural group, to practice their own religion or to use their own language. "*

cultural and religious characteristics, differ from the rest of the population but also from those who do not have the citizenship of the residence state, especially since the phenomenon of migration[1], which has been manifested in the last decades, has led to the formation of stable and sufficiently large groups, which aim to obtain the citizenship of the state of residence and to integrate socially and economically but retain, ethnic, linguistic, cultural and religious specifics[2].

In the documents adopted at European level within the Council of Europe and the Organization for Security and Co-operation in Europe, the term "national minority" is used in the broad sense to emphasize the importance of the group in question, to distinguish it from groups less important numerically and exclusively folk groups.[3]

Related to the concept of minority[4], an attempt was made at international level to define non-discrimination, understood and on a fundamental principle level.[5]

Starting from the analysis of some international documents adopted within the League of Nations and the United Nations Organization, which predominantly refer to the protection of minority rights and less to the consecration of these minority rights, the opinion was outlined that individuals, not groups, are subject to such protection, this being practically oriented towards the individual minority and not to the minority-group[6].

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[1] Diaconu, *Minorities in contemporary international law*, 103.

[2] Diaconu, *Minorities in contemporary international law*, 109.

[3] A. Demichel, *Minorités* (*Encyclopaedia Universalis*, Vol. XV), 430 – 435; *Encyclopedia of the United Nations and internațional agreements*, (Taylor and Francis, 1985), 515-517.

[4] I. Moroianu Zlătescu, *Multiple Discrimination and Combating It in Exercising the Right to Non-Discrimination and Equal Opportunities in Contemporary Society* (Pro Universitaria, 2014), 33 and the following.

[5] A. Bailleux, *Recherches sur la protection des minorités en droit public interne*, in *L'Etat et les minorités*, Annales de la Faculté de droit du centre universitaire de Toulon et du Var (Tome 1, 1976), 84; A. Fenet, *Citoyenneté et minorités* (Litec, 1995), 82.

[6] A. Bailleux, *Recherches sur la protection des minorités en droit public interne*, in *L'Etat et les minorités*, Annales de la Faculté de droit du centre universitaire de

We believe that in international regulations and in the national law of the states, the consecration and protection of the individual's right to preserve its origin, language, culture, religion contribute to the development of the consecration and protection of the rights of ethnic, linguistic, cultural and religious minorities[1], as the consecration and protection of the rights of the same minorities creates the framework for their exercise by each member of the respective minority.

By the will of the States that create international human rights standards, including in the matter of minorities, individuals become holders of rights and obligations in the international legal order, they may invoke these rights before domestic and international bodies and may have judicial capacity in judicial proceedings, being recognized, including the right of referral, but its possibility of action is regarded as an exception and is subordinated to the will of the state[2].

Harmonization of objectives, under the conditions of full respect of human rights and the principle of non-discrimination, is likely to eliminate conflicts, without prejudicing each other's ethnic, linguistic, cultural or religious characteristics.

Referring to the dimension of the minority phenomenon and returning to what the minority concept would represent, as the great encyclopaedias of the world[3] even demonstrate, minorities are *forms of human aggregation that coagulate around the elements of racial, ethnic, linguistic and religious differentiation of the people who compose them in relation to the rest of the population of a given state*[4], or *"they*

Toulon et du Var, (Tome 1, 1976), 84; A. Fenet, *Citoyenneté et minorités* (Litec, 1995), 82.

[1] M. R. Prisăcariu, *The legal status of national minorities* (Bucharest: C.H. Beck, 2010), 3.

[2] R. Miga-Beşteliu and C. Brumar, *International protection of human rights*, Course notes, 5th Edition (Bucharest: Universul Juridic, 2010), 28.

[3] See, for example, *Nouveau Larousse Encyclopédique*, vol. 2 (Larousse-Bordas, 1998), 1021; Al. Fărcaş, *International human rights law and the issue of national minorities* (Bucharest: Romanian Institute for Human Rights, 2005), 14; I. Diaconu, *Minorities. Status and perspectives* (Bucharest: Romanian Institute for Human Rights, 1996), 9 – 11.

[4] Fărcaş, *International human rights law and the issue of national minorities*, 14.

consider themselves to be different and are considered by others to be separate and different." [1].

COMPARATIVE LAW ISSUES IN THE DEFINITION OF THE MINORITY CONCEPT

In Austria, they are considered to be national minorities *"those groups which are subject to the application of the Law on the respective groups (since 1976) and who live and have their homes traditionally in parts of the territory of the Republic of Austria consisting of Austrian citizens who do not have German mother tongue and have their own ethnic cultures*[2].

In Switzerland, *"national minorities are groups of people outnumbered by the rest of the country population or canton, whose members are Swiss citizens, have long-lasting, strong and enduring relations with Switzerland and are guided by the desire to defend traditions together, religion or their language"*[3], and in Poland the conditions for recognizing membership of a minority are regulated, respectively by*: the groups that are resident in their territory and their members are Polish citizens*[4].

Bulgaria does not limit the minorities through a definition or enumeration, while Hungary defines national minorities as *"nationalities established on the territory of the country at least 100 years ago, citizens who are in minority in terms of number of inhabitants, different from majority by language, culture and traditions, and there is a community spirit that indicates the desire to preserve these characteristics".*

Croatia considers national minorities the groups of Croatian citizens traditionally established on the territory of the state and having religious, ethnic, linguistic and / or cultural characteristics that differentiate them from others, animated by the desire to preserve these

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[1] *Encyclopedia Britannica,* vol.VI (XV-th Edition), 921.
[2] Diaconu, *Minorities in contemporary international law*, 101.
[3] Diaconu, *Minorities in contemporary international law*, 101.
[4] Diaconu, *Minorities in contemporary international law*, 101.

different characteristics. Bosnia and Herzegovina is a multinational state made up of three constituent groups, respectively the Bosnians, Croats and Serbs, while in Macedonia the term minority is replaced by the community.

According to the Lithuanian law, only *"its citizens are part of national minorities"*[1].

In Estonia, *"those Estonian citizens residing in Estonia, maintaining lasting, strong and enduring relations with Estonia, are different from Estonians based on their ethnic, cultural, religious or linguistic characteristics, and are motivated by the concern to maintain together their cultural traditions, religion, or own language, which form the basis of their common identity"*[2] belong to national minorities.

Related to the definition of minorities in Luxembourg, they are perceived as *"a group of people established by many generations on the territory of the duchy, who have Luxembourgish citizenship and have retained distinctive ethnic and linguistic characteristics"*[3].

In Romania, persons belonging to national minorities in addition to the fundamental human rights, provided for in the Romanian Constitution they also enjoy special rights, in order to maintain the identity of the minority group, at least at a cultural, linguistic and religious level[4].

National legislation focused mainly on the development of criteria in the field of non-discrimination, the use of mother tongue in the public sphere and in education, political representation of minorities both at central and local level.

CONCLUSIONS

Based on the analysis of documents adopted by the UN, the Council of Europe and the OSCE on the legal protection of minority

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[1] Diaconu, *Minorities in contemporary international law*, 101.
[2] Diaconu, *Minorities in contemporary international law*, 101.
[3] Diaconu, *Minorities in contemporary international law*, 101.
[4] C. Necula, *Combating discrimination* (Bucharest: Ars-Decendi, 2004), 10.

rights, the unitary approach to this issue, the international norms contained in the Framework Convention on National Minorities, the Universal Declaration regarding the Rights of Persons which are part of national or ethnic, linguistic and religious minorities and the International Covenant on Civil and Political Rights could be noticed, thus forming an integrated system for the protection of minorities.

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LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (20), Year XVIII, 2019, pp. 51-60

THE LIMITS OF THE DEVOLUTIVE EFFECT OF THE APPEAL

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Abstract:

The appeal has a devolutionary character, meaning that, if exercised within the time limit, it causes a new trial on the substance. Based on the devolution effect of the appeal, the appeals court will again judge the trial in substance but with respect to the limits determined by the principle of availability, namely: the limits of the request for appeal (tantum devolutum quantum appelatum) and respectively the limits of the request of the court (tantum devolutum quantum judicatum). The court of appeal will be able to judge only within the limit shown by the appeal request, namely only for the reasons presented in its contents, without further extending the procedural framework to the broader limits, of the request to appeal. Total callback operates if the call is not limited to certain solutions in the disposal of judgement or when it tends to overturn the judgment or if the subject matter of the case is indivisible.

Key words: *The limits of the devolution effect of the appeal*

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The appeal has a devolutionary character, meaning that, if exercised within the term, it causes a new trial on the substance, and all the factual and legal issues that were the subject of debates at the first court, but with observing the express prohibitions provided for by certain rules and respecting the rules for invoking certain irregularities.

As a reform appeal by which judicial control is exercised, the court of appeal will verify the solution appealed from the point of view of soundness, ruling that the factual situation retained by the judgment under appeal is consistent with the evidence administered in the case and has been properly established, as well as from the legal point of view, respectively, if the first court correctly identified, interpreted and applied the norms of material law incident to the factual situation deduced from the judgment, as it was held in question.[1]

Given that the appeal is the right of action through which judicial control over the court decision is pronounced by the first court, the appellant by the appeal develops his criticisms in fact and in law about how the judgment before the first court was conducted or against the judgment given, by the grounds of appeal, setting the limits within which the judgment in the appeal will take place.

According to the provisions of art. 477 para. (1), *the appeal court will proceed to re-evaluate the fund within the limits set, expressly or implicitly, by the appellant, as well as regarding the solutions that are dependent on the part of the judgment that was appealed*. (2) *The refund will operate on the whole case when the appeal is not limited to certain solutions in the disposal of judgement or when it tends to annul the decision or if the object of the dispute is indivisible.*

Insofar as it does not motivate or the motivation of the appeal, it does not include new reasons, means of defense or proofs, the appeal court will rule in substance only on the basis of those invoked in the first court.

On the basis of the devolution effect of the appeal, the appeal court will again judge the trial in substance but with respect to the limits

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[1] Gabriel Boroi, *Noul Cod de procedură civilă, comentariu pe articole, vol. II, ediția a 2-a revizuită și adăugită* (Bucharest: Hamangiu, 2016), 84-85.

determined by the principle of availability [1], namely: the limits of the request for appeal (tantum devolutum quantum appelatum) and respectively the limits of the request for judicial appeal (tantum devolutum quantum judicatum). In other words, the court of appeal will be able to judge only to the extent shown by the request for appeal, namely only for the reasons set out in it, without further extending the procedural framework to the broader limits, of the request for trial (High Court of Cassation and Justice, Commercial Section, Decision No. 769 of February 22, 2011). So what was not contsted by the appeal will enter into the working power provisional court, the court of appeal not calling on them to lean on these issues.[2]

To the extent that it appears from the request for appeal that the appellant refers to the issues judged by the first court, then the court of appeal will judge within the limits of the request for judicial appeal.Total callback operates if the appeal is not limited to certain solutions in the judgement or when it tends to overturn the judgment or if the subject matter of the case is indivisible.

Case Study :

By the appeal against the judgment given by the substantive court, the appellant-defendant criticized the solution of the first court, showing that it did not rule on the fund of the case and called for the judgment under appeal to be set aside.

By this first appeal criticism, the appellant-defendant criticized in all the solution of the substantive court, it was not limited only to certain solutions from the judgement, or considering the indivisible object of the litigation, respectively the action in claiming a land surface and an boarder action, we consider that the court of appeal had to conduct an analysis of the case as a whole, to verify the judgment given by the substantive court, both under the aspect of the matter and under the aspect of legality on all aspects, in this case the return of the appeal operating on the whole cause and not just in the light of the arguments mentioned in the appeal request.

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[1] Ciobanu and Nicoale, *Noul Cod de procedură civilă,* 1314

[2] Andreea Tabacu, *Drept procesual civil* (Bucharest: Universul Juridic, 2013), 338.

We consider that illegally, the appellate court has limited itself to analyzing the judgment under appeal only in the light of the argument regarding the need to take into account the agricultural recession of 1959-1963 and the claim regarding the impossibility of occupying the land by the appellant-defendand because it holds less land and that measurements were made on the land being marked the boundary by stakes.

The ones mentioned in the decision of the court of appeal as grounds of appeal are in fact arguments that the defendant-appellant invoked in the application, this invoking the illegality of the solution pronounced by the substantive court.

According to the provisions of art. 476 para. (1) civil procedure Code, *the appeal exercised in time provokes a new trial on the merits, the court of appeal ruling both in fact and in law*.

According to the provisions of art. 477 para. (1), *the court of appeal will proceed to re-judge the fund within the established limits, expressly or implicitly.* (2) *The refund will operate on the whole case when the appeal is not limited to certain solutions in the judgement or when it tends to annul the decision or if the subject of the dispute is indivisible.*

The aforementioned legal norms establish the devolutionary effect as well as the extensive effect of the appeal.

A first criticism of illegality that we bring to the judgment is that the court of appeal did not analyze first the applicant's ownership of the claimed land, did not analyze whether it has an active procedural quality to claim the disputed land and to calls for the establishment of the boundary line.

In the claim action, a first condition that is required to be analyzed concerns the ownership of the person claiming the occupation of the land that is the subject of the action.

Please note that the court of appeal did not analyze this aspect, it is clear from the judgment under appeal that the acts envisaged by the court were the primary acts of the authors of the parties, respectively the property titles no. 1030 / 11.01.2005 issued on behalf of the author Manea Paulina and the title of property no. 1274 / 11.04.2007 issued on behalf of the author Manea Aurel.

The court of appeal does not make reference and does not consider in the judgment of the contested decision the property documents of the parties, respectively the property act on which the plaintiff-claimant owns the claimed area of land.

Also, another criticism concerns that the court of appeal does not make a comparison of the way in which the parties acquired the right of ownership regarding the overlapping land. The court holds in the reasons of the judgment appealed that *analyzing the property titles of the parties and all their old documents, the expert found that the land overlaps on a portion of 194 m.p., which is currently owned by the defendant.*

We consider that the court is the one that has to analyze the property titles of the parties and the way of acquiring the property right and not the expert, it only identifies, measures, transposes into the draft establishing whether or not there is overlap.

Although the expert appointed to the substantive court concludes that, in fact it is not an occupation, but an overlap of land, it is obvious that the court had to make a comparison of the ways of acquiring the right of ownership with respect to that land, it had to be to determine which of the titles is preferable.

Through the expertise, the expert transposed land areas from the titles of the authors of the parties and not the property documents of the parties.

The court of appeal holds in the reasons of the judgment under appeal that the defendant-appellant was restored the property right for 3 land areas at the Place of the House, totaling an area of 6344 sqm, but this area was not included in the expert report carried out in this case , the report being highlighted only an area of 4653 sqm reconstituted to the author Manea Aurel.

However, he rejected the evidence with the technical expertise requested by the appeal request, on the grounds that no objections were raised, although at the assize of May 29, 2017, it was requested to restore the expertise, although this evidence was also requested by the appeal and reiterated in front of the court.

Also, the property report of the applicant and the defendant were not highlighted and transposed in the expert report.

According to the file decision issued in the file no. 2042/241/2009, which confirms the compromise of the parties expressed by the transaction contract concluded between the succesors of the author Manea Aurel, the lands in the title of property no. 1274 / 11.04.2007 from the point of the Place of the House were assigned both to the appellant-defendant and to another heir, respectively called Bojenete Larisa the area of 639 sqm and the surface of 1691 sqm.

The land transposed by the expert and envisaged by him at the expertise also includes a part of the land to the Bojenete Larisa, land which according to the mentions of the decision consent file mentioned is bordering on the north side with the land of title issued in the name of the plaintiff's author.

Also, part of the land identified by the expert did not belong to the appellant-defendants, since through the sale-purchase contract authenticated under no. 341 / 03.03.2010 by BNP Vasile Stoian, this alienated a land area of 535 sqm cadastral no. 35283, to his son Petruș Marius-Andrei.

Therefore, the work prepared by the expert is not in conformity with the reality, the expert transposing acts other than the property documents of the parties and measuring lands belonging to other persons.

With regard to the second argument made by the appeal application in the sense that the defendant did not occupy the applicant's land, the expert of the case established after the measurements that it is not a land occupation but an overlap, the land in question being included in the title of each part.

Consequently, as long as the plaintiff does not prove ownership of the land on which the matter is subject of litigation, there has been no comparison of the ways in which the parties and their authors have acquired ownership of the land, as long as the court decision is based on an expert report that also refers to lands other than those owned by the parties, and in which the property documents of the parties are not considered, we consider that the decision given by the court of appeal is illegal.

In the reasons of the judgment under appeal, the appellate court notes that both parties actually have smaller areas than those mentioned

in the titles of property, and the disputed area cannot remain in the claimant's property and the defendant's property, having to be assigned only to one of the part.

We consider that the court of appeal did not motivate the solution delivered, the judgment does not include the reasons on which it is based, it does not explain why the applicant is entitled to receive the area of land that is the subject of the dispute as long as there is no occupation of the land by the defendant and it was not held that the plaintiff's title is preferable following the court's analysis. Basically, the appeal court did not make a judgment of the fund, although it was the main criticism formulated by the appeal request.

By the decision of the court of appeal, the appeal was admitted, the decision was quashed and the case was sent for re-examination. One of the members of the trial court, made a separate opinion, noting that the *appeal against the judgment of the first court is motivated, and the devolution effect is limited to the aspects invoked by the appellant regarding the solution given to the action in the claim, but which to the extent they were appreciated as established, it would have extended the devolution effect on the other two applications regarding the grinding and payment of compensation for the lake land use. The judge holds that the court responded to the criticisms made by the appellant, the appellate court being obliged to re-analyze the substance of the case only from the point of view of those invoked by the appellant, and not to proceed ex officio to the total re-examination of the case. In relation to the criticisms formulated by the appellant, it is found that the appeal is charged to the court that it did not analyze the existence of the applicant's property right, that it did not proceed to a comparison of the titles of property issued to their authors under Law no. 18/1991 and of the primary documents of ownership. However, these criticisms were not formulated by the appeal request either expressly or implicitly. As a consequence, in relation to art. 488 para. 2 Code of civil procedure, these aspects cannot be invoked in the appeal, even in the situation in which they could be classified in one of the grounds of cacellation.*

The majority opinion was in the sense that: the criticisms brought by the appellant-defendant to the decision fall within the reasons

provided by art. 488 points 6 and 8 Civil Procedure Code. Thus, as regards the failure to state the reasons on which the judgment is based, the Court finds that, in fact, the solution does not show for which arguments the land in dispute is the property of the applicant and is not the property of the defendant, requiring the latter to respect the ownership of his opponent. As there is no disassociation regarding the preference given to the title issued to the applicant and the removal of the one exhibited by the defendant, it cannot be considered that the court has entered the investigation of the substance of the claim, which, by its essence, implies comparing the titles by proving the ownership quality by the author of the author of the author of the title of the property (probatio diabolica).

The court of appeal rejected the evidence, considering that it must be done in the reconstitution procedure, without establishing that, possibly, one of the parties to the case would not have received, in this procedure, the disputed area in the property thus reconstituted.

Such an assertion is the wrong one, the comparison of the titles when two persons are at the same time possessed by the administrative authorities on the same land, ignoring the precedence of the right of property until the moment of losing this right in favor of the cooperative or state organization, is a misapplication of the material law clauses claiming that, in the case of the claim, in which both parties own a title, the titles of their authors are compared. The lack of such a comparison constitutes an effective investigation of the substance of the case, neither in the first instance nor in the one of appeal, not establishing who was before the co-operative, the owner of the land in question, by administering all the evidence allowed by law. Including the criticism regarding the erroneous establishment of the fact that the part would not have requested the restoration of the expert work, an assertion on which the decision of the appeals court is based, is based on the content of the sitting minutes of May 29, 2017, when the part submitting new documents, admitted by the court as evidence in the file, referring to the agricultural records prior to the cooperative, called for the restoration of the work through the prism of these documents. The failure to formulate objections to the drafted work is irrelevant, as long as the expert has not made findings that are

not in conformity with the reality, but, on the contrary, has revealed to the court that both parties hold property titles on the disputed land surface, a question that should have determined the procedure for comparing the titles from it, the administered proof being the one that required supplementing the probation in order to be able to give preference to one of the reconstitution acts.
Therefore, the court did not rule on an action in the claim, as it was invested, but on a request for bail, even its disposition judgement rules on the respect of the title of property, but contrary to the considerations of the judgment, which hold that both parties hold titles of property, without showing which of them truly respects the old property rights of the parties and does not motivate the preference given to one of them.

CONCLUSIONS

The appeal has a devolutionary character, in the sense that, if exercised within the term, it causes a new trial on the substance.

The court of appeal will still judge once the trial in fund, but with respect to the limits determined by the principle of availability, namely: the limits of the demand of appeal (tantum devolutum quantum appelatum) and respectively the limits of the request of the court (tantum devolutum quantum judicatum).

Total callback operates if the call is not limited to certain solutions in the disposal of judgement or when it tends to overturn the judgment or if the subject matter of the case is indivisible.

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e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (20), Year XVIII, 2019, pp. 61-81

CONTRIBUTIONS TO CONSTITUTIONAL JURISPRUDENCE IN THE CONSTRUCTION OF PRINCIPLES OF LAW

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Abstract

For the Romanian legal system, the jurisprudence does not have the quality of a formal source of law. Nevertheless, the legal reality, viewed from a historical perspective, has demonstrated the essential role of judicial practice in interpreting and enforcing the law, in constructing argumentative practices, in clarifying the will of the legislator and in discovering the less obvious meanings of legal norms and, last but not least, in unifying thought and legal practice. Therefore jurisprudence, along with doctrine, is an important component of the Romanian legal system.

Based on these considerations, in this study we intend to highlight some aspects of constitutional jurisprudence. We underline its contribution to the emergence and development of the constitutionality control of laws as well as the building of some principles of law. We mainly analyze the role of judicial practice in constructing the principle of proportionality in the constitutional law, of the principle of equality and the interference between the principle of proportionality and the principle of equality. In this respect, we support the role of jurisprudence not only in the correct interpretation and application of constitutional norms, but also in their construction, in the discovery of normative meanings which are often only implicit in the formal expression of the rule of law of the constitutional principles mentioned above. By doing this, the constitutional jurisprudence does not limit itself to the interpretation of the rules of the Fundamental Law in accordance with the classical methods, but also has an important contribution

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to the clarification and construction of some principles of law, to the constitutionalizing of the entire legal system and of the judicial practice from all the courts

Keywords*: Constitutional principles; principle of proportionality; principle of equality of rights;contributions of case law.*

I SOME ASPECTS REGARDING THE INTERPRETATION OF THE LAW BY CONSTITUTIONAL JURISPRUDENCE

The normative law-making activity needs to be continued with the activity for norms enforcement; in view of implementation, the first logical operation to perform is their interpretation.

Both the Constitution and the law are presented as a set of legal norms, but these norms are expressed in the form of a normative text. That is why, what is the object of interpretation is not the legal norms, rather the text of the law or the Constitution. A legal text may contain several legal rules. From the constitutional norm can be deduced a constitutive text by way of interpretation. The text of the Constitution is drafted in general terms, which influences the degree of determination of the constitutional norms. By interpretation the constitutional norms are identified and determined.

It should also be emphasized that a Constitution may contain certain principles that are not clearly expressed *expresis verbis*, but they can be inferred through the systematic interpretation of other norms.

In the sense of the above, the specialized literature stated: "The degree of determination of the constitutional norms through the text of the fundamental law can justify the necessity of interpretation. The norms of the Constitution are very well suited to the evolution of their course, because the text is inexorably inaccurate, formulated in general terms. The formal superiority of the Constitution, its rigidity prevents its revision at very short intervals and then the interpretation remains the only way to adopt the normative content, usually older, to the constantly changing social reality. The meaning of the constitutional norms is by

their very nature, that of maximum generality, its exact determination depends on the will of the interpreter."[1].

The scientific justification of interpretation results from the need to ensure the effectiveness of the norms contained in both the Constitution and the laws by means of some institutions which mainly carry out the activity of interpreting the norms enacted by the author.

These institutions are firstly the law courts and constitutional courts.

Verifying the compliance of a normative act with the constitutional norms, institution that represents the constitutionality control of the laws, does not mean a formal comparison or mechanical juxtaposition of the two categories of norms, but a complex work based on the techniques and procedures for interpreting both the law as well as the Constitution.

Therefore, the necessity of interpreting the Constitution is a condition for its application and for the assurance of its supremacy. The constitutional control of laws is essentially an interpretation of both the Constitution and the law. It is necessary to have independent public authorities that have the competence to interpret the Constitution and in this way to examine the conformity of the law with the Constitution. Within the European model of constitutional justice, these authorities are the Constitutional Courts and Courts of Law.

II CONTRIBUTIONS OF THE CONSTITUTIONAL JURISPRUDENCE ON THE CONSTRUCTION AND INTERFERENCE OF THE PRINCIPLES OF PROPORTIONALITY AND EQUALITY

The uniformity has been consistently rejected by the onstitutional Court's jurisprudence in relation to the interpretation and application of the principle of equality. The strict equality before the law implies that,

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[1] I. Muraru, M. Constantinescu, E.S. Tănăsescu, M. Enache and Gh. Iancu, *Interpretation of the Constitution. Doctrine and Practice* (Bucharest: Lumina Lex, 2002), 67.

in equal situations, the treatment is equal, without discrimination. If the situations are different, the treatment can only be differentiated, which implies the principle of proportionality. Consequently, the breach of the principle of equality arises when a different treatment is applied to similar situations or where the same legal treatment applies to situations which by their nature are different. Also, the breach of this principle may also occur in situations where there is no objective and reasonable reasoning for a differential treatment of identical situations, or if the unequal legal treatment is not appropriate to the purpose of the law.

The jurisprudence of the Constitutional Court has evolved in this respect, starting from accepting that different situations are to be treated differently, until recognizing new constitutional principles, namely the right to difference.[1] The Constitutional Court has ruled that a difference in legal treatment on social grounds or categories of officials is inadmissible, as it would be discriminatory.[2] It admitted that there may be situations that allow for such particularities, but not any such case justifies a difference in legal treatment, especially if the different legal treatment would be discriminatory. The Constitutional Court has established unconstitutional the provisions of the War Veterans Act concerning the conditioning of the veteran of war, to the circumstance of not being fighting against the Romanian army. In this case, the discrimination between Romanian citizens is unjustified, and therefore it is necessary to ensure "equal treatment of all those who have joined in foreign armies"[3]. These are identical situations, which require identical treatment. The Constitutional Court has also applied the principle of equality in other situations, considering either that the situations to be so similar that there is no justification for a difference in legal treatment or, if it exists, constitutes discrimination in relation to the criterion used.[4]

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[1] Ioan Muraru and Mihai Constantinescu, *România's Constitutional Court* (Bucharest: Albatros, 1997), 113-114;

[2] Decision No.6/1993, published in the Official Gazette no. 01/1993

[3] Decision No.47/1994, published in the Official Gazette no.139/1994

[4] Decision No.124/1995, published in the Official Gazette no.293/1995; Decision No.35/1993, published in the Official Gazette no.218/1993; Decision No.3/1994, published in the Official Gazette no.155/1994; Decision No.114/1994, published in

The Constitutional Court has held that the principle of equality of rights requires an equal treatment for situations which, depending on the purpose pursued, are not different.[1] It is also interesting to emphasize the fact that the appreciation of the identity or the difference between the situations in which legal treatment is applied is made from a teleological perspective with reference to the aim pursued by the legislator.

At the same time, the Constitutional Court has pointed out that the observance of the principle of equality of rights does not have the significance of reflecting in the legal norm a full uniformity of social situations but, on the contrary, the diversity of social situations can be corrected by the legislator in a proportionate way, to bring them to a common denominator.[2] The explicit reference to the principle of proportionality means the adequacy of the legal norm to the diversity of the reality to which it applies and, therefore, the general and abstract nature of the rule is concretized in relation to this diversity of situations.

The rejection of uniformity and the need to differentiate the legal treatment according to different objective situations, without being discriminatory, is reflected in the jurisprudence of the Constitutional Court. Referring to the different situation of students in private education, and on the other hand, those in state education, the Court found that, once they entered the chosen system, they are subject to the rules of each system. So, in reality, the contested provisions do not discriminate, but offer different solutions for different situations.[3] In other words, the necessary adequacy of the legal treatment to the objective situation considered is an application of the principle of proportionality.

C.D.H. (1994), 324-328; Decision No.30/1998, published in the Official Gazette no.113/1998

[1] Decision No. 1 on February 8th, 1994, published in the Official Gazette no. 69 on March 16th, 1994

[2] Decision No. 349 on September 24th, 2013, published in the Official Gazette no. 708 on November 19th, 2013

[3] Decision No.70/1993, published in the Official Gazette no.307/1993. This Decision is invoked constantly by the Constitutional Court, in this matter.

This rule is formulated in the jurisprudence of the Court of Justice with value of a principle: "The principle of equality before the law requires equal treatment for situations which, depending on the purpose pursued, are not different. Consequently, a different treatment cannot only be the expression of the judge's exclusive appreciation, but must be rationally justified in respecting the principle of equality of the citizens before the law and public authorities."[1]

The jurisprudence of our Constitutional Court confirms this interpretation of the principle of equality which refers to the equality of citizens before the law and the public authorities and not the equality of the legal treatment applied to a category of citizens compared to another. Since the fundamental rights "represent a constant of the personality of the citizen, an equal chance granted to any individual", article 16, paragraph (1) of the republished Constitution concerns the equality of rights between the citizens, not the identity of the legal treatment on the application of some measures, regardless of their nature. Thus, the Constitutional Court justifies not only the constitutionality of administering a different legal regime in relation to certain categories of persons, but also the need for such legal treatment.[2]

It has also been established in the jurisprudence that the principle of equality of rights does not imply uniform legal treatment of all offenses and the regulation of a sanctioning regime according to the coverage of the damage caused by the offense committed is the natural expression of the constitutional principle of equality which requires that in the same situations the same regime be applied, and in different legal situations the legal treatment should be differentiated.[3] The conduct of the investigated persons who can contribute to finding the truth, in certain cases, is a situation involving a differentiated legal treatment.

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[1] Recital 5 of the Plenum of the Constitutional Court no.1/1994, published in the Official Gazette no.69/1994. In the same sense, see the Decision No. 85/1994, in C.D.H. – 1994, pp. 68 - 74

[2] See Decision No.213/2004, published in the Official Gazette no.519/2004 and Decision No.240/2004, published in the Official Gazette no.562/2004.

[3] See Decision No. 1214 on October 5th, 2010, published in the Official Gazette no. 808 on December 3rd, 2010

This constitutes a measure of the criminal policy, caused by the recrudescence of some serious antisocial phenomena which require the necessity for the establishment by the State of a system of special measures, which are not such as to prejudice the principle of equality.[1] The Constitutional Court has not held the existence of a discrimination between the persons committing the theft and benefiting from the possibility of reconciliation as a way of removing criminal liability and the persons committing theft of trees, because they are in different situations and the different legal treatment established by the legislator is based on the objective criterion of the importance of the social value protected by the rule of incrimination, the national forest fund constituting a good of national interest[2].

Also, in its jurisprudence, our Constitutional Court referred to the criterion according to which finds its application one or other legal regime: "When the criterion according to which, one or the other legal regime applies, is objective and reasonable, and not subjectively and arbitrarily, being constituted by a certain situation envisaged in the hypothesis of the norm and not by the personality or the quality of the person to whom it is applied, therefore *intuitu personne*, there is no basis for the qualification of the regulation deducted to the control as discriminatory, therefore contrary to the constitutional standard of reference[3].

At the same time, the jurisprudence of the Constitutional Court stated that: "one cannot talk about discrimination if, through the play of legal provisions – included also through the succession in time of some normative acts - certain persons may end up in unfavorable situations, thus appreciated subjectively in the light of their own interests[4].

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[1] Decision No. 636 on May 18th, 2010, published in the Official Gazette no. 398 on June 16th, 2010.

[2] Decision No. 293 on April 28th, 2015, published in the Official Gazette no. 436 on June 18th, 2015.

[3] See Decision No. 192 on March 31st, 2005, published in the Official Gazette no. 327 on June 21st, 2005

[4] Decision No. 1038 on September 14th, 2010, published in the Official Gazette no 742 on November 5th, 2010

Applying this reasoning of proportionality, the Constitutional Court has come to the recognition of a fundamental right: *the right to difference.* "Generally, it is appreciated that a violation of the principle of equality and non-discrimination exists when differential treatment is applied to equal cases, without the existence of objective and reasonable motivation or if there is a *disproportion (s.n.)* between the aim pursued by unequal treatment and the means used. In other terms, the principle of equality does not prohibit specific rules. That is why the principle of equality leads to the emphasizing on the existence of a fundamental right, *the right to difference (s.n.),* and to the extent that equality is not natural, the fact of imposing it would mean the establishing of discrimination."[1]

The applying of the principle of proportionality has as legal consequences the relativization of equality as a principle. The jurisprudence of the Court confirms that the principle of equality is a particular case of the general principle of proportionality, since the uniqueness of legal treatment can be justified only in a particular hypothesis, namely when the situations are the similar or identical. Starting from the need to differentiate the legal treatment for different situations, the Constitutional Court has consistently held that a protection measure applied to certain social or professional categories in special situations does not have the meaning of a privilege: "A measure of protection cannot have the meaning of a privilege neither of a discrimination, therefore it has been intended precisely to ensure, in certain specific situations, the equality of the citizens who would have been affected in its absence."[2] In these situations, the principle of proportionality imposes the necessary adequacy of the protection measures to the proposed purpose, namely, ensuring, in special situations, the equality of citizens.

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[1] Decision No.107/1995, published in the Official Gazette no.85/1996. See Decision No.6/1996, published in the Official Gazette no.23/1996; Decision No.198/2000, published in the Official Gazette no.702/2000; Decision No.54/2000, published in the Official Gazette no.310/2000; Decision No.263/2001, published in the Official Gazette no.762/2001

[2] Decision No.104/1995, published in the Official Gazette no.40/1996

Applying the same reasoning, which is based on the principle of proportionality, the Constitutional Court ascertained that a regime derogating from the common law regarding the enforcement of tax receivables is justified by the fact that it is foreseen the non - obsolescence to the forced enforcement of these debts (article 137, paragraph C. Fiscal Procedure). These special procedural rules are appropriate to special situations, namely the fact that the object of enforced enforcement is to collect the tax receivables, which are the sources of the state budget, "which is of general interest"[1]

In accordance with the principle of proportionality, applied in this area, the difference in legal treatment must have a rational and objective basis. The provisions of Article II from O.U.G. No 22/2003[2] are constitutional because the difference in the legal treatment regarding the granting of compensatory payments introduced by the criticized text between the category exempted by state-owned companies and other companies is justified by the existence of a rational and objective criterion, consisting in the existence of different situations, but also by the real possibility of the Government to bear compensatory payments.[3] The different legal treatment, objectively and rationally determined by different situations, cannot create privileges or discrimination. The Constitutional Court rejected the objection of unconstitutionality of the provisions of Article 4, paragraph 2, letter a, point 12 of Law no. 543/2002[4], finding that, according to the legal provisions criticized, all culprits in the same situation benefit or are exempted from the pardon, "in relation to the nature of the offense and its content, in the legal form in force at the time of the offense." In the opinion of the Constitutional Court, the convicts who committed crimes at different times, when the criminal law regulated in different editing the content of the respective offenses, are in different situations, which justify the application of

[1] Decision No.432/2004, published in the Official Gazette no.1176/2004.
[2] Published in the Official Gazette no.252/2003
[3] Decision No.457/2003, published in the Official Gazette no.49/2004.
[4] Published in the Official Gazette no.72 /2002.

different legal treatment "according to the legislator's free choice, without being able to hold the establishment of privileges or discrimination."[1]

In the same sense, the Constitutional Court ruled that the withdrawal by the issuing authority of the endorsement, authorization or attestation, which results in the termination of the individual employment contract, for which concluding the existence of these documents is a mandatory condition, does not constitute a discriminatory legal treatment, but rather the application of a differentiated legal treatment in relation to the different situation of certain categories of employees who choose to exercise some occupations or trades.[2]

Unlike these cases where the principle of proportionality has been observed, in others, the Constitutional Court has found that the difference in legal treatment has no rational and objective justification, which fact has as consequence a disproportionate and discriminatory treatment between persons in the same situation.

Thus, our Constitutional Court ascertained as unconstitutional the provisions of Article 15, paragraph 1 of Law no. 80/1995 on the Status of Military Staff[3], which allows the granting of paid parental leave up to 2 years only to active military women, and not male military cadres.[4] The

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[1] Decision No.546/2004, published in the Official Gazette no.107/2005. See Decision No.200/2004, published in the Official Gazette no.420/2004, see also Decision No.240/2004, quoted previously, through which the Constitutional Court ascertained that the provisions of article 81, paragraph 3, article 86^1, paragraph3 şi article 86^7, paragraph 3 of the Criminal Code are constitutional. The legislator did not violate the provisions of article16 of the Constitution, as the different legal regime is justified by the different situation in which certain person categories are.

[2] Decision No.545/2004, published in the Official Gazette no.85/2005.

[3] Published in the Official Gazette no.155/1995.

[4] Decision No.90/2005, published in the Official Gazette no.245/2005. In exchange, the Constitutional Court ascertained the constitutionality of the provisions of article 38, paragraph 4, article 50, paragraph 1^1 şi article 194 of Law no.19/2000, because the right of the citizens to a pension is regulated both through general law as through special laws in regard to certain social-professional categories that are in a particular situation. Therefore, the regime instituted throughout the regulations criticized is reasonable and is justified, because the persons referring to are in different situations. (Decision No. 116/2005, published in the Official Gazette no. 228/2005).

legislator may introduce derogating measures from the common rules, with respect to the following conditions: the existence of different situations; to exist a rational and objective justification; the different legal treatment does not create a clear disproportion between different categories of persons; that the derogating measures are not discriminatory. Or, in the present case, the Constitutional Court rightly found that the complete abolition of certain categories of persons from the benefit of a form of insurance prescribed by law for all insured persons violates the constitutional principle of equality, representing a discrimination, because military cadres in activity are not different from other categories of policyholders. Applying the same legal reasoning, the Constitutional Court noticed the unconstitutionality of article 362, paragraph 1 letter *d* of Criminal Procedure Code[1] the legal provisions criticized, which stipulate that the injured part can appeal the criminal side of the case and the civil part only in respect of the civil side, being contrary to the constitutional principle of equality. These two parts of the criminal proceedings are in an identical situation, namely in the situation of a person injured in his / her rights by committing the offense. As a consequence, the unequal treatment in access to redress is unjustified, including the proportionality criterion, since the defendant, the injured part, the civil part and the civilly responsible part are of the same quality and respectively are parties to the criminal proceedings.

The Constitutional Court has stated that the legislator is free to lay down conditions for the occupation of certain positions or for exercising of certain professions. If the legislator intends to introduce an exception to these conditions without complying with the constitutional requirements, it creates the premises of discrimination between persons who, although in the same objective situations, enjoy different legal treatment, which contravenes the provisions of article 16 paragraph 1 of the Constitution. [2]

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[1] Decision No.482/2004, published in the Official Gazette 1200/2004.

[2] Decision No. 117 on March 6th, 2014, published in the Official Gazette no. 336 on May 8th, 2014

The interference between the principle of equality and the principle of proportionality also exists in the case of protection of the national minorities.

As stated in the Explanatory Report on the Framework Convention for the Protection of National Minorities[1], the states may adopt special measures to promote full and effective equality between national minorities and those belonging to the majority. Such measures must be appropriate to the intended purpose. This requirement expresses the principle of proportionality, which is applied in order to avoid violating the rights of others or discriminating against others. The principle of proportionality requires that these safeguards are not extended, in time and in the sphere of application, beyond what is necessary, in view of achieving the intended purpose.

The Constitutional Court has applied the principle of proportionality by analyzing the constitutionality of some provisions of the Law on Education no. 84/1995[2]. The Romanian village in areas traditionally inhabited or in a substantial number of persons belonging to national minorities, if there is sufficient demand, should, as far as possible, endeavor to ensure the persons belonging to national minorities "the benefit of adequate learning opportunities for their minority language. The application of these measures shall be without prejudice to the learning of the official language or teaching in that language."

The measures taken by the state for the protection of national minorities must not contravene the requirements of the principle of equality of rights of citizens and therefore there must be "a reasonable ratio of proportionality between demand and possibilities, between demand and the means used or between the means used and the aim pursued."[3]

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[1] Adopted by the Committee of Ministers of the Council of Europe in Strasbourg at 10.11.1994

[2] Published in the Official Gazette no.167/1995 and republished in the Official Gazette no.1/1996. See Decision No.139/1999, published in the Official Gazette no.353/1999

[3] Ibid.

The principle of equality, applied to the exercise of the right to vote, may also involve proportionality. The material conditions for exercising the right to vote may vary according to the diversity of situations. This reality involves a differentiated legal treatment, appropriate to every concrete solution, which is a proportionality relationship. The doctrine stated that "the legislator can set up so many different legal regimes, how many particular situations he encounters, without respecting the strict equality imposed on it regarding the right to vote."[1]

The constitutional principle of equality has applications in electoral, judicial, fiscal, etc.[2] In all these areas, the principle of proportionality, which implies the right to differentiation in legal treatment, applies if the situations in which are the citizens are different.

For our research we have chosen to analyze the application of the constitutional principle of proportionality in tax matters for two reasons: the constitutional text (Article 56 paragraph (2)), recalls the general principle of justice and equity, and secondly the jurisprudence of the Constitutional Court is richer in this field than in other areas, with regard to the interference between the principle of equality and the principle of proportionality.

The application of the principle of proportionality in the field of taxation arises from the provisions of Article 56 (2) of the revised Constitution. "The statutory system of taxation must ensure the *correct* settlement of tax burdens." These provisions must be analyzed through a systematic interpretation of the constitutional texts in the matter, namely the provisions of Article 56, paragraph (1), which establishes the obligation of citizens to contribute through fees and taxes on public expenditure and the provisions of Article 139, according to which taxes and duties can be established only by law or, in case of local taxes and duties, are set by local and county councils, according to the law. In accordance with the provisions of Article 56, paragraph (3), any other

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[1] Simina Elena Tănăsescu*, Principiul egalităţii în dreptul românesc, The Principle of Equality in Romanian Law* (Bucharest: All Beck, 1999), 219

[2] Tănăsescu, *Principiul egalităţii în dreptul românesc*, 169-253.

benefits shall be prohibited, except for those established in exceptional circumstances by the law.

The French Declaration on Human and Citizens Rights (1789)[1] consecrated the principle of equality before tax law and the need for proportionality between the possibilities of citizens and their contribution to public spending. The Romanian constitutional provisions in the field are similar to the regulations existing in the constitutions of other states. Thus, the provisions of Article 53 of the Constitution of Italy establish the obligation of each to participate in public expenditures, *proportionally* to their own capacity, and the fiscal system functions on principles of progressivity. Similarly, the Constitution of Spain establishes in Article 31, the obligation for all citizens to contribute to public spending, according to their possibilities, through a fair tax system, based on principles of equality and progressiveness.

The provisions of Article 56, paragraph (2) of the Romanian Constitution have the meaning of a principle of social justice and equity. As a principle of social justice, the correct setting of tax burdens corresponds to the social character of the state, taking into account the need to protect the most disadvantaged social strata. As a principle of fairness, is intended not to distort the equal opportunities that exclude any privilege or discrimination.[2] The Law on Public Finance (Law no. 10/1991)[3] states in Article 5 that at the elaboration and execution of the budget lie the principles of universality, balance and reality, which represent the concretization of the constitutional provisions above.

The provisions of Article 56, paragraph (2) of the Constitution imply a necessary adjustment between the contribution of each and his / her possibilities. This adequacy can be imagined either in the form of a strict equality of everyone's contribution, or in the form of a necessary proportionality between the income of each and his part of the tasks.[4] The

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[1] Article13 stipulates that: "For the maintenance of public and administrative expenditure, a common contribution is needed. It must be shared among citizens equally in relation to their possibilities."

[2] Tănăsescu, *Principiul egalităţii în dreptul românesc,* 127

[3] Published in the Official Gazette no.23/1991

[4] Tănăsescu, *Principiul egalităţii în dreptul românesc,* 194

proportionality ratio between the contribution of each and his / her possibilities also involves the possibility of reducing or exempting from tax liability if their situation so requires.

The peculiarities of the principle of equality, applied in tax matters, were highlighted in the legal doctrine, as well as in the jurisprudence of the Constitutional Court. The equality before the tax law is based on the universality of participation in tax burdens, which is a specific principle of fiscal policy. According to the provisions of Article 56, paragraph (1) of the Constitution, all citizens are obliged to contribute to public expenditures. This obligation involves the idea of equality before tax law without any privilege or discrimination.

The expression of the principle of equality applied in this area is uniformity. The applying of the constitutional principle of equality in tax matters translates into a very simple exigency, though quite constraining for the legislator: "for the rule of universality to be strictly respected within the same category of taxpayers, both the privileges and discrimination are formally forbidden".[1]

The tax law may take into account the objective differences between the various categories of taxpayers, but any differentiated legal regime must be justified by an objective difference in the situation, in relation to the purpose of the law. In this sense, "the notion of category plays an important role in the principle of equality in tax matters"[2], and the uniformity is not contrary to a certain trans-category differentiation[3].

The tax may be proportional, progressively or regressively. In the literature in specialty it has been shown that the specificity of the tax, regardless of its form, "exists in the ratio of *proportionality* that is established between the taxable amount and the levy, because in terms of tax, proportionality is the true picture of the principle of equality.[4]" In this case, proportionality is a mathematical relation, which can realize the

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[1] Tănăsescu, *Principiul egalităţii în dreptul românesc,* 175

[2] L. Favoreu and L. Philip, *"Les grandes decisions du Conseil Constitutionnel,",* 551, quoted by Tănăsescu, *Principiul egalităţii în dreptul românesc,* 182

[3] Tănăsescu, *Principiul egalităţii în dreptul românesc,* 192

[4] Tănăsescu, *Principiul egalităţii în dreptul românesc*, 194

idea of social justice, which results in a fair distribution of tax burdens depending on the possibilities of each taxpayer. The progressivity of the tax is a particular aspect of the principle of proportionality applied in this matter in the sense that the fair distribution of tax burdens means: the higher a person's income is, the more his tax contribution increases. Accordingly, proportionality is an expression of material equality, "when the quota increases at the same time with the taxable mass, we find ourselves in the presence of a progressive rate, expression of the material equality that seeks to equalize the real income, through tax.[1]

The Court applies the provisions of Article 56, paragraph (2) of the Constitution, specifying the constitutional requirements which the law on taxes and charges must comply. "Taxation must be not only legal, but proportionate, equitable and not to differentiate taxes on the basis of groups or categories of citizens."[2] It is noted that the principle of proportionality is a condition of constitutionality of the law in tax matters but to be applied after the distinctions shown in the previous chapter. The Court applies the principle of proportionality, as expressed by the provisions of Article 56 (2) of the Revised Constitution, and notes that Article 7, paragraph (4) of amended Law No 32/1991 removes any inequality and discrimination in the field of taxation, being in line with constitutional provisions, according to which, "the higher the total income of a person, the more his tax contribution increases"[3].

The Constitutional Court has applied the principle of proportionality as a relationship between the taxation base and the tax. Regarding the provisions of article 7, paragraph 6 of the Law no. 32/1991, the Court finds that by indexing the taxation, the grid does not change, but the level of the taxable income is updated, correlated with the increase of the inflation index. "It is true that the tax increases, but only as a result of the increase of the taxation base."[4] In this respect, the doctrine stated: "As the taxpayer's criterion for equality before the tax

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[1] Tănăsescu, *Principiul egalităţii în dreptul românesc*, 203
[2] Decision No.6/1993, previously quoted.
[3] Decision No.91/1994, published in C.D.H. – 1994, 287 – 292.
[4] Decision No.53/1994, published in C.D.H. – 1994, 222 – 225.

law, the taxable amount is the criterion according to which vary the legal regime of the tax. But the principle of tax justice, imposed by Article 53, paragraph (2) of the Constitution (Article 56 (2) of the Revised Constitution *n.n.*), imposes the uniformity of the legal regime of taxation as soon as the taxable amount is the same".[1]

The principle of proportionality has also been applied by the Constitutional Court in other situations. Thus, proportionality implies a comparative reasoning that takes place between taxes and duties and, on the other hand, the income, salaries or benefits. A fee, in order to be legitimate, must be justified in the performance of a public authority. Otherwise, it is a financial impediment that restricts unconstitutionally the exercise of a right[2]. In the same sense, the Constitutional Court has established that the judicial stamp and the stamp duty are not a restriction of the free access to justice because justice is a public service of the state and it is fair that part of the expenses be borne by those who resort to this service.

However, the fees are not the price of the service, and the state has the possibility to determine the amount of the service. The Constitutional Court is not in measure of censoring the legislator's options and to replace its sovereign and full appreciation with its own appreciation, for it would thus turn itself into a legislator, practically a subsequent one.[3] Therefore, the introduction by the legislator of exceptions to the general rule for the payment of the judiciary fees for the stamp duty (tax exemptions) does not constitute discrimination or a violation of this constitutional principle[4]. The exclusive right of the legislator to determine taxes or duties and their amount or, as the case may be, tax exemptions or reductions in favor of certain categories of

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[1] Tănăsescu, *Principiul egalităţii în dreptul românesc,* 205.
[2] Decision No.179/1994, published in C.D.H. – 1994, 78 – 86.
[3] Decision No.75/1997, published in the Official Gazette no.258/1997.
[4] Decision No.29/2000, published in the Official Gazette no.460/2000. In the same sense see Decision No.532/2004, published in the Official Gazette no.91/2005, by which the Constitutional Court rejected the exception of unconstitutionality of the provisions of article 40^1 of Law no.137/2002, published in the Official Gazette no.215/2002.

taxpayers, cannot be arbitrary. These measures must respect the principle of proportionality found in the content of the concept of fiscal justice, in that the measures adopted to favor certain categories of taxpayers must be appropriate to the conjectural situations and to the economic and financial situation of the country during that period[1]. The application of this principle results also from the fact that any differentiation must be justified by the purpose of the law or the economic and fiscal policy of the state.[2] "No constitutional rule prohibits the granting of fiscal facilities to categories of taxpayers for the purpose of the good realization of the economic, fiscal and social policy of the state." The Constitutional Court also objected to the idea of uniformity of the tax: "The legal regime of taxes is inevitably different, and it also involves an economic and financial strategy. The uniformity of the regulations in this area would result in the abolition of all taxing criteria and of the purpose pursued by the legislator throughout the financial leverages."[3]

The Constitutional Court has determined that the tax should not be abusive. Thus, it must correspond to the objective pursued by the legislator and be appropriate to the taxable mass.[4] As we have seen, the taxable mass is the criterion by which the tax regime varies. Moreover, "the tax is based on a strict conception of proportionality, which refers exclusively to the notion of an arithmetical proportion. "Consequently, the establishing of a tax without existing a taxable mass in an objective sense, that is, an income that cannot be achieved, is an abusive taxation. "In order to eliminate any possibility of abusive taxation and taking into account the intention of the legislator ... it follows that the extension of the obligation to pay the tax, considering the non-utilitarian lands, is unconstitutional, contravening article 53, paragraph (2) of the Constitution (article 56, paragraph (2) of the revised Constitution *n.n.*),

[1] Decision No.292/2000, published in the Official Gazette no.702/2000.
[2] Decision No.62/.1999, published in the Official Gazette no.308/1999.
[3] Decision No.102/1995, published in C.D.H. 1995 – 1996, 118 – 125.
[4] Tănăsescu, *Principiul egalităţii în dreptul românesc*, 195.

on which grounds one cannot establish a tax on an income that cannot be achieved."[1]

CONCLUSIONS

The supremacy of Constitution would remain a mere theoretical issue if there were no adequate safeguards. Undoubtedly, the constitutional justice and its particular form, the constitutionality control of the laws, represent the main guarantee of the supremacy of the Constitution, as expressly stipulated in the Romanian Basic Law.

The constitutionality control of laws is the main form of constitutional justice and is a basis for democracy guaranteeing the establishment of a democratic government that needs to respect the supremacy of law and Constitution.

George Alexianu considered that legality is an attribute of the modern state. The idea of legality in the author's conception is formulated as follows: all the state organs operate on the basis of an order of law established by the legislator and which must be respected.

The same author, referring to the supremacy of the Constitution, asserts itself in full regard to the realities of today: "When the modern state organizes its new appearance, the first idea that concerns it is to stop the administrative abuse, hence the invention of constitutions and by judicial means, the establishment of a legality control. Once this abuse is established appears a new, a more serious one, that of the Parliament. Then are invented the supremacy of the Constitution and various systems to guarantee it. The idea of legality thus gains a strong leverage."[2]

Verifying the compliance of a normative act with the constitutional norms, an institution that represents the constitutionality control of the laws, does not mean a formal comparison or mechanical juxtaposition of the two categories of norms, but a complex work based on the techniques and procedures for interpreting both the law as well as the Constitution.

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[1] Decision No.49/1994, published in C.D.H. – 1994, 40 – 52.

[2] G. Alexianu, *Constitutional Law* (Bucharest: House of Schools, 1930), 71

Therefore, the necessity of interpreting the Constitution is a condition for its application and for the assurance of its supremacy. The constitutionality control of laws is essentially an activity for the interpretation of both the Constitution and the law.

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LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (20), Year XVIII, 2019, pp. 82-98

BRIEF CONSIDERATIONS ABOUT ROMANIAN EDUCATION – A PHENOMENON INCLUDED IN THE SOCIETY'S GENESIS

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Abstract:

In the broadest sense of the word, education is a phenomenon that includes the company's genesis, evolving into the most closely related to it. Therefore, we can say that various forms, learning occurs with human society, the opportunities and aspirations that can not be broker. Therefore, the education in our country, sensitive since its beginning, in the ideological and cultural processes and developments, will bear the general stamp of the time, the one of an important instrument in the consolidation and development of the society, satisfying its imperatives and exigencies.

Key words*: teacher; education; school; phenomenon; society.*

INTRODUCTION

The education, school and teaching have formed for us, as for everyone else, a research and valuation object. A number of pens, school people and great scholars have carefully oriented to such a subject with implications in all-time society development.[2]

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[2] Ştefan Pascu, *Istoria învăţământului din România*, Vol.I (Bucharest: Didactică şi Pedagogică, 1983), 9.

In the widest sense of the word, education is a[1] phenomenon included in the society's genesis, evolving in the closest connection with it. This is why we can say that, under various forms, education appears once with the human society, from which possibilities and aspirations it cannot be broken.[2]

Education starts since the time of the *primitive commune*, by oral transmission, from generation to generation, of knowledge and techniques related to food procurement, hunting, fishing, agriculture and animal breeding, living and coating, ornaments and tools of defense against enemies, which means that the human progress is closely related with the surrounding environment.

Therefore, the education in our country, sensitive since its beginning, in the ideological and cultural processes and developments, will bear the general stamp of the time, the one of an important instrument in the consolidation and development of the society, satisfying its imperatives and exigencies [3].

Since the constitution of the Romanian feudal nations (14th - 16th century), there was a preoccupation for school development. *Clerics* and other literates were needed for the political - administrative institutions.

Supporter of the feudal state, the church has played an important role in the development of the culture from that time, and also in the development of education and teaching. It is explainable that the first schools will be organized near monasteries, episcopacies, cathedrals. The priests and monks, fulfilling the mission of teachers, have learnt the children to write, read, make calculations and memorize prayers.

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[1] Precent where we can deduct a manner of acting, thinking; training, study, discipleship; the field and the activity of training and education (in schools), according to the *Explanatory Dictionary of Romanian Language* (Bucharest: Universul enciclopedic, 1998), 542.

[2] Gheorghe Iscru, *Contribuţii privind învăţământul la sate în Ţara Românească până la jumătatea sec. al XIX-lea* (Bucharest: Didactică şi Pedagogică, 1975), 11.

[3] Pascu, *Istoria învăţământului din România*, 76.

Starting with the 14th century, the churches and monasteries will become the most significant centers of scholar activity, the most favorable environments for the development of the culture in that time[1].

In monastery schools, there were teachers, instructors, professors, named at that time *năstavnici* and *grămătici*[2], as also assistant instructors, named *vătaji*. Their mentioning in a number of documents shows a certain teaching activity[3].

In the monastery school, education was generally basic. The teachers were teaching the young who were preparing for cure or for copying religious texts, to become copyists, clerks, gramatici.[4]

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[1] Proofs on the existence of monastery schools in that times also offer some iconographic representations. For example, on one of the walls of the church *Sf. Nicolae Domnesc* from Curtea de Argeş, in a composition, are depicted three schoolchildren with their teacher, during the training, Pascu, *Istoria învăţământului din România*, 77.

[2] The term *grămătic* (greek.-gramatikos and lat.-gramaticus) assigned, on origin, the elementary school teachger for learning to write and read, Ştefan Bârsănescu, *Pagini nescrise din istoria culturii româneşti (sec.X-XVI)* (Bucharest: Academiei, 1971), 140.

[3] Hence, in the *March 1415 charter*, issued by Mircea cel Bătrân, the năstavnic Sofronie is mentioned, also reminded in a document from 1467. Also, *the document from 3 April 1480*. refers to the nastavnic from Tismana monastery. In a *document from Moldova*, from the 15th century, it is talked about a grămătic from Neamt monastery. Some *muntenian documents* say about Radu, the grămătic from Tismana, or Stan, the grămătic from Ramnic, etc. The Moldavian chronicler Macarius (sixteenth century) recalls that Theoctistus II, before being Bishop of Moldavia, in the middle of the sixteenth century, when he was abbot of the monastery Neamt, hav served as năstavnic and teacher, in Bârsănescu, *Pagini nescrise din istoria culturii româneşti*, 130;

The documents also certify the existence of other monastery schools. For the 18 clerks, gramatici and chancellors documentarily certified in Teleorman, it is possible for a sloveni school to have existed in Măniceşti or near Ţigănia-Drăghiceşti monastery, near Rușii-de-Vede, in A. Manolache and Gh. Pârnuță, *Contribuţii la istoria culturii şi învăţământului în Teleorman* (Bucharest, 1979), 47.

[4] Teaching in Slavonian (and probably in Romania) the writing, reading, church songs, were making exercises to draw the lordly initials and monograms, to know and practice the ritual of the religious service. Also, the teachers were teaching the interpretation of religious dogma, texts with phylosophical contents, religious code of laws. It was also teached Greek, chronology, astronomy (particularly in the perspectivel of understanding the religious calendar), rhetoric, music, elementary notions of arithmetics necessary to account the monastery revenue. Among all these disciplines, the first education object

In the 17th century, although the educational forms are maintained, the Romanian education comes out from its patriarchal meanings, targeting higher purposes We find teachers, writers, clerks, in villages, like Toader from Stoiceştii Focşanilor, Gheorghe from Odobeşti, etc..

The word school[1] appears for the first time in our old literature in the work *Octoihul românesc* (1570) written by Diaconul Coresi: *aşişderea în şcoală meşterii şi dascălii să înveţe mai vârtos româneşte (en. School masters and teachers should learn Romanian with more dedication)*[2].

In his work, *Statutele şcolii din Şchei*, Johannes Honterus (1498-1549), famous educator who opened new paths for education and culture, referring to the *attempts to remedy a set-back of the education*[3], *the lack of qualified teachers and inappropriate retribution of the existing ones*, was arguing that: *...the employment of teaching personnel fell upon the secular authorities, who, together with the clerical counterparts, will have both the obligation to remunerate and to control the teachers' activity. ...Each commune would have to ensure the required material conditions for the teachers.*.

Nicolaus Olahus (1493-1568) has supported and renovated education and teaching, being the first organizer of the primary and higher education from Transilvania.

In this respect, in 1560, in the Tyrnavia Synod, he decides the employment of one teacher for children's education near every urban or

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was the Slavonian grammar, in Bârsănescu, *Pagini nescrise din istoria culturii româneşti*, 212.

[1] The first Romanian school known as – *The School from Şcheii Braşovului* - was constituted in 1459 (from wood) and in 1597 (from stone), as Sextil Puşcariu, brasovean literate, sais. The teachers teach in this school reading, writing, religious songs, Pascu, *Istoria învăţământului din România*, 114.

[2] Pascu, *Istoria învăţământului din România*, 109.

[3] Making reference to the education from Transilvania, criticizing the bad condition thereof, was assuring that efforts have been made for the desirious-learning youth to have, in the cities, a sufficient number of teachers and professors, and for the latter to be remunerated, so as no scholar to be without education due to his/ her poverty ..., Johannes Honterus, *Statutele Şcolii din Braşov*.

rural congregation (therefore setting the foundation of primary education), democratic initiative, if we consider that the school was, until then, a privilege of the nobility.

For a good performance of the higher education (meant for training clerics), he ordered the creation, for teachers, aside a substantial salary, of a stăipt, meant to defend them from the abuses of the nobility.

Olahus believed so much in the role of education that, by his will (1562), he left a part of his assets to the schools founded by him.[1]

In Moldova, Vasile Lupu (1634-1653), a lover of culture, granted special attention to the role that the professor had in the school.[2]

In the last quarter of the 18th century, the Lordly Academy form Bucharest, higher education institution, was inaugurated.

In 1707, Brancoveanu reorganizes the Lordly Academy, by the act entitled *Rânduiala dascălilor*[3], whereby he sets the number of professors, the disciplines that every professor was to teach, the schedule etc.

Also, Brancoveanu makes efforts to ensure sufficient income for the payment of the teachers and the school, typography and library for the development of the educational process.

To train the necessary teachers for the Academy, Brancoveanu granted scholarships to one of the graduates from Bucharest, to continue the studied in Italy.

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[1] Pascu, *Istoria învăţământului din România*, 129.

[2] The school founded by him, the Higher Grade College from Iasi, needed famous teachers. Hence, seeing the lack of good teachers in Moldavia, he brought good and zealous teachers from Kiev, A. D. Xenopol, *Istoria românilor din Dacia Traiană*, VII (Iași, 1898), 60.

[3] The first teacher was teaching seven disciplines: logic, rhetoric, physics, about sky, birth and death, about soul and metaphysics. The second teacher was translating various works of the Greek clasicism authors (*Isocrate's lectures*, *\Demostene' lectures*). the third teacher would have to translate the *Thoughts* of Chrisoloras and Caton, Fochilide and Pitagora, Esop, Homer. In adition, the grammar of Lascaris should have been tought, but the students should have been explained, in Eudoxiu Hurmuzachi and Nicolae Iorga, *Documente privitoare la istoria românilor*, vol.XIV (Bucharest, 1915), 392-394..

Also in the 17th century, it is talked about the *family teachers* who teach Greek, Slavonian, Latin and Romanian, literature, history, art etc.

The 18th century is characterized by the development of a modern education. The content of education, generally, is no longer predominantly religious, and the teachers and their disciples were mostly secular.

For the first time, the idea *of educational system* appears in the Charter of Alexandru Ipsilanti from 1776, the most comprehensive act of school legislation from that time in Romania.[1].

The state manifests a higher and higher preoccupation for school, for the necessary funds, to select the professors, for an effective control on the performance of the instructive - educative process.

All these measures can be considered the first *measures of school policy* met in the Romanian Countries.[2]

School development will keep pace with society development, serving in particular to the interests of the dominant class.

By the *1814 Charter*, dedicated to the organization of the Bucharest school, the lord of the Romanian Country, Ion Caragea, introduces the concept of *responsibility of the officials* in ensuring the conditions for the good performance of the instructive - educative

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[1] The educational system was conceived in 4 steps:

1) the beginner cycle (3 years), where grammar was teached;
2) the advanced cycle (3 years), where Greek and Latin was teached;
3) the 3-year cycle, where rhetoric, poetic, the Aristotel moral, Italian and French was teached;
4) the upper grade, where arithmetics, geometry, history, geography, Aristotle phylosophy, astronomy were teached.

The elementary education was tought in schools of Slavonian and Romanian language, founded within the county capitals.

Middle schools (with two grades) were operating in Bucharest, Craiova and Buzau.

The higher education was ensured by the Lordly Academy, in Pascu, *Istoria învăţământului din România*, 233.

[2] Ştefan Bârsănescu, *Istoria pedagogiei româneşti* (Bucharest, 1941), 47.

process. *Instruction preservation* was primarily ensured by providing budget funds allocated regularly.[1]

Nicolae Mavrocordat (1711-1716) provided for the payment of such amounts from the lordly revenue.

Also to this respect, Grigore Ghica, considering the schools as the *fountain supplying the extracurricular crowd with the wealth of education and wisdom* [2] and being aware of the fact that for such institutions to operate, necessary funds were needed, by the *1743 Charter* he introduced the payment of 1-coin tax for each priest[3].

The fluctuation of measures on the necessary funds to maintain the schools was due to the instability of the Fanariot lords, switched by the Turkish between the two Princedoms.

It is to retain their preoccupation in this matter. The payment of the teachers' wages, although with high differences[4], but made with priority against other working people, certifies the role of the school in state and the consideration that the teachers begun to enjoy[5].

School development was closely related to the existence of an institution aiming at controlling teachers' activity and recording the progress made by the scholars[6].

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[1] Pascu, *Istoria învăţământului din România*, 230-231.

[2] V.A. Urechia, *Istoria şcoalelor de la 1800-1864*, I-IV (Bucharest, 1892), 17-18.

[3] PReviously, Constantin Mavrocordat decommissioned, by the *1734 Charter*, the school tax charged from priests, deciding for the teachers to be paid from the treasury funds, in A. D. Xenopol, *Epoca fanariotă, 1711-1821* (Iaşi, 1892), 618-619.

[4] By the *1766 School reorganization charter*, issued by Grigore Alexandru Ghica (Moldova), a large differentiation was created with regard to the wage for teachers. Hence, the Greek teacher in Galati was receiving 250 Lei, the Romanian teacher from Iasi 120 lei, the same amount was receiving the Greek teacher from Botosani and 60 lei each for the Romanian teachers in the lands, in Urechia, *Istoria şcoalelor de la 1800-1864*, 52. The differentiation was even higher when comparing the payment of these teachers with the one of the Greek teachers from the Iasi Academy. Thus, the higher teacher was receiving 1500 lei and the first teacher of Greek grammar was receiving 600 lei, in Radu Iacob, *Istoria vicariatului Haţegului* (Lugoj, 1913), 293.

[5] This fact explains the *1801 Resolution* of Alexandru Moruzi, lord in the Romanian Country, whereby it was ordered for the Facoianu High Stward to pay the teachers first.

[6] Hence, Grigore Ghica in the *1743 Charter* was arguing about the control of the teaching activity and the results thereof: ... *and to check the schools, the teachers, twice*

With regard to Transilvania, the first school law on the elementary education, was drafted in 1774, sanctioned by Maria Tereza, under the name of *directive rules for the improvement of education from elementary or Serbian and Romanian non-united trivial schools*. The modernist highlights come out from the following passage, particularly significant: *... for the training of the young to the made under good conditions, capable teachers were needed, therefore it was provided not to employ and not to entrust the position of a teacher to anyone if such person was not appropriately certified by a detailed exam, which to show that he or she is prepared to teach students... .*

By the *1776 School Patent* (Schul-Patent)[1] some specifications are made in connnection with the preparation, employment and duties of the teachers; with regard to their payment, it was stipulated that this will be regulated by the contract made between the communal authorities and the respective teacher.

A special place in the school legislation was taken by *Ratio educationes* (1777) and *Ratio educations publicae* (1806) which dealt with all the issues of the education[2].

But, irrespective of the corner of the country where they performed, a thing is certain: *...although highly oppressed*[3]*, one should underline the devotion that the teachers had, they did not stop to bring efforts in training the students*[4].

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per year, what kind of dedication they have... in Pascu, *Istoria învăţământului din România*, 232.

[1] whereby it was regulated the orthodox elementary education from Banat, which continued to remain under the control of the church and civil authorities.

[2] and namely: the structure and objectives of education, education plans, selection of teachers and professors, principals, inspectors, their duties, origin of funds, ... in Pascu, *Istoria învăţământului din România*, 241.

[3] as asserted in a *1813 anaphora*.

[4] To this respect, the budgets with the remuneration of the teachers from the Academy with teaching in Greek from Sf. Sava prove even more their work in sacrifice. The first teacher from Sf. Gheorghe-Vechi was remunerated 4 times less than the one from Sf. Sava.

In 1775, in order to help them, the teachers from the Greek and Hellenic school from Slatina were granted exemptions in the years 1775 and 1797.

From the second half of the 18th century, it is noticed the preocupcation for stability and continuity in education. To this respect, the teachers who demonstrated competence and endeavor in education were appointed *irreplaceable teachers* (inamovibili)[1].

A step forward in school organization was made by the *School regulations*, applied in 1833 in the Romanian Country and 1835 in Moldavia, whereby the orientation and the basic principles of education were set: *...good education is the primary concern of a nation*. A valuable idea of the *Regulations* was with regard to the proclamation of the priority of merit and talent of the teachers[2], who were having, on their turn, the obligation to improve continuously.

School regulations are appreciated as the first school laws, in the modern sense of the word, including similar provisions along the 258/234 articles.

Hence, the teacher – central figure *of the Regulations*- was proposed in position, by the *Eforia şcoalelor*, consolidated by the lord and it remained inamovible, except for serious cases.

The duties of the teachers were numerous and not easy: they should have direct the scholars towards the holy, respect for codices and control, love for a good trim and love for country and to transform them in honest and working people before making them educated, etc..[3]

In Transilvania and Banat, *the 1854 school law* brings important changes in connection to the teachers. Therefore, the teachers were divided in three categories: ordinary[4], secondary[5], assistants[1], the

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Also, for the effort made in *educating children*, the teacher Chiru from the Râmnicul-Vâlcea school was exempted by Al. C. Moruzi, from all *the burdens* after 1798, in Pascu, *Istoria învăţământului din România*, 246.

[1] The same was with the teacher Chiriţă from the School Sf. Gheorghe-Vechi from Bucharest, in Pascu, *Istoria învăţământului din România*, 335.

[2] Ion Popescu-Teiuşanu, *Legislaţia şcolară feudală în Ţările Române*, in *Contribuţii la istoria învăţământului românesc* (Bucharest: Didactică şi Pedagogică, 1970), 68.

[3] Anghel Manolache and Gheorghe Pârnuţă (coordinators), *Istoria învăţământului din România* (1821-1918), vol.II (Bucharest: Didactică şi Pedagogică, 1993), 16.

[4] Professors who graduated a higher education institute and having passed a teaching qualification exam.

[5] Professors teaching technical objects or without a qualification exam.

payments being made depending on the group where the teacher was falling.[2]

After the defeat of the 1848 Revolution, the schools were closed for more than two years, all the teachers were decommissioned, a lot of them being imprisoned of pursued.

The new school legislation made of: *The new study curriculum from the Romanian Country* (1850) and *The settlement for the reorganization of public teaching in the Principality of Moldavia* (1851) were providing that the professors will teach in a system of schools according to the nation's demands, with the needs of the various classes of people and with a national character. Also, it was decided to increase the expenses for education, to ensure at least one part of the material basis, one of the primary conditions to develop the all-grade education, neglected after 1848.

The formation of the Romanian national unitary state in 1859 has opened new perspectives for education.

Thus, by the *Law of public instruction* from 1864, it was created an appropriate framework for the operation and development of school (it was constituted an education system with three levels: elementary, middle, higher), institution that acquired the appropriate statute for the role and tasks incumbent to it in the social life of the Romanian state.

The law of public instruction proclaimed two modern principles on the popular instruction (elementary education): gratuity and obligation, Romania becoming one of the first countries from the world with taking such measures[3].

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[1] Temporarily employed professors.

[2] Manolache and Pârnuţă (coordinators), *Istoria învăţământului din România* (1821-1918), 159.

[3] In 1864, school obligation was only included in the laws of a few countries from Europe: The Scandinavian Countries and Prussia and only in two states from S.U.A.- Massachusetts (1852) and New York (1853). In Italy, although proclaimed in 1859, school obligation was only achieved later, in 1877. In France, towards which schools the Romanians directed their aspirations, the obligation for elementary training was only acknowledged by the *Law of 28 March 1882* (Jules Ferry). England never had a law that would acknowledge the school incumbency, only in 1870, in Scotland in 1872.

With regard to the professional training of the teachers, differences were between the rural and urban life.[1].

Also, by this law it was opened the road for democratic education, because one of the highest ideological positions of this law was the recognition of a full equality of the girls with boys in matter of education.

After the *1864 Law on public instruction*[2], it is intensified the activity to find forms to train the teachers, appropriate to the school development objectives and for the mission to be fulfilled.[3]. In this

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Switzerland acknowledges on its turn the incumbency of education by the *Federal Constitution* from 1874. Among the neighbour countries, Bulgaria recorded this principle in 1879, and Serbia in 1882. In Transilvania, Romanian land, the Austrian comination - pursuing propaganda purposes and the consolidation of the absolutist power, introduced school incumbency in 1857. The measure was reinforced after the creation of the Austrian-Hungarian dualism, by the Law XXXVIII/1868.

With regard to the gratuity of elementary education, this was acknowledged generally once with proclaiming incumbency. The first states that granted gratuity were Italy, Norway, Switzerland, USA, Austria, Denmark, Prussia, England, in Constantin C. Giurescu, *Istoria învăţământului din România* (Bucharest: Didactică şi Pedagogică, 1971), 118.

[1] If for cities, the teachers were trained in an urban elementary school, transformed in a primary special school, for villages, it was provided that any person who justifies the promotion of the course equivalent to the rural primary school could be a teacher. Twice per year, the training was organized on commune centers, where a short course of teaching was held.

The lack of precise provisions for the training of teachers, in a stage when the primary school was fixed with major objectives and the generalization of the first level of the education system was introduced, constitutes one of the boundaries of this law.

The professors for the urban area education were trained in normal higher schools provided in Bucharest and Iasi. The introduction of this provision in the law underlines that in order to increase efficiency of the middle education, a professional higher education was needed. IT was in fact a step forwards with regard to the teaching training of the teachers, in transforming them in youth educators.

Also, the teaching body of the universities was to be recruited among the personalities from that field, good specialists, in Manolache and Pârnuţă (coordinators), *Istoria învăţământului din România* (1821-1918), 223-225.

[2] With regard to the training of teachers for the middle education, the provisions of the 1864 law will only be applied starting with 1880.

[3] The school people criticized the idea to leave education and training on the priests. Constanţa Dunca was writing in this regard: *If you don't want for Romania to be lost, do*

respect, in 1901 any difference is removed between the training of teachers and elementary teachers, creating a normal *unique* school.

At the end of the century, *The law f public instruction, 1864* was replaced with *The law on primary education and normal-primary education* from 1893 (The Take Ionescu Law). Although modern[1], it is particularly characterized by the difference made between the urban and rural education.

The law on primary and normal-primary education from 1896[2] (Poni Law) highlights even more the part that falls on the state in the material support ensured to schools.

The law on secondary and higher education from 1898 was the fruit of an ample consultation of the teaching body and of the activities of a commission managed directly by Spiru-Haret, the minister of public instruction at that time, and it provided among others that[3] a teaching seminary will be organized near each university, meant to prepare the teaching personnel for secondary education.[4]

The law on higher education from 1912 (C.C. Arion) provided for the increase oif the university autonomy and it specified the rights of the management bodies, the organization of faculties, managed based on

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not give the future generation on the hands of priests; shee saw the solution of this issue in the formation of a high number of normal schools, article written in the magazine *Amicul familiei*, year II, no. 1 (1864, 15 March).

[1] In the meaning that it had teaching orientations towards practical activities (the introduction of labour, with the construction of workshops). School incumbency is established for the ages between 7 and 14 years. In the first chapter it was argued about the fines that the parents who failed to enroll their children in the schools would have to bear and it was provided that the obligation will be primarily applied to boys. Primary education was divided in: village schools, lower primary schools, higher primary schools and supplementary and repetition primary courses. The duration of courses in the normal teacher schools was established to 5 years, the same for normal elementary teacher schools, in *Istoria învăţământului din România* (1821-1918), vol.II (Bucharest: Didactică şi Pedagogică, 1993), 344.

[2] It was modified in the next decade: in 1897, 1903, 1908, 1909. The amendment from 1897 introduced the organization of the 5 rural classes on divisions.

[3] It included 114 articles, divided in 5 chapters. In the 2nd section, the conditions for appointment of principles were provided.

[4] Marin Niculescu, *Spiru-Haret, pedagog naţional* (Bucharest, 1932), 121.

their own regulations, which were previously approved by the Parliament etc. .

From 1912 and until 1918[1] no significant school law drafts were recorded.

In Transilvania, *the law on education* from 1868 made the foundation for the people's education organization (until 1918), which stood under the supreme state control. [2] The teachers had the right to organize in corporations (associations). Also, the law provided the control bodies of education and the scope of their duties. In connection with the training of teachers, it was provided the formation of *Preparandii*[3] with a teaching period of 3 years. The law stipulated, aside these Preparandii, an elementary school, as application school.[4]

On its turn, *The law from1893* was regulating the salaries of the teachers, in the meaning that, if in the church commune, due to poverty - determined by the state bodies - cannot ensure the legal wage of the teacher, he can call for the *state aid*, but in this case, the state will be entitled to intervene more deeply in the administration and operation of the school.[5]

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[1] In 1918, within the project *Education for the villages*, Simion Mehedinţi drafted a legislation made of: *Legea Eforiilor şcolare and Legea pentru şcoala pregătitoare şi seminariile moderne*.

[2] Whi have had an important contribution in the development of elementary school from Transilvania and Banat, have fulfilled a multiple social functionality: they trained the youth, formed and developed national conscience of the young generations, made a science distribution activity, etc., in *Istoria învăţământului din România* (1821-1918), vol.II (Bucharest: Didactică şi Pedagogică, 1993), 308.

[3] E.g.: Preparandia from Arad, Preparandia from Oradea, Preparandia from Sibiu, Preparandia from Năsăud, Preparandia from Gherla, etc.

[4] Following the application of the *Law on education 1868* the number of elementary schools increase, the competence of the teachers was improved, the level of the elementary education increase, teaching associations were formed.

[5] *Istoria învăţământului din România* (1821-1918), 347.

THE PROFESSIONAL ORGANIZATIONS OF THE TEACHERS

There is no teacher in Romania - irrespective of the grade - not acknowledging that the Romanian school from 1859 and particularly in 1866, not yet has a well-delimited direction, a purpose, an ideal, towards which to direct the public concerns.[1]

The gradual procurement of the feeling of professional solidarity, the association in professional organizations of the teaching staff, become possible in the social-historical context of evolution on multiple plans that the Romanian society sees especially after the *Law of public instruction* from 1864.

As a preliminary form, the teaching conferences represented the framework for periodical meeting where the feeling that the meeting of educators is required was formed.

In 1877, it was formed the *The society of institutors from Bucharest* which had among its objectives the widening of the scope of cultural and teaching knowledge for a professional improvement.[2]

In 1878, by the initiative of several teachers from Bucharest, was constituted the *Society of the Teaching Staff from Romania*, with the following purposes: lighting heads of families, the state body, all Romanians, about capital importance of education; closeting relations between teachers of any grade and their grouping on the basis of solidarity, in an intelligent body; defending the rights and stimulation of the teaching staff activity; improving the organization, staff and indispensable material of a solid instruction.[3]

The Society develops its activity by organizing in Bucharest the First *Congress of the Teaching Staff from Romania* in 1884[4]. 14 more congresses followed.

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[1] *The First Congress of the Teaching Staff from Romania*, the session from 2,3-4 April 1884 (Bucharest: Tipografia Modernă, 1885), 6.
[2] *Istoria învățământului din România* (1821-1918), 426.
[3] *The First Congress of the Teaching Staff from Romania*, 6.
[4] The purposes of the Congress were:
1) to study the existing lacks in the organization and performance of education;

In 1894, the *Association of Buzau teachers* and *The Putna County Association* are formed.

In 1902 it is formed the *Association of teachers from Romania* aiming at creating a pension and aid center, to support all their members.

In 1910, *the Association* affiliates to the *International federation of the teacher associations* and sends a delegation to the 2nd Congress of the Federation (Paris, July 1910).

In 1916 it is constituted the *General association of the members of the Romanian primary teaching staff*.[1]

All these *professional associations* (and more others) aimed at improving the statute of the teaching staff and the educational process.

The congresses of the teaching body represented real insights on the school situation at that time and also, horizon openings with regard to the united action of the teachers to contribute to the escalation of the prestige of their profession, in school, thinking and teaching practice progress.

CONCLUSIONS

The state manifests a higher and higher preoccupation for school, for the necessary funds, to select the professors, for an effective control on the performance of the instructive - educative process.

School development was closely related to the existence of an institution aiming at controlling teachers' activity and recording the progress made by the scholars.

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2) to propose means for improvement and measures to be taken to mitigate any determined deficiencies;
3) to give the legislators, governments and state institutions the concurrence of the experience of the education members;
4) to join the relations of collegiality between all the education members in a compact and smart body, in the *First Congress of the Teaching Staff from Romania*, 2.

[1] Due to the low number, secondary teachers could not constitute in a mass movement, as with their colleagues, from the primary education, their activity taking place in circles on cities, in *Istoria învăţământului din România* (1821-1918), 427.

Supporter of the feudal state, the church has played an important role in the development of the culture from that time, and also in the development of education and teaching. It is explainable that the first schools will be organized near monasteries, episcopacies, cathedrals. The priests and monks, fulfilling the mission of teachers, have learnt the children to write, read, make calculations and memorize prayers.

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LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (20), Year XVIII, 2019, pp. 99-110

THE CHARACTER OF THE EUROPEAN CONSTRUCTION

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Abstract

The Organization of European Economic Cooperation was founded as a permanent organization of coordinating national economic policies. Also, having the task of distributing US aid has not been able to initiate the removal of economic and trade barriers between member countries. The European Union was created with a view to putting an end to the great number of bloody wars left by neighboring countries. Since 1950, European countries have begun to unite both economically and politically within the European Coal and Steel Community to ensure lasting peace. Its founding countries are: Belgium, Germany, France, Italy, Luxembourg and the Netherlands.

Keywords*: European Union; European Construction; treaties.*

PRELIMINARY SPECIFICATION

The idea of European union was expressed in XVIII century by Jean-Jacques Rousseau, Immanuel Kant, later, being taken by Saint-Simon, Christian Prudhomme or Victor Hugo in 1849. On September 7, 1929, Aristide Briand suggested to the General Assembly of the Nation's Society to create between European states a federal relationship which does not affect the sovereignty of these states.

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In this sense, on September 19, 1946, the British politician and the prime minister of United Kingdom in the World War II, Winston Churchill affirm to University of Zurich, the need of constitution United Stated of Europe, a first stage being the partnership between France and Germany.

The Organization of European Economic Cooperation was founded as a permanent organization of coordinating national economic policies. Also, having the task of distributing US aid has not been able to initiate the removal of economic and trade barriers between member countries.

The Organization of Northern Atlantic – NATO – is set up one year later, on April 4, 1949, on political-military plan. It has 12 states as founding members, including SUA.

In the same year, on May 5, 1949, the European Council was created as a concretization of the European idea, with 10 founding members. These are: Belgium, Denmark, France, Ireland, Italy, Luxembourg, UK, Netherlands, Norway and Sweden.

EUROPEAN COMMUNITY OF COAL AND STEEL

Belgium, Italy, Germany, Luxembourg and the Netherlands accept the proposal, but UK, on May 27, 1950, refused to participate on negotiation on the grounds it could not consider a limitation in terms of sovereignty, in that way showing itself uninterested.

Some events marked the signing of the European Community Treaty of coal and steel and on June 10, 1950, the Robert Schuman's statement was followed by open negotiations in Paris; on June 20, 1950, also in Paris, a conference was held which aimed at drafting the European Community Treaty of coal and steel. On April 18, 1951 the Treaty of Paris was signed and on July 25, 1952, the European Community Treaty of coal and steel entered into force after its ratification by the six states: France, Italy, Federal Republic of Germany, Belgium, the Netherlands and Luxembourg. This Treaty was concluded for a period of 50 years.

Four Community Institutions have been set up by the Paris Treaty, and a number of decision-making powers have been transferred from the Member States' institutions. These institutions are: the High Authority, which is an organ with national character accountable body and has the responsibility to administer the common coal and steel market and governs free movement and free competition, this being the objective of the European Community Treaty of coal and steel, a goal for which it has binding decision-making powers which it exercises vis-à-vis the Member States and directly on sector undertakings; The Parliamentary Assembly, this being the institution entrusted with the political control of the High Authority; The Special Council of Ministers ensures that the High Authority acts in close liaison with national governments; and the latter institution is the Court of Justice, which ensures the authority of the law within the territorial boundaries of the six signatory states of the Treaty[1].

EUROPEAN ECONOMIC COMMUNITY AND EUROPEAN ATOMIC ENERGY COMMUNITY

In a Memorandum, the Benelux countries proposed on May 20, 1955, the creation of a Common Market with a broader economic dimension than Coal and Steel Production (ECSC). It must correspond to an organization with a broader activity profile, as originally outlined by the Monnet-Schuman Plan. In this memorial, it was stated that economic integration should lead to political integration and follow some ideas from the Beyen Plan, which outlined the outlines of a common European market.

On March 25, 1957, the two treaties were ready to be signed. The Treaty establishing the EEC is also called the Common Market and its

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[1] For details see Iulia Boghirnea, *The Reference for a Preliminary Ruling Before the Court of Justice of the European Union – Procedure and Effects*, Proceedings of the International Conference European Union's Hystory, Culture and Citizenship, 8th edition (Bucharest: C.H. Beck, 2015), www.iccu.upit.ro, 582-589.

political aims are mentioned in the Preamble to the Treaty. The Treaty establishing the EAEC or Euratom has the mission to contribute to raising the standard of living in the Member States and developing trade with other countries by establishing the necessary conditions for the rapid development and development of nuclear industries.

In art. 2 of the Euratom Treaty notes that the main objectives are: developing research and ensuring the dissemination of technical knowledge; the establishment of uniform safety standards for the health protection of the population and workers and the supervision of their application; reducing investment and ensuring, in particular by encouraging business initiatives, the creation of the basic facilities needed to develop nuclear energy in the Community; overseeing the constant and fair supply of all users of the Community with ores and nuclear fuels; ensuring by appropriate controls that the use of materials is not diverted for purposes other than those for which they are intended; the exercise of the proprietary right which is recognized on special fission materials; ensuring the large outlets and access to the best technical means by creating a common market for specialized materials and equipment through the free movement of capital for nuclear investment and the freedom to hire specialists in the Community; establishing with other countries and international organizations any links that can promote progress in the peaceful use of nuclear energy.

At the same time with the signing of the Treaties of Rome, on March 25, 1957, a convention on some common institutions of the European Communities was adopted. Since then, for the three Communities, the Parliamentary Assembly and the Court of Justice are common.

The two Rome treaties, on an institutional level, have taken over the TCECO system with a less open organization to the supranational character. From this point of view, in the specialized doctrine it was stipulated with regard to the Treaties of Rome, that "by the institutional and decisional mechanism that I foresee, the supranational elements are at least seemingly contracting".

By their constituent and additional documents, the two Communities set up in Rome have two joint institutions with the ECSC,

such as the Parliamentary Assembly and the Court of Justice, and with each Community (EEC and EAEC) The Council of Ministers, a general management body and an executive committee as an executive body.

In 1961, the economic and European cooperation organization was based on new objectives and foundations. On this organization have been enrolled Canada, Australia, S.U.A., Japan. Its regulatory object is the condition that trade carries out its activities between states, such as: quality standards, competition conditions, environmental policy, export conditions, exchange rate, unemployment.

The famous agreement on disagreement, signed in Luxembourg, takes place on January 29, 1966. Through it, France dictates its will "to make any decision unanimously or not at the Ministerial Council." So, the rule of majority in decision-making has been postponed. It was also considered to be a danger to the sovereignty of the Member States and should have taken place at the end of 1965.

The Reunion of Heads of State and Government took place in The Hague on 1-2 December 1963. At that meeting, a decision was taken to open negotiations between the Communities and the States that had submitted the requests for membership. 5 years later, on 1 July 1968, the Customs Union became fully operational, with six months ahead of the timetable set by the Treaty. Thus, tariffs and restrictions have been removed between Member States, internal customs barriers have been canceled and the common external tariff has been finalized.

ECONOMIC AND MONETARY UNION

Charles de Gaulle, the president of France, retires in 1969, date that puts accent and goes to the end of obstructionist policy of France. George Pompidou, being the new president of France, at the end of the 1969, initiated a high-level summit in the Hague. In this place, the Heard of State and Government have come to the understanding of receiving new member and, in the long run, to realize an economic and monetary union. This must happen until 1980. The Economic and Monetary Union is a project that belongs to the Prime Minister of Luxembourg, Pierre Werner. On October 8, 1970, it represented a project bearing its name

and constituted a gradual unification of national economic policies and the creation of a monetary organization leading in 1980 to a common currency. The Economic and Monetary Union has been defined in the Resolution of the Council of the Communities.

Due to global financial destabilization, on April 24, 1972, the Communities initiated the European exchange rate called the "Currency Snake." It was intended to compel the states that participated in maintaining the national currencies at a mutually agreed level, not allowing oscillations higher than 2,5 %.

The Lomé Convention, the capital of Togo, I was signed on January 28, 1975, between the CEE and the African - Caribbean - Pacific countries. It abrogated the Treaties of Arusha and Yaounde. In this city, four multilateral trade and development agreements between the United States and countries and territories have ended. In these conventions, the ACP countries joined with the EU countries, the latter providing financial support but also trade advantages related to their exports to the Community market. The Lomé II Treaty was signed in 1980, and in 1985 the third was signed with the assistance of 66 states. The Lomé IV Treaty was signed in 1990.

Regarding the establishment of the European Court of Auditors, it was signed by the Brussels Convention in March 1975. A year later, the Treaty of Cooperation with the Maghreb countries, namely Algeria, Morocco and Tunisia, was signed by the CEE, and in 1977, with the Maschrik countries, namely Egypt, Jordan, Syria.

THE TREATY OF MAASTRICHT

The 12 members of the European Communities on 7 February 1992 signed the Treaty on European Union Training in Maastricht. On November 1, 1993, it entered into force.

The Treaty of Rome sets the foundation for the ever closer union of the peoples of Europe, and the EUA contained in its introduction the determination of the states to achieve a European Union. All the while, the Maastricht Treaty marks a new phase in the process of

creating an ever closer union among the peoples of Europe. At this stage, decisions are taken by citizens.

Under the Maastricht Treaty, the European Union is made up of 3 foundations, such as: the first pillar, the European Communities, which is also called the Community Pillar; the second pillar, namely the Common Foreign and Security Policy and Cooperation in the field of Justice and Home Affairs, being the third pillar.

Regarding the Maastricht Treaty, the European Union does not have legal personality, which it acquires through the Treaty of Lisbon, according to the legal provisions, art. 47 of the Treaty of European Union. As a result, the EU does not have the ability to engage externally with third countries, it does not have the capacity to conclude treaties, but it can only engage politically. Communities can engage Member States in international agreements, which means that they have legal personality.

The Treaty of Maastricht is made up of seven titles and contains: Common provisions referring to the EU by setting objectives: setting up an economic and monetary union comprising a foreign policy and a single currency; Provisions amending the Treaties establishing the EEC, ECSC, Euratom; Provisions relating to the common foreign and security policy; Provisions on cooperation in the fields of justice and home affairs and Final provisions.

THE TREATY OF AMSTERDAM (TA)

After the Unique European act and the Treaty of Maastricht, the Treaty of Amsterdam is the third major revision of the Community Treaties, signed in Amsterdam on 2 October 1997, following the Intergovernmental Conference opened in Turin on 29 March 1997. On 1 May 1999, the Amsterdam Treaty entered into force, also bearing the name of TA. It consists of 3 parts, such as: substantive changes to treaties, simplification of treaties and general provisions.

The first part, respectively, the substantive changes to the Treaties, mainly consist of: Community institutions, fundamental principles and Community policies.

With regard to the institutions, the following changes have taken place: the role of the European Parliament has clearly been strengthened

by setting a ceiling on the number of its members, that is, it cannot exceed seven hundred, thus imposing an amendment to the national laws on in the selection of members of the European Parliament; certain decision-making procedures have been replaced by the co-decision procedure, mainly in the area of the internal market. One last change would be that new competences have been received by the Court of Justice, such as asylum, visas, immigration and other policies on the free movement of persons and cooperation in the field of police and justice in criminal matters.

The second part, the simplification of the treaties is the consequence of consecutive checks of the Community Treaties, consisting of additions to the original text, and the previous provisions are not removed. An affirmation regarding art. 10 The TA refers to the fact that simplification does not affect the common rights and obligations arising from EU membership. Therefore, a complete renumbering of TCE and TMs was made, as the presentation of TCE became increasingly unclear. Therefore, according to art. 12 par. 1 TA, articles, titles and sections of TMS and TCE have been changed by the provisions of TA and renumbered according to the tables of equivalence set out in Annex TEC.

The last part of the Treaty of Amsterdam concerns the unlimited duration of the treaty, the confirmation of the parties to the contract, the entry into force and the drafting thereof in the official languages of the European Union.

European Central Bank, based in Frankfurt, was founded on January 1, 1999, while providing the foundation was 1 July 1998. The single currency "euro" was introduced to 11 European countries, these settlements scripted meeting and convergence conditions. This time emphasizes the beginning of the third stage of the EMU.

THE TREATY OF NICE

Its entry into force was 1 February 2003, the first treaty covering 27 Member States, taking into account the applications for membership of Eastern Europe. The Treaty of Nice has brought modifications to TMs,

TECs and certain acts that concern them, such as: Changes of Treaty of Maastricht concern situations where there is "a clear risk" of a serious breach by one of the Member States of the principles of democracy, freedom, the rule of law and respect for human rights and fundamental freedoms; other amendments referring to the gradual structuring of a common defense policy on the common foreign and security policy; The Political and Security Committee, which is under the responsibility of the Council and has political control over operations and stewardship of crisis management operations; new provisions on enhanced cooperation have been introduced in the CFSP field. Other changes to the TMs and TECs that the Treaty of Nice has brought are: new provisions on judicial cooperation in criminal matters, thus setting up Eurojust with Europol; "Provisions on closer cooperation" is the title of Title VII and has been amended in "Provisions on Enhanced Co-operation"; the changes to TCE, TCECO and TEATRAM refer to institutions, voting procedures and enhanced cooperation; a new Statute of the Court of Justice is provided for by the Treaty of Nice, thus stipulating the establishment of jurisdictional chambers.

The European Coal and Steel Community Treaty expires on 25 July 2002, which was concluded for a period of 50 years. Brussels was the place where the Convention meetings were held, after which discussions and concessions were decided by agreement on the adoption of a draft of a European Constitution on 13 July.

The draft Constitution covered several phases of its adoption, taking the form of a treaty. Therefore, on 29 October 2004, the Treaty establishing a Constitution for Europe was also signed under national procedures, subject to ratification by the Member States.

Eventually, it was rejected in the referendum practices that took place on 29 May 2005, in France and on 1 June 2005 in the Netherlands, in which the referendum had a consultative role in the country. The prolongation of the ratification process was determined in November 2006, by mid-2007, agreed at the European Council in June 2005. The euro is put into circulation on 1 January 2002 in 12 Member States, less in England, Sweden and Denmark. The currency is the only way of

paying in the European ministries, on 28 February 2002, when the third and last phase of the Monetary Economic Union was completed.

At the European Council in Copenhagen, Denmark in December 2002, 10 countries from Eastern Europe were invited to join the EU. According to the "One Europe" statement, Romania and Bulgaria have received both aid commitments of over € 1 billion a year and assurances of resuming negotiations with new member states. Until October 2004, negotiations have to be concluded.

In Athens, Greece, the Accession Treaties were signed with the 10 Candidate Countries on April 15, 2003, they concluded the EU membership treaty, namely Hungary, the Czech Republic, Poland, Slovakia, Lithuania, Latvia, Estonia, Malta, Slovenia and Cyprus. As these 10 states acceded on 1 May 2004, the enlargement of the European Communities / the European Union is constituted. At that time, the European Union comprises 25 Member States. The fact that both Romania and Bulgaria joined the European Union on January 1, 2007, comprises 27 states.

THE TREATY OF LISABON[1]

The first treaty that Romania signed as a member state is the Treaty of Lisbon, which was signed on 13 December 2007 and entered into force on 1 December 2009[2].

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[1] Ioana-Nely Militaru**,** *Dreptul Uniunii Europene*, ed. III revised and added (Bucharest: Universul Juridic, 2017), 33.; Ioana-Nely Militaru, *„*Considerations Relating to External Competence to Eu Trade Policy", *International Conference, „Perspectives of business law in the third millennium" Journal* (2016), www.businesslawconference.ro; Radu Ştefan Pătru, „Anumite consideraţiuni privind personalitatea juridică a Uniunii Europene în urma Tratatului de la Lisabona", *„Consilier European" Journal* no. 1 Department for European Affairs (2010): 12-16; Elise Vâlcu, „Brief Considerations on the Area of Freedom, Security and Justice and applicability in the Union's Legislature Procedure According to the Lisbon Treaty", *Journal of Legal Studies*, issue 3, year VII, no. 1-2 (2012), 139-150.

[2] I. Boghirnea, *Teoria generală dreptului* (Craiova: Sitech, 2013), 29.

The Treaty of Lisbon, as well as the Treaty of Amsterdam and Nice, is a treaty to amend existing ones: The Treaty of the European Union and the European Community and the Treaty on the Functioning of the EU.

The Treaty of Lisbon includes a solidarity clause between the Member States. According to art. 51 of the UN Charter, this provision implies that in the context of a Member State being the subject of armed aggression on its territory, the other Member States have the obligation to provide assistance and assistance by all means available to them.

Through this treaty, the Heads of State have proposed to adapt European institutions and working methods, strengthen the democratic legitimacy of the Union, but also its fundamental values.

Under the Treaty of Lisbon, the voting system is simplified by extending the qualified majority principle. Therefore, in order to adopt a decision, it is necessary to have a favorable agreement of 55% of the members of the Council, containing at least fifteen of them and constituting member states that meet at least 65% of the population of the Union[1].

CONCLUSIONS

This article analyzes the chronology of European construction, issues related to the emergence and development of European communities. The following are also presented: the Treaty of Maastricht, the Treaty of Amsterdam and the Treaty of Nice, as well as notions concerning the European Coal and Steel Community, Euratom and the Economic and Monetary Union.

The European Union was created with a view to putting an end to the great number of bloody wars left by neighboring countries. Since 1950, European countries have begun to unite both economically and

[1] Elise Vâlcu at al, *Means of collaboration at the level of the "Decisional Triangle" within the legislative procedure states by the Lisbon Treaty* - Working papers of the 6th Lumen International Scientific Conference, 6 th Lumen International Scientific Conference (2015).

politically within the European Coal and Steel Community to ensure lasting peace. Its founding countries are: Belgium, Germany, France, Italy, Luxembourg and the Netherlands.

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LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (20), Year XVIII, 2019, pp. 111-125

LEGAL MORTGAGES CONSIDERING THE PRINCIPLE OF EQUALITY OF THE PARTIES WITH REGARD TO CIVIL LAW

Emilia MATEESCU[1]

Abstract:

The Civil Code regulates the equality with regard to civil law, understanding by this the fact that no factual situation that would fit one part of the civil legal relationship into a social or professional category or any other similar situation will have no effect on civilian capacity.

Legal mortgages are real rights of real estate collateral, which the law introduces into the civil capacity of one of the parts of the legal relationship from which the secured mortgage receivable was born without the parties having agreed for that purpose.

By creating some genuine security rights under the law in the civilian capacity of the person without explicit consent in this respect, the Civil Code creates legal advantages for certain categories of civilian participants without foundation.

Key words: *equality with regard to civil law; real right of real estate collateral; civil capacity; legal benefits.*

INTRODUCTION

The emergence of the mortgage is controversial. The appearance of the notion can not be placed in time precisely because, like any legal institution, it has had different forms in different systems of law. The

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initial forms of this legal structure presented some elements with today's mortgage.

Under the Roman law, at the base of the mortgage there was the pledge (pignus)[1] that could be carried on the real estate and which only transfers the possession and the debtor had the possibility of a real action through which to obtain the return of the good if he/she paid his/her debt. Subsequently, the rights of the pledge creditor were extended to the point where the right to sell the pledged asset was recognized for the recovery of the debtor's debt. The pledge creditor could not use the good but could collect the usufruct in exchange for interest.

It was initially considered that the mortgage would be of Greek origin (ipotiki), given the fact that the term mortgage was of Greek origin[2]. Some authors are of the opinion that the legal institution of the mortgage is of Roman origin since its formation as a legal institution in Roman law, it originated from *pignus* and it was later completed as the legal figure called mortgage[3].

From the terminological point of view it is unanimously admitted that the term "*mortgage*" is of Greek origin, without the difference in its title depending on the object upon which it refers.

REAL ESTATE MORTGAGE IN THE CIVIL CODE

The Civil Code regulates the real collateral / security rights and classify the real estate mortgage under the category of real collaterals.

In the 2nd Chapter of the Civil Code entitled - Real rights in general, it is mentioned in art. 551 point 10 that there are real rights and real collateral rights.

Regulated succinctly and implicitly by the above mentioned provisions, the real estate mortgage finds a large completion in the

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[1] Alin Adrian Moise, *Legal regime of privileges and real estate mortgages* (Bucharest: Universul Juridic, 2015), 29.

[2] C. St. Tomulescu, *Private Roman Law* (Bucharest: University of Bucharest, 1973), 264.

[3] Emil Molcuț, *Private Roman Law* (Bucharest: Universul Juridic, 2004), 241.

provisions of the art. 2377 - 2386 of the Civil Code as special norms to the general norms of the mortgage matter, that is the art. 2343 - 2376 of the Civil Code.

GENERAL PRESENTATION. REAL ESTATE MORTGAGE – FROM THE REAL RIGHT TO CONTRACT

The mortgage in general has been defined as being the real collateral (security) that is constituted without the depositor's dispossession and which implies the involvement of a good, that is movable or immovable property, the guarantee of an obligation, conferring both a right to pursue and a right of preference to its rightful holder[1].

From the manner of regulating the mortgage, it results that it is a legal construction with features specific to the real rights and for a specific purpose, namely that of guaranteeing the obligations.

The specificity of the regulation determines the interdisciplinary approach of this institution, which is an accessorial real right.

The establishment of the real right of a mortgage shall be based on the parties' agreement and on the basis of the law.

In other words, the real right of a mortgage is just as much as any other real right.

As a general rule, the mortgage is constituted by the parties' convention. Practically the parties to the legal act conclude the act in order to constitute a real right to guarantee an obligation having as object a real estate, which is a mortgage.

However, we believe that the mortgage is constituted by legal act (bilateral or unilateral) even when it is established by law.

At the base of legal mortgages are legal acts on the basis of which claims were made which the law guarantees with a mortgage. It is the conclusion drawn from the analysis of the provisions of the art. 2386 of the Civil Code governing legal mortgage receivables. In such situations,

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[1] Liviu Pop and Ionuț-Florin Popa and Stelian Ioan Vidu, *Basic Elementary Civil Law – Obligations* (Bucharest: Universul Juridic, 2012), 806.

the mortgage is born under the law as a derivative effect of a legal act giving rise to a claim and to guarantee that claim[1].

Our opinion is based on the principle of *nemo censetur ignorare legem* applicable to all legal acts and facts. Based on this principle it can be assumed that the parts of the legal acts referred to in the art. 2386 Civil Code have taken into account the content of this text and have also pursued[2] the creation of real estate mortgages right through the conclusion of those legal acts. So we might consider the formation of the legal mortgage as a component of the cause of the legal act giving rise to the debt claim, a cause established by law, and on which parts of the legal act could not plead the nullity of the legal act on the grounds of the the illegality of the case of the cause.

In addition to the principle stated above, we consider that the establishment of legal mortgages by the Civil Code was made for the purpose of legal protection of persons who in one way or another contributed to the legal and economic existence of the property in the patrimony of the owner of the property right over that specific building. We will then see what are the legal acts that give rise to legal relationships between the parties, to which the law binds the birth of the real right of mortgage.

NOTION. ORIGIN OF MATTER. LEGAL FEATURES. LEGAL NATURE

According to the art. 2343 Civil Code, the mortgage is a real right on movable or immovable property affected by the performance of an obligation.

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[1] For another opinion, see Alin Adrian Moise, *Legal regime of privileges and real estate mortgages*, 241.

[2] According to the Civil Code of 1864, as a rule, the cause (purpose) of the legal act was the objective pursued at its conclusion. It is also underlined that the structure of the case includes two elements, namely the immediate purpose and the mediated purpose. The new Civil Code has not retained this conception, by not defining the cause and by considering the immediate purpose, in this regards see Gabriel Boroi and Liviu Stănciulescu, *Civil Law Institutions* (Bucharest: Hamangiu, 2012), 121.

So, the real estate mortgage is the name of a real right that has one or more real estate used to guarantee the performance of certain obligations.

The origin of the real estate mortgage are represented by the provisions of the art. 551 point 10 Civil Code corroborated with the provisions of the art. 2343 - 2386 Civil Code.

The legal characters of the mortgage are the following:

a) THE MORTGAGE IS A REAL RIGHT

The character of a real right belonging to the real estate mortgage is primarily due to its classification as a real guarantee right, but also to the provisions of the Art. 2343 defining the mortgage.

Real right has been defined as the patrimonial right by virtue of which its owner can exercise his/her attributes over a good, directly without another person'asistance[1], this one representing the legal relationship between two persons in respect of a good.

Within this legal report only the right holder is determined and the passive subject consists of the totality of the other persons to whom the general obligation to do nothing which can affect the exercise of the real right by its holder.

The main characteristic recognized by the real ights is that they confer on their holder both a right to pursue and a right of preference.

The article 2345 of the Civil Code provides that the mortgage right shall be retained on the assets encumbered by any property owner, thus regulating the right of pursuit. It also regulates the right of the mortgagee to pre-empt their claim before the chirographum creditors as well as before the lower-ranking creditors.

b) THE MORTGAGE IS AN ACCESSORIAL RIGHT

The provisions of art. 2344 of the Civil Code provides that the mortgage is, by its nature, an accessory. The mortgage subsists as long as there is an obligation it guarantees.

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[1] Eugen Chelaru, *Civil law. The main real rights* (Bucharest: C.H.Beck, 2013), 26.

This means that the real right of a mortgage cannot have a stand-alone existence because it is born simultaneously or after the birth of the guaranteed obligation. Being accessory by its nature, the mortgage cannot exist without the obligation it guarantees. From this relationship, it results that the birth of the mortgage right presupposes the valid existence of the guaranteed obligation, the transmission of the principal obligation will lead to the transmission of the mortgage, the extinguishment of the obligation will also extinguish the mortgage, except in the cases where the mortgage subsists. As far as the guaranteed obligation is concerned, the Civil Code provides that the mortgage can guarantee the fulfillment of a future or possible obligation, which means that the birth of the obligation bond will take place earlier or simultaneously with the mortgage and the execution of this bond, may be future or possible.

c) THE MORTGAGE IS INDIVISIBLE

The indivisibility of the real estate mortgage results from the provisions of the art. 2344 Civil Code stipulating that the mortgage is, by its nature, indivisible.

Through the indivisibility of the mortgage, it is understood that the mortgage is carried entirely on all of the encumbered assets, on each of them and on each separate part of them, even in cases where the property is divisible or the obligations are divisible.

As a result of the indivisibility of the real estate mortgage, it will remain in the situation of dividing the real estate on each division; the creditor can follow any of these or even all at once.

In the case of the partial payment of the guaranteed bond, the mortgage will subsist on the entire property and it will be fully pursuable for the remainder amount to be paid, unless the parties have otherwise agreed.

The indivisibility of the mortgage will make it possible, in the event of the division of the claim to several creditors, that any of them is entitled to pursue the property in its entirety for the satisfaction of its claim. In the same way, the shared property will be pursued in the batch of any co-owner, which would pass for the entire debt, the guarantee

appearing as incorporated in the real estate – *res, non persona debet*[1].

The indivisibility of the mortgage is aimed at the legal protection of the claim holder and the assurance of the claim.

The legal nature of the real estate mortgage is the real right of the real estate guarantee, which is an accessory of the guaranteed obligation.

We believe that the legal nature of the real estate mortgage will govern the legal regime and the analysis of this institution.

TYPES OF REAL ESTATE MORTGAGES

The real estate mortgage is governed by the Civil Code as being of two kinds: conventional and legal. Upon the appearance of the Civil Code, real estate mortgages could have been constituted prior to the entry into force of the present Civil Code[2], and, after the entry into force of the Civil Code, they could be constituted only on the basis of this normative act or other normative acts in force.

The division of the mortgage into the conventional and legal real estate mortgage by the Civil Code is based exclusively on the criterion of the existence of a convention concluded with the immediate purpose of establishing the real mortgage right. We are of the opinion that legal mortgages are the result of the *lato sensu* conventions in which the immediate purpose is other than the creation of the real right of real estate mortgage. We could say that the law presumes that by concluding the legal acts underlying the hypotheses contained in the art. 2386 of the Civil Code, the parties seek to constitute a legal mortgage in order to guarantee the execution of their claims while they do not expressly renounce this right.

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[1] Constantin Stătescu, Corneliu Bîrsan, *Civil law. General Theory of Obligations*, (Bucharest: All, 1997), 418.

[2] According to art. 168 of the Law no. 71/2011 for the implementation of the Law no. 287/2009 on the Civil Code, real estate mortgages established before the date of entry into force of the Civil Code are subject, as regards the conditions of validity, to the legal provisions.

LEGAL REAL ESTATE IN THE CIVIL CODE

The main headquarters[1] of the matter in the Civil Code for the legal real estate mortgage is represented by the art. 2386 of the Civil Code according to which there are two categories of legal mortgages:
a) Legal mortgages regulated by the art. 2386 of the Civil Code
b) Regulated legal mortgages in other cases provided by law.[2]

In the category of legal mortgages regulated by the article 2386 of the Civil Code, we can include the following:

a) the mortgage of the seller, on the sold real estate, for the price due; this provision shall also apply in the case of exchanges with additional payment or the payment of the balance to the benefit of the person who alienates the good, for the payment of the debt owed;

b) the promissory purchaser of the mortgage for the non-fulfillment of the promise to contract, with the objective of a real estate registered in the land book, on that specific real estate, for the repayment of the sums paid on its account;

c) the mortgage of the person who has borrowed a sum of money for the acquisition of a building, on the immovable property (real estate building) thus acquired, in order to repay the loan;

d) the mortgage of the person who has alienated a real estate building in exchange for personal health support and maintenance, on the real estate building that was alienated, for the payment of the rent in money corresponding to the unperformed health support and maintenance; the ownership of the health support maintenance debtor shall not be included in the land book only with this mortgage, the provisions of the Art. 2.249 applying accordingly;

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[1] By the phrase - *headquarters* - we are considering a succession of texts that regulate together a larger number of legal mortgages. The Civil Code regulates other legal mortgages in its contents. Legal mortgages are also regulated by special legislation.

[2] Other legal cases include the real estate mortgages provided by the Civil Code and the real estate mortgages provided by other normative acts of a special nature. The present study relates only to the real estate mortgages established by the provisions of the Civil Code.

e) the mortgage of the co-owners, for the payment of the additional balance or the price due by the co-owner adjudicator of the real estate or for the guarantee of the eviction claim, on the buildings that were returned to the co-owner of such an obligation;

f) the mortgage of the architects and entrepreneurs who have agreed with the owner to build, reconstruct or repair a building, mortgage on the building, in order to guarantee the sums due to them, but only within the limit of the value increase that was thus achieved;

g) the mortgage of the legatee with private titles, on the inheritance property buildings due to the person bound to execute the legacy, for the payment thereof.

In the category of legal real estate mortgages regulated by other provisions of the Civil Code, the following are included:

a) the mortgage established by the art. 591 par. 2 of the Civil Code according to which the author of the work of good faith who has a right to a legal mortgage on the real estate building to pay the indemnity and may request the registration of the mortgage right on the basis of the agreement concluded in authentic form or of a court decision according to the provisions of art. 589 of the Civil Code.

b) the mortgage established by art. 592 of the Civil Code according to which whenever the owner chooses to oblige the author of the work to purchase the building, in the absence of the parties' understanding, the owner can ask the court to set the price and issue a court decision replacing a sale-purchase contract. The original owner of the building has a legal mortgage right on it for the payment by the author of the work.

c) the mortgage provided by the art. 797 of the Civil Code, according to which, in case of degradation risk of the property due to the abusive use of the usufruct, the court can dispose, according to circumstances, either the extinction of the usufruct or the taking over of the use of the property by the owner without usufruct with the obligation to pay the usufruct-user a rent during the usufruct. When the property is immovable (a building), in order to guarantee a rent, the court may order the enrollment of a mortgage in the land book.

d) the mortgage mentioned in the art. 1337 of the Civil Code, which stipulates that, in order to guarantee the necessary expenses, the gerent (administrator) has the right to ask the court, after an expert's examination ordered by the law for the presidential ordinance, to register in the land book a legal mortgage, according to the law.

e) the mortgage established by the art. 1869 of the Civil Code stipulating that in order to guarantee the payment of the price due for the work, the contractor benefits from a legal mortgage on the work, established and preserved under the law.

The particularity of legal mortgages is that they arise in consideration of the guaranteed claim. In practice, in most cases, the appearance of a secured claim will lead to the creation of the real mortgage right over one or more real estate properties, apparently, without complying with the formalism imposed on conventional mortgages.

However, from the analysis of the art. 2386 of the Civil Code, it results that the law requires the observance of the formal conditions for the proof of the legal relationship of the claim that benefits from a legal mortgage.

The legal act giving rise to the claim must fulfill all the conditions of validity (background and shape) for the legal mortgage to take effect in a valid way.

The effect of the legal mortgage is that the holder of the real mortgage right will have priority in satisfying his/her claim against other privileged or chirographic creditors.

The specificity of the claims underlying the legal mortgages governed by the Civil Code is given by the fact that the majority of the claims are represented by an economic value which is the basis of the birth of the property right itself upon that specific building.

The seller will have a prior legal mortgage on the sold asset for the due price. The provision shall also apply to the creditor of the debt balance or to the payment of the balance sum for the due balance amount. The solution of introducing a priority guarantee over any other guarantee is apparently as justifiable as possible. The owner of the property right on the building could not guarantee with his/her right to ownership of the

property as long as he/she has not fulfilled the obligation to pay the price of the property he/she is the owner of. As a result, in order to avoid situations in which obligations (through the general guarantee of the chirographer creditors as well as real collateral) were guaranteed before the price was paid, the Civil Code instituted the real estate mortgage in favor of the creditor of the price or the additional balance.

For the same reasons, the person who has paid money to buy a building under a sales promise will have a mortgage right on the real estate to recover these amounts of money if the sale is no longer due to his fault.

The one who borrowed a sum of money to buy a building will have a mortgage on the property until the loan is repaid.

The health support and maintenance creditor and the credit-annuitant will have a legal mortgage to guarantee their claim that will be registered in the land book with the maintenance or life annuity contract.

The co-owners will have a mortgage to guarantee the additional balance amounts which they are entitled to from the co-owner adjudicator or to guarantee their claims resulted in case of eviction; the mortgage will be imposed on the real estate buildings returned to the co-owner bond to such an obligation.

Architects and contractors who have agreed with the owner to build, rebuild or repair a building will have a mortgage right on the real estate property to guarantee the amounts owed to them, but only to the extent of the value increase achieved.

Whereas, according to the art. 1059 of the Civil Code, the legatee with the private title of some kind of goods is the owner of a claim on the inheritance by the art. 2386 of the Civil Code, which is established in favor of such legatee with private titles, a mortgage right on the buildings out of inheritance due to the one obliged to execute the legatee, for its payment. It follows from the corroboration of the two texts that it is only about the legatee with private title related to goods of that kind and not individually determined goods since, related to the latter ones, the legatee with private title becomes the owner at the time of the inheritance and that quality is incompatible with that of holder of the real estate mortgage right.

On a similar line of thinking related to the above mentioned items, the legal real estate mortgages provided by the other rules of the Civil Code set out real mortgage rights to guarantee claims belonging to persons who, for some reason, contributed financially to the existence of the right of ownership on the property. For these reasons, such claims (the author of the work of good faith, the abusive usufruct user for whom the usufruct has ceased for this reason, the claim of the gerent or the contractor of works) were rewarded by the Civil Code with a real right of guarantee under the law, and not the parties' convention.

Another feature of the legal mortgages provided by the Civil Code is that legal mortgages are only real estate mortgages. The Civil Code regulates the legal mortgage only in the real estate sector, although nothing prevents the legal mortgage from being regulated from the movable matters as well. As long as the mortgage was admitted also to movable property, we believe that the legal mortgage could extend to this matter in order to ensure the widest protection of the guaranteed claims. Of course, it could be argued that there is a possibility for the parties to the debt ratio to conclude a conventional mortgage in the movable matter if they wish to secure the debt with certain movable assets. But such an assertion would not be the foundation of the legal mortgage regulation in the real estate itself, because the parties would have the opportunity to conclude an act of real estate mortgage and so the creation of a legal real estate mortgage by the legislator would seem abusive. In practice, for as long as the parties can conclude a legal act or give up the conclusion of a legal act constituted by a real estate mortgage, the legislator's intervention to oblige the parties to bear the legal consequences of a real estate mortgage is lacking foundation.

On the other hand, the establishment of legal mortgages only in the real estate field and the non-establishment of similar instruments in the movable matter create the feeling of inequality between legal institutions, which, at least from the name point of view, seem to have been created to function in the same way.

Real estate mortgages are the legal protection instruments of the holder of the guaranteed/ secured claim so established by the law without the express will of the owner of the property right over the building.

However, the holder of the secured claim may expressly waive this protection at the end of the debt settlement or later.

From this perspective, the legal mortgages provided by the Civil Code and by the private law generally manifest themselves as legal protection procedures made available to the protected person (the claim holder) who can use them or not.

CONCLUSIONS

In view of the provision nature regarding the use of the real estate mortgage, the institution of the legal nature of legal mortgages appears to be likely to violate the principle of equality of parties in front the civil law from the private law relationships.

By art. 30 of the Civil Code, it is regulated the principle of equality of parties before civil law by establishing the fact that the race, color, nationality, ethnic origin, language, religion, age, gender or sexual orientation, opinion, personal beliefs, political affiliation, trade union membership social or a disadvantaged category, wealth, social origin, degree of culture, and any other similar situation have no influence on civilian capacity.

By legal equality it is understood that subjects of law enjoy, in principle, the same legal treatment, irrespective of their quality or category (formal legal equality) and, on the other hand, in the case of natural (biological), psychological or economical objectives enjoy special legal treatment, aimed at restoring real equality (equilibrium) between them (substantial, material legal equality)[1].

We consider that the establishment of legal mortgages, ex officio, in view of the nature of certain claims (not justified by any particular circumstances such as the age of the person to whose favor it is protected, the presumed state of need, other exceptional circumstances such as close family relations or the like) creates an imbalance between the parties to the legal relationship of the claim.

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[1] Marian Nicolae, *Civil Law General Theory, vol. I. Theory of Civil Law* (Bucharest: Solomon, 2017), 13.

In fact, the parties to the claim /debt relationship have concluded an act by which they have committed themselves to a certain benefit. For the obligation arising from the claim /debt relationship, the parties did not negotiate a real right of conventional guarantee as they most probably did not want their claim /debt relationship to be guaranteed by a mortgage.

With the legal mortgage set up by the Civil Code, one of the parts of the legal relationship of a claim is recognized as a right (real estate mortgage right) even if the party does not opt to obtain the right, explicitly, although it has this legal possibility. On the other hand, the other party to the debt claim does not have a legal procedure to contest this real right of real estate mortgage constituted in the absence of the owner's will or in the absence of any negotiations in this respect.

As a result, by establishing a legal mortgage, in the civil capacity of one of the parties to the legal relationship has more rights than would have been desired by the party, that is, in addition to the right to receive the benefit, a real estate right through a step-by-step intervention, which is often justified by the belonging of the claim holder to a certain professional or social category (architect, entrepreneur, estate vendor, author of works of good faith, abusive usufruct user, legatee with private title, etc).

All of these people are often full-time persons, with full exercise capacity, who enter legal obligations in a legal position, negotiate the terms of their contract clauses, are able to execute their contracts, and may therefore secure their claims just like anything another participant in binding reports.

The protection granted by providing real rights in civilian capacity for such categories of claim holders is contrary to the principle of equality before the civil law established by art. 30 of the Civil Code.

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LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (20), Year XVIII, 2019, pp. 126-149

R.S VIETNAM CONSTITUTION - GENERAL ASPECTS

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Abstract:

This article attempts to present general constitutional aspects by integrating textual and contextual analysis of global influences on constitutional history in Vietnam. It presents data on constitutional rights adopted in the five constitutional texts of Vietnam. Throughout thousands of years under the feudal regime and nearly one hundred years under the colonial domination, Vietnam did not have any constitution; and the constitution enacted on November 9, 1946, by the National Assembly of the Democratic Republic of Vietnam was the first of the country, which had officially opened up the constitutional history in Vietnam. After the Constitution of 1946 followed by the Constitution of 1959, the Constitution of 1980, the 1992 Constitution (amended and supplemented in 2001) and the Constitution in effect are the Constitution of 2013. Each Constitution is attached. In conjunction with a period of development of the history of the national revolution, let us learn together about the historical context as well as the nature of Vietnam's Constitution.

To understand these texts in context, it is based on historical documents and material on the constitution. The structure of the argument follows the development of the constitutional rights, reviews and provides a short commentary on certain provisions of the Constitution of the Republic Socialist of Vietnam, which we deem necessary to be pointed out. Particular focus is placed on certain normative solutions that we believe are not adequately regulated and at the same time the interest of the citizens of Vietnam.

The present article aims at presenting the Vietnam fundamental law with the highlighting of some essential aspects regarding the exercise of the legislative, executive and judicial powers, the institutional particularities and, last but not least, the

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evolution of the regulation that was generated by the state's accession to the international integration... Constitutional control is another aspect that we have focused on the study, considering may the important role of the Constitutional Court in the rule of law. The analysis can be signified as a point of reference in the comparative study of constitutional regulations.

Keywords: *legislative power; constitutional control; separation of powers in the state; human rights; Constitution of the R.S Vietnam; commentary on articles.*

INTRODUCTION

A constitution is an aggregate of fundamental principles or established precedents that constitute the legal basis of a polity, organisation or other types of entity, and commonly determine how that entity is to be governed. The Constitution is the most valuable legal document with a particularly important position in the legal system and political life of each country. At the same time, it can be considered the political manifesto of every state government. The constitution is a legal basis for building and perfecting a consistent and unified legal system. It is also the basis for the organization and operation of the State apparatus. The Vietnamese Constitution is the most important legal and political document after the Party's platform, the original law, which regulates very basic issues of a State. The August 1945 Revolution, brought perdition of French domination in Vietnam. Concomitantly, Hồ Chí Minh formally declared the independence of the nation and the birth of the Democratic Republic of Vietnam on September 2 , 1945[1] . Vietnam had since entered a new historic phase under the leadership of the Communist Party with the experimentation of five written constitutions and only one day thereafter, at the first meeting of the provisional government, President Ho Chi Minh proposed the early organization of a parliamentary general election and the elaboration of a

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[1]The First General Election of the National Assembly, 29 Jan (2011) *http://vietnamlawmagazine.vn /the-first-general-election-of-the-national-assembly-4448.html* accessed on 26.05.2019

constitution. He analyzed: "As we were formerly ruled by the absolute monarchy, then the colonial regime which was no less despotic, our country had no constitution and our people could not enjoy democratic freedoms. Therefore, I propose the Government to organize as soon as possible a general election according to the universal suffrage regime. All citizens, male and female, aged full 18 years old shall have the right to vote and to stand for the election, regardless of their economic situation, religion, ethnicity."

The August Revolution had recovered sovereignty for the nation and freedom for the people and set up the democratic-republican regime. After eighty years of struggle, the Vietnamese nation had cast off the colonial yoke and subsequently overthrown the monarchic regime. Our Fatherland had embarked on a new path. The national tasks in the present stage were to safeguard the territory, recover total independence and build the country on a democratic basis. Entrusted by all the citizens with the task of drawing up the first constitution of the Democratic Republic of Vietnam, the National Assembly recognized that the Constitution should embody the glorious success of the Revolution and base itself on the following principles:

1. To unite the entire population regardless of ethnic origin, sex, class or religion;
2. To guarantee democratic liberties;
3. To establish the strong and enlightened power of the people.

1. THE CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF VIETNAM IN 1946:

(Was passed by the National Assembly of the Democratic Republic of Vietnam on 9.11.1946)

The Constitution of 1946[1], comprising 7 chapters and 70 concise

[1]http://vietlaw.gov.vn/LAWNET/docView.do?docid=290&type=html&searchType=fulltextsearch&searchText= , accessed on 28.05.2019

things, reflected the real situation of the country in the early years of the revolutionary State. The 1946 Constitution was established as a strong affirmation in the legal aspect of the national sovereignty of the Vietnamese people, the independence and territorial integrity of the Democratic Republic of Vietnam. However, due to the war conditions, the 1946 Constitution was not officially announced. However, the spirit and content of the 1946 Constitution was always applied and governed by the Provisional Government and the National Assembly Standing Committee. The constitutional ideology of the 1946 Constitution has always been inherited and developed in later Constitutions.

The 1946 Constitution did not confirm the leadership of any party, group or class.

In fact, in the National Assembly I had many parties and different groups: Viet Minh, Viet Quoc, Viet Cach, Social Party, Democratic Party, Marxist Group.

In the 1946 Constitution, civil rights were clearly defined. Equal rights: "All Vietnamese citizens are on equal footing in all aspects: political, economic, cultural" (Article 6); “All Vietnamese citizens are equal before the law, are entitled to participate in government and national construction according to their talents and virtues” (Article 7); “In addition to equality of interests, minority nations are helped to support all aspects to quickly keep up with the general level ”(Article 8); "Women are on par with men in every way" (Article 9);

Specifically, the rights of citizens are stipulated in Article 10:

"Vietnamese citizens have the right:

- Freedom of speech
- Freedom to publish
- Freedom to organize and meet
- Freedom of belief
- Freedom of residence, domestic travel and abroad. ”

Economic rights: "Private property rights of Vietnamese citizens are guaranteed" (Article 12); "Gender benefits need intellectual and manual labor to be guaranteed" (Article 13).

Social rights: "Elderly or disabled citizens who cannot do anything are entitled to help. Children are educated in terms of education” (Article

14). In the remainder, the 1946 Constitution did not provide any regulations that limited these civil rights.

The 1946 Constitution stipulated that parliaments are "open to the public, the audience is allowed to listen" and "the media is allowed to recite the discussions and resolutions of the Parliament" (Article 30). This provision did not appear in the constitutions of 1959, 1980 and 1992. The public assembly is only vague in Article 83 of the 2013 Constitution.

2. CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF VIETNAM IN 1959:

(Was passed by the National Assembly of the Democratic Republic of Vietnam on 31.12. 1959)

The Điện Biên Phủ victory put an end to the war against the French in 1954[1], leading to the Geneva Conference, which divided Vietnam into two separate Zones: The North and The South. The Democratic Republic of Vietnam ruled in the North from Hanoi, and the Republic of Vietnam, under the support of the United States, ruled in the South from Sài Gòn (presently Hồ Chí Minh City). The Democratic Republic of Vietnam in the North enacted the second constitution in December 1959, a charter implementing Socialism in the North, modeling the Soviet constitutional system. Meanwhile, the Republic of Vietnam in the South enacted its own two constitutions in 1956 and 1963 respectively.

On April 1, 1959, the draft of the new Constitution was announced for all people to discuss and contribute ideas. On December 31, 1959, at the 11th session, the National Assembly I passed the 1959 Constitution[2] replacing the Constitution in 1946 and on January 1, 1960, President Ho Chi Minh signed an order to announce this constitution in

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[1] The Vietnam War: *Seeds of Conflict 1945 - 1960,* HIST. PLACE (1999) , http : / / www . historyplac . com / unitedstates / vietnam / index - 1945 . html

[2] Nhiều Tác giả , *Hiến pháp nước việt nam dân chủ cộng hoà [constitution]31.12.1959,* Hanoi: Nhà Xuất Bản Chính Trị Quốc gia Sự Thật, 2015;

public.

The 1959 Constitution including 10 chapters and 112 articles clearly stated the great revolutionary victories gained in the past and the target of our people in the new period. The 1959 Constitution stipulated the responsibilities and powers of state agencies, the rights, obligations of citizens, to promote the great creativity of our people in the construction of the country, unity and protect the country. This is a truly democratic constitution and the power to encourage people all over the country to strive to fight for new victories.

The new Constitution clearly recorded the great revolutionary gains in the recent past and indicated the goal of the struggle of our people in the new stage. The state was a people's democratic state based on the alliance between the workers and peasants and led by the working class. The new Constitution defined the political, economic, and social system of country, the relations of equality and mutual assistance among the various nationalities in, and provides the North the taking toward socialism, the constant improvement of the material and cultural life of the people, and the building of a stable and strong North of Vietnam as a basis of the struggle for the peaceful reunification of the country. The new Constitution defined the responsibilities and powers of the state organs and the rights and duties of citizens with a view to developing the great creative potentialities of our people in the construction, reunification and defence of the fatherland.

The new Constitution was a genuinely democratic Constitution. It was a force inspiring the people throughout the country to march forward enthusiastically and win new successes. The people were resolved to develop further their patriotism, their tradition of solidarity, their determination to struggle and their ardor in work. The people are resolved to strengthen further solidarity and unity of mind with the brother countries in the socialist camp headed by the great Soviet Union and to strengthen solidarity with the peoples of Asia, Africa and peace-loving people all over the world.

The party began to be mentioned in the 1959 Constitution: "under

the clear-sighted leadership of the Vietnam Lao-Dong Party[1], the government of the Democratic Republic of Vietnam, and President Ho Chi Minh, our entire people, broadly united within the National United Front, will surely win a glorious success in the building of socialism in the North of Vietnam and the struggle for national reunification. Our people will surely be successful in building a peaceful, unified, independent, democratic, prosperous, and strong Vietnam, making a worthy contribution to the safeguarding of peace in Southeast Asia and the world."

Compared to the 1946 Constitution, the 1959 Constitution added more new regulations on human rights such as: The Right to appeal and denounce to State agencies (Article 29), the Right to work (Article 30), the Right to rest (Article thirty first). Besides the regulation of rights, the 1959 Constitution also specified the basic obligations of citizens. Notably, the 1946 Constitution emphasized the role of the people in the constitutional process, in which the people have the right to constitutional resolution - a determination to enforce national ownership and relations to transport. National destiny (Article 21 of the Constitution 1946). However, the 1959, 1980 and 1992 Constitution later revoked this right. This was a very important direct democratic right of citizens and should be restored.

With the change of the economy and society, the 1959 Constitution partly overcome the limitations of the 1946 Constitution - the provisions were no longer suitable for the situation. The 1959 Constitution can be seen as a new step in the process of Vietnamese constitutional skills.

3. CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM IN 1980:

(Was passed by the National Assembly of the Socialist Republic of Vietnam on 18.12.1980)

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[1] http://baochi.nlv.gov.vn/baochi/cgi-bin/baochi?a=d&d=WNyf19510319.2.1&e=-------vi-20--1--img-txIN------ accessed on 08.06.2019

The end of the Vietnam War in 1975 led the nation to unification, following April, 30th, the Socialist Republic of Vietnam began a broad process of institutional administrative, legislative, and political standardization under the visionary management of one political force. The new way for a democratic reconstruction of the management structures at all levels, the rise of the living standard at material and spiritual level for all the citizens under the ruling of the Socialist Party contributed to the reinforcement of the collaboration and internal and international cooperation at different levels with people and states which strive for peace and friendship, based on the non- interference in the internal affairs, the mutual respect and on the national sovereignty, which became important objectives of the state policy of the new republic. The outdated forms of exploitation were replaced with new forms based on modern grounds, a better knowledge of the reality, efficient distribution and organization of the socialist means of production. The will of the working people materialized through the effective participation of every citizen in ruling actions of the political life, the accomplishment of the necessary for living goods, the sharing burdens and benefits to create a new social order under the ruling of a visionary party.

The Marxist - Leninist ideology based on equality and social equity principles, allowed the citizens to take part in the management of the economic activities, to create a good co-working among all the working people from cities and villages. Abolishment of the class system and the confrontations among them, allowed to enhance the modernization processes of the country, the increase of the culture level of the material and spiritual level, the awareness, research, innovation, education and training for all the people. The modernization of the legal system represented one of the direction actions of the political power to establish a high level of security and safety for all the citizens, to increase the degree of voluntary, the conscious and responsible compliance of all the persons, without privileges and discrimination, obeying solid principles of legality, equality and without bias. The prevalence of the right which rose from the power of the sovereign independent and free people, against the right of the force trained in favour of some privileged oppressor social classes, needed a specialized analysis of the

constitutional, legislative or administrative body of rules in relation with the provisions of the harmonious political and development programmes of the society.

On April 25, 1976, the General Election of the 6th National Assembly was conducted nationwide. From June 24 to July 3, 1976, National Assembly VI conducted its first session. At this meeting, on July 2, 1976, the National Assembly decided to change the name of our country to the Socialist Republic of Vietnam; At the same time, a Resolution on the amendment of the 1959 Constitution was established and a draft Constitutional Committee was set up with 36 people led by Mr.Truong Chinh - Chairman of the Standing Committee of the National Assembly as the Chairman of the Committee. By August 1979, a new draft of the Constitution was proposed for the people's opinion. On December 18, 1980, at the 7th session of the 6th National Assembly, the Constitution of the S.R. of Vietnam was unanimously approved.

Inheriting and developing the 1946 Constitution and the Constitution in 1959, the 1980 Constitution[1] consisted of 12 chapters and 147 articles. The Constitution summarized and identified the achievements of the revolutionary struggle of the Vietnamese people in the second half past century; which demonstrated the will and aspiration of the Vietnamese people, ensured a brilliant development of Vietnamese society in the coming time. As the basic law of the State, this Constitution stipulated the political, economic, cultural and social regime, basic rights and obligations of citizens, organizational structure and operational principles of Agencies State, expressing the relationship between the Party leaders, the people in control and the State management in Vietnamese society.

The word "Party" only began to appear in the official provisions of the 1980 Constitution. The 1980 Constitution not only affirmed the leadership of the Communist Party of Vietnam in the preamble but also specified in Article. 4. However, it still acknowledges the existence of

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[1] Nhiều Tác giả , *Hiến pháp nước việt nam dân chủ cộng hoà [constitution] 18.12.1980,* Hanoi: Nhà Xuất Bản Chính Trị Quốc gia Sự Thật, 2015;

other "political parties" in Article 9 of the Fatherland Front and Article 86 on the right to present a bill to parliament. In 1988, the Democratic Party and the Socialist Party announced their dissolution, ending the official multi-party period in Vietnam.

The constitution had added four new points:

Firstly, the State and society are obliged to take care of women's political, cultural, scientific, technical and occupational qualifications to promote the role of women. in social;

Secondly, the State needs to plan labor policies in accordance with women's conditions; Thirdly, cooperative members are also entitled to a delivery allowance;

Fourth, the State and society must take care of the development of maternity homes, kindergartens, public eateries, and other welfare facilities.

Not only is the content more and more complete, but also the number of provisions in the 1980 Constitution is more than the previous Constitution. If in the past, the Constitution in 1946 was only 18 Articles stipulating the rights and obligations of citizens the 1959 Constitution was 21 Articles and the 1980 Constitution was 29 Articles.

Although there were more progressive points in the 1980 Constitution on the recognition of human rights compared to the previous two Constitutions, however, in this Constitution, we still see some shortcomings such as the provision of rights and meanings. Citizens' cases were still limited, the way of regulating the rights of the 1980 Constitution according to the old thinking, expressing the idea of "State grants rights" to people.

However, according to the Constitutional spirit of developed countries, human rights were innate, inherent to each individual person, no one can violate and no one can give. The state must be responsible for acknowledging and ensuring those rights to be exercised in practice. Thus, the approach of our Constitution is quite different from that of developed countries. Another drawback of this constitution is that it did not recognize personal ownership. Perhaps due to the too simple conception and haste, the 1959 and 1980 Constitution did not recognize private ownership. During the war years, this regulation had a great effect

on mobilizing people to concentrate their strength on the victory of the resistance war. However, when it came to the construction and economic development, the above regulation was the source for the equalization and indifference to the means of production, leading to the waste of public, irresponsible in the Asset Management, corruption and rampant public funds became popular. The 1980 Constitution should have overcome this weakness and show new awareness about the path to socialism.

Compared to the Constitution of 1946 and 1959, human rights in the 1980 Constitution turned out to be more complete and stricter in legislative techniques. Regulations in the Laws were increasingly more specific, and simultaneously, selectively absorbed and inherited the provisions from the previous Constitutions. An example of inheriting and developing legislative skills through the Constitution on Human Rights[1], specifically on equal rights, was expressed in the following Constitution: if the 1946 Constitution stipulates Articles 6 to 9 include the following contents: "All Vietnamese citizens are on equal footing in all aspects: political, economic, cultural. All Vietnamese citizens are equal before the law, are entitled to participate in the government and national construction according to their talents and virtues. In addition to equality of interests, minority nations are helped in every way to keep up with the general level. Women are equal to men in every way "then to the 1980 Constitution, for equal rights for men and women (Article 63)

4. CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM IN 1992:

(Was passed by the National Assembly of the Socialist Republic of Vietnam on 15.04.1992).

In the 80s of the twentieth century, due to the influence of the Communist movement and international workers falling into decline, the socialist countries in Eastern Europe and the Soviet Union collapsed, our

[1] http://web.hcmulaw.edu.vn/doantruong/index.php/ho-tro-sinh-vien/khac/71-sv-khpl-nhan-quy-n-trong-cac-b-n-hi-n-phap-vi-t-nam - accessed on 10.06.2019

country fell into a serious economic crisis. In 1986, the Communist Party of Vietnam initiated an important economic reform program known as Đổi mới (Renovation)[1], which was meant to transform the centrally planned economy to the Socialist - oriented market economy. The 6th Congress of the Communist Party of Vietnam (December 1986) had proposed a reforming way with many important guidelines and solutions to maintain political stability and continued socio-economic development; in that context, many of the provisions of the 1980 Constitution no longer met the country's construction requirements in new conditions. The National Assembly decided to amend the 1980 Constitution to meet the requirements of the new situation and tasks.

On December 22, 1988, at the 3rd session of the National Assembly (Session VIII), a Resolution to establish the Constitutional Amendment Committee, composed of 28 comrades, chaired by the Chairman of the State Council - Vo Chi Cong, had changed the Constitution.

On April 15, 1992, on the basis of synthesizing opinions of the people of the whole country, this new draft of the Constitution was approved by the VIII National Assembly (at the 11th session). The 1992 Constitution was called the Constitution of Vietnam in the early period of the renovation process.

The 1992 Constitution[2] consisting of 12 chapters, 147 articles regulated political, economic, cultural, social, defence, security, basic rights and obligations of citizens, organizational principles and the activities of state agencies and institutionalized the relationship between the leadership of the party and the people in control, the State manages. The 1992 constitution created an important legal basis for the implementation of our country's renovation. The 1992 Constitution continued the Socialist constitutional tradition, but in a more moderate

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[1] Vuong, Q.H.; Dam, V.N; Van Houtte, D.; Tran, T.D. (Dec 2011). "The entrepreneurial facets as precursor to Vietnam's economic renovation in 1986" (PDF). *The IUP Journal of Entrepreneurship Development*. **VIII** (4): 6–47. Retrieved 25 December 2012.

[2] Nhiều Tác giả , *Hiến pháp nước việt nam dân chủ cộng hoà [constitution] 15.04.1992*, Hanoi: Nhà Xuất Bản Chính Trị Quốc gia Sự Thật, 2015;

manner, and introduced novel articles to promote economic liberalization.

By 1992, civil rights were more detailed and had added some new rights compared to the previous constitutions. Paragraph 3 of Article 67 of the 1980 Constitution had also been omitted. However, the 1992 Constitution still had a gap that allows citizens' freedoms to be violated. Specifically, civil rights stipulated in Articles 68 and 69 of the 1992 Constitution were enforced "in accordance with the law".

Article 68: Citizens have the right to freely travel and reside in the country, have the right to go abroad and return home from abroad according to the provisions of law.

Article 69: Citizens have the right to freedom of speech and freedom of the press; have the right to information; have the right to meet, organize and demonstrate according to the law.

Because "law" is understood to include laws and sub-law documents (such as decrees and circulars), this provision makes citizens' rights confined. For example, Decree 38/2005 / ND-CP provides some measures to ensure public order. Article 6 of this Decree prohibits a large concentration of people in public places without the permission of the competent People's Committee. At the same time, it allows the bureaucracy to enforce violators to leave the centralized location. This is the basis for the government to dissolve many protests in Vietnam in recent years.

Regarding the form of expression, the rights and obligations were recorded in the 1992 Constitution with more precise legislative techniques. For the first time, the term "human rights" is recognized in the Constitution (the three previous Constitution unified human rights to citizenship). The language expresses closely, reflecting the objective reality, leaving and leave out some humanistic words but it was not suitable to reality.

The number of rights and obligations recorded in the chapter on of basic rights and obligations of citizens has also developed, not only compared to not only the previous three constitutions but also against the Constitution of the countries. If the Constitution of 1946 has 28 Articles on basic rights and obligations of citizens, the 1959 Constitution has 21

Articles, the 1980 Constitution has 28 Articles, the 1992 Constitution has 34 Articles on the total 147 articles of the entire Constitution. In comparison with the 1980 Constitution, the 1992 Constitution only retains 4 Articles which are not corrected, 26 Articles must be amended and or supplemented and 4 new Articles with more reasonable arrangements. It is also because of the increase in the number of articles in the Articles of Law more than compared to the previous Constitution that The Citizenship Section in the 1992 Constitution was expanded more than the previous three. For example, citizens' property rights are more generally recognized (Article 58).

The capacity and changes in that form represent an increasingly advanced constitutional technique according to the principle of law that correctly reflects objective and feasible reality. As well as in the 1946, 1959 or 1980 Constitutions, the rights of citizens stipulated in the 1992 Constitution have been supplemented and more concretized to come to perfection. The basic rights of citizens under the provisions of the 1980 Constitution have been revised to suit the actual conditions of the period of the transition to socialism. The 1992 Constitution recognized private ownership as one of the most fundamental rights of citizens. Redefining citizens' private rights - one of the most fundamental crucial rights of a human being, is the most fundamental content of the 1992 Constitution - the Constitution of the renewal period and the re-awareness of rules and objectivity of the transition period to socialism. These are the successes in recognizing human rights in the Vietnamese Constitution.

However, in the context of current globalization, the human rights provisions of the 1992 Constitution have had some inadequate things that need to be changed by due to the following shortcomings:

First, human rights synonymous with civil rights as stipulated in Article 50 of the 1992 Constitution are inaccurate and easy to cause misunderstandings that in Vietnam, only Vietnamese citizens have human rights, but foreigners do not. Such provisions are contrary to the world's human rights regulations, because human rights are natural rights, anyone who is everyone is born without being discriminated against sex, ethnicity.

Secondly, it can be seen in the provisions of the Vietnamese Constitution that human rights are regulated in a manner recognized by the State. This is misleading that Human Rights are a right granted to the people by the State. These regulations are easy to see in the chapter on Citizens' Basic Rights and Obligations in the Constitution, such as In Articles 53, -58... of the 1992 Constitution, which stipulate In the form of a State recognizing its citizens' rights in a way that is subject subjected to the state's will, it is not that people enjoy these rights implicitly. This way of regulation is completely different from the approach of the developed countries' Constitution. Citizens' rights are those that belong to the creator to man, no one can violate or have the right to give to others. The state must be responsible for ensuring that those rights are exercised in practice.

In the early twenty-first century, Vietnam introduced important constitutional reforms. In December 2001, the National Assembly adopted, for the first time, amendments for the 1992 Constitution to meet the demands of the new transitional context[1]. As a result of the Doi mói Đổi Mới – Revolutionary policies, the dynamics of economic transformation, especially the speedy increasing diversification of sectoral structures of the economy with the remarkable rise of the private sectors, induced the need to amend the 1992 Constitution to reform the state machinery. Consequently, the constitutional amendments included the following important points: the concept of a "socialist rule of law state"; the principle of the "distribution of powers"; the new mechanism of a vote of confidence, which allows an National Assembly vote of confidence on to demonstrate which individual officials elected or approved by it; adjustment of the functions of the National Assembly and the Government to specify the principle of distributing the public powers; and limitation of the Procuracy's (public prosecutors) jurisdiction.

The 2001 constitutional amendments borrowed from, and were modified by, some Western values, especially the idea of the rule of law, the principle of separation of powers, and the institution of the vote of no

[1]https://moj.gov.vn/vbpq/lists/vn%20bn%20php%20lut/view_detail.aspx?itemid=22335 accessed on 12.06.2019

confidence. More than a decade after the first revision, during the August 4, 2011 session, the National Assembly established the Constitutional Amendment Commission and decided to comprehensively revise the 1992 Constitution.

The constitution-makers did not clarify the reasons. Yet, the internal economic and social transition after three decades of Đoi mói Đổi Mới and the impact of the globalization were important impetuses for constitutional reform in Vietnam.

5. CONSTITUTION OF THE SOCIALIST REPUBLIC OF VIETNAM IN 2013:

(Was approved by the National Assembly of the Socialist Republic of Vietnam on 28.11. 2013)

Institutionalization of the Platform to build the country during the transition period to the socialism of 1991 (supplement, development in 2011) of the Communist Party of Vietnam, along with the results of practical summation over 25 years of implementation the comprehensive reform of the country has demanded amendments and supplements to the 1992 Constitution; in order to institutionalize more fully and deeply more than the views of the Party and our state on promoting people's sovereignty, promoting socialist democracy and ensuring all state power belongs to the people.

On August 6, 2011, at the first session of the 13th National Assembly, the Resolution No. 06/2011 / QH13 was adopted to establish a draft Committee for amendments to the 1992 Constitution with 30 members, led by Comrade Nguyen. Sinh Hung - Chairman of the National Assembly, is who the Chairman of the Committee was. After a period of 9 months (from January 1 to September 2013), to collect comments from people throughout the country and overseas Vietnamese, on November 28, 2013, at the 6th session, National Assembly XIII officially ratified the Constitution of the Socialist Republic of Vietnam - the 2013 Constitution. On December 8, 2013, the President signed a Constitutional Order. The 2013 Constitution is effective has taken effect from January 1, 2014.

The Constitution of 2013[1] consists of 11 chapters and 120 articles. The Constitution constitutes the intellectual, will and aspirations of the whole Party and the whole people Vietnamese citizens, demonstrating the spirit of innovation for the goal of rich, strong and democratic people, fair and civilized society. The above-mentioned regulations still exist in the 2013 Constitution with a longer phrase: "the implementation of these rights is regulated by law". Basically, this regulation still retains the gap, so the state can issue legal documents to regulate the exercise of rights.

The difference of the Constitution 2013 compared to the remaining preceding Constitution is the emergence of the phrase "human rights", along with the provisions on cases of limiting "human rights" in Clause 2 Article 14: "Human rights and civil rights can only be restricted in accordance with the law in case of necessity such as for reasons of national defence, national security, social order, safety, social morality and strength, healthy community."

However, the 2013 Constitution does not explain or define in detail what is "national security, social order, safety, social morality, public health".

After a journey of more than 10 years of reform, the situation of the country changing so lead to the fact that the constitutional change is a necessity to better suit the current situation. It can be said that the constitutional legacy that the 1946 Constitution left for the following Constitution - the 1959 Constitution, the 1980 Constitution, the 1992 and 2013 Constitution is very large. Each Constitution recognizes the core provisions of the Constitution on Human Rights. However, through each stage, the Constitution has revealed the shortcomings that lawmakers have not yet anticipated so that the Constitution becomes relevant to reality. In response to these shortcomings, the 2013 Constitution was born and especially when regulations on human rights and human rights were considered the bright point in the 2013 Constitution.

In the 2013 Constitution, there are 11 chapters but in particular,

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[1] https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Hien-phap-nam-2013-215627.aspx accessed on 14.06.2019

the chapter on human rights; basic rights and obligations of citizens has the most articles, including 36 Articles (from Article 14 to Article 49). This is an important chapter because it is about constitutionalism that refers to the relationship between citizens and state agencies. Human rights are defined in Chapter II of the 2013 Constitution, based on the amendment, supplement and re-layout of Chapter V of the 1992 Constitution (Basic rights and obligations of citizens). Compared to the 1992 Constitution, the amended Constitution in 2013 had added many provisions on human rights, basic rights and obligations of citizens. This is reflected in some main contents such as:

Firstly,the position of the chapter "Basic rights and obligations of citizens" had changed from chapter V in the 1992 Constitution to Chapter II in the 2013 Constitution. Changing the above position is not simply a change in father clots that are a cognitive change. With the concept of promoting people's sovereignty in the Constitution, considering the people as the supreme subject of State power, human rights, basic rights and obligations of citizens must be determined in an important position, on the top of a Constitution. This change is the succession of the 1946 Constitution and the Constitution of many countries around the world, consistently demonstrating our Party and State's guidelines in recognizing, respecting, ensuring and protecting human rights. , basic rights and obligations of citizens.

The 2013 Constitution has made a distinction between "human rights" and "civil rights". In the amended Constitution, when it comes to human rights, the word "everyone" is used, when it comes to Vietnamese citizens, the word "citizen" is used. This provision represents an important development of awareness and thinking in recognizing human rights and civil rights in the Constitution. Under the provisions of Article 14, no one shall arbitrarily cut or restrict rights, except for the above-mentioned cases as required by the Law. Thus, the Constitution amended: the restriction of human rights and explicit citizenship must be prescribed by Law, not equal document under Law.

Secondly, the Constitution added a number of new rights, demonstrating a new step in the expansion and development of rights, reflecting the results of the reformed process over the past 30 years in our

country. These are the Right to Live (Article 19), the Right to donate human tissue, organs, cadaver donation (Article 20), the Impregnable Rights of private life, the Right to live in a clean environment (Article 43). The recognition of these new rights fully complies with the international treaties that the Socialist Republic of Vietnam is a member of, they demonstrating demonstrate the increasing awareness of human rights and affirming Vietnam's strong commitment in the implementation of human rights.

Third, constitutional technology has many innovations. The way of expression has its own set of rules, such as Article 14, Article 15. The constituents refer to international treaties that our State is a member so that the content of expressions can ensure compatibility. In addition, human rights are not only mentioned in Chapter II but also in many other chapters such as the Government, People's Procuracy and People's Courts. Thus, the state apparatus was created to protect human rights. This human rights approach represents the inheritance and the uptake of progressive views of countries around the world.

In fact, since the 2013 Constitution took effect, people have not yet been free to listen to parliamentary sessions. Although the 2013 Constitution stipulates that parliament meets publicly, it must wait until November 2015 for the participation of the public to be stipulated in the National Assembly meeting (amended). According to Clause 5, Article 8 of the Rules, "citizens can attend public meetings of the National Assembly. The General Secretary of the National Assembly organized a public hearing for the National Assembly's public meetings. ”Before the amendment of the Rules, people were still limited to hearing restricted to being able to hear the parliamentary sessions. In an interview published in *Ho Chi Minh City Law on June 4, 2017*[1], General Secretary of the National Assembly IV Nguyen Hanh Phuc said: “The National Assembly Office is preparing facilities to People are actually observed for people to observe, hearing and hear directly the activities of the delegates. Maybe at the end of the year or the beginning of next year is deployment the

[1] https://plo.vn/thoi-su/cong-dan-se-duoc-du-thinh-hop-quoc-hoi-706476.html- accessed on 16.06.2019

deployment will take place".

Although many despite of mass media's reported on parliamentary sessions, Mr. Phuc said: "Of course, that is not enough. Citizens and voters have the right to listen, monitor directly the activities of the National Assembly as well as the delegates they elect. In the past, in the old Ba Dinh Hall or the positions that the place where the National Assembly had held meetings like the Ministry of Defence hall, there were no conditions to organize. Now, there is a new National Assembly, when the design has taken into account this requirement at the beginning, as this requirement of design was taken into account at the beginning, the new meeting rules have a section for citizens to listen to the public session of the National Assembly. Now we have completed our own regulations for sightseeing and audition, then we can install extra soundproof glass above Dien Hong room, then we can organize audition for people the general public to register to and observe the Observe the National Assembly for work ".

Thus, although there is a regulation that the National Assembly is open to the public, it is difficult for the people general public to listen clearly when as the government installs soundproof glass at the parliament hall. Thus, the right to attend the parliamentary session of the people in the 2013 Constitution did not improve was not of any difference compared to more than the first constitution.

CONCLUSIONS

In a democratic state, human rights still occupy a central position, which are protected from state power. Therefore, no matter under what circumstances, human rights are always enhanced by being specifically defined in the Constitution and increasingly being increasingly improved to fit the historical situation, the state of the country, and the world.

It can be said that the Constitution of the Socialist Republic of Vietnam in 2013 has shown the Party's intentions and people's hearts, .The crystallization and innovation of democratic spirit, innovation promoting has promoted the strength of the great unity of the nation, meeting the requests to build a rule of law state a state law in the new

era. The constitution and realization of human rights and civil rights in the amended Constitution are the continuation and succession of previous constitutions and profound transformation of many contents and spirit of international conventions. on political, civil, economic, cultural and human rights; creating the highest legal foundation to ensure that human rights, civic rights and obligations are fulfilled, meeting achieving the goal of "rich people, strong countries, fair and civilized society (“wealthy citizens make a prosperous country, a fair and civilized society”).

In the context of Vietnam's membership of the ASEAN-*Association of Southeast Asian Nations*, and The European Council announced on Tuesday that it has approved the European Union – Việt Nam Free Trade Agreement (EVFTA)[1] and the EU – Việt Nam Investment Protection Agreement (EVIPA), and assigned the EU to sign the deals with Việt Nam on June 30 in Hà Nội. Analysing the fundamental law is a necessary step for a better understanding of the constitutional systems of the Member States, so very necessary in a space dominated by the free movement.

The European Commission has described the EVFTA as the most ambitious free trade deal ever concluded with a developing country: near-complete removal of tariff barriers: elimination of over 99% of customs duties on exports in both directions; reduction of non-tariff barriers: Vietnam will align more closely with international standards on motor vehicles and pharmaceuticals. As a result, EU products (which already comply with these standards) will not require additional Vietnamese testing and certification procedures. Vietnam will also simplify and standardise customs procedures;

EU access to Vietnamese public procurement: EU companies will be able to compete for Vietnamese government contracts (and vice-versa); improved access to Vietnamese service markets: the FTA will make it easier for EU companies to operate in the Vietnamese postal, banking, insurance, environmental and other service sectors; investment access and protection: Vietnamese manufacturing sectors such as food,

[1]http://vietnamnews.vn/economy/521798/viet-nam-eu-to-sign-evfta-on-june-30-in-ha-noi.html#JH65XIcv1Ar1OVME.99 - accessed on 26.06.2019

tyres, and construction materials will be opened up to EU investment. The FTA establishes an investor-state tribunal to resolve disputes between EU investors and Vietnamese authorities (and vice-versa).

Promoting sustainable development: the FTA includes commitments to implement International Labour Organization core standards (for instance, on freedom to join independent trade unions — potentially a momentous change as Vietnam does not at present have any such have never been a member of those unions) and UN conventions (for instance, on combatting climate change and protecting biodiversity).

CRITICISMS OF THE AGREEMENT[1]

Vietnam is a politically repressive state, and the human rights situation has deteriorated recently. As of In October 2018, 67 government critics had been arrested since the beginning of the year, and lengthy prison sentences handed down to many of them. For this reason, many stakeholders argue that the EU should insist on improvements before signing a trade deal with Hanoi.

The proposed investor-state tribunal, intended to protect foreign investors, could also give international companies undue influence in Vietnam, potentially discouraging the Vietnamese government from taking legitimate decisions (for example, on environmental protection) affecting business interests.

The revision of the Vietnam Constitution upon joining the international integration has been instrumental in unequivocally establishing unequivocally the role of national institutions in Constitution Law mechanisms, avoiding institutional blockages.

However, the regulation of human rights in a separate chapter of the fundamental law would be desirable in the context in which, in the absence of a catalog of fundamental rights and freedoms within the Constitution, it is necessary to identify them by going through the entire

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[1] http://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-vietnam-fta - accessed on 28.06.2019

constitutional text and referring to the Criminal and Civil Law relative to the protection of individual freedom.

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LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (20), Year XVIII, 2019, 150-159

BULLYING-SOCIAL PHENOMENON WITH LEGAL IMPLICATIONS

Georgiana STROE[1]

Abstract

Bullying is one of the most complex forms of aggressive behavior, defined as a form of abuse, physical violence, verbal or psychological intimidation, hărtuire or exclusion of an individual within a community.The main medium of this phenomenon, in particular at the school where a continuous increase in the intensity becoming increasingly more difficult to manage, most often being overlooked or ignored. His presence at the level of society is undeniable, with too little of our country level where is not a novelty item, and its harmful effects are felt to be sure.

Keywords*: bullying; school exclusion; violence; ignorance.*

Human violence is without a doubt a theme of topical interest at the level of society, its presence cannot be challenged, day after day we take part in it in as simple trackbacks, perhaps as abusers or victims. With regard to violence in school, although it is considered a taboo, it exists, and the aftermath of its presence are found in various plans: psychological, social, cultural.

Bullying is a form of abuse may manifest itself physically, verbally or emotionally, this assumption in particular humiliation, harassment, intimidation of a person. From the etymological point of

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view, the word, bullying, can be found in the 16th century, when the formula, my bully, mean, my lover, my dear ' or, from the word, boele, Danish.

Current meaning of the word being entered as late in the twentieth century, therefore, bully, means a person who is using the power of his authority to frighten or to dominate a weaker person[1].

It should be noted however that not all acts of violence, not all violent manifestations are actions of type bullying. The World Health Organization States that when a POPs bullyingul person, in this case a learner is teased repeatedly in a way that does not like[2].

Is not a manifestation of bullying is no joking or if children are teases. In spite of what you might consider school violence is not a novelty item, it was manifested from the lengthier times and also was considered an effective method of education, in terms of violence against teachers because students involved a simple element, fear imposing authority breathed compliance. The phenomenon of bullying is an installed and at the level of Romania, and from this point of view it occupies third place in the ranking of the 42 countries which were, according to investivate desfaşurat study by the World Health Organization.[3]

In terms of legislation at the national level, bullying has been banned, the Senate voting unanimously to amend the law on national education no. 1/2011 which aims at the prevention and prohibition of violence manifested in the form of bullying in the spaces intended for education as well as schools and kindergartens.

The law defines that psychological violence Education-bullying, which is the action or series of actions, physical or verbal, cyber-relational, in a difficult social context avoided, committed intentionally,

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[1] Tzvetina Arsova Netyelmann and Elfriede Steffan and Mariana Angelova, *„Strategies for a class without bullying, Handbook for teachers and school staff"* (2016), 10

[2] Institute of Education Sciences, *the UNICEF, School Violence* (Bucharest: ALPHA MDN, 2006)

[3] Ministerul Tineretului şi Sportului, *Bullying in schools, schools and kindergartens*, 17. November.2017

consistently and repeatedly, that involves an imbalance of power that has right a consequence achieving dignity times create an atmosphere of intimidation, demeaning, degrading, hostile or offensive, directed against a person or group of people and deals with matters of discrimination and social exclusion, or from a disadvantaged category of beliefs, sex or sexual orientation, personal characteristics, action or series of actions, behaviors that takes place education units and in all the spaces intended for education and vocational training.[1]

Having in view of evolvement, bullying has caught the attention of many organizations that are pursuing the best interests of the children, they have studied the phenomenon in an attempt to understand the causes and determinants in the process to stop or at least limit its manifestation through identification of effective methods.

Bullying can be classified after many criteria depending on the mode, depending on the level, or exponents in which space is achieved. Olweus has made the difference between three basic types in terms of bullying behavior2:

After the way, bullying can occur physically in the form of percussion, push, pinch, scratch, coercion through physical attack, verbal insults, imprecations, teasing, threats, irony, demeaning nicknames, scattering for gossip, lies and rumors that the victim in an embarrassing condition, and in terms of emotional, psychological violence manifests itself in the form of: handling, ridicule, marginalization through exclusion from group activities. While physical violence attracts more attention by its shape quickly visible manifestations of verbal and psychological violence are much easier to overlook, ignore.

Although your concerns the bullying in the most part of his school that violence is not only in children, beginning to make its presence felt and to work under the name of mobbing. The mobbing is a phenomenon of Bourn with discrimination and refers to psychological aggressiveness

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[1] www.edupedu.ro, *Bullying-education law, which provides for psychological evaluation for children victims and abusers,* 5 December 2018

[2] Netyelmann and Steffan and Angelova, *Strategies for a class without bullying,* 11

of actions performed by a boss or colleagues in order to cause a victim to leave the workplace resspectiv.[1]

Psychological aggression is to understand a form of violence and non-theoretical physics. The Workplace Bullying Institute proposes the following definition of psychological torture at work:[2],, mistreatment repeatedly to one or more target persons by one or more perpetrators, this covering verbal humiliation, abuse, offensive behaviour, including at non-verbal intimidation or even sabotaging the target person. This phenomenon occurs most often as a result of a faulty leadership, managers who do not have the necessary qualities of interaction with subordinates and thus cannot form a team to work properly and neither can sustain a friendly working environment. Considering that in the last decade, digital communication has become a vital means of expression, especially for young people through the rapid transmission of information. have multiple risks, the online space not being safe enough so your manifestations such as cyber bullying, sexting or cyber grooming are becoming more common. The first-ever Cyber bullying takes place at the level of different media: internet, smart phones, e-mails, facebook and other social networks, and the manifestations are diverse; script in the form of aggression (malicious comments, messages with malicious character, denigration, ridicule, cyberstalking) as well as in the form of sexual harassment.[3]

Cyber grooming involves the luring of minors for sexual purposes, in this sense, most often the abuser pretending to have an age close to the victim for the purpose of manipulation easier. Sexting is a sensitive alongside misogyny and misandrism cyberspace or sending sexist messages based on gender stereotypes. These celebrations are dangerous mainly due to the fact that it takes place in the public space, it is difficult to remove from the Internet, in most cases the abuser is

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[1] www.wordexpress.com, of „or, mobbing, bullying, two forms of discrimination that may arise in the workplace, the less known to us“

[2] www.bursa.ro, Mirela Săvălesu „Psychological torture at work-how does one recognize?”, 5 May 2018

[3] www.juridice.ro ,, Cyberbullying-legislative challenges. What else do you BU your kid?” 8 December 2017

anonymous, and the violence does not manifest itself through a direct contact with the the victim. A study of the dramatic situation shows Babydol in country 4 of 5 teenagers under the age of 18 years in Romania, saying they were victims of online harnassament.[1]

At national level the legal framework intended to protect children's rights is law No. 272/2004, one of the most important rights in the framework of this Act is the child's right to his own image. The contents of this law in view of protecting the public image of the juvenile, eliminating the risk that third parties have access to the intimate details of private life, to stop its public exposure when it isn't necessary.[2] On a general level the civil code in force shall act in article 73 any person's right to his own image, giving him the possibility of a prohibition on reproduction times decide to use the image produced.

At European level, one of the most important legal instruments is represented by the European Convention on human rights in article 6 enshrines the right to life of every child. Therefore, from the overall normative provisions of the Convention we can say that the right to life is a fairly complex and absolutely, in its table of contents is included and the right to development.[3] Far from ideal world but to which we aspire, Romanian legislation still provides for a framework specifically for the facts that would fall under cyberbullying.

The main forms of attack refers to the:

- the appearance and the way they dress a person, 67%
- hobbies and daily concerns 30%,
- the material situation of the family of a person 13%,
- results from school 12%,
- sexual orientation, religion 8%.

From the point of view of relationships, bullying is manifested under the following forms: violence between pupils according to the works analysed concerning school violence, which believes that the conflict between the students events are the most frequent. Bullying

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[1] www.salvaticopiii.ro, Save the Children Romania

[2] Law No. 272/2004 on the protection and promotion of children's rights (republished)

[3] www.juridice.ro

situation does not involve only two parties traditionally interact, generically, victim, offender, and usually, the situation is more complex and often involves more than two parties. In some definitions, the pattern is bulling represented as a triangle or rectangle involving the abuser, the aggressor still assistants shall be called and his followers, passive victim witnesses regarding the aggression and possible victim advocates, who take a clear position against the aggressor. The Romanian education this type of bullying is confirmed in the proportions of 90% of the directors and advisors investigated.[1]

The most common events of violence in relations between students being mainly verbal ones, but a share close to hovering and physical violence. An interesting aspect is the representative in this respect of the differences between the manifestation of violence on the part of girls versus boys, so if one of the genres is more violent than the other, there is in this sense a myth regarding the the fact that in terms of girls, they isolated situations manifests itself violently. Although in a few cases it was stated that girls are more aggressive than boys and that aggression is most often attributed to the latter, the girls making use of them, rarely physical violence by calling in the verbal harassment of nature orla psychological constraints. The causes that determine these behaviors being different guys comes into conflict and beat mostly for affirmation of masculinity, or for asserting status in a group or in the rivalry, the girls turn to violence because of competition in what most commonly relates to notes or love interests.

Students ' violence against teachers is unquestionably present at the level of the education system, but noted that the share has been reported, at least in the most serious forms is lower than in the case of violence among students. And if its forms of manifestation are sundries, ranging from minor deviations from the regulation school up to serious events that may be criminal incidence as well as physical assaults.[2]

Violence by teachers against students is manifested by inappropriate actions of diactice frames, which are not characteristic of a

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[1] Institute of Education Sciences, UNICEF, *School Violence*, 62
[2] Institute of Education Sciences, UNICEF, *School Violence*, 82

healthy teacher-pupil relations or which may reach severe physical forms what are sanctioned. Forms of inappropriate behavior refers to verbal assaults: screams, ironies, swearing, insults.

Non-verbal aggression is manifested in menacing glances, discriminatory attitudes, marginalization. Extremely important from this point of view is the parents ' attitude on the management of these problems, some parents are at least somewhat indifferent attitude in relation to manifestations of violence in the school environment, the plight of those that encourage hostile attitude but parents begin to be increasingly more open about this topic.

Myths about the bullying are many and consist of erroneous beliefs and concepts about violence, they often affect sensitive judgment of adults stumbling them to properly detect signals bullying. One of the main myths denies this phenomenon based on the severity of the reasoning that in the relations between the children of these manifestations are common, ordinary.[1] The myth from reality, all children are teasing and kidding among themselves which is in a way a normal process of adaptation of the child's social environment, however, it's important to set subtle line between normalcy and abuse, separation, which is difficult to accurately set relating to many subjective factors. Another myth alludes to the fact that the victim is to blame for what is happening, a harmful myth that has no real basis, since in most cases the victim does not cause any abuser. This conviction can instill fear of asking for help, the person assaulted feels guilty for what happens.

For the development of methods for the prevention of bullying should be understood primarily what causes this phenomenon are the determining factors.[2]

Some of the abusers are well regarded in the group, are popular, they influence among those of the same age and they love to dominate or lead others. More often than not they resort to violence from the perspective of maintaining dominance in the group, others are bullies because they have been isolated and feel a strong need to belong to a

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[1] Netyelmann and Steffan and Angelova, *Strategies for a class without bullying*, 14
[2] Mureşan, *Bullying behavior*

group, but does not possess the skills necessary for a proper relationship friendship.

Many children may not evaluate school violence as being negative or unacceptable, as do adults and can interpret acts of aggression as entertainment or fun, it can also see violence in a positive light or has friends to encourage this perception. Even if it could be assumed that the abuser is a strong and reliable person on it, this does not always happen-most often these kids having a low self esteem, more often than not they are the victims of monitors from parents or older brothers, may come from a violent family environment toxic or may have a poor relationship with others or a low tolerance, touches of impulsivity.

The effects of bullying are also varied, through physical bruises, scratches, wounds, his clothes or personal items may be lost or destroyed. The child being bullied may have headaches, panic, bad real or faked before going to school, also its interest towards school may decrease, and they. It may lose friends, can also experience feelings of helplessness, self esteem low self-esteem and can be reached and the risk behaviours; home Fugue self mutilation or even suicide.[1]

Methods for limiting this phenomenon focuses specifically on understanding the causes, determinants, but mainly is advising both for the victim and the aggressor, group activities will be encouraged where it may come into contact in other opinions and points of view, where they can understand notions such as tolerance and diversity.

From the analysis carried out by the Child Helping International only in Europe were 500,000 child phone calls regarding the reporting of bullying. More than 90% of the victims in Europe have shown school mates as abusers, more than 10% of these have included friends, the other 4% of cases being caused by teachers.[2] Also data supplied by UNICEF that nearly half the children in Romania, 46% were at a certain point the victims of bullying-ului,53% girls and 47% male. According to

[1] Mureşan, *Bullying behavior*

[2] www.ştirileprotv.ro, Crazier Bullying in schools in Romania. The age at which many children end up being threatened and humiliated. 10 May 2016

a study carried out in the year 2016 for save the children at the level of the Romanian education system:

- 1 in 4 children is repeatedly humiliated at school, in front of colleagues;
- 1 in 6 babies repeatedly was beaten;
- 1 in 5 babies repeatedly umilea another child in school.

Repeatedly, in 3 out of 10 school children were excluded from the Group of colleagues; 73% of children said that they had witnessed a bullying in the school environment.

As a conclusion, bullying is a social reality, a country-level system of education and most often a taboo subject that it is overlooked if not treated with indifference, but this approach is not proper in relation to the problem under consideration This requires a paradigm shift in. The current numerous organizations fighting against the phenomenon of bullying or trying to draw attention to, so try new creative processes, regarding stopping or at least limit phenomenon and the formation of an healthy education in child to develop in harmony, since as Nelson Mandela said, we owe our children, more vulnerable citizens by society a life devoid of violence and fear .

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LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (20), Year XVIII, 2019, pp. 160-172

OBSERVATIONS REGARDING THE ENGAGING OF CIVIL EXTRACONTRACTUAL LIABILITY FOR JUDICIAL ERRORS

Florin-Georgian CREȚU[1]

Abstract *:*

This paper has the purpose to shortly analyse the conditions of engaging delictual liability of the state for judicial errors, through examining the special procedure regulated by the Law no. 135/2010 concerning Criminal Procedeengs Code, but also the common law. More, due to equity concerns, the paper analysis, briefly, in the final part, the subsidiary liability of magistrates that acted with intention or serious negligence in causing damages, the liability based on the regress right regulated and recognised by the law in favor of the state.

Key words*: judicial error; state liability; magistrates; justice; civil liability.*

PROLEGOMENA

Saying that we are liable for our actions and their effects is an assertion about we can agree that it accompanied the whole humanity on its historical way, the difference being only the response manner vis a vis the reprovable deed and the unjustified damage brought to another person.

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One of the most resounding law principles is that formulated by the Roman jurisconsult Ulpian, according to wich "Juris praecepta sunt haec : *honeste vivere, alterum non laedere, suum cuique tribuere*". Beyond any ethical or law-positivist debate, with a lapidary and intuitive formulation, being lawful means to live honestly, to not harm another and to give to each one what he deserves. Regarding the law system as a whole, these principles are the foundation of any stable and fair legal and political system. But, regarding the civil extracontractual liability, this covers any hypothesis. Firstly, to live honestly means to not cause to another person damage - willingly, fact the excludes the honesty, or unwillingly, that excludes the preventive attitude that describes a *bonus pater familias*. So, living honestly has the meaning, in the domain of civil liability, of acting with good faith, with the intent of doing good - and what good is a damage ? - and to prevent any harm. To not harm another also means having a conduct animated by good faith and prevention and to give each one what he deserves - in the case was done, there is the obligation of remove or cover it, to indemnify the victim.

Today, under the conditions of the rule of law, the right to be indemnified by those that caused damage is guaranteed to each victim, the state, through its institutions, having an active role in the accomplishing of this right. The Law no. 287/2011 concerning The Civil Code provides generally that "any person has the duty to respect the rules of conduct imposed by the laws or the customs and to not bring harm, through its actions or inactions, to the rights or legitimate interests of other persons" - application of the *alterum non laedere* principle[1] - and that "The one that, having discernment, infringe this duty is held liable for all the caused damages and is bound to repair them integrally" - *application of the suum cuique tribuere principle*. Therefore, here we are after almost two millennials using the same principles that seem so eternal.

Not even the state, the one from which the laws and their enforcing come from, is not kept away from liability and that is in the

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[1] Sache Neculaescu**,** *Izvoarele obligațiilor în Codul civil art. 1164-1395. Analiză ciritică și comparativă a noilor texte normative* (Bucharest: C.H. Beck, 2013), 599.

virtue of i) its power and the amplitude of damages that it can cause and ii) its legal personality, the rule of law requirements imposing a preventive conduct, but also a compensation for the victims of its power, the state liability being, generally, a guarantee of its legitimity and restraint.

In this sense, according to article 21 of the Constitution, with the marginal title "Free access to justice", anyone has the right to petition the justice in order to defend his rights, liberties and legitimate interests, in the conditions of a fair trial, while article 52 provides that the passive subjects of extracontractual liability can be also the administravite and judiciary autorities and, according to article 44, claims against the state are guaranteed.

Even the states, in the relations between one another, the relations governed by the international public law, do not escape this principle because from the principle of sovereign equality among the states, the principle of good faith, the principle of cooperation between the states and the principle of peaceful settlement of disputes, enunciated in the article 2 of the U.N. Charter, derives that the states of the world are liable for the damages brought to other states.

Not even the European Union, the grandiose political, economic and legal construction does not escape Ultipan's principles, its liability could be engaged on the basis of extracontractual liability actions, throught which member states or third parties, natural and legal, have the right to reparations in the situation they suffered damages caused by the Uniun's institutions throught violations of rights and legitimate rights.

The issue of engaging civil delictual liability for damages caused through judicial errors has created controversies along the years. Now, the european laws and the domestic ones provide a serios of rules that constitues the basis on wich this liability arises from. From the perspective of european regulations is to be mentioned the provisions of article 3 of the Protocol No. 7 to the European Convention of Human Rights, but also the provisions of the article 34 of the Charter of Fundamental Rights of the European Union.

In the domestic domain, the Romanian lawmaker has manifested attention concerning liability for judicial errors, offering in the

Constitution and other organic laws, especially The Law no. 135/2010 concerning the Criminal Proceedings Code, which lays down a whole special procedure, means for the justice seekers to accomplish their right to petition when the judicial autorities cause them damages.

CONDITIONS OF ENGAGING STATE LIABILITY

Ab initio, it is important to say that the intent of the lawmaker was to engage the liability of the state in a special procedure and not in the common law procedure concerning delictual civil liability.

In the following pages, we will analyse the procedure laid down by the provisions of the Criminal Proceedings Code in relation to the necessary elements of civil liability.

The special procedure has a narrow application, limited by the specific elements that describe public law, from which :

1. THE ILLICIT DEED :

Through illicit deed, as a component of civil liability, we understand any deed through which, infringing the law provisions, are caused damages to the rights of other person. This has a bivalent nature :

1. The liability can be engaged just in case of a judicial error concerning the condamnation to a certain punishment or a educative measure through which a person is deprived of freedom, no matter if the said punishment or educative measure was or not enforced[1]. Also, for the justice seeker to be able to use this procedure it is necessary that after the retrial to be adopted a solution of acquittal (not one of ending the criminal trial) based on a new fact or recently discovered. Therefore, we can speak of a number of conditions:

[1] Article 538, Criminal Proceedings Code;

2. There must be a person condemned to the punishment of life imprisonment, imprisonment, criminal fine[1] or to a freedom depriving educative measure.
3. It is not of relevance if the respective decision through which such a punishment or measure was executed or not (the positive effect of *res judicata*).
4. Subsequently, in the hypothesis of a retrial, the court must adopt a decision of acquittal.
5. The decision through which was adopted the measure of acquittal must have as basis a new or recently discovered fact[2]. Concerning this condition, I appreciate that the person that in the first trial knew or could have known, given the circumstances, the respective fact (the imputability of not discovering the fact or the imputability of condemnation for false allegation[3]) cannot benefit the effect of the special procedure, because *nemo auditur propriam turpetudinem allegans.*
6. Compared to the first hypothesis, where the positive effect of res judicata can or cannot produce, in the second case the person must have been illegally deprived of freedom. The illegal deprivation of freedom through excluding the hypothesis of condemnation cannot represent anything else but the application of freedom depriving preventive measures provided by the Criminal Proceedings Code. Therefore, *de lege lata*, the case exclusively makes reference to restraint[4] , preventive imprisonment and home imprisonment. So, we cannot speak of the practicability of article 539 and, implicitly, of the effect of the right to petition in the case in which the person was subjected to a freedom

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[1] The code uses the notion of "punishment" in a broad sense, so, according to the principle *ubi lex non distinguit , nec nos distinguere debemus*, we will include in this category the criminal fine;
[2] Similar criterion with the one provided at article 453, first paragraph, of the Criminal Proceedings Code from the matter of revison, an extraordinary way of review;
[3] Nicolae Volonciu, *Codul de procedură penală comentat. 3rd ed., reviewed and added* (Bucharest: Hamangiu, 2017), 1493;
[4] I consider that the person that was subjected to the measure of restraint by the criminal investigation agent can benefit the effect of article 539;

restrictive measure[1]. From this hypothesis we can derive a series of conditions:

1. Against the person must have been started a criminal trial in the sense of european provisions;
2. The freedom depriving measure must have been illegally adopted, with the infringement of the conditions provided in the general part of the Criminal Proceedings Code.

Concerning the second case[2], it will be taken into consideration the notion of freedom of movement from the case law of the European Court of Human Rights (*liberté d'aller et venir), and the freedom depriving will be analysed through the criteria developed by the case law of the European Court : the possibility of taking another freedom depriving measure, the reasoning of the court's conclusion or of the prosecutor's order through which was adopted such a measure etc.*

On the notion of "judicial error" neither the fundamental law, neither the other legal provisions from this matter offer a definition of this concept. This notion has a general character that must be not limited only to the procedure laid down by the Criminal Proceedings Code. So, *lato sensu*, it can consist in any procedural or processual action of omission through which the agents invested with powers and competencies in the realization of the justice act cause damages with legal significance, infringing the law which should have been applied to parties that suffer the damages. And, *stricto sensu*, from the perspective of the special procedure, the judicial error consists in unlawful condemnation or freedom depriving by the judicial authorities.

It's to be mentioned the fact that the Law no. 303/2004 in the provisions of art. 96, 3rd paragraph, highlight the elements of a judicial error as follows :

a) *„It was adopted in the trial carrying out of procesual acts with the obvious infringement of material and procesual legal provisions, through which the rights, liberties and legitimate interests of the persons*

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[1] Hypotheses of judicial control and bail judicial control;
[2] Volonciu, *Codul de procedură penală comentat,* 1499.

were serious violated and were done damages that could not have been removed through an ordinary of extraordinary judicial remedy;

b) *Was adopted a definitive court decision that is obviously against the law or the situation that results from the evidences of the cause, through which the rights, liberties and legitimate interests of the persons were serious violated and were done damages that could not have been removed through an ordinary of extraordinary judicial remedy''.*

The institution of judicial error must be looked at with great attention because, on one hand, the whole social order has to suffer through fear, distrust etc., and, on the other hand, the impartiality of the justice system and the Romanian State have to suffer through the alteration of trust in justice.

In the analysis of the illicit deed must be highlighted the features of this liability, this being its direct, objective nature[1], because it is engaged against the state for the actions or omissions of the judicial agents invested by it.

2. THE DAMAGE.

Through damage is to be understood the result or the results of the illicit deed.

Concerning the damage, in the special procedure, the Criminal Proceedings Code, in the provisions of the article 540, has a special attention to the type of damage and its extent. In the first paragraph, the law provides four criteria that the court must take into account when establishing the extent of the damage :

A) The first one is the duration of the illegal freedom deprivation. As it is normal, the law is considering the social and psychological impact that the condemnation or the freedom deprivation has on the individual. The purpose of the punishments[2], freedom

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[1] Liviu Pop and Ionuț-Florin Popa and Stelian Ioan Vidu, *Curs de drept civil . Obligațiile* (Bucharest: Universul Juridic, 2015), 404.

[2] Constantin Mitrache and Cristian Mitrache, *Drept penal român.Partea generală* (Bucharest: Universul Juridic, 2014), 31;

depriving preventive measures is to correct the attitude of the individual and to bring it in the domain of the legality, and in the situation of a judicial error, the condemnation or the freedom deprivation was adopted without the individual which was subjected to them to have a deviant conduct in order for such punishments of measures to be necessary. Also, it must not be overlooked the fact that article 538 provides that the punishment or the educative measure must not be enforced, so the law also protects persons from the psychological impact of judicial errors. Besides, through the provisions of article 539 is given a protection against the arbitrary prolongation or maintaining[1] of preventive freedom depriving measure.

B) The second one is that of the consequences the judicial error had on the person and his family. On the second thesis, it is clear that the law concerns the repairing the secondary damage (*pretium affectionis),* generated by the lack of a family member, but also the negative image that is the direct consequence of the person's repression and that is produced, firstly, in the family. But, in this matter must be highlighted the deficiency of article 451 of the Criminal Proceedings Code which states in the first paragraph that the persons that have the right to petition for indemnifying on the ground of the procedure are "*the entitled persons, according to articles 538 and 539*" and "*the persons that were dependent* (by the person subjected to the unlawful measure) *at the time of* (his) *death*", therfore the simple fact that a person is a family member of the person illegaly condamned does not bring the conclusion *pe se* of the application of the special procedure.

Therefore, is to be concluded that the persons that are not in the sphere of subjects shown by the provisions of the Criminal Proceedings Code can make a judicial application, on the grounds of indemnifying for the damages suffered, to the court on the conditions of the common law, but the objective nature of state liability from the Code of Criminal Proceedings will be lost and the defendant in the common law trial will be the judicial agent that caused the judicial error. Also, for the protection of the persons that are victims of judicial errors, the Romanian

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[1] Volonciu, *Codul de procedură penală comentat*, 1498.

lawmaker has established as crimes the unjust repression[1] and the abusive criminal investigation[2]. So, for the purpose of celerity in indemnifying for the damage done is not excluded that family members of the one in case to establish themselves as civil parties in the criminal trial.

C) The third criterion for determining the extent of the indemnifying is the situation of the one entitled to it and the nature of the damage done. It is evident that it was taken into account the maintaining into reasonable boundaries of the pretensions that can be submitted by the justice seeker when looking to be indemnified for this kind of damage, the court having the duty to appreciate in concreto all of the de facto situations concerning the plaintiff and the nature of the damage done to him. For example, a person that was dependent on the person unjustly condemned to the punishment of imprisonment in the detention regime for 7 years that didn't have, before the condemnation, for 3 or 4 years, strong ties with the condemned person, but only phone conversation during holidays and tho which the condemned person was offering monthly a quarter of his salary will not benefit from moral compensation, established by the court, for the non-patrimonial damage caused by the lack of the condemned one from the life of the one that is dependent on him.

D) By the last criterion can benefit only a category of persons, this being people that worked before their condemnation or freedom deprivation. The main effect of this criterion is only a compensation of moral nature through considering the time in which the person were detained as time in labour, according to pension laws.

When it comes to the ways of indemnifying, the article 540 of the Criminal Proceedings Code provides three forms : a sum of money, life annuity or the internment of the victim, on the state's expenses, in an institution for social and medical assistance. I consider that the order of the enumeration is not random, because, considering the mentioned

[1] Article 283, Criminal Code;
[2] Article 280, Criminal Code.

criteria, the court will compel the state to pay a fixed amount on money, a life annuity - situation in which it's clear that the damage is of considerable extent, the victim having to pay large ammounts, monthly or periodically, for his social reintegration and/or for the treatment of the diseases because of the unlawful measureas he was subjected to - or will send the person to an institution for social and medical assistance - the damage done being clearly extreme.

3. CONCERNING THE CAUSALITY BETWEEN THE ILLICIT DEED AND THE DAMAGE, this must be treated with caution by the court, especially in the situations in which the plaintiff is in the category of the persons that are dependent on the convicted person. As I said, analysing of the causality, as well as the damage that can produce, is made *in concreto*, studying the *de facto* situation.

In the hypothesis of an application on the basis of civil extracontractual liability that is autonomous from the special procedure, I consider that, given the evidences administered in the court, can be highlighted a request devoid of moral grounds in the situation when the court founds the existence of general damages that can be easily brought by any family members (that are not dependent on the condemend person), the court being held to reject such claims as groundless because, besides the fact that is brought a subsequent damage, the claim represents per se an abuse of procesual rights.

4. FAULT

As I said earlier, the state liability is objective, independent of fault.. However, this must not be confused with the subsidiary liability of the magistrate that adopted the illegal condemnation and/or the illegal freedom deprivation, which is of subjective nature. In this case, the law has established a degree of fault with which the damage must be done in order to represent a judicial error : "the judge of the prosecutor that has committed the judicial error or the with bad faith or serious negligence"[1].

[1] Article 96, paragraph (7) from the Law no. 303/2004 related article 542 paragraph (2) from the Criminal Proceedings Code;

According to the provisions of article 99[1] [1] the bad faith represents the intent to cause the given activity and the negligence can only be a serious negligence, given the professional training of judges and prosecutors.

Concerning the prescription term, the provisions of article 541, paragraph (2), from the Criminal Proceedings Code, establish a term of six months since the court decision, the prosecutor's order or the conclusion of the judicial agents was definitive through which was found the judicial error.

SPECIAL EXCULPATORY CIRCUMSTANCES

The special procedure provides among the conditions *sine qua non* of the engagement of state's civil liability the fact that the person subjected to the wrongdoings to not determine his condemnation through false statements or in any other way, except the cases where he was forced, and the lack of imputability of the respective person for not discovering in useful time of the unknown fact or recent discovered. These conditions have the legal nature of exculpatory circumstances for the state, because are based on the idea of procesual fault and nobody is allowed to use in court his own fault in order to realize his right (*nemo auditur propriam turpetudinem allegans).*

THE SUBSIDIARY CIVIL LIABILITY OF MAGISTRATES - THE RIGHT TO REGRESS

The civil liability of magistrates[2] is always subsidiary, given the special procedure, and it is engaged exclusively against the state. The Criminal Proceedings Code and the article 96, paragraph (7) from the Law no. 303/2004 concerning the status of judges and prosecutors

[1] As it was introduced through article I, point 4 from the Law no. 24/2012.

[2] Including here the hypothesis of adoption by the criminal investigation agent of the measure of restraint, situation in which the liability is engaged against the prosecutor that supervises the acts of the policeman.

provide a legal action that the state has against the person guilty of judicial errors.

In contrast to the provisions of the article 507 of the former Criminal Proceedings Code, the action in regress in the vision of the current code is not mandatory. But, we must not make a confusion between the special procedure and article 1384, second paragraph, from the Civil Code, that provides the mandatory exercice of the right to regress in the situations in which the state is liable for the deed of other persons, because the special procedure has a special character compared to the provision of the Civil Code and must be applied the principle *specialia generalibus derogant*.

In this matter of liability, the state can exercise the right to regress only in the situation of establishing the judicial error author's fault. The state must prove in the regress action the fault of the liable person, through a court's decision or a prosecutor's order.

The regress action can be also exercised when the state was condemned by an international for the matters provided in articles 538 and 539, according to article 542, the liability being subjective, based on fault.

CONCLUSION

The state liability for judicial errors is a matter of internal and european social interest. The exercise of public power must be done in a reasonable, lawful and objective way, without bringing damages to the rights and freedoms of the citizens. The state must care for the training of the magistrates in order to maintain social order and the High Council of Magistrates, the institution that guarantees the independence of justice, must watch at respecting of human rights in relation to the justice system and the prestige of justice.

The regulation on state's liability for judicial errors have the purpose of preventing rights and liberties infringements by the judicial agents and, even though is conditioned by many aspects, it does not search for sheltering the responsable person, but *suum cuique tribuere*.

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LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (20), Year XVIII, 2019, pp. 173-187

MANIFESTATIONS AND EVENTS CAPABLE OF ENGAGING AND PRODUCING EFFECTS GOVERNED BY THE "NAIGHTY" TRAIT OF WILL, DRIVEN BY THE EVOLUTION OF HUMANITY AND INTERCONNECTED ON GENERIC RIGHT ELEMENTS

Andrei Mihai STAN[1]

Abstract

In the present paper we aim to analyze sib as many aspects as possible and as broadly as possible we are allowed by the inherent limits of this extremely offerable, casuistically speaking legal palette defining the extremely massive attempt threatening the right as a whole in the sense of positioning in the deserted abyss to the current realities, a matter which is condemnable for the final purpose and the reason for the Constitution, Treaties, Conventions and any acts with regulatory power. Treated cases will be elements specific to each branch of law to which they belong, obviously we are trying to create an exposure of both their "concept and development" but more importantly the applicability and necessity of their implementation in the internal legislation.

In the following, we will address the lack of institutions, which are even essential in our law, the legislative and inconsistency of the legislator, and perhaps the most important aspect of the possibility of introducing in the internal legislative spectrum some principles, institutions and mechanisms focused on innovation at global level whose benefits and applications are unquestionable.

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***Key words**: naughty; lege ferenda; exceptional cases; in depth law.*

I. ”You will aldo receivere from us a gift[1]”

A phrase often used mostly in the commercial environment, more specifically in medical and pharmaceutical, fashion, food, etc. The concept we are considering in this first section, punctual, can be historically triangulated from the dawn of great trade; with the exchange and discovery of monetary units as a convertible title of a certain value, the market experienced a similar boom as the present situation, partly because of the excess of transactions. Over time, this gagging behavior, which is part of the pattern of the vice of circularity, has undergone numerous metamorphoses, adapting and becoming a symbiote, bound indissolubly by humanity.

Thus, in order to offer a more precise offer to consumers, one of the techniques used (not very shortly) is represented by the free benefits obtained by the merchants, which can be characterized as directly proportional to the financial involvement of the first category . In particular, the bonuses (as products, services, coupons / discount codes) are judged by their regime as simple gifts in the form of manual remittances (we emphasize the applicability of this institution only in the case of tangible movable goods precisely because of the necessity of tradition - aspects that we will be considering whenever we refer to this concept) to customers (the criterion of delimiter being given by the minimum pecuniary value).

By stopping on the reverse, namely on our subject we seek to clarify two elements of the nature of creating legal divergences:

a) In the case of such rewards, which regime will be applicable when it is obvious that the 250 lei quota is valid for the legal conclusion of the transactions in this case, without which we can find that we are in

[1] Francisc Deak and Romeo Popescu, *Tratat de drept civil. Contracte speciale*. Vol. III, *4th Ed. udated and completed* (Bucharest:Universul Juridic, 2018), p. 293-296

the presence of simulated acts, the disguised donations as we speak of services or goods)). In this sense, we believe that the legal solution will be to impose, by similarity with other similar regulations, specialized instruments in the sense of formalizing these transactions without, however, affecting the expediency and mercantile character of the trade and implicitly of the entire market economy.

We do not think that the solution to the application of the common law (the donation regime) would be opportune, which would lead to a complete collapse, but we consider that a certain degree of legal intervention is favorable, thus we propose introducing a finding document with an extremely accessible role of probation which can create the premises for avoiding any illegal and fraudulent manifestations under the umbrella of "apparent and innocuous acts aimed at enforcing the efforts of the clients". The fiscal system should also be adapted to these "gifts" for a more responsible and efficient collection of monetary debts (aspects that affect not only our exposure, but also other resonant cases that can be identified with this type of legislative vacuum and fraudulent maneuvers that block taxing people who provide highly paid services in post-ecclesiastical domestic celebrations).

b) regarding the related aspects of the proposed theme, we want to analyze an extremely antique concept of current applicability, and here we refer to the same theme initially debated but doubled by monetary and semi-legal practices meant to ensure not only the gratification and Increasing customer loyalty (fidelity) and generating profit in the supplement (exemplary examples would be: purchase of several products, facilities or services simultaneously to benefit from a complimentary and complementary derogement, perceiving an offensive commission / price for those bonuses). Generally speaking, the examples are numerous, but we consider that the two exhibited can be very common, and while the first pseudo-consumer-oriented one is enrolled within the limits of the law with very few fraudulent subterfuges that could have legal implications, instead the second example is one of the subjects of the present work in the sense that it is evident the attempt to bypass and penetrate the legislative spectrum with misleading work to

create the appearance of an overthrowing act that is intended to substitute by simulation an obvious but manual (applicable sentence 1 a lit. a or a true donation (applicable as sentence 2 a letter a).

In this situation, we advocate for the minimum of clemency in the annihilation of these practices and propose the introduction of the rules necessary for the detection and sanctioning (both in terms of civil contractual liability and of the criminal liability) of these practices, precisely because of the pronounced character and the evasive evasion referring to related regulations, an observable aspect among the exact acts of the catalyst of our discussion, precisely this deceptive and completely absurd "price" that "masks eminently at sight" an illicit and malicious mechanism. On the other hand, we do not want to discourage the practice of these instruments, which in their case can lead to the creation of a competitive and adequate framework for the deployment of the leverage of the market economy; so we propose the implementation in the mirror but applied according to the internal attributes in the case, the laws related to the legal private law practices and their mode of operation in the news of adjusting, correcting and directing the internal economic environment adapted to a regulatory optics and updated to the current and future requirements as the model set out in the first example b), the sentence 1 could be a true starting point that can be strengthened and correlated with both the legislation that guarantees the legal relations in view and the needs of the subjects of law concerned. As a last aspect, we consider that it would be beneficial to raise the threshold for manual gifts to 500 lei; the multiple considerations starting with the rise of the living standard and the equilibration at the level of the foreign exchange policy; in this area we propose to integrate not only the tangible and embedded goods or services of equivalent value precisely in the sense of streamlining and unifying the legal practices.

II. EXTRA-PLANETARY LAW

This section represents the crowning of the journey to date and to be covered by the human species. Clarifying this assertion we will first refer to the rules and principles of physics and cosmology (the updated

evolutionary theory, the Fermi paradox and the quantum mechanics laws) that describe besides the multitude of processes, stages, levers of reality and material / conscious existence itself, of types of civilizations in 3 sets: Type 1 civilization (characterized by reaching the goal of sustainable exploitation to the maximum potential of existing resources on the host planet), type 2 civilization (involving the reaching of an extremely complex and multi-oriental stage of the human population, the element the reference being given to the possibility of harvesting, exploiting and storing the central star of the solar system-the Sun (in the case of Terra) -concept, at least in theory, achievable from nowadays using the Dyson Sphere matrix), type 3 civilization (the essential feature is given by c intergalactic olination).

The above-described phases can only be carried out through the passage of an eminently colossal temporal sphere, but even in this situation are necessary regulations (in a word) that correlate the fastest and most complex evolution of humanity with the need of the order of this date not only internationally but also interplanetary, intergalactic and possibly ... (additional references can be researched in the field of Multiverse Theory).

Initially, regulations will be subject to a simple rule of public international law, namely the principle of territoriality (existence and private international law), but with a slight adaptation to the working plan; thus, according to scientific opinion (doubled by a limited range of legal doctrine), any act, fact, legal valency event will be subject to the laws of three major systems of origin of the future spatial inhabitants (the first includes the future right of a possible European Federation , the second system of American and Australian law, and a last system in Asia, Africa and Oceania). So early (we refer to the transition from type 1 civilization to type 2 civilization) future possible new systems of law will be applied in accordance with similarity and applying the current exceptions of public / private law. The transition to the last stage of the covolding is considered to imply two intensely debated theories (among others slightly neglected by the scientific community):

a) The Collective Consciousness Theory requires an integrated and engaged plurilateral system, essentially linked not to the material human component but to the very essence of humanity in the intrinsic sense (the cognitive element); so as a result of the development of the necessary technology and of the harmonization of the whole human component through an absolute and indissoluble connection between each man, the human consciousness center is born, a futuristic and uncertain program at first glance, but we consider the link and the certainty offered by this element of tangency gives humanity one of perhaps the most important stages in its evolution-the attainment of absolute utopia. Under these circumstances, the doctrine affirmed the lack of necessity (opinion we share) of norms / institutions / legal systems precisely because of the impossibility of hijacking and viciation that such a so-called "Center of Consciousness of All "(Aspects regarding the possible birth of such a system, its characters as well as elements related to the idea of “Absolutely free judgement” can be analyzed in specialized studies; the so-called time out of consciousness will become the replacement of today's punishments, precisely because of the eradication of synaptic mapping impulses that influence utopian deviant-undesirable behaviors.

b) The Unified Law Theory, as controversial as the previous one, is based on the same principle of reaching such a stage that is so advanced and multi-developed by life that humanity has overcome the millennia of evolution orce individuality and specificity existence and caracteristic in part, see the idea and ramifications of globalization) that at any level of civilization the human species would be identified, although it is not connected as a unitary one in an absolute common consciousness, has undergone the unification of the most important domains energy, evolution, law, medicine, technology). By "unification" is meant the standardization of the essential living standards (referring to the types of civilizations - see in the mirror of the present day see the concept of "the needs of the third world and of the first world"), this bonding balancing and serving as an exact binder as the theory 1. The difference at least in the legal plane is the existence of the continuation of the concept and legal levers but updated to that civilization obviously

being observed the lack of collective components of the consciousness which thus translates into manifestation (perhaps the most important but of course not limited to) less intensive and overwhelming than the first point of view.

One of the specific features of evolution besides the general management and applicability of the right as a whole is represented by the emergence and development of a multitude of human actions with legal implications (some of which are notably achievable since the present exposition). We will make a few points in this regard:

-the possibility of procreation using genetic material from 3 / more people, or using techniques to alter the human genome in the sense of perfection of the characters identified as desirable by "creators" (but not only); these themes in general consider that they can be treated by applying the existing provisions with a minimum legislative summation systematically. In the case of the evolution of the theme, we consider that there is a need for up-to-date and appropriate regulations to ensure respect for non-patrimonial rights in particular (see Eugenics theory and the General Principle for a thorough understanding according to which the scientific technique can not be allowed in any way to create such "monstrosities" that "contain life").

- the problem of cloning also raises many legal questions which, however, we believe we have already analyzed in a previous paper (we can analyze the existing scientific-legal elements for creating an objective view).

-The artificial intelligence and the possible effects on humanity believe that it embodies perhaps the largest and most important thematic matter in the field of evolution but in this field we just want to point out a clear legal leeway (the insensibility of the law texts might be to blame) and precisely considering the magnitude we have decided that it is the most effective and enigmatic thing to leave to the judges and the public at large the debate on the issue (we completely reject the thesis that we have adopted such a supportive approach in order to ease our efforts).

III. CONTRACT WARRANTY; GUARDIAN OF THE LEGAL CIRCULARITY SECURITY[1]

In this section we will try to analyze what are the reference elements and legal implications of the contractual guarantee in terms of setting imperative boundaries but also of issuing valuable judgments on the concept that we consider able to print a possible new and more applicative new legislation. In particular, in order to establish and delimit the work theme, we will refer to the framework regulations and present in special laws in the field of contractual collateral with the effect on real contracts (this desideratum does not mark a rigid delineation in contrast to the rest of the contractual scope or the face by other possible applications useful in the case, but according to the majority opinion in the doctrine we share this area of interest is a so-called "common regulator").

The last decades have substantially enriched the field of contractual collateral so that the burning commercial desire has led to the emergence of new concepts and uses in the field, of which we will focus on:

a) extended warranties - a 'type' obligation assumed by traders (or, in general, on the part of which they incur the obligation to surrender the good) to ensure the long-term well-being of the products for the purpose of supplementary profit-making; but the idea that we are referring to presupposes a temporal expansion which is extremely colossal compared to the time of the "guaranty" (for example, we can assert the existence of contractual guarantees of 15, 50 or even "on life" (terminologically speaking in this latter case we appreciate that the reference will be temporally related to an average life span in general, corroborated with the global life expectancy, obviously the fact that in exceptional situations, overcoming them will, according to the clauses, involve indefinite indefinite liability, otherwise the rules of contractual liability this case proposes the name of the vital term strike guarantee), all of

[1] Stanciu D. Cărpenaru, *Tratat de drept comercial roman, 6th Ed updated* (Bucharest: Universul Juridic, 2019), 644-647

which are in fact slightly neglected. We are of the opinion that the parties will remain indefinitely employed in situations where such a convention is concluded and the law governing the meat can only be the one at the time of conclusion (except for the favorability of the new law). The benefit of the term is not susceptible to renunciation or post-modification (without mutual agreement of the parties in the coming positions), of course the regulations in question are applicable to an extremely long-term time course (precisely to avoid the existence of a conflict of laws over time) . The other aspects will be applied in concrete terms, but in relation to the specificity element of the extended duration.

b) guaranteeing the preservation of some communication functions over a certain period is somewhat inconceivable as the sister of the previous one in the sense of extremely long terms, but the difference is given by their content, as long as the contractual guarantee referred to in has an extended area (it includes the entire complex of features related to the confidential operation of a product), the variant lit. b refers to a specific field (certain functions, elements of interest to the clientele). In any case, there may also be a difference in the way the guarantee was created (for the first case we are always covered by a contractual clause, while for the second case we often find an extracontractual default clause / promise). The aspect that is of interest is the need for this type of guarantee to benefit from a legal framework designed to provide the population with the necessary security and leverage. We propose that the assignment of this type of collateral in a special category of stipulations that we will consider as "extra contract clauses", manifestations with force equivalent to the internal clauses of a contract, but which will require the fulfillment of the conditions created especially in this sense (at the moment the project stage is incipient-analytical). These stipulations will oblige the one to comply with as a "guaranty" or extend the regulations in the sense of covering incompatibilities reported by faulty elements or even the birth of damages (we also consider an update of the system of these security pillars free market).

c) the issue of collateral in the event of unidentifiable events when the contract is concluded concerns the situation of the various disturbances of a non-owner of a communication function which may

affect the guarantee scheme. In the case we will have a specific 2 specific examples (the applicability of our concepts being generic instead), namely very frequent interruptions or successive intermittents of electricity supply / various parallel mechanical shocks in owner's relation with mobile devices which often lead to the cassation of the a little tactile surfaces; precisely because we are talking about a foreign and impossible to predict element, we consider that the problem is not covered by the general guarantee covering any defect, in the case of some clauses we may encounter elusive stipulations (especially we refer to the adhesion contracts) the debtor's guarantee obligations in such moments, in which case the creditor will bear the costs incurred and obviously unjustly will have to "opt to guarantee his own acquisition" in an optician. In order to overcome these inadequacies, we consider that such clauses should not be allowed given the unmanageable nature of events in the field correlated with the purpose of the collateral (the exception could be given by those intermittent but extremely temporal intermittent ones, meaning the existence of a damage to the debtor of the obligation - we believe that only here could be a possible recalculation of the initial indices, obviously through judicial intervention). We also take the view that the cases of imprevision would require a substantial update between what might be envisaged and the situation envisaged by us (also applying the subsequent rules to this institution).

IV. NEO-MODERNIST SLAVERY - THE "WORK OF ART" OF CONTEMPORARY LIFE

We will directly analyze the case without introducing further introductions to the issue as we consider it atrocious and inconceivable as the evolutionary gift of the Internet, processing power and "superior intelligence" has been metamorphosed into such a hideous plasmy, turbulent and horrifying (only one case of multiple such nightmares). In a case in the United States, a young 35-year-old mother has been repeatedly accused of irreverent and semi-turbulent behaviors towards her own children in moments of "breaks between cadres" -that doing vlogger activity on a dedicated channel socialization. With the continued

and successive character of the events, it was triggered by an ex officio notification of federal law enforcement officers, the woman being accused of multiple offenses and contraventions. In the course of the criminal investigation, the competent bodies gathered enough evidence to reveal a behavior close to the one opened in the crimes of torture and degrading violations of man, the woman neglecting children out of the "spotlights" but posing in the perfect family in parallel for the audience. Finally, the charges were, but are not limited to, torture, abuse, threats, blackmail, inappropriate behavior and inappropriate behavior (starvation, negligence), even attempted murder, found guilty for 15 of the multiple accusations in the court's first instance indicating that the main imprisonment with 85-year-old imprisonment.

Such manifestations emanate a resonance that produces echoes in a multitude of straight branches, especially criminal law and civil law, in our legal system, but we consider it appropriate to regenerate and comply with the advanced legal practices (especially we mean to the laws of the Nordic countries) of superior mechanisms or new regulations that allow for effective control of such successive actions, we refer here to a more specific and diversified sanctioning regime in the criminal plane (complex information crimes with branches in the commercial sense , family, European), to an innovative or at least "borrowed" policy of protecting and removing affront to the best interests of the child (clear institutions and applications of denial of parenting are more practical and effective parental control over parental functions in situations of possible specific sanctions such as legislative proposals in Australia, according to which negligent / inappropriate parents will be subject to a temporal decay with the benefit of only two-month visits of the child in specialized centers), and of course current legislation in the field of information (increasing the criminal framework; increased punishments; contemporary institutions).

In addition to the ones already proposed, we would like to highlight the need to build a modern and up-to-date fiscal system that will not suffer from successive and obvious evasion due to legislative dreams. For this purpose, these "future" activities will have to be taken into consideration in order to establish a common system for detecting

and calculating taxes imposed on such activities, innovative elements that are currently not found in the legislation of any state (for example we mention that YouTube public publicity statistics have published a top of the best-paid content channels, with revenue ranging in first place to 5-digit amounts). In case harmonization with private international law and related legislation on foreign elements will be necessary.

V. "YOU HAVE THE RIGHT TO CHANGE YOUR MIND[1]"

In this case, we believe that any additions made to the penultimate theme approached in the proposed work in order to establish its area are superfluous. Consumers' legislation provides for a 14-day period (calculated on business days) within which any product (except as stated in the contractual clauses) can be returned without invoking the ground. Although this mandatory provision is often breached / disregarded, we would like to address another issue related to the right to scrap and we refer to the well-known use of discount coupons / vouchers / special discount codes / bar codes / other all of which are extremely present in the case of contemporary purchases. But what is the conflict with legal valences? Practically their use and in themselves the way they work as trajectories / limits / elements of efficiency are not only not regulated in any normative act in force in Romania but are not dealt with in the regulations or the terms and conditions of each trader.

Von take a concrete case for an enhanced understanding of our optics. Not often and in compliance with the law (in this sense, retailers who allow returns in extended terms to the provisions of the law), a consumer wants to return a certain product he or she has purchased on a classic or online basis, instead of being the result of this approach when using a discount code (possibly even limited to a small number of clientele, not a general one known to the public)? Legal by applying rules and suppositions, but above all retroactivity, since a contract can be denounced and the parties will be reinstated in the original situation, it is

[1] www.anpc.gov.ro

normal that the code used can be operational again. As a secondary example we can also analyze the situation of using such a code that was established as valid for a certain term but which can be effectively and legally used over time if in this case the trader (generally in the virtual space) allowed the transaction [another opinion debating that such a suspensive condition (here the condition including the use of the code in term, and the contract itself being considered to be basically concluded when the consumer's acceptance reached the merchant who confirmed it) unconsolidated by the lack of use in the term abolishes retroactively the contract].

In both cases and in many others, both the lack of regulation and the silence of traders seriously affect consumers' interests, which can only be remedied through prompt legislative intervention.

CONCLUSIONS

The legal beam meant to become the Sun on a sky clouded by corruption, inappropriateness and ethical degradation can be a brief assertion that sums up the present paper. We tried to outline and propose in this article the main issues that affect the entire functional and operational structure of the modern legal system at an indissoluble level regarding ethics, and also offer a series of reference elements as possible future generalized applications that will outline the framework necessary for the reconstruction and the upgrade of legality as we know it, precisely in order to achieve the most desirable and optimal parameters in view of the contemporary geo-political, economic and social context

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No.1 (20), Year XVIII, 2019, pp. 188-200

CYBERCRIME - CRIMINOLOGICAL REFERENCES

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Abstract:

This study analyses one of the actual and modern forms of criminality, which appeared as a result of the new technology evolution, namely cybercrime. This study aims to examine the notion of "cybercrime", focusing on the following areas of interest: the legal framework intended for stopping this illegal manifestation; considerations regarding some of the offences from this area; the object and motivation of these offences materialized in criminological effects; some details about the personality of hackers; and, last but not least, the presentation of some practical cases, which has in center both foreign and Romanian offenders. Therefore, through this study, readers will acknowledge how important and perilous the cyberspace has become, as well as the fact that some of the hackers had renounced of committing offences in favor of offering legal support for checking the computer networks and the Internet.

Key words: *cybercrime; legal framework; cyber offences; hackers; practical cases*

INTRODUCTION

In today's world, a world of technology and information, in which the innovation is the priority, the evolution of this technology and of the

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information systems had put their mark on all the fields that surround our everyday life, such as: the social, economic, civil, military, sanitary and defense sphere, as well as in many other areas. Therefore, the current society, which has no limits in development, uses every day the electronic devices, namely: the mobile phone or the computer, in all sectors of social, political and economic life. As a consequence, it was created a real cybernetic system, named "the cyberspace", in which was offered the possibility of committing offences in another way than "the traditional" way. Apart from the widespread preoccupation of using the computer in the interest of society and with the respect of the law, this technology has enabled some individuals, who are eager of the benefits of the new inventions, to take advantage of the achievements of the new technology, getting round the law and giving rise to cybercrime.[1]

Due to the benefits of the evolution of technology, cyberspace has become today an assembly of resources shared by citizens, enterprises, infrastructures of information and governments, without being established a clear mode of delimitation between these different groups. With the development of cyberspace the cybercrime has also emerged, cyber attacks becoming more and more common in recent years. Their complexity and frequency represent a serious threat to the safety of citizens around the world.[2] The use of information technologies offers great possibilities to store, transfer, manipulate and control data over a long period of time, and, also, to communicate and transmit large amounts of data from one computer system to another. Thus, computer systems can be considered both a mean of committing offences and their object. Cybercrime can have a very high price on the economy, but also in terms of human security.[3]

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[1] T. Amza, *Criminologie. Tratat de teorie și politică criminologică* (Bucharest: Lumina Lex, 2002), 637.

[2] B. A. Urs, „Cloud computing – mediul propice pentru criminalitatea informatică" in *Dreptul* No. 3 (2018): 145.

[3] A.-N. Vlăsceanu, „Cooperarea internațională în domeniul criminalității informatice", in *Revista de drept penal* No. 3 (2008): 129.

1. CYBERCRIME – LEGAL FRAMEWORK

Cybercrime can be understood not only in *strictu sensu*, in which case we are only referring to the crimes committed through computer systems, but also in *lato sensu*, when, within this notion, it is supplemented with offences committed through electronic payment means, in addition to the proper computer offences.

In concreto, it is specified the fact that other offenses may also be committed in association with computer systems or with electronic means of payment. For example, the crime of deception can be committed through electronic mail, social networks or through other facilities offered by computer systems. The crime of tax evasion and money laundering can be also committed through computer systems or electronic payment instruments.[1]

Moreover, beside the legal framework provided by the Criminal Code for cybercrime, there are also found other normative acts, all of which provide a mean of fighting against cybercrime, including: Law No. 8/1996 on copyright and neighboring rights and Law No. 455/2001 on electronic signature.

The Committee of Ministers of the European Union's neutral states has issued a series of recommendations aimed at combating criminal acts from cyberspace, for example: Recommendation No. R(81)20 on the harmonization of laws relating to the requirement of written proof and to the admissibility of reproductions of documents or recordings on computers; Recommendation No. R(85)10 concerning the practical application of the European Convention on mutual assistance in criminal matters in respect of letters rogatory for the interception of telecommunications; Recommendation No. R(87)15 regulating the use of

[1] M. Hotca, *Criminalitatea informatică (cybercrime – infracțiuni informatice)* (31 May 2018). Available at: http://htcp.eu/criminalitatea-informatica-cybercrime-infractiunile-informatice/. (Accessed on: 11 April 2019).

personal data in the police sector; Recommendation No. R(89)9 on computer-related crime.[1]

In lato sensu, the Criminal Code provides the following offenses that are integrated into the concept of cybercrime:

A. Fraud crimes committed through computer systems and electronic payment instruments, regulated in Chapter IV of Title II of the Criminal Code:

– Art. 249 - Computer Fraud;
– Art. 250 - Making fraudulent financial operations;
– Art. 251 - Accepting fraudulent financial operations.

B. Offenses against security and integrity of computer systems and data, provided in Chapter VI of Title VII of the Criminal Code:

– Art. 360 - Illegal access to a computer system;
– Art. 361 - Illegal interception of computer data transmissions;
– Art. 362 - Alteration of the integrity of computer data;
– Art. 363 - Disruption of the operation of computer systems;
– Art. 364 - Unauthorized transfer of computer data;
– Art. 365 - Illegal operations with devices or software.

C. Counterfeiting of bonds or payment instruments, namely the forgery of an electronic payment instrument (Art. 311 par. (2) of the Criminal Code)

D. Circulation of counterfeited securities (Article 313 of the Criminal Code);

E. Computer fraud (Article 326 of the Criminal Code);

F. Child pornography – (Art. 374 par. (3) of the Criminal Code).

2. CYBER OFFENCES

In present days, cybercrime is an area of utmost importance in criminal field, especially by the way technology sets its stamp on us. The domain is vast, technical and extremely complex. This is the reason why

[1] E. Stancu, *Tratat de criminalistică, III^rd edition, revised and added* (Bucharest: Universul Juridic, 2004), 701.

these elements have made the criminal phenomenon reaches global proportions. The cross-border nature and the dynamics of the legal phenomenon make it extremely dangerous, related to the seriousness of the actions, which can be committed with the help of the computer systems.[1]

Attacks may be regular (with a low impact on national security systems, for example, a hacker's attack to make money) or potentially catastrophic (through limited actions that can generate unanticipated effects, with serious consequences at a national level, for example, a cyber-attack on a bank's files can cause panic and generate mistrust in the banking system).[2]

With reference to some computer crimes, these could be:

- Spread of viruses - represents a real danger, computer viruses being far more harmful than it could be imagined at first glance. Therefore, through viruses it can be accomplished espionage or major offenses, such as blackmail and constraint.
- Software piracy - consists of illegal and unauthorized use of a computer program, the phenomenon being one of the most frequent in the world.
- Steals through Mailbox – is one of the oldest cybercrime.
- Attacks on ATM, debit card, PC passwords, PINs - Computers are heavily used in financial fraud not only as a crime instrument, but also to enter in databases and steal confidential information on financial accounts.
- Cyber spying – requires the data acquisition by illegitimate means or the disclosure, transfer or use without right or without any other legal justification of the commercial or industrial secret, with the intention of causing an economic prejudice to the person who has the right of the secret or with the intention of receiving illicit economic advantages for himself/ herself or for another person.

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[1] Urs, „Cloud computing – mediul propice pentru criminalitatea informatică", 141.

[2] A. Frighenciu, „Criminalitatea organizată în domeniul cibernetic" in *Studia Securitatis* No. 3-4 (2007): 41.

Unlike classical or traditional (physical) forms of committing offences, cybercrime is rather difficult to detect, especially in the case of a person who "erases" the traces of his criminal activity. Moreover, this criminal phenomenon is often difficult to place in legal terms, considering the cross-border nature of computer networks. Cybercriminals often use new methods or adapt and transform various equipment's, programs or computer contaminants in order to conduct their illicit activities.[1]

3. CRIMINOLOGICAL EFFECTS OF CYBER CRIMES

Concerning the criminological research, it is appreciated that it is quite difficult to identify the causes and conditions which generate cybercrime, and it is even more difficult to develop concrete proposals for combating or stopping this specific type of crime.[2]

From a certain point of view, the cyber offense is a logical extension of other types of crimes. In other opinions, this is a faster and more anonymous way to achieve the same results: bank fraud, attacks on competition, terrorism, espionage, etc. From another viewpoint, the crime committed through the computer is very different, even contradictory. On the one hand, this is because computer crime can be more profitable than any other form of fraud; reason why it is even more prompted by criminals specialized in computer work. On the other hand, many of the computer-related crimes are considered as intellectual challenges which are not intended for making profit.[3]

In the following, the attention will be focused on the object and motivation of the offender who commits computer attacks; in the specialty literature[4], those could be classified as follows:

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[1] Urs, „Cloud computing – mediul propice pentru criminalitatea informatică", 146.
[2] Amza, *Criminologie*, 647.
[3] Amza, *Criminologie*, 452-453.
[4] Amza, *Criminologie,* 468-454.

a. Attacks on the army or special services of information - National security increasingly depend on computers, which store information from the military space satellites to the deployment of troops around the world, espionage transforming practically into a computer penetration game.

b. Attacks against businesses - Competition between large companies and the increase of rivalries between national economies have turned industrial espionage into a real threat, most of the computer-related business crimes being criminal acts belonging to employees.

c. Financial attacks - Banks have always been a tempting target for hackers, those attacks often being considered by inside people who know the technical details.

e. Attacks committed (with hate, malice) by employees or former employees – Not all cases, where a computer is being accessed illegally, are aimed at identifying and circumventing information.

f. Attacks for amusement - Many of the hackers who illegally access various computer systems do not do this for money, some of them being young, very young or even children who understand this behavior as an ultimate level of video games.

g. Cyber-attacks committed with criminal instinct - Even if criminals do not directly target computers or electronic information, there are frequent cases in which they act instinctively.

4. CONSIDERATIONS REGARDING THE HACKERS

In a very short time, the unprecedented development of information technology led to the creation of a new group, from the category of those included in the "White-Collar Crime". This new group has a special distinctiveness that of the computer-makers and a segment engaging in criminal activity through hackers who commit cybercrime from the simplest to the most sophisticated ones.[1]

The investigation of a cybercrime relates to both its author and the operating mode of the person who illegally access a cybernetic system. Thus, the perpetrators of cybercrime, who could come from

[1] Stancu, *Tratat de criminalistică,* 706.

different environments, are characterized as having an education and intelligence over the average offenders, but also as having a special motivation.

Some specialists affirm that "Tomorrow's terrorist may be able to cause greater damage with a keyboard than a bomb."[1] Most authors who talk about cybercrime believe that they are committed by hackers. According to some authors, the hacker is defined in several forms, as follows:

- the person who likes to explore the details of programming and the ways in which their abilities can be expanded;
- an enthusiast programmer;
- the person who is capable of being appreciated;
- the person who can make programs fast;
- an expert on a particular program.

The categories of offenders who can perform cyber-attacks are represented by anarchist attackers (they penetrate computer systems without a coherent strategy for achieving their goals), coordinated attackers (they organize and plan actions that have a precise target and a well-defined objective, being motivated by a series of strategic political purposes, which determine them to use sophisticated means of introducing the so-called "Trojan horses" - logic bombs) and hackers (they are the attackers who break security systems and penetrate information systems of an organization, institution or business; provoking chain-breaks of cybernetic systems, stealing data and programs, planting viruses, and causing other damages that may pose a threat even to national security.)[2]

The hacker can be defined as: a person who likes to explore the details of the systems and the ways in which they can practice their skills; a person who enthusiastically schedules; he/she is an intruder who tries to discover with insistence and curiosity, he/she likes the intellectual challenge, and he/she is obsessed with penetrating any computer data.

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[1] Amza, *Criminologie*, 658.

[2] Frighenciu, „Criminalitatea organizată în domeniul cibernetic", 43-44.

Hackers can be classified according to their motivations: political motivations (for making public their opinions or for confronting harsh political regimes through the penetration of computer systems), financial motivations (the group seeks personal earnings; hackers, using false authorizations, can penetrate into companies' information systems, steal business plans and secret information about new products and then they sell them to rival companies); governmental motivations (acts committed by a government against another government, in the form of government espionage and the information war); social motivations (the group has a "gang" mentality and is strongly driven by the idea of doing something special to ensure his/her fame).[1]

In stories about hackers, it was noticed some common features, some psychological features. For example, it is unquestionable the fact that most hackers have a high level of intelligence. Another common feature is assertiveness, perseverance in achieving the proposed goal. Hackers must have a strong will because, in their activity, they should often do a demanding and a continuous work without encouraging results along the way and should make decisions based on their own criteria. Most hackers prefer to work individually, even if they have the experience of teamwork. The distance and cold in communication, the predisposition to conflict and the lack of emotions expressed outwardly are drawing broadly the possible portrait of a hacker.[2]

It is said that for a hacker it is very hard to keep silence when he manages to break a protected system, especially if he/she is at the age of crystallization his/her personality. However, the life of the hacker can be long if he/she knows "to lock his/her mouth". Moreover, with the passage of time, hackers are no longer interested in what people say around them, preferring to keep their full anonymity, for security reasons.

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[1] Frighenciu, „Criminalitatea organizată în domeniul cibernetic", 45.

[2] D. Baiski, „*Portret"* (2004). Available at: http://www.dusanbaiski.eu/node/164. (Accessed on: 14 April 2019).

5. PRACTICAL CASES

Computer crimes have been remarked both at an international and national level, many hackers' names having widely been known to the public, at present. Those hackers have created, especially at a high level, a real danger in terms of financial damage for both private and state institutions. Thus, here are a few examples of cases which have in center famous names of hackers.

Kevin David Mitnick, an American known as "Condor", is a famous name in hackers' world, being the first hacker to appear on an FBI "Most wanted" poster. Because of a miserable childhood, he was prone to criminal acts, being caught in high school while hacking computers. Despite the successive convictions he has received and the treatments he was forced to, Mitnick continued to commit crimes.

His criminal activity has been materialized in various illegal actions, such as: unauthorized access in telephone networks, the theft of technical manuals from the Pacific Bell phone company from Los Angeles, file tampering and unauthorized penetration of the network of the Digital Equipment company, the invasion of systems such as Motorola Cellular Division, the Department of Motor Vehicles in California, as well as breaking the military systems.

At the time of his trial, slogans were heard in courtroom, and then were taken over by the American press: "Release Mitnick!" or "Mitnick President," which once again demonstrated the popularity and appreciation of this offender. For the allegations of illegal possession and use of 15 credit cards, he was sentenced to five years imprisonment, being recorded the first legal sanction to an American citizen for the act of intrusion for theft into an interstate computer network.[1]

Mitnick's incarceration had put an end to an era where hackers were considered a modern version of Robin Hood, which later led to the real danger that such individuals really represent.

Kevin Mitnick published in 2002 a book: "The Art of Deception" in which he explains why companies should invest more effort and

[1] Frighenciu, „Criminalitatea organizată în domeniul cibernetic", 45-46.

money to teach their employees to secure the company's secrets rather than to invest large amounts of money in data security programs. He claims that "the weakest link in safety is still the man", discovering that it is easier to manipulate people than technology. Mitnick needed special approval to write the book at a computer, and, in the present, he founded a company to show employers how to fight cyber piracy.[1]

Răzvan Manole Cernăianu, a Romanian known as TinKode, is another name known to the hackers' world, being one of the most wanted hackers in the world until his arrest in 2012. According to the information from his personal blog, the attacks were made only for informational purposes and not for malicious ones, unwilling to endanger the confidential data of the victims and notifying each time the problems found through an e-mail sent to the administrators of the systems of those companies.

In his career, he has attacked dozens of sites and IT infrastructures, but he does not have a favorite hack. Every of them seems to be important to him, but if he were to choose one, that would be the attack on the British Royal Navy. "They had bragged about how they have invested 500 million pounds in their security system and that they are ready for attacks from other countries", said Cernăianu. That statement motivated Răzvan; he wanted to see how powerful the British system was. "After a week, I made public the access. I liked them because they recognized their mistake that they should not boast", he added.[2]

He did not leave a trace in any system he broke and there was no trap for him. He was caught because he was too talkative. "A friend knew what I was doing. He spoke in other circles about me, and there was an

[1] Frighenciu, „Criminalitatea organizată în domeniul cibernetic", 46.

[2] F. Casota, *Unul dintre cei mai cunoscuți hackeri români a trecut în legalitate după 90 de zile în închisoare și acum povestește cum învață companiile să se apere. "Am atacat Marina Regală Britanică și într-o săptămână le-am făcut public accesul"* (29 September 2015). Available at: https://www.zf.ro/business-hi-tech/. (Accessed on: 14 April 2019).

undercover policeman who pumped the secret out of him, got my name and then caught me", he said.[1]

After leaving prison, Cernăianu founded Cyber Smart Defense alongside Mădălin Dumitru, an acquaintance with experience in IT. Currently, Cernăianu conducts security audits and makes penetration tests of IT infrastructure: "If you want to find all the weaknesses of a system, you need to have experience, to be in the mind of the hacker, and experience is gained through practice", he wrote on his blog.

CONCLUSIONS

Cybercrime had appeared as a result of the technology advance and of the concern for widespread use of the technology in the interest of society. Thus, it offered the hackers and those who wish fast and secured earnings the possibility to benefit from these new inventions of the digital revolution, getting round the law and committing different cyber offences. This form of criminality is materialized in launching attacks in the virtual space against the army, special services of information, in the financial field, committed by offenders or unsatisfied employees, who threaten and damage the global economy and the security of the states for varied reasons, such as amusement, malice or for satisfying criminal instincts. In order to stop and prevent cybercrime, the legislator built a broad legal framework for executing the persons who perpetrate cybercrimes, the framework being completed by other legal provisions from both National and European law, as well as International pacts and treaties, with universal character, which prohibit cybercrime. Regarding the hacker, it can be observed that some of them commit offences for criminal instinct and others just for their own amusement, but there are also some cases when famous hackers had decided to use their talents for legal purposes and for helping the justice.

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[1] F. Casota, *Unul dintre cei mai cunoscuți hackeri români a trecut în legalitate după 90 de zile în închisoare și acum povestește cum învață companiile să se apere*

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LEGAL AND ADMINISTRATIVE STUDIES, www.jlas.upit.ro.
e-ISSN: 2344-6900, ISSN-L: 1583-0772
No.1 (20), Year XVIII, 2019, pp. 201-215

FROM THE CAPITAL PUNISHMENT TO RESPECTING THE RIGHTS OF THE CONVICT. A FEW ASPECTS REGARDING THE EVOLUTION OF THE ROMANIAN PENALTY SYSTEM

Valentina Alexandra NICOLAE [1]

Abstract:

From the application of the most drastic punishments for crimes whose nature was meant to produce a prejudice to the physical and mental integrity of a person or who aimed at its patrimony and until the current period, where no question of the application of a capital punishment, at least as far as the Romanian State is concerned, the romanian sanctioning system has undergone numerous modifications aimed primarily at sanctioning the facts stipulated by the criminal law that have been committed with guilt, this sanctioning beeing applied in compliance with the rights of the convicted person. The present work aims to make a general overview of the evolution of the Romanian sanctioning system, from the daco-roman period and until today, the presentation of facts that are no longer criminally incriminated in the current criminal legislation and last but not least a comparative analysis at international level.

Key words: *Capital punishment; sanctioning system; evolution; protection of the fundamental rights of the condemned.*

With the emergence of society, it was noted the necessity of defending social values, without which we cannot talk about a "state" in the true sense of the word. These social defence relations have emerged

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with society and have known both a peaceful form that was based on cooperation and a conflict. In this respect, it is noted that actions aimed at or as a result of violating the rights of individuals, the production of psychological and particularly physical injuries or targeting their assets, attracted the reaction of the injured person who, most often, dress the form of vengeance. [1]

In time, a restriction of the victim's reactions was attempted as they were likely to produce situations that could lead to the weakening of society by the physical destruction of its members. In this context we can talk about a first attempt to limit the victim's reaction, namely the law or the principle of thalion known under the formula "eye for an eye and tooth for tooth", according to which the victim's response and the intensity of aggression was supposed to be a ratio of proportionality. However, this principle proved to be unsatisfactory as it led to the compromise of the idea of justice on the one hand and ended in a double loss for society on the other hand, a situation in which this rule of the thalion was replaced by the composition, that is, with the cartel intervened between the conflicting parties, the victim receiving an allowance for the sickness suffered. This agreement has elapsed with time from an optional measure to a binding nature. [2]

From the moment the state appeared, as the form of organization of public power ,the law was born as a way of expressing and imposing the state will, radically changing the defence of social values. Thus, the main task of the State becoming that of defending the interests of its citizens, this function is nothing more than the reflection of a historical necessity of defence of the social values system at the time. [3]

In the period of antiquity we cannot talk about a science of criminal law, manifexing a pronounced tendency to the etatization of repression without creating a new conception of the punishment, it continues to produce the effects of a vengeance for the damage caused

1 Costica Bulai, *Manual de drept penal.Partea generala* (Bucharest: All Educational, 1997), 9.
2 Bulai, *Manual de drept penal.Partea generala,* 10.
3 Bulai, *Manual de drept penal.Partea generala,* 10.

by the offender, vengeance appearing as a natural solution to an aggression. [1]

In roman law it was noted that the offences were not regarded as the source of obligations but as unlawful deeds, they attract the sanctification of the one who realised them. The sanctification of private crimes has gone through four phases: the system of Revenge of the blood, the system of voluntary composition, the system of legal composition and the system of remayors by the state. The first two we have approached previously, therefore we will continue to discuss the last two systems. Thus, as far as the legal composition is concerned, we can say that unlike the volunteer, it cannot be denied by the victim. [2]

The law of the XII Table shows for some crimes a phase of passage from the volunteer to the legal composition. Thus, for the blatant theft the composition was voluntary and in the case of the unflagrante was legal. [3]

In the case of the system of repression by the state , in order to protect the interests of the society, the state penalises even crimes that adversely affect the interests of individuals thus achieving a transformation of private crimes into public crimes. [4]

In this stage there are still traces of the application of the old suppression systems. Thus, the sentence applied to *membrum ruptum* is an application of the law of the talion and the one applied to the fracture bone constituted an application of the system of legal and voluntary composition. [5]

As for the theft, in the primitive era of Rome it was defined as a private offense that gave the victim the right to individual vengeance, and then to a cash composition. In The modern era it is observed the tendency of theft to become a public offense. [6]

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1 Bulai, *Manual de drept penal.Partea generala,* .26.
2 Cristinel Murzea, *Drept roman,* Editia a II-a (Bucharest: All Beck, 2003), 302.
3 Murzea, *Drept roman,* 302.
4 Murzea, *Drept roman,* 302.
5 Murzea, *Drept roman,* 302.
6 Murzea, *Drept roman,* 304.

As for the murder in Ancient Rome, the exercise of the right to life and death by an ascendant on the descendants of his authority, did not constitute the deed of manslaughter so that, until the time of Emperor Constantine the Great was Possible the murder of the son subjected to parental power by the one who was vested with such authority. [1]

In the medieval period , crimes such as theft, murder or violation of property were severely punished, most of these punishments were accompanied by the confiscation of wealth. These sanctions were applied to everyone , from ordinary people to noblemen, in certain situations the nobles could be forgiven or put under protection by the King. [2]

During King Ladislau the I'st time, a substantial fine was required for murder, so the one who killed a person was sent to prison and his properties, from vineyards, farmland, servants, and slaves were given to the family of the murdered.

Also, for the forced penetration into the home of a nobleman the punishment stipulated was equal to 2/3 of the property of the guilty, which returned to the injured one and the remaining 1/3 were given to the wife and son of the offender. [3]

If the villain had no material possibilities to pay his punishment, then he was shaved in the head and carried through the public square, whipped and sold in that state. People who were guilty of violating the rules had to be subjected to punishments offered by the church, which involved among others, posts. those who burned the houses of others had to pay 16 oxen and to rebuild the destroyed building. Forced penetration into someone's house was punishable by payment of 10 Boi. [4]

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1 https://dreptmd.wordpress.com/teze-de-an-licenta/omorul-calificat/ , site accesed on 18.04.2019, 22:20.

2 https://www.historia.ro/sectiune/general/articol/cum-erau-pedepsiti-infractorii-in-evul-mediu-de-la-un-banal-scandal-la-crima , site accesed on 18.04.2019, 22:36.

3 https://www.historia.ro/sectiune/general/articol/cum-erau-pedepsiti-infractorii-in-evul-mediu-de-la-un-banal-scandal-la-crima , site accesed on 18.04.2019, 22:36

4 https://www.historia.ro/sectiune/general/articol/cum-erau-pedepsiti-infractorii-in-evul-mediu-de-la-un-banal-scandal-la-crima , site accesed on 18.04.2019, 22:36

The law from year 1231 of King Andrew II stipulates that the property of an individual convicted by legal procedure may be taken over by the king or given by him to anyone who wishes. [1]

Regarding minor punishments, these were given to educate the entire community by using the example method, thus the perpetrators were placed in a cylinder illustrated with their mistakes, the illustrated tape explaining to the crowd ,the crime the person is convicted for and also the penalty applied. [2]

The capital punishments were enforced by various means throughout history, the most famous being the crucifying, burning at the stake, the thrust in the wheel, the drag on the tire, the majority being used even in the territory of our country in medieval period. [3]

In February 1785, the two martyrs of Transylvania, Horia and Cloşca were pulled on the wheel, shortly after Crişan, the third ruler of the uprising from 1784, was found dead in the cell. The punishment was a means of torture with notoriety in medieval Europe. Basically, the convicting were stretched to the ground (usually in the bare skin), tied to the hands and feet, over which a huge wooden wheel ,filled with metal spikes, well-pointed,was past. The executioner pressed the wheel over the convicts so that the thorns cause them wounds as deep as possible. Those who resisted the suplicium were stretched on the wheel and left prey to the crows until their last breath. [4]

The cutting of living convicts was another means of torture. They were hung upside down, then with a saw, they split the body in two starting between the legs. Death was only when it came to the torso and

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1 https://www.historia.ro/sectiune/general/articol/cum-erau-pedepsiti-infractorii-in-evul-mediu-de-la-un-banal-scandal-la-crima , site accesed on 18.04.2019, 22:36

2 https://www.historia.ro/sectiune/general/articol/cum-erau-pedepsiti-infractorii-in-evul-mediu-de-la-un-banal-scandal-la-crima , site accesed on 18.04.2019, 22:36

3 https://m.adevarul.ro/locale/vaslui/cum-erau-pedepsite-femeile-adultere-perioada-medievala-top-10-instrumente-sadice-tortura-1_561ce02df5eaafab2c9c9ccb/index.html ,site accesed on 18.04.2019, 23:14

4 https://m.adevarul.ro/locale/vaslui/cum-erau-pedepsite-femeile-adultere-perioada-medievala-top-10-instrumente-sadice-tortura-1_561ce02df5eaafab2c9c9ccb/index.html ,site accesed on 18.04.2019, 23:14

often prolonged the time for those who assisted in lynching not to forget how traitors are punished. Another sadistic means was the skining of the people, the punishment that was usually applied to those who opposed the system. Death was slowly but surely. [1]

The cradle of Judah. Also known as the seat of Judah, this was actually a pyramid-shaped tripod with a metallic tip. It was basically a stake, but it was used for public humiliation, and it didn't lead to death. The convict was seated naked on the seat of Judas , the secheles left by this torture chair tormenting the condemned all his life. [2]

The Iron Maiden is another infamous invention of the Inquisition, which was actually a metallic coffin that had the shape of a female body. The interior was lined with many needles that permeated the body of the convicts immediately after closing the lid. The goal was to extract the confessions of heretics, not to kill immediately. The defendant could have been agonizing for even two days. [3]

Interrogation chair. It was the means of punishment used in the case of adulterers, witches, and women of light morals. The chair was fitted with a lot of needles that pierced the skin. It was more of a form of public humiliation. The chair was also used to make them confess the deed. [4]

Purifying the soul. Although the name does not lead to sadistic things, it was a terrifying means of torture. It was used with predilection in Catholic countries with the stated purpose of purifying the soul of the condemned. It was believed that the soul of the one subjected to this

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1 https://m.adevarul.ro/locale/vaslui/cum-erau-pedepsite-femeile-adultere-perioada-medievala-top-10-instrumente-sadice-tortura-1_561ce02df5eaafab2c9c9ccb/index.html ,site accesed on 18.04.2019, 23:14

2 https://m.adevarul.ro/locale/vaslui/cum-erau-pedepsite-femeile-adultere-perioada-medievala-top-10-instrumente-sadice-tortura-1_561ce02df5eaafab2c9c9ccb/index.html ,site accesed on 18.04.2019, 23:14

3 https://m.adevarul.ro/locale/vaslui/cum-erau-pedepsite-femeile-adultere-perioada-medievala-top-10-instrumente-sadice-tortura-1_561ce02df5eaafab2c9c9ccb/index.html ,site accesed on 18.04.2019, 23:14

4 https://m.adevarul.ro/locale/vaslui/cum-erau-pedepsite-femeile-adultere-perioada-medievala-top-10-instrumente-sadice-tortura-1_561ce02df5eaafab2c9c9ccb/index.html ,site accesed on 18.04.2019, 23:14

supplicium would be saved,not the body. Specifically, they pour boiling water or hot coals in the mouth of the convict. It was believed that the surviving one was innocent. Of course, no one escaped alive. [1]

Also, as medieval execution methods we mention the firing squad, this method being used since ancient times, an example of this being the ancient Rome or Sandinavia that used the archery groups to execute the inmates. [2]

In some areas of medieval Asia the condemned to death were executed by pulling in bamboo. As a rapidly growing plant of up to 30 cm a day, this type of execution was a slow one, designed to produce long suffering to the condemned before passing into the unbeing. A similar method was also used in Romania, by Vlad Tepes, but this method was faster compared to the one previously presented. [3]

Other methods used were the pressing of convictions by elephants specially trained for this purpose, burning at the stake, applied to those accused of witchcraft or heresy, hanging, guillotine and so on. [4]

With the passage of time, the development of society has led to a taming of the sanctioning system,capital punishments being applied less and less .

In 1865 ,Romania becomes the first country in Europe to abode the death penalty, followed by Portugal (1867) and the Netherlands (1870). In this respect, there are three important moments that have led to this long-awaited humanization of punishments in the Romanian principalities of the 19th century, namely: the stage of the organic

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1 https://m.adevarul.ro/locale/vaslui/cum-erau-pedepsite-femeile-adultere-perioada-medievala-top-10-instrumente-sadice-tortura-1_561ce02df5eaafab2c9c9ccb/index.html ,site accesed on 18.04.2019, 23:14

2 http://www.redescoperaistoria.ro/2014/12/10/7-metode-de-executie-medievale-ingrozitoare/ ,site accesat în data de 18.04.2019, 23:41.

3 http://www.redescoperaistoria.ro/2014/12/10/7-metode-de-executie-medievale-ingrozitoare/ ,site accesat în data de 18.04.2019, 23:41

4 http://www.redescoperaistoria.ro/2014/12/10/7-metode-de-executie-medievale-ingrozitoare/ ,site accesat în data de 18.04.2019, 23:41

regulation of the Romanian country in 1831, the Islaz proclamation of 1848 and finally, the Penal Code of 1865. [1]

The organic regulation was a condition imposed by the Russian authorities, following the Treaty of Adrianopole in 1829, following which the Romanian principalities entered under the Russian protectorate. [2]

The organic regulation provided, by art. 289 as: *"The Lord will be able to reduce the punishment of the guilty and yet forgive certain incidents. Punishments with the cutting of hands or death, as well as exploitation or labor abolish and can not be followed from now on (...) ".* [3]

However, the measure was not long-lasting because, on 11 March 1832, General Kiseleff informed the Assembly about the reintroduction of the capital punishment, the announcement being followed by a general reform of the penalty and penitentiary system, which was followed by a decrease in criminality. [4]

Regarding the Islaz proclamation, it was read on June 9, 1848, in paragraph 19, the complete abolition of the death penalty: *"The abolition, both in deed and in Word, of the death penalty". The revolutionaries went even further, claiming that: "The Romanian people, although they do not know the being of the death penalty, but because often through criminal judgments the oldest system judges have dared to give out some death sentences without being able to put themselves into the work, the Popole*

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1 https://www.historia.ro/sectiune/timp-liber/articol/abolirea-pedepsei-cu-moartea-romania-prima-tara-din-europa-care-face-acest-lucru ,site accesed on 19.04.2019, 06:14.

2 https://www.historia.ro/sectiune/timp-liber/articol/abolirea-pedepsei-cu-moartea-romania-prima-tara-din-europa-care-face-acest-lucru ,site accesed on 19.04.2019, 06:14.

3 https://www.historia.ro/sectiune/timp-liber/articol/abolirea-pedepsei-cu-moartea-romania-prima-tara-din-europa-care-face-acest-lucru ,site accesed on 19.04.2019, 06:14.

4 https://www.historia.ro/sectiune/timp-liber/articol/abolirea-pedepsei-cu-moartea-romania-prima-tara-din-europa-care-face-acest-lucru ,site accesed on 19.04.2019, 06:14.

decrees the abolition with All the death penalty, both in the work and in sentences. " [1]

Decree No. 7/14 June 1848 of the Provisional Government foresaw the abolition of the death penalty. However, it was only in force until 13 September 1848, when the Ottoman troops entered Bucharest and defeated the revolutionaries, ending their short democratic experiment. It should also be recalled that even in Moldova, although the revolutionaries did not take power, they demanded the abolition of the capital punishment in their programme: ' *17. The abolition of the death penalty and the beatfish. The age in which we live makes a superfluous comment in this.* " [2]

In 1859 the country of Wallachia and Moldova formed a new state. A number of reforms were initiated by Alexandru Ioan Cuza in the first half of the 1860, including the criminal reform introducing a modern and coherent criminal Code which, surprisingly for those times , through him was abolished the death penalty. [3]

The criminal code was promulgated and published on 30 October 1864 but entered into force on 1 May 1865; The harshest punishment was hard work for life (art. 7). In 1865, Romania was the first country to abolish the death penalty in Europe in the modern period, followed by Portugal in 1867 and Netherlands in 1870. [4]

The Constitution of 1 July 1866 explicitly stated that the death penalty could not be reinstated (article 18). With the exception of several

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1 1 https://www.historia.ro/sectiune/timp-liber/articol/abolirea-pedepsei-cu-moartea-romania-prima-tara-din-europa-care-face-acest-lucru ,site accesed on 19.04.2019, 06:14.

2 2 https://www.historia.ro/sectiune/timp-liber/articol/abolirea-pedepsei-cu-moartea-romania-prima-tara-din-europa-care-face-acest-lucru ,site accesed on 19.04.2019, 06:14.

3 3 https://www.historia.ro/sectiune/timp-liber/articol/abolirea-pedepsei-cu-moartea-romania-prima-tara-din-europa-care-face-acest-lucru ,site accesed on 19.04.2019, 06:14.

4 4 https://www.historia.ro/sectiune/timp-liber/articol/abolirea-pedepsei-cu-moartea-romania-prima-tara-din-europa-care-face-acest-lucru ,site accesed on 19.04.2019, 06:14.

military offences that were provided in the military Code, which were also applied during the First World War, the death penalty remained abolished until 1938. "*Art. 18: The death penalty will not be re-established, except for the cases provided in the military Penal code in the time of Resbel.* "[1]This punishment was reintroduced by Charles II.

With the establishment of the communist regime in 1945, in Bucharest, in the attempt to abolish all forms of communist resistance there have been a number of changes in the penal legislation, aiming at reintroducing the capital punishment. Thus, the death penalty was reintroduced in Romania through a series of laws and decrets such as Law No. 50 of 21 January 1945 and Law No. 312 of 24 April 1945.[2]

The communist regime was not limited only to giving laws, but in addition to this were created the organisms necessary for its application This is how military tribunals were established, instances of elimination of all opponents of the regime .The death penalty was applied primarily to those who rebelled against the regime, political prisoners, but also those of common law, in this category entering particularly dangerous criminals, rapists or all those who were committing serious crimes against the public order and peace. [3]

Execution plattoons were used for execution of punishments, "executions" being chosen after a certain psychological profile. During the period of Nicolae Ceausescu the Execunaires were performed only in the prison of Jilava (Fort 13) and Rahova (in an underground polygon).[4]

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1 1 https://www.historia.ro/sectiune/timp-liber/articol/abolirea-pedepsei-cu-moartea-romania-prima-tara-din-europa-care-face-acest-lucru ,site accesed on 19.04.2019, 06:14.

2 https://www.historia.ro/sectiune/general/articol/pedeapsa-cu-moartea-in-romania-comunista-104-persoane-au-fost-executate-prin-impuscare-in-epoca-lui-nicolae-ceausescu ,site accesed on 19.04.2019, 06:34.

3 3 https://www.historia.ro/sectiune/timp-liber/articol/abolirea-pedepsei-cu-moartea-romania-prima-tara-din-europa-care-face-acest-lucru ,site accesed on 19.04.2019, 06:14.

4 4 https://www.historia.ro/sectiune/timp-liber/articol/abolirea-pedepsei-cu-moartea-romania-prima-tara-din-europa-care-face-acest-lucru ,site accesed on 19.04.2019, 06:14.

In the period 1965 – 1989 in Romania were sentenced to death and executed by shooting 104 people, intellectuals or criminals of common law. It is notoriously the case of Ion Râmaru or Gheorghe Ştefănescu named "Bachus", the defendant businessman who sold millions of gallons of counterfeit wine. The last Romanian who died under the bullet rain of the firing squad was Ion Pistol, a citizen sentenced to the death penalty by the Teleorman County Court, for particularly serious murder. His execution was held on May 12, 1987. [1]

After the fall of the communist regime, the death penalty was definitively abolished by decree-Law No. 6 of January 7, 1990, the hardest punishment stipulated by the current legislation being life-detention.

• "To emphasize the profound humanist character of the regime introduced in Romania by the popular revolution and for the realization of the proposals made by citizens,

• The Council of the National Salvation Front decrees:

ART. 1-The death penalty stipulated for some crimes in the criminal Code and special laws is abolished and replaced by the punishment of life imprisonment.

ART. 2-from the date of adoption of this Decree-Law all provisions concerning the death penalty of the criminal Code, the Code of Criminal Procedure and other normative acts, other than those stipulated in art. 4, are considered to refer to the punishment of life imprisonment.

ART. 3-death sentences, applied by definitive but unexecuted decisions, are replaced by life-imprisonment, according to the procedure for replacing this punishment.

ART. 4-Repeal art. 54, 55, 120 para. 4 and 130 of the criminal Code, as well as the provisions relating to the execution of the death

1 1 https://www.historia.ro/sectiune/timp-liber/articol/abolirea-pedepsei-cu-moartea-romania-prima-tara-din-europa-care-face-acest-lucru ,site accesed on 19.04.2019, 06:14.

penalty of Law No. 23/1969 and of the regulation approved by the decision of the Council of Ministers no 2282/1969. ' [1]

With the accession of Romania to the European Union ,the unification of union Aquis has become compulsory in its entire content, so apart from the fact that Union and European regulations expressly prohibit the capital punishment ,all of the attention is directed Now to respect the rights of the condemned, regardless of the seriousness of the crime for which they were sanctioned, more and more on the idea of humanity of punishment, re-education and social reintegration.

In this respect, the European Parliament resolution of 8 October 2015 on the death penalty noted:

"[...] A. Whereas the abolition of capital punishment throughout the world is one of the main objectives of EU human rights policy;

B. Whereas the World Day against the death penalty of 10 October 2015 focuses on better awareness of the application of capital punishment to drug-related offences;

C. Whereas, according to the Office of the United Nations High Commissioner for Human Rights, more than 160 UN member States, with various legal systems, traditions, cultures and religious contexts, have either abolished the death penalty or not practice;

D. Whereas, according to the latest figures, 2 466 people from 55 countries were sentenced to the death penalty in 2014, which represents an increase of almost 23% compared to the figure in 2013; Whereas 607 executions were held in the world in 2014; Whereas these figures do not include those believed to have been executed in China, who continue to execute more people than the rest of the world together and condemn thousands more to death; Whereas death sentences and executions continue at an alarming rate in 2015; Whereas the increase in the number of sentences to the death penalty is closely linked to judgments given by courts in the mass processes in response to terrorist offences in countries such as Egypt or Nigeria; Whereas Chadul and Tunisia take into account the possibility of reintroducing capital punishment;

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1 http://www.cdep.ro/pls/legis/legis_pck.htp_act_text?idt=11033 , site accesed on 19.04.2019, 06:44.

Whereas some states in the US continue to rule and execute sentences to death.

E. Whereas cases of death sentences have been reported in Pakistan, Nigeria, Afghanistan, Iran, Iraq, Sudan, Somalia and Saudi Arabia, and whereas in recent years hundreds of women have been killed by stoning for adulteration; Whereas lapidation as a method of execution of capital punishment is considered a form of torture;

F. Whereas eight states provide in their legislation the death penalty for homosexuality (Mauritania, Sudan, Iran, Saudi Arabia, Yemen, Pakistan, Afghanistan and Qatar), and whereas some provinces in Nigeria and Somalia formally apply Death penalty for sexual acts with same-sex partners;

G. Whereas the death penalty is often used against disadvantaged people, mentally ill or belonging to national and cultural minorities;

H. Whereas 33 states apply the death penalty to drug-related offences, which leads to approximately 1 000 executions each year; Whereas, in 2015, executions were carried out for this type of crime in China, Iran, Indonesia and Saudi Arabia; Whereas, in 2015, the death penalty continued to be applied for drug-related offences in China, Indonesia, Iran, Kuwait, Malaysia, Saudi Arabia, Sri Lanka, the United Arab Emirates and Vietnam; Whereas these offences may include various charges relating to trafficking or possession of drugs; [...]" [1]

In conclusion, after a long period in which committing a crime was punished with death, this sanction being executed by using inhuman means, intended to produce unmeasurable suffering to the condemned, Romania recently managed to put a definitive end to this practice, the road being marked by countless obstacles, at first determined by the mentality and the degree of culture of the society at that time after which it was sustained by political interests. The exit from the communist regime and the accession to the European Union, among others, marked a new beginning from a political, economic and social point of view but

1 .http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0348&language=RO , site accesed on 19.04.2019,7:01.

above all finally put an end to the application of such statorniced measures from the oldest times.

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