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THE 13TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Legal Sciences in the New Millennium

International Protection Regulations in the European Union

Elena Loredana Pirvu[1]

Abstract: The refugee crisis has called attention to the weaknesses of the Common European Asylum System. The EU needs a reformed asylum system that would be effective and provide protection, based on common rules, on solidarity and on fair sharing of responsibilities. The reforms proposed by the European Commission that we have analysed in this article will guarantee that people who are evidently in need of international protection will have quick access to it, but also that those who are not entitled to enjoy protection in the EU can be quickly returned. What is proposed at EU level is the final element of a global reform of the Common European Asylum System (CEAS). So as to better meet the new challenges of migration, action must be taken on several fronts: external borders must be managed more effectively, we should cooperate better with third parties and, above all, illegal crossing must be stopped, relocating migrants to first asylum countries on EU territory. The proposals for reforming the CEAS, initiated by the European Commission and which are currently being negotiated, are elements that help make important steps in the right direction so as to create at the European level the structures and tools needed for a comprehensive system, which would be able to deal with future challenges.

Keywords: Common European Asylum System; seeker of refugee status; subsidiary protection; directive; *acquis*

1. The Common European Asylum System

The European Union (EU) has been working towards the establishment of a Common European Asylum System (CEAS) since 1999, with several pieces of legislation being adopted between 1999 and 2013.

The Union's common policy on asylum, immigration, visa and external border controls is based on Title V (Area of freedom, security and Justice) of the Treaty on the functioning of the European Union (TFEU). Under Protocols 21 and 22 to the Treaties, the United Kingdom, Ireland and Denmark shall not take part in the adoption by the Council of proposed measures pursuant to Title V TFEU. The United Kingdom and Ireland may notify the Council, within three months after a proposal or initiative has been presented, or at any time after its adoption, that they wish to take part in the adoption and application of any such proposed measure. At any time Denmark may, in accordance with its

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constitutional requirements, notify the other Member States that it wishes to apply in full all relevant measures adopted on the basis of Title V TFEU.[1]

A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of establishing progressively an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Union. Such a policy should be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States.[2]

In recent years, the European Union has adopted a series of important legislative measures in view of harmonising the different Member States' asylum systems. The Dublin Regulation determines which Member State is responsible for examining an individual asylum application. The Reception Conditions Directive sets out the minimum conditions for the reception of asylum seekers, including their accommodation, education and health. The Asylum Procedures Directive provides for the minimum standards for asylum procedures, thus making an important contribution to international law, as this aspect was not initially regulated by the 1951 Convention. The Qualification Directive introduces the concept of subsidiary protection, which complements the 1951 Convention on the Status of Refugees, a form of protection that should be granted to persons who face the risk of serious harm. The CEAS offers improved access to asylum procedures for people seeking protection, it leads to fairer, faster and better asylum decisions, it helps ensure that people who fear persecution will not be brought back to such danger and it provides dignified, decent conditions for both asylum seekers, and for those who enjoy international protection on the territory of the European Union.

The main existing legal instruments are:

- Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of "Eurodac" for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (hereinafter referred to as the *Eurodac Regulation*);

- Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person – recast (hereinafter referred to as Dublin III Regulation);

- Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (hereinafter referred to as the *Reception Conditions Directive*);

- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (hereinafter referred to as the *Common Procedures Directive*);

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European agenda on migration – Brussels, 13.5.2015, COM(2015) 240 final.
[2] Recital 2 of the preamble to Directive 2013/32/EU.

- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (hereinafter referred to as the *Qualification Directive*);

- Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (hereinafter referred to as the *EASO Regulation*);

- Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

2. Main Provisions of the Community *Acquis* in the Field Of Asylum[1]

2.1. Qualification Directive 2011/95/EU[2]

The Directive lays down standards regarding the conditions that third-country nationals or stateless persons must fulfil in order to become beneficiaries of international protection, regarding a uniform status for refugees or for those persons that are eligible for subsidiary protection and regarding the content of the type of protection granted.[3] Thus, Member States may adopt or maintain more favourable standards to decide which persons fulfil the conditions for being granted refugee status or which persons are eligible for subsidiary protection, as well as to determine the content of the international protection, insofar as those standards are compatible with the provisions of the Directive.[4]

The main objective of the Directive is, on the one hand, to ensure that all Member States apply common criteria to identify the persons in real need for international protection and, on the other hand, to ensure a minimum level of benefits to such people in all Member States[5]. It has been established that a common concept needs to be adopted for the need for protection occurring on the ground, for the origin of harm and protection, for domestic protection and persecution, including the reasons for the persecution.[6]

One of the essential conditions to be able to obtain refugee status within the meaning of Article 1 Section A of the Geneva Convention is the existence of a causal connection between the reasons for the persecution, namely those related to race, religion, nationality, political opinion or membership in a particular social group, and acts of persecution or lack of protection against such acts.[7]

Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application. To this end, the applicant must provide all the information and documentation at the applicant's disposal regarding the

[1] Only the European legal instruments undergoing amending at present will be discussed.
[2] It clarifies the reasons for the granting of international protection, thus contributing to the strengthening of asylum decisions. At the same time, it will improve access to rights and integration measures for people enjoying international protection.
[3] Art.1 - Directive 2011/95/EU.
[4] Art.3 - Directive 2011/95/EU.
[5] Recital 12 of the preamble to Directive 2013/32/EU.
[6] Recital 25 of the preamble to Directive 2013/32/EU.
[7] Recital 29 of the preamble to Directive 2013/32/EU.

applicant's age, background, including that of relevant relatives, identity, nationality or nationalities, country or countries, and place or places of previous residence, previous asylum applications, travel routes, travel documents and the reasons for applying for international protection.[1]

The objectives of the Directive, namely to establish standards for the granting of international protection to third-country nationals and stateless persons by Member States, for a uniform status for refugees or for persons eligible for subsidiary protection, as well as for the content of the protection granted, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity, as set out in Article 5 of the TEU. In accordance with the principle of proportionality, as stipulated in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.[2]

2.2. Common Procedures Directive 2013/32/EU[3]

The purpose of this Directive is to establish common procedures for granting and withdrawing international protection pursuant to Directive 2011/95/EU.[4] This applies to all applications for international protection lodged in the territory of the Member States, including the border, in the territorial waters or transit zones of the Member States, as well as to the withdrawal of international protection. In addition, Member States may establish or maintain more favourable standards on procedures for granting and withdrawing international protection, insofar as that those standards are compatible with this Directive.[5]

When a person makes an application for international protection to an authority competent under national law for registering such applications, the registration shall take place no later than three working days after the application is made.[6] If the application for international protection is made to other authorities which are likely to receive such applications, but not competent for the registration under national law, Member States shall ensure that the registration shall take place no later than six working days after the application is made.

In order to ensure that applications for international protection are examined and decisions thereon are taken objectively and impartially, it is necessary that professionals acting in the framework of the procedures provided for in this Directive perform their activities with due respect for the applicable deontological principles. It is in the interests of both Member States and applicants for international protection that a decision is made as soon as possible on applications for international protection, without prejudice to an adequate and complete examination being carried out.[7]

In the interests of a correct recognition of those persons in need of protection as refugees within the meaning of Article 1 of the Geneva Convention or as persons eligible for subsidiary protection, every applicant should have an effective access to procedures, the opportunity to cooperate and properly communicate with the competent authorities so as to present the relevant facts of his or her case and

[1] Art. 4(2) - Directive 2011/95/EU.
[2] Recital 49 of the preamble to Directive 2011/95/UE.
[3] Aims at achieving fairer, faster and better asylum decisions. Asylum seekers with special needs will enjoy the necessary support to be able to explain their application, and an increased level of protection will be ensured, particularly for unaccompanied minors and for victims of torture.
[4] Art.1 - Directive 2013/32/EU.
[5] Art.5 - Directive 2013/32/EU.
[6] Art.6 - Directive 2013/32/EU.
[7] Recitals 17, 18 - Directive 2013/32/EU.

sufficient procedural guarantees to pursue his or her case throughout all stages of the procedure. Moreover, the procedure in which an application for international protection is examined should normally provide an applicant at least with: the right to stay pending a decision by the determining authority; access to the services of an interpreter for submitting his or her case if interviewed by the authorities; the opportunity to communicate with a representative of the United Nations High Commissioner for Refugees (UNHCR) and with organisations providing advice or counselling to applicants for international protection; the right to appropriate notification of a decision and of the reasons for that decision in fact and in law; the opportunity to consult a legal adviser or other counsellor; the right to be informed of his or her legal position at decisive moments in the course of the procedure, in a language which he or she understands or is reasonably supposed to understand; and, in the case of a negative decision, the right to an effective remedy before a court of law.[1]

With a view to ensuring effective access to the examination procedure, officials who first come into contact with persons seeking international protection should be able to provide third-country nationals or stateless persons who are present in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, and who request international protection, with relevant information as to where and how applications for international protection may be lodged. Where those persons are present in the territorial waters of a Member State, they should be disembarked on land and have their applications examined in accordance with this Directive.[2]

On the other hand, with respect to the withdrawal of refugee or subsidiary protection status, Member States should ensure that persons benefiting from international protection are duly informed of a possible reconsideration of their status and have the opportunity to submit their point of view before the authorities can take a reasoned decision to withdraw their status.[3]

In accordance with a basic principle of Union law, the decisions taken on an application for international protection, the decisions concerning a refusal to reopen the examination of an application after its discontinuation, and the decisions on the withdrawal of refugee or subsidiary protection status are subject to an effective remedy before a court of law.[4]

2.3. Reception Conditions Directive 2013/33/EU[5]

In applying this Directive, Member States should make efforts to ensure full compliance with the principles of the best interests of the child and of family unity, in accordance with the Charter of Fundamental Rights of the European Union, the 1989 United Nations Convention on the Rights of the Child and the European Convention for the Protection of Human Rights and Fundamental Freedoms respectively.[6]

With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party. Standards for the reception of applicants that will suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down. The harmonisation of conditions for the

[1] Recital 25 - Directive 2013/32/EU.
[2] Recital 26 - Directive 2013/32/EU.
[3] Recital 49 - Directive 2013/32/EU.
[4] Recital 50 - Directive 2013/32/EU.
[5] Ensures that there are humane material reception conditions (for instance, accommodation) for asylum seekers throughout the European Union and that the fundamental rights of the individuals concerned are fully respected. Furthermore, it guarantees that detention is only applied as a measure of last resort.
[6] Recital 9 of the preamble to Directive 2013/33.

reception of applicants should help to limit the secondary movements of applicants influenced by the variety of conditions for their reception.[1]

With a view to ensuring equal treatment amongst all applicants for international protection and guaranteeing consistency with the current Union asylum *acquis*, in particular with Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 it is necessary to extend the scope of this Directive in order to include applicants for subsidiary protection.[2]

The reception of persons with special reception needs should be a primary concern for national authorities in order to ensure that such reception is specifically designed to meet their special reception needs.[3]

The detention of applicants should be applied in accordance with the underlying principle that a person should not be held in detention for the sole reason that he or she is seeking international protection, particularly in accordance with the international legal obligations of the Member States and with Article 31 of the Geneva Convention. Applicants may be detained only under very clearly defined exceptional circumstances laid down in this Directive and subject to the principle of necessity and proportionality with regard to both to the manner and the purpose of such detention. Where an applicant is held in detention he or she should have effective access to the necessary procedural guarantees, such as judicial remedy before a national judicial authority. With regard to administrative procedures relating to the grounds for detention, the notion of "due diligence" requires that Member States take concrete and meaningful steps, as a minimum condition, to ensure that the time needed to verify the grounds for detention is as short as possible, and that there is a real prospect that such verification can be carried out successfully in the shortest possible time. Detention shall not exceed the time reasonably needed to complete the relevant procedures. The grounds for detention set out in this Directive are without prejudice to other grounds for detention, including detention grounds within the framework of criminal proceedings, which are applicable under national law, unrelated to the application for international protection of the third-country national or the stateless person. Applicants who are in detention should be treated with full respect for human dignity and their reception should be specifically designed to meet their needs in that situation. In particular, Member States should ensure that Article 37 of the 1989 United Nations Convention on the Rights of the Child is applied.[4]

Since the objective of this Directive, namely to establish standards for the reception of applicants in Member States, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Directive, be better achieved at the Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.[5]

2.4. Regulation (EU) No. 603/2013 on the Eurodac System[6]

The purpose of the Regulation is to assist in determining which Member State is to be responsible, pursuant to Regulation (EU) No. 604/2013, for examining an application for international protection lodged in a Member State by a third-country national or a stateless person, and, on the other hand, to

[1] Recitals 10-12 of the preamble to Directive 33/2013.
[2] Recital 13 of the preamble to Directive 33/2013.
[3] Recital 14 of the preamble to Directive 33/2013.
[4] Recitals 15-18of the preamble to Directive 33/2013.
[5] Recital 31 of the preamble to Directive 33/2013.
[6] Allows law enforcement authorities access to the EU database containing the fingerprints of asylum seekers, under very strict conditions, so as to prevent, detect or investigate the most serious crimes such as murder and acts of terrorism.

facilitate the application of Regulation (EU) No. 604/2013 under the conditions set out in this Regulation. In addition, it also lays down the conditions under which Member States' designated authorities and the European Police Office (Europol) may request the comparison of fingerprint data with those stored in the Central System for law enforcement purposes.[1]

For the purposes of applying Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, it is necessary to establish the identity of applicants for international protection and of persons apprehended in connection with the unlawful crossing of the external borders of the Union. It is also desirable, in order effectively to apply Regulation (EU) No. 604/2013, and in particular Article 18(1)(b) and (d) thereof, to allow each Member State to check whether a third-country national or stateless person that is illegally staying on its territory has applied for international protection in another Member State. Fingerprints are an important element in establishing the exact identity of such persons. Thus, it was necessary to set up a system for the comparison of their fingerprint data, namely a system known as "Eurodac", consisting of a Central System, which would operate a computerised central database of fingerprint data, as well as of the electronic means of transmission between the Member States and the Central System, hereinafter the "Communication Infrastructure".[2]

It is essential, in the fight against terrorist offences and other serious criminal offences, for the law enforcement authorities to have the fullest and most up-to-date information so as to be able to perform their tasks. The information contained in Eurodac is necessary for the purposes of the prevention, detection or investigation of terrorist offences as referred to in Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism or of other serious criminal offences as referred to in Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States. Therefore, the data in Eurodac can be examined for comparison by the designated authorities of Member States and the European Police Office (Europol), subject to the conditions set out in this Regulation. The powers granted to law enforcement authorities to access Eurodac should be without prejudice to the right of an applicant for international protection to have his or her application processed in due course in accordance with the relevant law.[3]

Since Eurodac was originally established to facilitate the application of the Dublin Convention, access to Eurodac for the purposes of preventing, detecting or investigating terrorist offences or other serious criminal offences constitutes a change of the original purpose of Eurodac, which interferes with the fundamental right to respect for the private life of individuals whose personal data are processed in Eurodac. Any such interference must be in accordance with the law, which must be formulated with sufficient precision to allow individuals to adjust their conduct and which must protect individuals against arbitrariness and indicate with sufficient clarity the scope of discretion conferred on the competent authorities and the manner of its exercise. Even though the original purpose of the establishment of Eurodac did not require the facility of requesting comparisons of data with the database on the basis of a latent fingerprint, which is the dactyloscopic trace which may be found at a crime scene, such a facility is fundamental in the field of police cooperation. The possibility to compare a latent fingerprint with the fingerprint data which is stored in Eurodac in cases where there

[1] Article 1(1), (2).
[2] Recitals 4-6 of the preamble to Regulation No. 603/2013.
[3] Recitals 8, 9 of the preamble to Regulation No. 603/2013.

are reasonable grounds for believing that the perpetrator or victim may fall under one of the categories covered by this Regulation will provide the designated authorities of the Member States with a very valuable tool in preventing, detecting or investigating terrorist offences or other serious criminal offences, when, for instance, the only evidence available at a crime scene are latent fingerprints.[1]

2.5. Dublin III Regulation (EU) No. 604/2013[2]

Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, namely the one which the criteria set out in this Regulation indicate is responsible.

Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.

The processing together of the applications for international protection of the members of one family by a single Member State makes it possible to ensure that the applications are examined thoroughly, the decisions taken in respect of them are consistent and the members of one family are not separated.[3] In order to ensure full respect for the principle of family unity and for the best interests of the child, the existence of a relationship of dependency between an applicant and his or her child, sibling or parent on account of the applicant's pregnancy or maternity, state of health or old age, should become a binding responsibility criterion. When the applicant is an unaccompanied minor, the presence of a family member or relative on the territory of another Member State who can take care of him or her should also become a binding responsibility criterion.[4] The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.[5]

Any Member State should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations and examine an application for international protection lodged with it or with another Member State, even if such examination is not its responsibility under the binding criteria laid down in this Regulation. A personal interview with the applicant should be organised in order to facilitate the determination of the Member State responsible for examining an application for international protection. As soon as the application for international protection is lodged, the applicant should be informed of the application of this Regulation and of the possibility, during the interview, of providing information regarding the presence of family members, relatives or any other family relations in the Member States, in order to facilitate the procedure for determining the Member State responsible.[6]

In order to provide for supplementary rules, the power to adopt acts in accordance with Article 290 TFEU is delegated to the Commission in respect of the identification of family members, siblings or relatives of an unaccompanied minor; the criteria for establishing the existence of proven family links;

[1] Recitals 13, 14 of the preamble to Regulation No. 603/2013.
[2] It strengthens the protection granted to asylum seekers during the process of determining the State responsible for examining the application and clarifies the rules governing the relations between States. It helps establish a system for detecting, at an early stage, the problems faced by national asylum and reception systems, addressing their deep-rooted causes before these problems turn into real critical situations.
[3] Recital 15 of the preamble to Regulation (EU) No. 604/2013.
[4] Recital 16 of the preamble to Regulation (EU) No. 604/2013.
[5] Art.6(1)-Regulation (EU) No. 604/2013.
[6] Recitals 17-18 of the preamble to Regulation (EU) No. 604/2013.

the criteria for assessing the capacity of a relative to take care of an unaccompanied minor, including where family members, siblings or relatives of the unaccompanied minor stay in more than one Member State; the elements for assessing a dependency link; the criteria for assessing the capacity of a person to take care of a dependent person and the elements to be taken into account in order to assess the inability to travel for a significant period of time. In exercising its powers to adopt delegated acts, the Commission does not exceed the scope of the best interests of the child as provided for in this Regulation.

3. Reforming the Common European Asylum System

3.1. Options for Reforming the Common European Asylum System and Developing Safe and Legal Ways to Reach Europe

The migration crisis of 2015 highlighted the need to reform the Common European Asylum System (CEAS). Under the current framework presented above, asylum seekers are not treated uniformly and recognition rates differ, which may encourage secondary movements and submitting multiple asylum applications.

As presented in the previous chapter, the Common European Asylum System (CEAS) sets common minimum standards for the treatment of all asylum seekers and asylum applications. In practice, the treatment of asylum seekers, as well as recognition rates, vary between Member States, encouraging secondary movements and submitting multiple asylum applications. Following these findings, in May and June 2016, the Commission presented two sets of proposals with a view to further harmonisingasylum procedures and standards. Legislative proposals are currently being discussed in the Council.[1]

On 6 April 2016, the European Commission published a communication[2] launching the reforming process of the Common European Asylum System. The communication presented:

- options for creating a fair and sustainable system for the distribution of asylum seekers between Member States;

- greater harmonisation of asylum procedures and standards in order to create similar conditions across Europe and thus to limit measures that act as incentives for attraction factors, so as to reduce irregular secondary movements;

- strengthening the mandate of the European Asylum Support Office (EASO).

As part of the implementation of the European Agenda on Migration, this Communication, as indicated above, sets out a few options to move towards a more humane, fairer and more efficient European asylum policy, as well as towards better management of the legal migration policy. Based on the feedback received to this Communication, the Commission came forward with other appropriate proposals, and it was necessary to build a fair and sustainable common asylum policy.

The large-scale, uncontrolled arrival of migrants and asylum seekers has put a strain not only on many Member States' asylum systems, but also on the Common European Asylum System as a whole. The volume and concentration of arrivals has highlighted in particular the weaknesses of the Dublin System, which establishes the Member State responsible for examining an asylum application based

[1] The Council examines legislative proposals presented by the European Commission in view of reforming the CEAS.
[2] Communication from the Commission to the European Parliament and the Council Towards a reform of the Common European Asylum System and enhancing legal avenues to Europe - Brussels, 6.4.2016.

primarily on the first point of irregular entry. The differing treatment of asylum seekers across Member States has further exacerbated the problem of irregular secondary movements.

The Commission has identified five priority areas where the Common European Asylum System should be structurally improved:

Establishing a sustainable and fair system for determining the Member State responsible for asylum seekers: in order to deal better with a high number of arrivals and ensure a fair sharing of responsibility, the Commission proposed to amend the Dublin Regulation – either by streamlining and supplementing it with a corrective fairness mechanism or by moving to a new system based on a distribution key.

Achieving greater convergence and reducing the submission of multiple asylum applications: the Commission proposed a further harmonisation of asylum procedures, so as to ensure a more humane and equal treatment across the EU and reduce pull factors that draw people to just a few Member States. Thus, the Commission proposed two new Regulations to replace the Asylum Procedures Directive and the Qualification Directive, respectively, as well as a few specific amendments to the Reception Conditions Directive.

Preventing secondary movements within the EU: to ensure that the Dublin System is not disrupted by abuses and asylum shopping, the Commission proposed measures to discourage and sanction irregular secondary movements. In particular, certain rights will be made conditional upon registration, fingerprinting and stay in the EU country assigned to the applicant.

A new mandate for the EU's asylum agency: the Commission proposed to amend the European Asylum Support Office's mandate so that it could play a new policy-implementing role as well as a strengthened operational role. For instance, EASO will manage the distribution mechanism under a reformed Dublin System, will monitor the compliance of Member States with EU asylum rules, will identify measures to remedy shortcomings, and will take operational measures in emergency situations.

Reinforcing the Eurodac system: to support the application of a reformed Dublin System, the Commission proposed to adapt the Eurodac system and to expand its purpose, facilitating the fight against irregular migration, better retention and sharing of fingerprints, as well as returns.

The communication also included aspects regarding the ensuring of safe and legal migration routes. The EU must allow people in need of international protection to arrive in the EU in an orderly, organised, safe and dignified manner. This is, in fact, a common responsibility of the international community. At the same time, conditions must be created to cover existing legislative gaps and to address demographic challenges through a proactive labour migration policy. Thus, the Commission has developed a series of measures addressing the legal migration routes to Europe and integration policies:

A structured resettlement system: building on existing initiatives, the Commission set out a proposal to frame the EU's policy on resettlement. This proposal put in place a horizontal mechanism with common EU rules for admission and distribution, the status to be granted to resettled persons, financial support, and measures to discourage secondary movements.

A reform of the EU Blue Card Directive: strengthening its role as a system valid throughout the EU by developing a harmonised approach providing for more flexible admission conditions, improved admission procedures and enhanced rights for highly-skilled third country nationals.

Measures to attract and support innovative entrepreneurs, who can boost economic growth and help create jobs.

A REFIT evaluation of the existing legal migration rules, with a view to streamlining and simplifying the current rules for different categories of third-country nationals to reside, work or study in the EU.

Pursuing close cooperation with third countries, as part of existing policy dialogues and operational cooperation under the Global Approach to Migration and Mobility (GAMM), in order to ensure a more effective management of migratory flows.

The Commission also presented an EU Action Plan on Integration.[1]

3.2. The European Agenda on Migration[2]

On 13 May 2015, the European Commission proposed, through the European Agenda on Migration, a comprehensive strategy to address the immediate challenges of the current crisis and to provide the Union with tools to better manage migration in the medium and long term in areas such as irregular migration, border management, asylum and legal migration.

As a result of the recent tragedies in the Mediterranean, both in the European Parliament and in the European Council, there has been political consensus to mobilise all efforts and tools available so as to adopt immediate measures in order to prevent more people from dying at sea. Thus, the Commission has set out the concrete and immediate actions it will take, including:

- Tripling the capacities and assets for the Frontex joint operations Triton and Poseidon in 2015 and 2016. An **amending budget** for 2015 was adopted to secure the necessary funds – a total of €89 million, including €57 million in AMIF (Asylum, Migration and Integration Fund) and €5 million in ISF (Internal Security Fund) emergency funding to help frontline Member States – and the new Triton Operational Plan was presented in late May;

- Proposing the first ever activation of the emergency mechanism under Article 78(3) TFEU to help Member States facing a sudden influx of migrants. At the end of May, the Commission proposed a temporary distribution mechanism for persons in clear need of international protection within the EU. In late 2015, a proposal was presented for a permanent EU system for relocation of mass influxes in emergency situations;

- Proposing, by the end of May, an EU-wide resettlement scheme to offer 20,000 places to be distributed in all Member States to displaced persons in clear need of protection,[3] with a dedicated extra funding of €50 million for 2015 and 2016;

- Carrying out various actions in view of a possible Common Security and Defence Policy (CSDP) operation in the Mediterranean to dismantle traffickers' networks and to fight smuggling of people, in accordance with international law.

The migration crisis in the Mediterranean was a signal regarding immediate needs. At the same time, it has revealed that the common EU migration policy has fallen short. In the future, the European

[1] Action Plan on the Integration of third-country nationals - Strasbourg, 07.06.2016, COM(2016) 377 final.
[2] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration – Brussels, 13.5.2015, COM(2015) 240 final.
[3] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece and Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece.

Agenda on Migration aims to transpose all existing political guidelines into a set of mutually coherent and reinforcing initiatives, based around four pillars, so as to manage migration better in all its aspects.

The four pillars of the Agenda on Migration are:

- Reducing the incentives for irregular migration, notably by seconding European migration liaison officers to EU Delegations in key third countries; amending the Frontex legal basis to strengthen its role on return; a new action plan with measures that aim to transform people smuggling into high risk, low return criminal activity and to address the root causes through development cooperation and humanitarian assistance;

- Border management – saving lives and securing external borders, particularly by strengthening the role and capacity of Frontex; helping strengthen the capacity of third countries to manage their borders; pooling further, where necessary, certain coast guard functions at EU level;

- Europe's duty to protect: a strong common asylum policy: it is a priority to ensure a full and coherent implementation of the Common European Asylum System, notably by promoting systematic identification and fingerprinting, by making efforts to reduce its abuses, by strengthening the Safe Country of Origin provisions of the Asylum Procedure Directive; evaluating and possibly revising the Dublin Regulation in 2016;

- A new policy on legal migration: the focus will be on maintaining a Europe in demographic decline as an attractive destination for migrants, notably by modernising and overhauling the Blue Card scheme, by reprioritising our integration policies, and by maximising the benefits of migration policy to individuals and countries of origin, including by facilitating cheaper, faster and safer remittance transfers.

3.3. Proposals for Reforming the Common European Asylum System

The Commission's European Agenda on Migration of May 2015 sets out further steps towards a reform of the Common European Asylum System, which were presented in two packages of legislative proposals in May and July 2016. The main pending proposals were:

- Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (COM(2016)0467);

- Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (COM(2016) 0466);

- Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) (COM(2016)0465);

- Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council (COM(2016)0468);

- Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for

international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (COM(2016)0270);

- Proposal for a Regulation of the European Parliament and of the Council on the establishment of "Eurodac" for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast) (COM(2016)0272);

- Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010 (COM(2016)0271);

- Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (COM(2015)0450);

- Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU (COM(2015)0452).

3.4. The Legislative Package of May 2016

The European Commission, with the package launched in May 2016, presented proposals for the reform of the Common European Asylum System by creating a fairer, more efficient and sustainable system for the distribution of asylum applications between Member States. The basic principle will remain the same: asylum seekers must submit their application in the first country they enter, unless they have family in another country but, thanks to a new mechanism ensuring equity, no Member State will have to bear disproportionate pressures on its asylum system. Other elements of the proposals were the transformation of the current European Asylum Support Office (EASO) into a true European Union asylum agency in order to reflect its enhanced role within the new system and reinforcing Eurodac, the EU's fingerprint database, with a view to better managing the asylum system and tackling irregular migration.

- **Reforming the Dublin System**

The EU's rules for determining which Member State is responsible for dealing with each asylum application (known as the "Dublin System") were not designed to ensure a sustainable sharing of responsibility across the European Union and guarantee timely processing of applications.

Thanks to the new proposal, the Dublin System will be more transparent and effective. A mechanism will also be set up, which will deal with situations of disproportionate pressure on Member States' asylum systems. The new system is designed to be fairer and more robust, so as to better withstand pressure. The new system will ensure quick determination of Member States' responsibility for examining an asylum application, which will protect those in need and discourage secondary movements (submitting asylum applications seeking the best conditions – "asylum shopping").

The main new elements are:

- A fairer system based on solidarity: it will include a corrective allocation mechanism (the fairness mechanism). The new system will automatically establish when a country is handling a disproportionate number of asylum applications, by reference to a country's size and wealth. If one country is receiving disproportionate numbers above and beyond the reference value (over 150% of the reference number), all further new applications in that country will be relocated (regardless of nationality) across the EU, after a verification of their application's admissibility, until the number of applications is back below that level. A Member State will also have the option to temporarily not take part in the reallocation. In that case, it would have to make a solidarity contribution of €250,000 for each applicant for whom it would otherwise have been responsible under the fairness mechanism, to the Member State that received the person instead;

- A mechanism that also takes account of resettlement efforts: the fairness mechanism will also factor in the effort being made by a Member State to resettle straight from a third country those in need of international protection. This will acknowledge the importance of efforts to find legal and safe pathways to Europe;

- A more efficient system: it will provide for shorter time limits for sending transfer requests, receiving replies and carrying out transfers of asylum seekers between Member States, and it will remove shifts of responsibility;

- Discouraging abuses and secondary movements: clearer legal obligations for asylum applicants will be provided for, including a duty to remain in the Member State responsible for their claim, geographic limits to the provision of material reception benefits will be established and there will be proportionate consequences in case of non-compliance;

- Protecting asylum seekers' best interests: stronger guarantees for unaccompanied minors and a balanced extension of the definition of family members will be included. The United Kingdom and Ireland are not required to participate in these measures but instead determine themselves the extent to which they want to do so, in accordance with the relevant Protocols attached to the Treaties. If these two Member States do not opt in, the current rules as they operate today will continue to apply to them, in line with the Treaties.

- **Reinforcing the Eurodac system**

In order to support the practical implementation of the reformed Dublin System, the Commission is also proposing to adapt and reinforce the Eurodac system and to expand its purpose, facilitating returns and helping tackle irregular migration.

The main new elements are:

- Extending the scope of the Eurodac Regulation by including the possibility for Member States to store and verify data belonging to all third-country nationals or stateless persons found irregularly staying in the EU and who are not applicants for international protection, but they will have to be identified for return and readmission purposes;

- Ensuring the primordial nature of the Dublin procedure before the return procedure in all cases in which there is a HIT coincidence issued by the Eurodac system, following the verification of people found irregularly staying in the EU;

- Introducing the obligation to take fingerprints and the facial image of all categories of fingerprinted persons (asylum seekers, aliens illegally entering the EU's external borders and foreign nationals in

illegal situations on the territory of the Member States), including the possibility to impose sanctions on aliens who refuse fingerprinting;

- Introducing the obligation to store personal data of all fingerprinted aliens (surname, name, date of birth, citizenship, identity documents and facial image) for the purpose of easy identification, especially in the case of the return procedure;

- Providing for the Member States' obligation to introduce other biometric identifiers into the Eurodac system – the facial image – and in the future for the system to be upgraded with an automatic facial recognition system;

- Providing for the comparison and transmission of the fingerprints of all categories of fingerprinted persons (asylum seekers, aliens illegally entering the EU's external borders and aliens illegally present on the territory of the Member States);

- Reducing the age of the persons who can be fingerprinted to 6 years, from 14 years as in the current Regulation.

- **Establishing a European Union Agency for Asylum**

The proposal will transform the existing European Asylum Support Office (EASO) into a fully-fledged European Union Agency for Asylum, which will have an enhanced mandate and considerably expanded tasks to address any structural weaknesses that may arise in the application of the EU's asylum system.

The main new elements are:

- The proposal aims to transform the current European Asylum Support Office into an EU asylum agency with a broader mandate and considerably expanded tasks to address the structural weaknesses that may arise in the application of the EU's asylum system;

- The draft Regulation establishes an obligation for Member State authorities to cooperate with the Agency by providing and exchanging information with speed and accuracy;

- One of the main new tasks of the Agency will be to use the reference key to apply the equity mechanism under the new Dublin System. The Agency will also have the task of ensuring greater convergence in assessing applications for international protection across the EU, strengthening practical cooperation and exchange of information between Member States, and promoting Union law and operational standards as regards asylum procedures, reception conditions and protection needs;

- As regards the promotion of Union law and operational standards, EASO will develop operational standards for the implementation of the legal instruments of the Union, as well as indicators for verifying compliance with these standards. The Agency will also be able to develop guidelines and good practice on the implementation of the Union's legal instruments on asylum;

- Monitoring and evaluating the implementation of the CEAS – it providesfor the Agency's role to monitor and evaluate all aspects of the CEAS, in particular asylum procedures, the Dublin System, recognition rates, the quality and nature of international protection granted, monitoring compliance with operational standards and guidelines, asylum and reception systems and the ability of Member States to manage these systems effectively, especially in times when they face disproportionate pressures.

3.5. The Legislative Package of July 2016

In July 2016, the European Commission presented proposals to complete the reform of the Common European Asylum System in order to move towards a fully efficient, fair and humane asylum policy – one that can function effectively in times of both normal and high migratory pressure. To this end, and based on the existing experience, a more efficient and coherent asylum system requires a set of common, harmonised rules at EU level. Therefore, the Commission proposed the creation of a common international protection procedure, uniform standards for protection and rights granted to beneficiaries of international protection and a better harmonisation of reception conditions in the EU. Overall, these proposals will streamline and shorten the duration of the asylum procedure and the decision-making, will discourage secondary movements of asylum seekers and will increase integration prospects of those that are entitled to international protection.

- **A fair and efficient common EU procedure**

The Commission is proposing to replace the Asylum Procedures Directive with a Regulation establishing a fully harmonised common EU international protection procedure to reduce differences in recognition rates from one Member State to the next, to discourage secondary movements and to enhance procedural guarantees for asylum seekers.

The main new elements are:

- Streamlining, clarifying and shortening the asylum procedures

The procedure is shortened and streamlined, with decisions normally to be taken within 6 months or less. Shorter time-limits (1-2 months) are established in particular cases where applications are inadmissible or manifestly unfounded, or in cases where the accelerated procedure applies. Time-limits are also introduced for lodging appeals (ranging from 1 week to 1 month) and for decisions at the first appeal stage (ranging from 2 to 6 months).

- Common guarantees for asylum seekers

Asylum seekers will be guaranteed the right to a personal interview and to free legal assistance and representation, as early as the beginning of the administrative procedure. Reinforced safeguards are provided for asylum seekers with special needs and for unaccompanied minors, for whom a guardian should be assigned 5 days at the latest after an application has been made.

- Stricter rules to combat abuse

New obligations to cooperate with the authorities will be introduced, as well as strict consequences if these obligations are not met. Sanctions for abuse of the process, lack of cooperation and secondary movements, which are currently optional, will become compulsory, and they will include the rejection of the application as implicitly withdrawn or manifestly unfounded, or the application of the accelerated procedure.

- Harmonised rules on safe countries

The Commission clarifies and makes mandatory the application of the safe country concepts. In addition, the Commission proposes to fully replace the national designations of safe countries of origin and safe third countries with European lists or designations at EU level within five years from the entry into force of the Regulation.

- **Harmonised Protection Standards and Rights**

Asylum seekers must be able to obtain the same form of protection regardless of the Member State in which they make their application and for as long as such protection is needed. In order to harmonise protection standards in the EU and todeter secondary movements and asylum shopping, the Commission proposes to replace the existing Qualification Directive with a new Regulation.

The main new elements are:

- The draft regulation provides for more obligations for the applicants and the Member States, respectively;

- Some of the mandatory provisions included in the draft regulation exist in the current Qualification Directive but are not mandatory;

- This draft regulation is linked to the proposed EASO Regulation, instituting obligations for Member States to take into account documents issued by EASO (guidelines, COI, etc.);

- The draft regulation provides for a reconsideration of the situation of beneficiaries of international protection upon renewal of the residence permit, as well, but such a situation is likely to cause additional burden on the competent authorities without having a particular utility;

- Periods of validity of residence permits from which Member States cannot derogate are provided for (the validity of residence permits issued for the first time to beneficiaries of subsidiary protection is 1 year, and national legislation provides a validity of 2 years);

- Greater convergence of recognition rates and forms of protection;

- The type of protection and the period of validity of residence permits granted to beneficiaries of international protection will be harmonised;

- Stricter rules for sanctioning secondary movements;

- The 5-year waiting period for beneficiaries of international protection to become eligible for long-term resident status will be re-launched each time that person is found in a Member State where he or she does not have the right to stay or reside;

- Protection will be granted only for the required period;

- The obligation to periodically review the status is introduced, in order to take into account, for instance, changes in the countries of origin that may have an impact on the need for protection;

- Incentives for better integration;

- The rights and obligations in terms of security and social assistance of persons enjoying international protection will be clarified, and access to certain types of social assistance may be conditional on participation in integration measures.

- **Dignified and harmonised reception conditions throughout the EU**

Last but not least, the Commission is proposing to reform the Reception Conditions Directive to ensure that asylum seekers can benefit from dignified and harmonisedreception standards throughout the EU, which will help prevent secondary movements.

The main new elements are:

- harmonising the reception conditions in EU countries

This will ensure both equal treatment, in accordance with fundamental rights, for all applicants across the EU and in the states where there are problems, and will reduce secondary movements to countries having higher standards.

It will also contribute to a fair distribution of applicants between Member States.

- reducing incentives in case of secondary movement

In order to ensure migration management and to prevent secondary movements, it is essential that applicants remain in the responsible Member State.

The introduction of several measures restricting freedom of movement and the consequences imposed when the restrictions are not observed lead to the introduction of monitoring measures for applicants.

Moreover, the harmonisation of measures to assign a specific place of residence to applicants imposes reporting obligations and the provision of reception materials only in kind.

This applies in particular to 3 situations: the applicant does not apply for international protection in the Member State; the applicant evades on the first illegal entry or at the legal entry; and the situation in which the applicant is returned to the Member State where he or she is requested to be present after having had an illegal stay in another Member State.

- increasing the self-confidence of applicants and integration possibilities

With the exception of the applicants to be rejected, the other applicants should be allowed as soon as possible to work and earn their own income from the moment their application begins to be analysed.

This helps reduce dependence and allows for good integration prospects for those who obtain a form of protection.

The time-limit for access to the labour market should be reduced from no later than 9 months to no later than 6 months.

Member States are also encouraged to grant access to the labour market no later than 3 months to the applicant whose application is well founded.

- **EU resettlement framework**

Resettlement is a strategic instrument to manage migration flows. At the same time, resettlement is an important legal pathway to offer protection to those in real need. The purpose intended by the regulation is to establish a legal resettlement framework based on initiatives of resettlement and humanitarian admission within the EU, as well as on the experience acquired through national resettlement programs.

The main objectives of this draft regulation are:

- providing for legal and safe pathways to the EU, reducing in the long term the risk of large-scale irregular arrivals;
- providing common rules for resettlement and humanitarian admission;
- effectively contributing to resettlement and humanitarian admission initiatives at a global level;
- helping to alleviate the pressure in third-countries to which a large number of persons in need of international protection have been displaced.

Under the new framework, the Council will adopt a two-year EU resettlement and humanitarian admission plan, on the basis of a proposal from the Commission. This plan will include the maximum

total numbers of persons to be admitted, the contributions of Member States to this number and the overall geographical priorities. Member States contribute to the EU resettlement and humanitarian admission plan on a voluntary basis. Efforts by Member States under this plan are supported by funding from the EU's budget.

The draft regulation provides for two types of admission: resettlement and humanitarian admission. It defines a common procedure, eligibility criteria and grounds for refusing admission, as well as common principles regarding the status to be granted to persons who have been admitted. Given the expertise of UNHCR in this field, it is also given an important role in this process.

In addition, the regulation will reduce discrepancies between national resettlement practices and will enhance the Union's position in view of reaching its global policy goals, and it reiterates the importance of the early, effective integration process of relocated persons, highlighting that the success or failure of a resettlement operations depends directly on such measures.

3.6. The Expected Impact of the New European Legislative Proposals on Asylum at National Level

As a Member State of the European Union, Romania has established full rights and obligations as any other Member State, which entails interconnections with the Union's constituent bodies.

In the new international context generated by the massive influx of illegal migrants into the European Union, an influx that started in 2014 and reached its peak in 2015 and 2016, Romania has proven it has been an important actor in the forums of international bodies in their attempt to deal with the crisis that the massive influx of illegal migrants has caused at European level. At the same time, Romania took part in the process of implementing the Council Decisions (EU) 2015/1523 and 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, which ensured the legal framework for the resettlement process. Through these decisions, EU Member States have undertaken to resettle people in need of international protection to Greece and Italy, thus ensuring the opportunity of the two Member States to cope with the high number of illegal migrants registered on their territory.

Thus, it can be pointed out that Romania is one of those Member States of the European Union that participate proactively in the concerted effort of the international bodies deployed in order to approach and solve exceptional situations (in this case in the field of migration); this has been highlighted a few times in the reports drawn up by the structures and bodies of the Union, our country being one of the reference pillars in observing and applying the principles of solidarity and responsibility, which safeguard the good functioning of the European Union.[1]

A convincing and effective way to manage the migration phenomenon is modifying the legislative package of the European Union governing the asylum activities detailed above. Currently, this package is being negotiated, with some disagreements between the Member States of the European Union regarding the introduction of mandatory resettlement provisions and the automatic distribution of international protection applicants (on the basis of a pre-set calculation formula), but also with regard to the concept of the single responsible Member State (on the one hand, some Member States agree to the compulsory introduction of the allocation share based on a quota and to the principle of the single responsible Member State, and on the other hand, there are Visegrád Member States opposed to quotas and the principle of the single responsible Member State). In fact, negotiations have been taking place on the amendments to this package of legal acts since 2016, and preconditions for

[1] Please note the interim and final COM reports on the implementation of the two Decisions on resettlement and relocation.

the setting of a moment when they will be completed do not exist.

Romania will have to take into account the principle of cooperation, which is and will remain a principle governing relations between Member States, as well as between Member States and international bodies, and this principle will govern the entire activity carried out by our country in the coming period.

4. Conclusion

As mentioned before, the CEAS is increasingly pursuing a connection between responsibility and solidarity in the field of asylum, on a voluntary basis. This means, on the one hand, that Member States, including Romania, must fully observe the rules of the EU *acquis* and, on the other hand, that Member States should provide support to those Member States facing temporary high pressures on their asylum systems.

A decisive role for Romania in the period soon after the completion of the negotiation process of the new CEAS legislative package will be, first of all, the effort to transpose the instruments making up the new *acquis* in the matter. At the same time, the continuous development and strengthening of the mechanisms that ensure the maintenance of a unitary and quality practice on the processing of asylum applications at national level will be a solid guarantee of the existence of an efficient and functional national asylum system, and the responsible authorities[1] will have to concentrate all their resources to this end.

5. Bibliography

EU asylum acquis

Regulation (EU) No. 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of "Eurodac" for the comparison of fingerprints for the effective application of Regulation (EU) No. 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No. 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (hereinafter referred to as the *Eurodac Regulation*).

Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person – recast (hereinafter referred to as Dublin III Regulation).

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (hereinafter referred to as the *Reception Conditions Directive*).

Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (hereinafter referred to as the *Common Procedures Directive*).

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (hereinafter referred to as the *Qualification Directive*).

[1] Decision no. 639 of 20 June 2007 regarding the structure and the attributions of the General Inspectorate for Immigration, as subsequently amended and supplemented.

Regulation (EU) No. 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office (hereinafter referred to as the *EASO Regulation*).

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.

New Commission legislative proposals

Proposal for a Regulation of the European Parliament and of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (COM(2016)0467).

Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (COM(2016) 0466).

Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) (COM(2016)0465).

Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council (COM(2016)0468).

Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (COM(2016)0270).

Proposal for a Regulation of the European Parliament and of the Council on the establishment of "Eurodac" for the comparison of fingerprints for the effective application of [Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person], for identifying an illegally staying third-country national or stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (recast) (COM(2016)0272).

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Proposal for a Regulation of the European Parliament and of the Council establishing a crisis relocation mechanism and amending Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (COM(2015)0450).

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Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

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European Union and the Need to Stand up for the Universality of Human Rights in the Context of Migration

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Abstract: Europe, embodied by the European construction, was always seen as the land of unity, the land where people are equal and their fundamental rights are guaranteed and protected. After two world wars when it has been proven that human life and human dignity could be at someone's discretion, the European leaders, hand in hand with all the leaders of the world, inspired from the Universal Declaration of Human Rights, stood for universality of human rights making them a corner stone for Europe. But the last years, from this new century, marked by severe economic and social crisis, than the starting of the Syrian war, demonstrated that there are still many gaps that have to be fulfilled and the European project, actually, the European Union, is weaker and weaker, the distance between citizens and their leaders grows, and a strong crisis of authority is going on. Much more, the migration than began after the Syrian war proved that human rights are not yet so well defended as the European and non European citizens believed and a lot of measures and strategies have to be the main preoccupation for all the institutional and policies of the EU. Thus, this article deals with the main provisions of the European Agenda for Migration and the way the leaders succeeded, more or less, to apply it in order that universality of human rights to be respected and put it in the center of their politics.

Keywords: citizen; migration; rights; freedoms; hatred; asylum

1. European Union as a Construct for Peace and Freedom. What we Celebrate at the End of this Year?

Ironically, the end of this year mark two important date for the mankind and its rights. Firstly, as usual, on the 10th of December, we have to celebrate the International Human Rights Day, but taking into account all the events that took place during this year, it seems that we have no reasons for applauses but rather for remembering and meditation on hatred and intolerance. As the Director of EU Agency for Fundamental Rights *(*FRA), Michael O'Flaherty declared *"More and more, we are seeing a crisis of values, a crisis of fundamental rights*," and added *"Many of the most vulnerable people in our societies are finding themselves the target of hatred that is a far cry from the rights set out in the Universal Declaration. We all have a duty to stem this erosion of the humane values that form the cornerstone of European society.*"[2]

Throughout the history of humanity the possibility of migration was a savior solution for hundreds, thousands of men and women. They were looking for a new place where to find a new homeland because of wars and political instability or simply to find a better job or a more beautiful place to live. Migration is also a respond to demographic trends and labour market gaps in the EU. So, migration, in

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the same time represent a courageous expression of the individual's will to overcome adversity.[1] The United Nations tries to play a catalyst role in this field and thus appears another important day that we have to mark that is the International Migrants Day, on the 18th of December. It's not a happened that for this year the campaign proposed by the United Nation Secretary General is: Together for Migration![2] International Organization for Migration is annually held on December 18 to recognize the efforts, contributions, and rights of migrants worldwide.[3] It is mean to celebrate the positive contributions that migrants make to our societies, to recognize and honour their struggles and the challenges they face, and also to remember those who died this year trying to reach a better life.[4]

The EU Agency for Fundamental Rights underline the message that the International Migrant Day has to be the moment when we should remember our obligation to defend Europe as a continent of rights, freedoms and respect that provides safety for people in need of protection. In the same spirit, the Agency calls for respect and inclusion, an inclusive society are the precondition for integration which in turn is needed for EU societies and economies to grow and flourish[5].

2. Migration and the Power of Integration

Protecting fundamental rights is important to empower migrants and thereby provide them with the tools to lead economically productive lives that are to the advantage of everyone in the EU. Strengthening the EU as an area of strong fundamental rights protection will ensure that the EU continues to remain an attractive region for high skilled workers as well as for essential services, and a space of freedom, security and justice for all.[6]

As we can see in the latest years, migration is increasing around the globe and as a consequence societies are and will continue to become more diverse and multi-ethnic. Refugees and migrants go through long and difficult journeys to get to the European Union, where they dream and want to build a new future.

Migration is both an opportunity and a challenge for the EU. The medium to long term priorities consist of developing structural actions that look beyond crises and emergencies and help EU Member States to better manage all aspects of migration.

What is important to underline is that most of the migrant people are looking for legal pathway to establish in a EU country and want to work according to their knowledge, legally. Unfortunately, many narratives focus only on some certain of migration, aspects that impact society in many ways, generating a variety of responses such as hatred, xenophobia, etc. It has been reported a growing intolerance and hostility towards migrants and asylum seekers. Also, hate crime incidents range from everyday harassment to attacks, violence, and even murder.

Therefore, the duty of the European leaders is to protect those in need and to elaborate a clear common policy by creating the ability to bring together European and national efforts to address migration.

[1] http://www.un.org/en/events/migrantsday.
[2] http://www.unric.org/en/latest-un-buzz/30414-international-migrants-day-together-for-migration.
[3] https://www.timeanddate.com/holidays/un/international-migrants-day.
[4] http://www.unric.org/en/latest-un-buzz/30414-international-migrants-day-together-for-migration.
[5] http://fra.europa.eu/en/news/2015/international-migrants-day-fra-calls-respect-and-inclusion.
[6] Background FRC 2014 on http://fra.europa.eu/en/node/11114.

3. An European Agenda on Migration- Short Considerations

Jean Claude Juncker, presented, in Malta, on the 23rd of April 2014, a plan for immigration, consisted of five points, in which he called for more solidarity in the European Union's migration policy. This plan was part of the campaign of Juncker for his position of the new president of the Commission and included an appointed a commissioner with special responsibility for migration to work on a new policy of migration and later based on this proposal, in the European Council statement made on the 23rd of April 2015, the member states committed to taking rapid action to save lives and to step up EU action in the field of migration. After a couple of days, the European Parliament adopted a Resolution and at the 13th of May 2015 the European Commission elaborate a European Agenda on Migration, a comprehensive approach for the improving of managing of migration in all its aspects. (COM (2015) 240)

As it is shown in the Introduction of the Agenda, no member state can effectively address migration alone, so it is need a new and more European approach. For success, this requires using all policies and tools and all actors: member states, EU institutions, international organizations, civil society, and local authorities.[1]

After the Introduction follows the first part, "Immediate action", that responds to the need of swift action in response to the human tragedy in the whole of the Mediterranean.

The Agenda is built upon four pillars to manage migration better:

1. Reducing the incentives for irregular migration: the focus is on addressing the root causes behind irregular migration in non-EU countries, dismantling smuggling and trafficking networks and defining actions for the better application of return policies;

2. Saving lives and securing the external borders: this involves better management of the external border, in particular through solidarity towards those Member States that are located at the external borders, and improving the efficiency of border crossings;

3. Strengthening the common asylum policy: with the increases in the flows of asylum seekers, the EU's asylum policies need to be based on solidarity towards those needing international protection as well as among the EU Member States, whose full application of the common rules must be ensured through systematic monitoring;

4. Developing a new policy on legal migration: in view of the future demographic challenges the EU is facing, the new policy needs to focus on attracting workers that the EU economy needs, particularly by facilitating entry and the recognition of qualifications.[2]

This structure created the possibility to send a clear message to citizens that migration can be better managed collectively by all EU actors.

The next part named "Moving Beyond", it is considered that EU has to address to all the issues regarding migration in an effective and sustainable manner in the longer term because European cooperation needs to go further. That's why, the Commission will launch parallel reflections on some areas: the completion of the Common European Asylum System; a shared management of the European border; a new model of legal migration.

In applying the provisions of Agenda on Migration, EU has both short, and long term priorities.

[1] Introduction to European Agenda on Migration, COM(2015) 240 final, Brussels, 13.5.2015 (www.eu-lex.eu).
[2] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/index_en.htm.

Thus, the EU aims at taking immediate action to prevent further losses of migrants' lives at sea by providing additional funding to Frontex joint search and rescue operations, to the safe and legal resettlement of people to Europe, to the Regional Protection and Development Programmes and to the most affected Member States located at the EU's external borders.

In addition, the EU aims to strengthen the role of Europol as an intelligence hub for dismantling criminal networks and intends to launch Common Security and Defence Policy (CSDP) operations in the Mediterranean to capture and dismantle boats. The EU will also activate the emergency system provided in the Treaties so that asylum seekers may be relocated in a more solidary manner, as well as establish a pilot multi-purpose centre in Niger, in cooperation with the International Organization for Migration and the UN Refugee Agency.

An altogether new concept, the Hotspot, will allow EASO, Frontex and Europol to work on the ground in affected EU Member States to swiftly identify, register and fingerprint arriving migrants and to assist in investigating and dismantling migrant smuggling networks.

The positive part is that the European Commission reports some progress on applying the Agenda. For instance, the Commission is reporting on progress made in the implementation of the EU-Turkey Statement and on the EU's relocation and resettlement schemes. The Commission also adopted a fourth Recommendation today that takes stock of the progress achieved by Greece to put in place a fully functioning asylum system and sets out a process for the gradual resumption of Dublin transfers to Greece.[1]

In this respective, the commissioner for Migration, Home Affairs and Citizenship, Dimitris Avramopoulos declared: "Both Italy and Greece have made herculean efforts in recent months in managing the refugee crisis. The fact that today we close the infringement cases on the fingerprinting and registration of migrants is proof of that. This November was a record month for relocation with over 1,400 persons transferred, and Member States must build on this progress by further intensifying and sustaining their efforts. Our aim is to relocate all those in Italy and Greece who are eligible for relocation within the next year. These efforts, together with a lasting reduction in arrivals from Turkey thanks to the EU-Turkey Statement, are necessary building blocks for a gradual return to the Dublin system for Greece.[2]"

In the same time, FRA in order to address some of these challenges makes a number of suggestions. These include: improving information flows about procedures and the status of applications to ease tensions among migrants as well as providing translations and child-friendly information; free and greater access to legal counsel; better protection for children such as prioritising the claims of unaccompanied children, vetting staff, individual risk assessments and sufficient resources for child guardians; qualified staff who are trained how to work with children, to identify victims of trafficking and gender-based violence; and avoiding excessive use of detention for migrants who will be returned.

The EU's current Dublin rules determine which Member State is responsible to examine applications for international protection. However, applying these rules can take up to 11 months, leading to bottlenecks and leaving applicants, particularly children, in challenging circumstances.

[1] IP/16/4281: Commission reports on progress made under the European Agenda on Migration.
[2] IP/16/4281: Commission reports on progress made under the European Agenda on Migration.

4. Conclusions

As we showed during the present study, migration is one of the political priorities of the Juncker Commission. In his speech deliver on the 14th of September 2016, "State of the Union Address", at the European Parliament, he declared*:* "*When it comes to managing the refugee crisis, we have started to see solidarity. I am convinced much more solidarity is needed. But I also know that solidarity must be given voluntarily. It must come from the heart. It cannot be forced*."

And to conclude, we think that the words of Dimitris Avramopoulos, Commissioner for Migration, Home Affairs and Citizenship, are very relevant for this moment:

"*The European Border and Coast Guard* ***is a symbol for the European Union****. A symbol of a Europe that is able to* ***deliver, united****. We are now better equipped than before to face the migration and security challenges*."[1]

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[1] http://ec.europa.eu/priorities/sites/beta-political/files/2-years-on-migration_en.pdf.

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Aspects on Involvement of Citizens in the Decision-Making Process of the European Institutions

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Abstract: This work presents outline relevant issues concerning the real involvement of citizens in the decision-making process of the European institutions as well as the control exercised by the European Ombudsman. Institutional development of the EU, increasing the level of integration and awareness of the European identity strengthened significantly by the introduction of European citizenship by the Maastricht Treaty of 1993 have prompted both the European institutions and the European political environment the need to involve European citizens in making decision and creating the premises for a well-defined decisional transparency. The establishment of the European Ombudsman, a body with the role of investigating complaints by citizens of Member States or residents of the European Union or by associations and undertakings based in the European Union for maladministration by the institutions and bodies of the European Union, in addition to the fact that it is interested in the citizen's perception of the administrative decisions taken by the European institutions and gives the citizens of the Member States the possibility of exercising control over these decisions, regardless of whether these decisions have an economic or political impact on the citizens.

Keywords: European citizenship; the decision-making process; European Ombudsman; People's Lawyer

1. General Aspects on European Citizenship, Rights and Obligations Set Forth by European Union Treaties

Involvement or participation of citizens in the administrative act, in making administrative decisions at both local public administration level and central or European level, is of paramount importance for the administrative system and the civil society. The local, regional or European elected representatives should represent citizens, as their decisions have an impact on the entire daily activity of citizens. Citizens' involvement in the activities of the Union's institutions is achieved either by accurately informing them on the activities conducted by the institutions as well as on their policies or by consulting citizens with regards to questions of interest of them. An efficient government may only be achieved with the citizens' support. The European Union has been numerous times accused of not being sufficiently transparent in relation to adopting decisions or to their institutional activity. In order to improve this aspect, various campaigns of informing and raising European identity awareness or different programmes supported by European funds have been conducted. The official websites of the European institutions provide information of interest to citizens in real time. The Official Journal of the European Union facilitates the access to the European Union law to all parties interested. All

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debates and deliberations of the Council on legislation are made public. Accurate information of the European citizens facilitates a constructive consultation, as every participant to consultations is informed when taking the floor and positive results may therefore be obtained in practice. (Boc, 2013, p. 19)

The process of political integration should have obligatorily succeeded the unification and economic integration of Europe. The economic unification on which an agreement had been reached was not seen as the end of a process, as it was not considered to be a goal in itself, but only as a mere intermediary towards the political unification. Or, this process became visible as the European Communities were being democratised. This democratisation was achieved by increase in the authority of the European Parliament, determined by direct elections. By introduction of new decisional procedures (firstly by the Single European Act in 1987, then by the Maastricht Treaty in 1992[1] and the Treaty of Amsterdam in 1987[2]), the Parliament decides with the Council on a large number of aspects regarding the life of the Union. The representativeness and the democracy of the Union were therefore enhanced, in other words, the citizens' representation in the decisional process and in the democratic adoption of decisions. (Barbulescu, 2008, p. 104)

The article 1(2) of the Treaty on the European Union (TUE)[3] marks "*a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizens*". Consequently, two essential elements of good governance/good administration are outlined, *transparency and rapprochement with citizens*. In addition, the Union recognises the rights, freedoms and principles set out by the Chart of the Fundamental Right of the European Union[4] and plans to adhere to the European Convention for Protection of Human Rights and Fundamental Freedoms[5]. The fundamental rights, "as they are guaranteed by the European Convention for Protection of Human Rights and Fundamental Freedoms and as resulting from the constitutional traditions of Member States, represent general principles of the Union law", pursuant to article 6(3) of TUE. In all its activities, the Union shall respect their citizens' equality principle (article 9 of TUE) and the proportionality principle (article 5(4) of TUE), according to which *"the content and form of the Union action shall not exceed what is necessary to achieve the objectives of the European Union Treaties".*

The Union institutions give the citizens and the representative associations *"the opportunity to make known and publicly exchange their views in all areas of Union action"* and *"maintain an open, transparent and regular dialogue with representative associations and civil society"* (article 11 (1) and (2) of TUE). To ensure coherence and transparency of the Union actions, the European Commission carries out broad consultations with parties concerned. The European Parliament and the EU Council adopt provisions on procedures and conditions required to present a civic initiative, according to article 11 of TUE, so that the will of the Union citizens may be heard and taken into consideration. (Craig & Grainne, 2009, p. 84)

[1] The Maastricht Treaty was signed by the European Council on 7 February 1992 and entered into force on 1 November 1993.
[2] The Treaty of Amsterdam, adopted on 16-17 July 1997 and signed on 2 October 1997, entered into force on 1 May 1999.
[3] The Treaty on the European Union, published in OJEU, C 326/13 of 26.10.2012 consolidated version.
[4] The Chart of the Fundamental Right of the European Union, OJEU, 2012/C 326/02.
[5] The European Convention for Protection of Human Rights and Fundamental Freedoms, amended by Protocols no. 3, 5 and 8 and supplemented by Protocol no. 2, concluded at Rome on 4 November 1950, published in the Official Journal no. 135 of 31 May 1994.

By virtue of article 15 of the Treaty on the functioning of the European Union[1] (TFUE), in order to promote good governance and ensure participation of the civil society, the Union's institutions shall respect the transparency principle according to which any citizen of the Union and any natural or legal person residing or having its registered office in a Member State shall have *"the right of access to the documents of the Union's institutions, bodies, offices or agencies of the Union, whatever their medium".*

The Chart of the Fundamental Right of the European Union represents a mandatory legal instrument of which the European citizen may avail in relation to any European court. It has represented "a landmark in the European construction, in the sense that this time, the integration aimed the values specific to citizens and their rights and not the economic values". (Tănăsescu, p. 17)

The Chart represents "*a genuine catalogue of the rights from which all European citizens should benefit in relation to all European Union institutions and Member States whenever the latter enforce the European legislation"*. At European level, the citizens of the UE Member States as well as the citizens of third states (Salomia, 2013, p. 253) benefit from a right of good governance in relations to the European Union institutions and bodies, according to article 41 of the Chart of the Fundamental Right of the European Union.

In article 43, the Chart provides the right of every Union citizen or any natural or legal person residing or having its registered office in a Member State of the European Union to refer to the European Ombudsman in case of maladministration in relation to the activity of the institutions or community bodies, except for the Court of Justice of the European Union and the General Court of the European Union, in terms of their jurisdictional competences. Additionally, article 44 stipulates the right to filing a petition by every Union citizen or any natural or legal person residing or having its registered office in a Member State of the European Union. Article 42 lays down the right of access to the documents of the Union's institutions, bodies, offices and agencies, irrespective of their medium. Article 47 sets out that all and any person of whose rights and freedoms guaranteed by the Union law have been violated is entitled to a course of action with a court of law.

The preoccupation for the transparency of the European activities has materialized throughout time in normative acts which are extremely important for the protection of the fundamental rights of the citizens inside the Union. Therefore, Regulation no. 1049/2001 regarding public access to European Parliament, Council and Commission documents[2] gives EU citizens and all persons residing or having their registered office in the European Union free access to the information included in the documents of such institutions. In the preamble of the Regulation mentions are made that "openness enables citizens to participate more closely to the decision-making process and guarantees accountability of the administration" and "*contributes to the strengthening of the democratic principles and respect for the fundamental rights as they are laid down in the European Union Treaty and the Chart of the Fundamental Rights of the European Union".*

In September 2001, the European Parliament approved the European Code of the Good Administrative Behaviour which sets forth the standards to comply with by European Union institutions and bodies and by their employees in relations to citizens of the European Union. It elaborates on the provisions of the Chart of the Fundamental Right of the European Union and reunites the procedures of material and procedure nature which should govern the actions undertaken within EU institutions and bodies.

[1] The Treaty on the functioning of the European Union, published in OJEU, C 326/13 of 26.10.2012 consolidated version
[2] The EU Regulation no. 211 of the European Parliament and Council of 16 February 2011 regarding citizens' initiative, OJEU L 65/1 of 11.03.2011.

(Balan, Varia, Iftene, Troanță & Văcărelu, 2010, p. 90) This Code has become a key instrument in applying the principle of good governance as it helps citizens to understand and exercise their rights and promotes the public interest in an open, efficient and independent administration. It enables citizens to learn about the administrative standards which they should expect in relation to EU institutions.

Citizenship was established by provisions of the Maastricht Treaty, which introduced in the EC Treaty the second part entitled "*Citizenship of the Union*", including art. 8(17) -8 E(22). Granting a European citizenship by this Treaty emerged on the one hand as an instrument which allows rapprochement of the Union with its citizens and on the other hand as a social legitimacy of the European edifice. (Mătușescu, 2013, p. 125) Recognised by virtue of article 17 of TCE to all citizens of a UE Member State and considered to be complementary to the national one, once the Treaty of Amsterdam was adopted, the European citizenship enables European citizens to participate to a community construction process in a more significant manner. In accordance with article 20 of TFUE "Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship." Two attributes of the concept of European citizenship are therefore recognised: dependence of European citizenship on national citizenship and distinct nature of the former in relation to national citizenship which it does not replace.

It should be pointed out that the European citizenship does not confer a person the right to automatically acquire the citizenship of another Member State of the European Union. An ad literam interpretation of the provisions in the treaties may lead one to an erroneous conclusion in the sense that, being subordinated to national citizenship, the quality of European citizen may not be attributed to nationals of a third stat. The jurisprudence of the Court of Justice of the European Union tries to set a clear dividing line between the two citizenships. For instance, in the case *C 145/04 of 12 September 2006, Spain/Great Britain, Rec 1-7917, CJEU*[1] recognises the possibility of a state to grant certain rights arising from the European citizenship of specific persons who have good relations to such state, others than their nationals.

The derived character of the European citizenship in relation to national citizenship would imply that loss of the latter should entail deprivation of the person of all rights attached to European citizenship. *In the case of 2 March 2010, Rottman, case C -1354/0, the Court of Justice of the European Union* recognises the right of a state to cancel the citizenship fraudulently obtained. Nevertheless the same court obliges to respect the proportionality principle and objectively assesses whether the measure taken is grounded in relation to the crime committed.[2]

The Court of Justice of the European Union sets that "*The status of European citizen is meant to be the fundamental status of the Member States nationals which allows the ones among the latter who are in the same position to obtain, irrespective of their citizenship and without prejudice to the exceptions expressly stated in this regard, the same legal treatment"*.[3]

By provisions referring to the European citizenship, there emerges an entire set of rights which may be classified into the following categories: political rights, economic freedoms and guaranteed rights.

The category of political rights includes: the right to vote and to stand as candidates in local elections, the right to vote and to stand as candidates in the European Parliament.

[1] CJEU, C 145/04 of 12 September 2006, Spain/Great Britain, Rec 1-7917.
[2] CJEU, 2 March 2010, Rottman, case C -1354/08.
[3] CJEU, 20 September 2001, Grzelczyk, Case C -184/99, Rec. I – 06193.

The economic freedoms encompass the right to free movement and the right to stay, the free movement of workers and free access to jobs, the right to settle in any member state which implies access to unpaid activities and the freedom for establishment of firms.

The category of guaranteed rights includes: the right to petition, the right to appeal a European mediator.

2. Rights of European Citizens

2.1. General Aspects

The European citizenship entails rights and duties of citizens; accordingly, the same article 20 of TFUE sets out that "*Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties".* Classified into several categories, political rights, economic freedoms and guaranteed rights, the rights of the European citizens shall be exercised "*within the conditions and limits defined by the Treaties and by the measures adopted thereunder."* The European citizens' rights are constantly evolving, article 25 of TFUFE stating that, on the basis of an evaluation conducted by the European Commission every three years on the application of the provisions regarding the EU citizens' rights, *"without prejudice to the other provisions of the Treaty",* the Council, acting unanimously in accordance with the special legislative procedure and after obtaining the consent of the European Parliament, may adopt provisions to add to the rights listed in article 20(2). These provisions shall come into force after their approval by the Member States.[1]

The right to vote and to stand as candidates in local elections and the right to stand as candidates in the European Parliament have been recognised by provisions of article 8B (19) paragraph 1 of the TEC (turned into article 19). According to these provisions, any Union citizen who resides in a Member State and is not a national of such state has to right to elect and stand as candidate in the municipal elections of the state where he or she resides. This right shall be exercised subject to arrangements adopted by the Council which will unanimously act on the proposal of the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State. By virtue of article 22 (1) of TFUE *"Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State under the same conditions as nationals of that State."*

The detailed arrangements and derogations on exercising the right to vote and to stand as a candidate in the European elections and the municipal elections for the citizens of the European Union residing in a Member State of which he is not a national are set by Directives of the Council 93/109[2] and 94/80[3].

The right to diplomatic and consular protection is conferred by provisions of article 8C (20) of TEC and article 23 (1) of TFUE.

[1] The EU Regulation no. 211 of the European Parliament and Council of 16 February 2011 regarding citizens' initiative, OJEU L 65/1 of 11.03.2011, p. 127.
[2] Directive 93/109/EC of Council of 6 December 1993 to set norms on exercising the right to vote and to stand as a candidate in the European Parliament for citizens of the European Union residing in the Member State of which they are not nationals, OJ L 329, of 30.12.1993, page 34, amended by Directive 2013/1/EU of 20 December 2012, JO l 26/27 of 26.01.2013.
[3] Directive 94/80/EC of Council of 19 December 1994 to set norms on exercising the right to vote and to stand as a candidate in municipal elections for citizens of the Union residing in the State of which they are not nationals, OJ L 368, of 31.12.1994, p. 38.

According to these provisions, every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary rules and start the international negotiations required to secure this protection. With regards to this right to diplomatic and consular protection, there is a series of difficulties which starts mainly from the fact that it should not be mistaken with the right of the European citizens to enjoy protection by European institutions. The *CJEU, 28 November 1996, Odigitria, Case C 293/95 Rec. I -6129*, does not exclude potential undertakings by the Commission towards recognizing the right to diplomatic and consular protection[1]. On the other hand, materialisation of this right to European citizens proved to be difficult as Member States reached an agreement only on consular assistance in relation to death, accident, serious disease, arrest, support for repatriation.[2]

Upon introduction of the concept of **"European citizenship"** by the Maastricht Treaty (1993), right to free movement and free residence inside European Union was granted to all citizens of Member States. Additionally, the Treaty included in the domain of common interest of Member States the policy on asylum, crossing external borders and policy on immigration.

In close connection with the subject matter of this study, we will further refer to the guaranteed rights recognised to European citizens, rights which give them the opportunity to actually get involved in the decision-making process of the European Union institutions: right to information, right of access to administrative documents, right to petition, right to refer to a European mediator.

2.2. Right to Information and Citizens' Initiative

The right to information and the European citizens' initiative come to meet the demand relating to rapprochement of the decision with the citizens. It represents methods by which citizens may propose legislative bills on the agenda of the European Union, in fields in which the Union has powers and competences to legislate.[3]

The Maastricht Treaty (1992), enhanced by the Treaty of Lisbon[4] (2007), also grants the European Parliament the right of initiative and allows it to request the Commission to submit a proposal. Moreover, in terms of common foreign policy and security policy, the Member States have the right to legislative initiative. According to article 11 (4) of TUE" *Not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the European Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties."*

"The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the provisions for the procedures and conditions required for a citizens' initiative within the meaning of the article of TUE, including the minimum number of Member States from which such citizens must come."– article 24 (1) of TUE.

[1] CJEU, 28 November 1996, Odigitria, Case C 293/95, Rec. I -6129.
[2] Council Decision no 95/553/CE of 19 February 1995.
[3] European Citizens Initiative, Europe Direct Information Centre in Bucharest, European Institute in România address: http://ec.europa.eu/citizens-initiative.
[4] Treaty of Lisbon to amend the Treaty on the European Union and the Treaty on the Functioning of the European Union, OJEU, 2007/C 306/01.

Regulation of the citizens' initiative comes in the context of correcting the democratic deficit of the European Union and the lobby activities carried out by the main associates of the civil society within the Member States. The European citizen hereby becomes a new player in the classic decision-making triangle of Europe, made up of the European Commission, the European Parliament and the Council of the European Union.

The opportunity given to citizens to express through legislative initiatives represent an important step in ensuring legitimacy and consolidation of the participative democracy within the Union. Therefore, the European citizen is ensured a new perspective and is given the opportunity to actively participate to elaboration of decisions which concern him directly. Once instituted, this mechanism of promoting the interests of the European citizens enhances the internal democracy of the European Union and capitalises on the manifestations of the civic concerns on the European territory[1].

In practical terms, this right is exercised in *compliance with Regulation no. 211 of 16 February 2011*[2].

2.3. Right of Access to Administrative Documents

The right of access to the documents of the European Council, Commission and Parliament is granted by provisions of article 191A (225) paragraph 1 introduced in the EC Treaty of Amsterdam, taken over in article 15 (3) of TFUE and article 42 of the Chart of Fundamental Rights of the European Union.

In line with provisions of this article, any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the European Parliament, Council and Commission, subject to the principles and the conditions to be defined in accordance with paragraphs 2 and 3 (they refer to potential limits of such right of access, on grounds of public or private interest; each institution shall set by internal rules and regulations specific provisions on public access to their documents).

Citizens' involvement and transparency of the decision-making process in the European institutions are also conferred by Regulation no. 1049/2001 of the European Parliament and Council of 30 May 2001 regarding free access to documents of the European Parliament, Council and Commission. (OJ L 154/31.05.2001)

In the Preamble of the Regulation, statement is made that the transparency contributes to enhancing democratic principles and respect of the fundamental rights.

The documents of the European institutions which may be publicly accessed are represented by "any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility*".* (article 3 of Regulation)

The exceptions on the public access to documents of the European institutions are set forth in article 4 of the Regulation. Therefore, the institutions shall refuse access to a document where disclosure would undermine the protection of:

[1] European Citizens Initiative, Europe Direct Information Centre in Bucharest, European Institute in România address: http://ec.europa.eu/citizens-initiative.
[2] EU Regulation no. 211 of the European Parliament and Council of 16 February 2011 regarding citizens' initiative, OJEU L 65/1 of 11.03.2011.

a) The public interest, as regards: (1) public security; (2) defence and military matters; (3) international relations; (4) the financial, monetary or economic policy of the Community or a Member State;

b) Privacy and the integrity of the individual, in accordance with Community legislation regarding the protection of personal data;

c) Commercial interests of a natural or legal person, including intellectual property;

d) Court proceedings and legal advice;

e) The objective of inspections, investigations and audits, unless there is an overriding public interest in disclosure.

The document access applications shall be submitted in writing, including in electronic form, in one of the languages of the Member States and in a sufficiently precise manner to enable the institution to identify the document. The applicant is not obliged to state reasons for the application. (article 6.1 of the Regulation) The institution shall grant access to documents requested and shall provide them within 15 working days from registration of the application. The graceful appeal shall apply in favour of the applicant. According to European regulation, in the event of a total or partial refusal or lack of response from the institution, the applicant may, within 15 working days of receiving the institution's reply or of the date by which the institution should have responded, make a confirmatory application requesting the institution to reconsider its position. (articles 7.2 and 7.4 of the Regulation)

Similarly to the Romanian legislation, the graceful appeal is a preliminary procedure mandatory before referring to a court of law.

Pursuant to article 11.1 of the Regulation, each European institution shall have a register of publicly accessible documents.

Most European States guarantee the citizens the right of access to administrative documents. Therefore, in France, the right of every person to public information and administrative documents is provided for by the law, whereas exceptions refer only to protected interests such as: national defence, external relations, monetary policy, national security and public order, legal procedures, tax-related documents, personal files or documents on personal life, trade or industrial secret. In Italy, the access to administrative documents is guaranteed to all persons who have a legitimate interest therein. The exceptions from this right take account of documents on state secrets as defined by the law, military, industrial or trade secrets. In addition, public authorities may deny access to documents should disclosure of such documents influence the work of the administration in a negative manner[1].

In România, article 31 of the Constitution, as amended and republished, establishes the fundamental right of the person to have access to any information of public interest which may not be restricted. Established under the influence of international legal instruments, this right has a double regulation in the Romanian legislation, namely the Constitution and the Law 544/2011 regarding public access to information of public interest[2]. This right institutes both the person's right to be accurately informed on any information of public interest and the authorities' obligation to inform the citizens on public

[1] Professor Gyula Gulyas PhD, Lecturer Liviu Radu PhD, Research Assistant Dan Octavian Balica, Research Assistant Cristina Haruţa PhD Student. *Ethics in Public Administration. Course Book.* Ministry of Education, Research and Youth. BABEŞ-BOLYAI University of Cluj-Napoca, 2011.

[2] The consolidated form of Law no. 544/2001, published in the Office Gazette no. 663 of 23 October 2001, on 20 July 2016 is achieved by including the amendments and additions brought by: RECTIFICATION no. 544 of 12 October 2001; LAW no. 371 of 5 October 2006; LAW no. 380 of 5 October 2006; LAW no. 188 of 19 June 2007; LAW no. 76 of 24 May 2012; LAW no. 144 of 12 July 2016.

affairs and matters of personal interest. The principle of informing the citizens represents a fundamental principle in conducing activities by authorities and institutions in România, be they of central or local nature. The principle sets the right of citizens to know the concrete mechanisms on the public access to information of public interest or the transparency in the decision-making process as well as the right to inform the citizens which triggers the correlative obligation of the authorities to create the bases required to inform the citizens on every decision taken or administrative act concluded.

2.4. Right to Petition the European Parliament

The right to petition the European Parliament is set by article 8D (21) paragraph 1 of the TEC, according to which every citizen of the Union shall have the right to petition the European Parliament. Set in article 24 (2) of TFUE as a right of European citizens, the right to petition is extended by article 227 of TFUE to other categories of persons. Therefore, beneficiary of these rights may be any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State; the petition may be individual or in a group; the subject of the petition shall be on a matter which falls under the Union's fields of activity; the subject matter of the petition shall directly affect its author. In other words, the petitions should be absolutely circumscribed to the community domain; the activities which have no community relevance, yet only a national, internal relevance are therefore excluded, e.g. activities relating to persons' income taxation. (Manolache, 2006, p. 105) In accordance with articles 201 and 202 of the Rules of Procedure of the European Parliament, the petition commission within the Parliament rules on the admissibility of the petition, following a preliminary analysis which may include: audits, investigations, request for information etc. The commission may decide to prepare a report, submit a resolution proposal to the Parliament, may request the advice of a commission specialised in the matters addressed or may convey its recommendation to the European Commission so that a response should be remitted or an action be taken[1]. In the unpublished Decision of 14 September 2011, Ingo-Jens Tegebauer/European Parliament, ruled in Case T-308/07, *the General Court of the European Union* considers that a petition deemed to the inadmissible by the commission may at any time be subjected to a jurisdictional investigation, in the course of action for cancellation, such investigation being the only guarantee of the right to submit a petition[2].

The right of defence includes as derivative the ***person's right of access to administration documents*** in order to submit his own point of view. Thus, one must say that in the matter of public servants disciplinary regime, in a case filed against the advice issued by a discipline commission, the Court considered that such advice represents a harmful act and that it may be the subject matter of an action, as the advice mentioned, despite its issuance by a consultative body, had been issued upon the completion of an investigation which the commission should have conducted in full independence and in accordance with a special, distinct procedure, of contradictory nature and subjected to the fundamental principle of the right of defence[3]. A fortiori, such a reasoning should by analogy apply in case of decisions adopted in application of article 10 (2) the first thesis of Regulation no. 1073/1999[4], as these decisions come from an independent community body and are also taken in relation to or

[1] The EU Regulation no. 211 of the European Parliament and Council of 16 February 2011 regarding citizens' initiative, OJEU L 65/1 of 11.03.2011. p. 137.
[2] Decision of 14 September 2011 ruled by the General Court of the European Union, unpublished, Ingo-Jens Tegebauer/ European Parliament ruled in Case T-308/07.
[3] Court Decision of 29 January 1985, F/Commission, 228/83, Rec., p. 275, point 16.
[4] (EC) Regulation no. 1073/1999 of the European Parliament and Council of 25 May 1999 regarding investigations carried out by the European Anti-fraud Office (OLAF).

upon completion of an investigation which should be carried out in full compliance [...] of the right of the persons concerned to express their opinions on actions which regard them"[1].

2.5. Right to Appeal a European Mediator

The right to appeal a **European** Mediator is conferred by provisions of article 8D (21) paragraph 2 of TEC.

The Parliament appoints a mediator habilitated to collect the complaints from any European citizen or any natural or legal person residing or having its registered office in a Member State. These complaints concern cases of maladministration in relation to actions taken by institutions or bodies, except the Court of Justice and the General Court of First Instance which perform their duties. The mediator conducts the investigations which he considers grounded, either based on his own initiative or in line with the complaints filed directly or through a member of the European Parliament, excepting the cases when such actions are or were subject to a jurisdictional procedure. Should the mediator note a maladministration case, he shall inform the institution concerned thereon. The institution shall have three months to take actions. Subsequently, the mediator shall send a report to the European Parliament and the institution concerned. The person who filed the complaint is informed on the outcome of the investigation. Every year the mediator submits a report to the European Parliament on the outcomes of the investigations conducted.

After each election of the European Parliament, the mediator is appointed for the duration of the office. His term may be renewed. Should the mediator fail to meet the requirements necessary to function or commit a serious error, he may be declared resigner by the Court of Justice, upon request of the European Parliament.

The mediator fulfils his tasks in full independence. In fulfilling his tasks, he does not request or accept instructions from another body. Throughout the period of his function the mediator may carry out no other professional activity, irrespective of whether such activity is remunerated or not. The independence refers to his relation to the European Parliament, however does not exclude jurisdictional control over his activity. This hypothesis is set by *the Court of Justice of the European* Communities in Case C 234/02P.[2]

3. European Ombudsman

The Ombudsman is a democratic institution created to operate in a democratic spirit with a cooperative government and amiable officials. It chiefly pursues to rectify any mistake which might occur.[3]

3.1. Role of the European Ombudsman

According to articles 42 and 43 of the Chart, any European citizen is recognised the right of access to documents of Union's institutions, bodies, offices and agencies as well as the right to appeal the European Ombudsman with regards to cases of maladministration relating to activities of the Union's institutions, bodies, offices and agencies, except the Court of Justice of the European Union in exercising its jurisdictional function. The opportunity to notify the European Ombudsman or the Court

[1] Decision of the EU Public Function Court of 28 April 2009 in jointed F-5/05 and F-7/05, subject matter being an action filed on grounds of articles 236 EC and 152 EA.
[2] CJEC, 23 March 2004, Lambert, Case C 234/02P, Rec. I -2803.
[3] (Deleanu, 2006, p. 547) and (Hossu, 2013, p. 62).

of Justice, as appropriate, "*constitutes elements of consolidating efficiency and efforts to guarantee the right to a good administration, strictly at the level of the European Union".*

The European Ombudsman has on the one hand the role of an external control mechanism, i.e. exanimation of complaints on inappropriate behaviour in administration and recommendations on rectifying actions, and is on the other hand a source of support for the Union's institutions, helping them to improve their activity by indicating the domains which may be enhanced.

The national denominations of the Ombudsman are different: Parliamentary Commissioner in Great Britain, Defender of People in Spain, Mediator in France, Protector of Citizens in Canada, Parliamentary Delegate of Defence in Germany, Commissioner on Administration Affairs in Cyprus, Defender of Civil Rights in Poland, Ombudsman for Human Rights in Slovenia, People's Lawyer in România, Parliamentary Lawyer in the Republic of Moldova (Centre for Human Rights in Moldova), in other states – public mediator, parliamentary lawyer etc.

3.2. Appointing and Dismissing the European Ombudsman

The procedures on appointing and dismissing the Ombudsman are set forth in article 219-221 of the Rules of Procedure of the European Parliament; according to article 221, at the beginning of every legislature, just after his election or in cases stipulated in paragraph (8) of the same article (death or dismissal), the President launches a call for candidacies in order to appoint the Ombudsman and sets the timeframe to submit them. The call is published in the Official Journal of the European Union and the candidacies have to be supported by minimum 40 deputies who are nationals of at least two Member States.

Should the Ombudsman fail to meet the requirements necessary to function or commit a serious error he may be dismissed by the Court of Justice of the European Union, upon request of the Parliament. Dismissal may be requested by a tenth of the Parliament members. The request is also conveyed to the competent commission who, in the event most members consider there are grounds for dismissal, submits a report to the Parliament. Upon his request, the Ombudsman is audited prior to taking a vote on the report. After the debates, the Parliament decides by secret ballot. In case the vote is in favour of dismissing the Ombudsman and the latter fails to act on it, the President notifies the Court of Justice of the European Parliament in the session period following the vote, at the latest, and demands a decision in the shortest time possible with regards on the request for dismissal. The Ombudsman's voluntary resignation interrupts this procedure.

Although he is totally independent in performing his duties, the European Ombudsman has close relations with the Parliament, which is exclusively responsible for his appointment, may request the Court of Justice to dismiss him, sets the norms regarding performance of his duties, provides assistance in relation to investigations and receives his reports.

3.3. Status of the European Ombudsman

The status and general conditions on exercising the European Ombudsman's functions were laid down by Decision 94/262/CECO, EC, Euratom of the European Parliament of 9 March 1994 regarding the status and general conditions on performance of the European Ombudsman's duties[1], in accordance with article 195 (4) TEC and article 107 (4) of CEEA (current article 228 TFUE). Pursuant to article 2 (1) of this decision, the Ombudsman contributes to identification of cases of

[1] Decision 94/262/CECO, EC, Euratom of the European Parliament of 9 March 1994 regarding the status and general conditions on exercising the European Ombudsman's functions, published in OJ L 113, 4.5.1994, p. 15 – amended by EP decisions of 14 March 2002 - OJ L 92, 9.4.2002, p. 13 and of 18 June 2008 - OJ L 189, 17.7.2008, p. 25.

maladministration relating to the activity of the Union's institutions and bodies, except the Court of Justice and the General Court of First Instance. The action of any other authorities or persons may not be subject matter of a complaint referred to the Ombudsma. (Mihailescu, 2017, p. 166)

The European Parliament appoints the European Ombudsman after each election and for the duration of the entire legislature. The term may be renewed. The Ombudsman is appointed from among the personalities who are citizens of the Union, enjoys all civil and political rights, presents all guarantees of independence and fulfils the requirements necessary in the county of origin for exercise of the highest jurisdictional functions and possesses expertise and competences recognised for fulfilment of Ombudsman functions.

3.4. Duties of the European Ombudsman

The Ombudsman performs his duties in conditions of full independence, to the general interest of the European Union and its citizens. With a view to performing these duties, he does not request or accept instructions from any government or body. The Ombudsman refrains from any actions which are not compatible with the nature of his duties. Upon taking his position over, the Ombudsman makes a firm commitment before the Court of Justice of the European Union to perform his duties in full independence and impartially and to respect, for the entire duration of his term and after its completion, the obligation of honesty and discretion in case of accepting some positions or advantages after expiry of his term as Ombudsman. During performance of his duties, the Ombudsman may not hold another political or administrative position or carry out any professional activity, irrespective of whether this is remunerated nor not.

Almost in any law system it may be, the Ombusdman represents a body of protecting the citizens, derived from the Parliament, which holds a prerogative to control the administration, enjoys large independence and acts in the absence of an excessive formalism. (Tofan, 2011, pp. 18-19)

4. People's Lawyer

People's Lawyer is the constitutional denomination under which the ombudsman is organised and functions in Romania. Created by the Constitution in 1991, as an innovation in the legal and state life of România, but also in Europe, the institution of the People's Lawyer (Ombudsman), institution of Western European inspiration, was actually set up and started operating after adopting its organic law, Law no. 35/1997 regarding organisation and functioning of the institution People's Lawyer.[1] The institution People's Lawyer is a national institution meant to promote and protect human rights, within the meaning set by Resolution of the General Assembly of the United Nations (UN)[2] no. 48/134 of 20 December 1993, by which Principles of Paris were adopted. (Muraru, 2004, p. 118)

Distinct from similar European institutions, according to the Constitution revised, People's Lawyer is conferred enhanced attributes, especially in terms of control of the constitutionality of laws. Therefore, in line with constitutional provisions of article 146 of the Constitution, People's Lawyer has the prerogative to refer to the Constitutional Court in relation to unconstitutionality of laws, *prior to their promulgation; additionally,* in relation to a law already entered into force, *he may* directly invoke the exception of unconstitutionality before the same Court and *may thus entail* a posteriori *the*

[1] Law 35/1997 regarding the organisation and functioning of People's Lawyer*) – Republished in the Official Gazette 181 of 27 February 2018 was amended by Law no. 9/2018 for amendment and addition to Law no. 35/1997 regarding organisation and functioning of People's Lawyer.

[2] Resolution of the General Assembly of the United Nations (UN) no. 48/134 of 20 December 1993.

control of constitutionality of laws. Many references to the Constitutional Court in relation to the exception of unconstitutionality filed by the People's Lawyer are intensely mediated; for instance, People's Lawyer appealed the Constitutional Court and invoked the exception of unconstitutionality of the Government Emergency Ordinance 13/2017[1], Government Emergency Ordinance 15/2016 supplements the provisions of Law 3/2000 regarding organisation and conduct of the referendum in the sense of allowing organisation and conduct of the local referendum on the same date as the local elections, using the same polling stations, constituency offices and voting stamps.[2]

In terms of the prerogative of People's Lawyer to raise the exception of unconstitutionality, by ***Decision no. 148/2003***[3], *the Constitutional Court has seen that it does not include a judicious solution with potential of juridical norm of constitutional rank, as the exception raised by People's Lawyer to the benefit of a person may not have the significance of an authentic guarantee or be a measure to protect the citizen as long as this person, having the legal capacity and being animated by a legitimate interest, may personally exercise the procedural right to raise the exception before the court of law.* In addition, the Constitutional Court acknowledges that People's Lawyer might not even invoke a procedural position which should legitimate his participation to a lawsuit before courts of law. As long as citizens are guaranteed the right of free access to justice as well as the right to defence, citizens may defend themselves in the legal domain against any enforcement of some unconstitutional legal provisions. This is the reason why People's Lawyer is endued with a competence which is as excessive as it lacks consistency, namely the competence of raising the exception of unconstitutionality, outside a lawsuit, on behalf of the litigant.

Law 35/1997 regarding organisation and functioning of People's Lawyer was amended by Law no. 9/2018 to amend and supplement Law no. 35/1997 regarding organisation and functioning of the institution of People's Lawyer so that he is assisted by deputies specialised in the following domains of activity: a) human rights, equal chances between men and women, religious forms and national minorities; b) rights of family, young persons, retired, disabled persons; c) defence, protection and promotion of child's rights; d) army, justice, police, penitentiaries; e) property, labour, social protection, taxes; f) prevention of torture and other punishments or cruel, inhuman or degrading treatments applied in detention places, by the National Preventive Mechanism.

The main duties of People's Lawyer are: a) petition settlement; b) activities on constitutional contentious: c) submitting points of view, upon request of the Constitutional Court; d) he may refer to the Constitutional Court with regards to unconstitutionality of laws, prior to their promulgation; e) he may directly refer to the Constitutional Court in relation to the unconstitutionality of laws and ordinances; f) activities on administrative contentious: he may inform the administrative contentious court, under terms and conditions of the administrative contentious law; g) promoting the appeal in the interest of the law before the High Court of Cassation and Justice with regards to law matters which were settled differently by courts of law, by irrevocable court judgments; h) he submits his reports the two Chambers of the Parliament, which are annual or upon the request of the former; the reports may contain recommendations on amending the legislation or measures of a different nature to protect the rights of freedoms of citizens; i) he submits reports to the presidents of the two Chambers of the

[1] Decision of the Constitutional Court no. 63/08.02.2017 by which it was rejected as inadmissible because this was repealed by Government Emergency Ordinance 14/2017 after notification of the Constitutional Court.

[2] By Decision of 26 May 2016 by which the Constitutional Contentious Court acknowledged that Government Emergency Ordinance no. 15/2016 to supplement Law no. 3/2000 regarding organisation and conduct of referendum is unconstitutional. The Court acknowledged that the normative act examined fails to observe the requirements provided in article 115 (4) of the Constitution, in reference to an extraordinary situation of which regulation may not be postponed**.**

[3]Decision no 148 of 16 April 2003 of Constitutional Court regarding constitutionality of the legislative proposal to revise the Constitution of România, Published in the Official Gazette no. 317 of 12 May 2003.

Parliament or, where appropriate, the prime minister, in cases he finds during investigations conducted, legislative gaps or serious cases of corruption or failure to enforce the national laws.

People's Lawyer for protection of child's rights performs his duties in order to ensure observance of child's rights and freedoms and implementation at national level, by central and local authorities, by persons holding high positions at all levels, of the provisions of the UN Convention with regards to child's rights.

People's Lawyer for child's rights provides protection and assistance to the child, upon the latter's request, without requesting the consent of the parents or the legal representatives. The child is informed on the outcome of the examination of his request in the appropriate form of his intellectual and mental maturity.

In order to ensure observance of child's rights and freedoms People's Lawyer for the child's rights is entitled to act on his own initiative so as to assist the child in difficulty or at risk, without requesting the consent of the parents or the legal representatives. People's Lawyer for the child's rights cooperates with all persons, non-commercial organisation, public institution or authority carrying out activities in the domain, decides on the requests regarding violation of child's rights and freedoms, may file lawsuits with courts of law. In his activity, People's Lawyer for child's rights is assisted by a specialised subdivision within the People's Lawyer Office.

People's Lawyer may be consulted by the initiators of bills and ordinances of which content regard rights and freedoms of citizens stipulated by the Constitution of România, by pacts and other international treaties regarding fundamental human rights to which România is part.

The institution of People's Lawyer performs its duties: on own initiative or upon request of natural persons – irrespective of age, gender, political views or religious beliefs, trading companies, associations or other legal persons. People's Lawyer accounts only to the Parliament to which he shall submit his reports. In these reports People's Lawyer may also make recommendations regarding legislation or taking some actions to protect public freedoms.

The performance of duties deriving from the capacity of People's Lawyer to protect the citizens' rights and the positive results of this institution determine us to believe that implementation of this institution of the ombudsman in the Romanian system has been successful, to the benefit of the citizen and also of consolidating the rule of law.

5. Conclusions

The European Union Treaties have outlined a framework for the development of the democratic life at the level of the European Union; the institutions have the obligation to maintain an open, transparent and constant dialogue with the civil society. To this end, various mechanisms of consulting citizens have been implemented and the citizens have been recognised the right to legislative initiative.

An important milestone in the evolution of the European Union is represented by the efforts to combat the democratic deficit, concept which was invoked to criticise the undemocratic and inaccessible character for the ordinary citizen of the European Union to documents of representative institutions, especially due to the complex manner in which such institutions function.

Although over the past years the European Union has taken important steps towards allowing the beneficiaries of the decisions made by the European institutions – the Union's citizens – to actively participate to making such decisions, one may see a poor communication by European institutions

with citizens and a poor involvement of citizens in the decision-making process or a failure to become aware of the rights conferred by the European treaties.

To respect citizens' right to get involved in the decision-making process by the public institutions or public central and local authorities, România has adopted the Law no. 52 of 21 January 2003 regarding decisional transparency in public administration.[1] The objective of this law is to increase the accountability level of the public administration in relation to the citizen as beneficiary of the administrative decision, to stimulate the citizens' active participation in the administration decision-making process and in the process of elaborating normative acts and to enhance the transparency level of the entire public administration. In addition, Law no. 544 of 12 October 2001 regarding the public access to information of public interest provides for free and unlimited access of the person to any information of public interest as a fundamental principle of the relation between people and public institutions.

Moreover, creation of an autonomous institution similar to the *ombudsman* – People's Lawyer, specialised in the matter of administrative control, gradual development of the administrative capacity of the existing institutions, generally the ones which exercise external control, of hierarchic or specialised type, adaptation of the control mechanisms of administrative guardianship to the new realities, in harmony with the European requirements, determine us to state that the Romanian legislation meets the European requirements in this matter and provides a new legal institutions meant to defend the rights and freedoms of the citizens in their relation with the public administration. The amendments to Law 35/1997 by Law 9/2018 in terms of observance and protection of child's rights is an additional proof that România is making efforts to align to the standards imposed by European Union with regards to the fundamental human rights and freedoms and the provisions of the UN Convention on child's rights.

Outlining and prefiguration of the activity of administrative control, including through the institution of People's Lawyer and all other control systems provided for by the Romanian legislation, are legally supported by and result in the requirements derived from the imperative *rule of law*, with its two main coordinates, i.e. *abiding the law* by all administrative authorities of the state, and *observing citizens' rights and freedoms* as conferred by the law. (Manda, 2005)

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Methodological Aspects Concerning the Crime Scene Investigation in Case of Crimes against the Regime of Arms and Ammunition

Nicolae Mărgărit[1]

Abstract: Regarding the methodological aspects in cases of crimes against the regime of arms and munitions, one of the most important forensic activity is the crime scene investigation. This forensic activity needs a major and careful attention within the activities that needs to be followed in a case of unauthorized use of guns and munitions. We have also analyzed in the present study the categories and the importance of the clues and evidences discovered at the crime scene, the interpretation in order to determine the nature and the circumstances in which the act was committed.

Keywords: arms and ammunition; forensic activity; methodological aspects; crime scene; clues and evidences;

1. Introduction

The purpose of this paper is to analyse the methodological aspects concerned with the crime scene investigation in case of crimes against the regime of arms and ammunition.

This study sets forth an analysis of its two parts: 2. Crime scene investigation in case of crimes committed with firearms and 3. Some practical specific aspects which crime scene investigation needs to solve.

The subject matter of the study is important to the criminalistics doctrine in this field, and to the doctrine of criminal proceedings law. Crimes against the regime of arms and ammunition have some specific aspects, which have been selectively presented below.

2. Crime Scene Investigation in Case of Crimes Committed with Firearms

Crime scene investigation is the main activity of criminalistics incorporating elements from all disciplines of science. Following the integration of Romania into the European and North-Atlantic structures, it was necessary to make the procedures to follow compliant with international requirements. To that end, a *Good Practice Manual*[2] has been created, however this manual did not replace all the instructions of M.I. no. S/420 of 01.04.2003 to carry out crime scene investigation.

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[2] Developed by the members of the National Institute of Criminalistics of the General Inspectorate of the Romanian Police.

As a novelty, we refer here to the obligation for the first policeman who arrives at the crime scene to draw up and hand over to the head of the team a written report, in which the policeman indicates the circumstances of the act, the measures that have been taken, whether the scene suffered any changes or not, what changes, his or her professional opinions by that time, the result of witness interrogation. (Revista Ciminalistica, 2008, p. 35) The head of the crime scene investigation team is the case manager and the operator of evidence, being the person authorised to keep in touch with the media[1]. The person in charge with the criminalistics activities coordinates and carries out these activities and, when they are completed, hands over to the head of the team the evidence and the types of evidence together with the custody forms and the photographic board (after making it) and writes down in the register the activities that have been carried out.[2]

Emphasis is laid on discovering, collecting, preserving, packing and transporting the biological evidence which is necessary for forensic genotyping.[3] The success of determinations depends on the quantity and the quality of the collected biological evidence.

An essential role in the activity of the criminal prosecution officer is played by his or her knowledge and experience in the area of criminalistics, as well as by the team that arrived at the scene and carry out the crime scene investigation. The tasks of the crime scene investigation team are not limited to the examination of the crime scene and its surroundings, as they involve even an intuitive activity for the interception of the findings at the crime scene, and this is the reason why, in the view of the authors of the manual, the phrase "inquiry into the crime scene" is also used, which obviously means more than just an investigation. (Revista Ciminalistica, 2008, p. 35)

The crime scene investigation process consists of performing some simple or more complicated operations, which involve thinking and doing, of developing an investigation strategy, and approaching creatively the situations requiring such a knowledge activity. Simple tasks are carried out according to some algorithms in the form of criminalistics tactical methods, in compliance with some procedural rules which are well known to the criminal investigation body.

The ***criminalistics tactical method*** is a scientifically argued recommendation with regard to the order and the type of actions taken by the criminal prosecution body in solving some problems, carrying out concrete actions for the purpose of ensuring their due effectiveness, considering the particularities of the criminal case and the inquiry situations.

The ***tactical operation*** may be defined as a system of activities, integrated and coordinated with regard to the purpose and the tasks of the crime scene investigation or of another prosecution action, aimed at ascertaining the situation of the crime scene or the discovery of the cause, holding down, revealing and picking up the clues of the crime, and determining the circumstances in which the criminal activity was prepared and took place.

Upon the receipt of an announcement[4], the prosecution body must take immediately the following measures, no matter if it has or not the competence to solve the cause:

- to identify the person who made the complaint or the denunciation;
- to ascertain some initial data about the crime that has been committed, the place and the time when it was committed, the number of victims and their condition, whether the perpetrator is known or not;

[1] The prosecutor or the judicial police officer depending on their competence.
[2] The police officer or agent who has crime scene investigation duties among his or her responsibilities.
[3] Which may be determined from nucleate cells (which contain a nucleus) or from cytoplasm matter (mitochondrial DNA).
[4] A complaint, a denunciation or an announcement of one's own act, or an action at the initiative of the prosecution body.

- to inform the superiors and the responsible police units;
- to order some urgent measures which the local police need to take;
- to establish the investigation team;
- to ensure the participation of the victim's family;
- to prepare the appropriate technical and scientific means which are specific to criminalistics;
- the universal criminalistics kit;
- the photographic kit and the special kits;
- the mobile forensic laboratories;
- the detection equipment;
- the technical means for identification based on external personal particulars;
- to go urgently to the crime scene.

In a crime scene investigation in connection with crimes committed with firearms, some general activities are carried out, which involve searching for, examining, holding down, picking up and transporting the clues. *Some of the immediate activities of a general nature* are: marking the crime scene and preventing curious people from getting in, if the victim is alive, rescue measures are taken, removing any imminent hazards, perceiving the crime scene as a whole and the significant items in its perimeter, ascertaining the most significant clues and their relation, identifying and detaining the suspects, informing the competent judicial body to carry out the crime scene investigation.

Next, activities will be carried out in order to discover the clues created by the act committed, to discover the corpus-delicti weapon, extract the bullets from the targets objects, pick up and pack the clues that have been discovered, and determine the place where the gun was fired.

The actual crime scene investigation will take place only after the area has been correctly marked, in compliance with the rules of criminalistics tactics. Crime scene investigation has two distinct phases which take over the characteristics of the activities carried out at these two stages:

- the static phase; and
- the dynamic phase.

The static phase of the crime scene investigation involves a careful examination of the crime scene, both on the whole, and in the most important areas, without making any change to it, for the purpose of determining the condition and the position of the physical objects serving as evidence, the visible clues, for measuring the distance between the main objects in order to clarify some circumstances of the cause, determining any possible changes made before the arrival of the investigation team. At the same time, it is necessary to ascertain the odour specific to a recent shooting, proceeding at the collection of air samples.

When the conditions are appropriate, the use of a tracking dog for processing the traces of odour can lead to results which are particularly useful to the cause. (Berchesan, 1998, p. 141)

The findings of the static phase are held down through photographing, as well as through filming or video-magnetic recording.

The dynamic phase of crime scene investigation involves a thorough examination of all the objects and means serving as evidence, and of the clues which are in a particular relation with the crime that has

been committed. The objects which are supposed to be in a relation with the crime, if they are unknown, are moved from their initial position so as to ensure the optimal conditions for discovering, holding down and picking up the clues.

The most frequent clues in such cases are the blood stains or drops or a pool of blood, the corpus-delicti weapon or parts of it, unused cartridges, bullets and burnt tubes, the victim's body, foot prints, as well as different objects which were lost or left on purpose at the crime scene, etc.

Most of attention goes to the position in which the guns and the ammunition were found, their condition, the traces found on them[1]. Before examining a firearm, it is necessary to confirm whether it is loaded or not. In case that rusted or blocked guns are found, if possible, a gammagraphy will be requested in order to determine whether there are any cartridges in the detonator. Special attention is paid also to the series of the gun. If the series and the number of the gun have been removed through shaping, action is taken to reconstruct them in order to determine the provenience of the gun, its model, the year when it was made. Different traces may be identified on the armament and the fired cartridges, such as papillary traces, traces of flames, burned powder, smoke, mineral fat and gun oil, blood, textiles, mud, and so on.

The gun may be found at the crime scene, left by the perpetrator for the purpose of creating the version of suicide, but most of times it is hidden. If the act was committed in a building or a courtyard, some suitable places for hiding a gun are the attic or the basement, the layers in the garden, piles of hay, coops, stoves, beds, floors, walls, etc. When the weapon is discovered, it is picked up by griping it from the parts which are less used in its usual handling, so as not to destroy the traces. The barrel must be at no times directed to any person nearby; it must be held towards the ground. Each piece of the gun is examined, taking down in the report its position, then the number of cartridges and of burnt tubes found nearby. The muzzle is covered with gauze or paper, so as not to destroy the marks in the barrel. The gun is packed for transportation in such a manner that its surface which is more used in handling does not come into contact with the walls of the pack, because this could destroy any possible traces of hands or blood.

The bullets inside the victim's body are extracted by the coroner. Bullets may also be found in different objects such as walls, furniture, trees, ground, etc. Care should be taken not to create any new marks when they are extracted. Separate boxes filled with cotton are used for packing so as not to destroy any clues. Traces of blood are really useful in forensic investigation, because depending on their form, size, colour and direction, a lot of important elements may be determined, such as the place and the position of the victim when hit by the bullet, the time that passed from the moment of shooting.

In close range shooting, besides the entry and exit orifices created by the bullet, there are also the traces of additional factors. Their presence around the orifices shows that the shooting was from a close range and from the direction of those orifices around which they are deposited. Their lack does not mean that the shot was from a long distance, because the action of additional factors can be stopped by placing a cover between the muzzle and the target. For this reason, in determining the distance and the direction of shooting, when there are no traces of additional factors, the marks left by the bullet are used. When the orifices are not convincing enough to determine the direction of shooting, the data provided by the channel created by the bullet are used. In bone tissues, the entry orifices created by the bullet are smaller than the exit ones, so that the lesion in the bone has the shape of a truncated cone, with the large base in the direction of movement of that bullet. Moreover, in its

[1] For example, the digital prints on the butt or grip of the gun, on the trigger and its guard, on the magazine, the cartridges in the magazine, on the barrel or the muff of the stopper.

trajectory, the bullet carries along particles of clothes and of the previously damaged tissues and loses them in the next tissue.

The place of shooting may be determined based on a few elements, such as: the general appearance of the crime scene, the traces of the shot discovered on the victim's body and on different objects, other kind of traces and even statements made by individuals. In those cases when the entry point and the exit point are discovered in a particular object, the place of shooting is determined by connecting these points with a line and extending this imaginary line drawn by the bullet.

3. Some Practical Specific Aspects which Crime Scene Investigation Needs to Solve

3.1. To determine whether it is a Suicide, A Suicide Frame-Up, An Accident or a Homicide

With regard to suicidal, one should consider that some areas are preferred for shooting, primary the head (above or in front of the ear, inside the mouth) or the area of the heart, however, obligatorily, it must be places which allow the victim to make the movement. Another aspect to be carefully analysed is the presence of any hesitation signs (several bullets are fired, and some don't hit the target properly), because this is also specific to homicide, the victim's specific position, who, sometimes, may move after the shooting, whether the gun is firmly held in the hand (it is not possible to place a gun after death so as to create this aspect), the existence of several gunshot wounds, the first in the vital area, may be found only when a automate gun is used, as it does not require a new manoeuvre; the presence of additional factors of shooting on the hands of the body. Sometimes, the additional factors are not found on the clothing too, if it is thin, passing through the entry orifice and into the channel of the wound. (Uţică & Florescu, 2003, p. 150)

In suicidal, the position of the victim, corroborated with the position of the gun, with the presence of additional factors of the shooting, and the direction and the distance of the shooting may depict an accident situation, which occurred when cleaning the gun, or due to a fall while holding a loaded gun.[1]

In homicide, some aspects are revealed which can help to correctly categorize the act, such as the position of the victim, in relation with the existing conditions at the scene, the place where the gun was found, the distance and the direction of shooting, the absence of the additional factors of the shooting, whether the victim is shot from behind or in places or angles which suggest that the victim could not have done it and, usually, through the clothing; the direction of blood flow on the body and on the clothing or under the body may indicate the initial position of the victim at the time of shooting, the presence of digital prints on the used gun other than the victim's, the lack of fire marks on the gun found near the victim, etc.

3.2. To Thoroughly Examine the Crime Scene so as to Discover, Hold Down, Pick Up and Preserve All Traces or Other Types of Physical Evidence

This should contribute, as much as possible, to clarifying the following issues:

- the position of the victim and whether any changes intervened compared to the position at the time of the shooting;
- to determine the distance and the direction of shooting and to identify the place where the shooter fired the gun – in homicide – in order to find any possible traces left there (tubes, plantar prints, traces related to transportation);

[1] The possibility of triggering the fire in the given conditions shall be examined.

- to determine what type of gun was used and the type of ammunition;
- the number of shots and their order;
- the correspondence between the gunshot wounds and the traces left on clothing;
- to discover elements indicating a staging of the crime scene;
- whether it is a suicidal, an accident or a homicide.

3.3. Some Requirements Specific to Crime Scene Investigation for Holding down the Overall Picture and the Position of the Clues and Corpora-Delicti

This refers to:

- Taking pictures of and filming the body from every angle so as to determine its relation to doors, windows, pieces of furniture or other items in the room or in the crime area;
- Taking pictures and making metric sketches, with the exact distances between the main elements of the crime scene; for example, one can determine the direction of the shooting based on the place and the position of the fired tube; metric photographs of the wounds shall also be taken, with the traces around (sometimes the trace is in the form of a radial blackened area, where the number of rays indicate the number of grooves or the form of the printing ring, being possible to determine the calibre of the barrel that left that trace);
- Photographing the naked body and the wounds at the morgue, trying to catch on film any blackened spots inside the channel, which might indicate the direction and the trajectory of the bullet;
- Carefully examining the ceiling, the floor, the walls and other places, in order to discover holes of bullets, stains of blood, tubes, caps, etc;
- Picking up, labelling and preserving the clothing for laboratory examination (examining the holes with X rays to ascertain whether the traces are left by the bullet);
- Picking up very carefully the gun that was found, for specific examinations (dactyloscopic, ballistic, etc); measures shall be taken to cover the channel of the barrel of hunting weapons in order to preserve the mercury vapours;
- Carefully marking the guns (on the barrel or on the metal part – not on replaceable pieces), as well as the bullets (usually, on top);
- Preserving the additional traces of the shooting on the hands of the body (putting and sealing them in plastic bags), as well collecting, with special care, the traces of the additional factors found in the gunshot wounds and around them;
- Taking down accurately the situation of the clues, the main objects and the significant details (type, calibre, model, the number and the series of the gun, the place where blood stains were found, their form, direction of flowing on the body and on clothing, etc);
- Using metal detectors to look for the tubes, the gun, in hidden places, on covered fields, rugged grounds, or powerful magnets to search the wells and the ponds in the area.

3.4. The Specificity of Investigations

Apart from the general objectives and issues of these activities, in case of violent deaths caused by firearms, special attention shall be paid to determining the place where the gun was fired or at least the direction of the shooting, to collecting the data regarding the circumstances of the case – the time when

it occurred, the conditions and the place where the gunshot was heard, to the operative verification of the firearms belonging to the people who were present or moved inside the area and, primarily, the people who are known to officially possess firearms or signalled as possessing such firearms clandestinely, to turn the checks towards a particular direction when the type of weapon is known, to the judicious use of data referring to the personal particulars of the suspects and to conducting the necessary experiments with regard to:

- the possibility to hear the shot or to see some particular circumstances of the case from some particular spots;
- the determination of the distance and direction of shooting;
- the possibility of the bullet to rebound under certain conditions;
- the check of some negative circumstances of the case (the victim was moved, the position of the gun was changed, blood stains are missing).

Additionally, in order to examine the traces left by the gunshot, to determine the direction, the distance and the angle of the shooting, as well as for clarifying the various circumstances of the homicide, the prosecution bodies and the specialists who are present at the crime scene must take into account other factors too, among which the *elements of the shooting* have a significant weight:

➢ *the speed of the bullet, of the projectile* – determined by the type and quantity of powder, the weight and the length of the barrel; due to gases resulting from the burning of powder, the pressure is very high and it continues to grow rapidly with the first centimetres covered by the bullet on the barrel. While the speed of the bullet rises inside the barrel, the pressure of gases lowers down to 420-380 kgf/cm^2 when the bullet leaves the barrel. For this reason, the criminalistics implications of the interior ballistic phenomena occur especially in case of modified weapons, with the barrel cut, where the bullet leaves the barrel with a reduced initial speed - 400-500 m/s, and the maximum gas pressure, a fact which causes a change of trajectory. The increase of the initial speed of the bullet increases the range of the gun, the piercing force of the bullet and its killing effect. (Berchеşan & Ruiu, 2004, p. 392)

➢ The *trajectory* is the length covered by the centre of gravity of the bullet in the air, from the moment it leaves the barrel until it falls down, being influenced both by the resistance of the air and by gravitation. The effect of these two factors is the reduction of speed and the tendency of the bullet to overturn, inclusively its gradual descent under the throw line. For criminalistics, only a part of the elements of the trajectory are of interest, namely the line and angle of firing, the throw line, the incidence point and angle and the distance of shooting.

➢ The *range of the gun*[1] is the distance from the origin of the trajectory to the point of falling, measured in the horizontal plan. Weapons have a theoretic range (the distance at which the bullet is thrown) and a practical range (the longest distance at which the target may be hit), but in point of ballistics, the effective range is relevant, meaning the longest distance at which the bullet maintains its precision and its destructive force.

➢ The *blow back of the gun*, due to the pressure of gases put on the frontal wall of the stopper through the tube of the cartridge. This should be taken into account by those who carry out the crime scene investigation, the digital prints discovered on the butt and the attachments of the gun having (due to the blow back force) a dynamic aspect. Moreover, the correct interpretation of these elements ensures a premise for discovering a murder disguised as suicide. Therefore, if the perpetrator simulated a

[1] Or the distance of shooting.

suicidal, placing the gun in the victim's hand, both the butt of the gun and its attachments will carry also static traces.

- The *piercing force of the bullet*[1] is an element, not an insignificant one, which can help to determine the distance at which the gun was fired.

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[1] Determined by its kinetic energy, its form and hardness, the angle of incidence and the density of the fabric at the impact spot.

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Reflections on the Petition Right Juridical Warranty in the Romanian Constitutional Law Doctrine

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Abstract: The petition right, as a fundamental right of the Romanian citizen has the character of juridical warranty because this right is guaranteed by the Constitution and also is a substantive law. By granting the petition right is assuring a good administration of the state in the citizens' favor. The aims and the objectives of the present research is to present the fundamental petition right of the Romanian citizen at the doctrine level and the characteristics of this guarantee right. Regarding the prior work, the analyses conducted so far have dealt less frequently with the topic approached here. The approach used in the present study was to analyze the Romanian constitutional doctrine. The results of the present study are important to the social society because it makes the correlation between the petition right and the good administration. The paper is original and it brings value from the perspective of the granting the right to petition at a constitutional level which ensures the protection of the citizens in relation with the public authorities and also to other rights, liberties and citizen interests, thus ensuring a good administration of the State to the benefit of its citizens.

Keywords: petition right; good administration; guarantees rights; Romanian constitution; protection of citizens;

1. Introduction

In the present context of a democratic society, we have considered that the aspects approached by this research were particularly important given the society's inclination towards a continuous improvement of its administration, the citizens' aspirations to improve the quality of life and the relation with the public authorities, the need for public safety and security and the need to grant the fundamental citizen rights in a constitutional state.

The doctrine considers the right of petition a guarantee which ensures the accomplishment of the other fundamental citizen rights and freedoms.

Being a subjective right, the right of petition provides a juridical warranty, since it benefits, on one hand from the systems granting the constitutional rule and, on the other, from the juridical warranty of a subjective right.

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2. Doctrine Landmarks with Regard to the Romanian Citizens' Fundamental Right of Petition

The right of petition is a fundamental citizen right which grants a right to demand and to make requests before the authorities of the state. Therefore, this right to demand, being an essential right, warrants the existence and the observance of all other fundamental citizen rights.

The right of petition grants the citizen's civil liberties.

One of the iconic documents where we can find the historical sources of human rights is Magna Carta, a document issued in England in 1215.

Our research revealed that the right of petition was the first fundamental human right acknowledged by Magna Carta in 1215. Therefore, in the content of the aforesaid document, in Chapter 61 (in other translations Chapter 70 [2] – author's note), we have found that a petition announcing an act of injustice should be settled within 40 days.

After 1215, we have identified another British document which is among the first constitutional provisions, namely the Bill of Rights, which in 1689, in Article 5, acknowledged that the citizens who brought petitions to the king would not be condemned or accused for making them.

A first author defined the fundamental rights as being those *"subjective citizen rights, essential to human dignity, to the free development of human personality, to the preservation of human rights, which express some supreme values, rights which are proclaimed by the Constitution and granted by the Constitution and the law, in the economic, social, politic, cultural and historical context of a particular society established as a state."* (Pavel, 2004, p. 77)

The subjective rights are the *"prerogatives or powers granted by the Constitution and the law to the will of the subjects of the legal relation to act or not in a particular way, which involves the recognition of an area of individual autonomy, or to demand the other subject or subjects some appropriate attitude and, ultimately, to ask for the protection of their right by the state authorities, in case that it is unlawfully reflected on."* (Pavel, 2004, p. 77)

A second author held that *"fundamental rights are subjective rights. Together with the other subjective rights and their associated duties, they form the legal status of a citizen."* (Muraru & Tănăsescu, 2016, p. 148)

Fundamental rights are *essential rights* for the Romanian citizens. The fundamental rights and freedoms being *supreme values* and being granted by the Constitution, they form a *system of juridical warranties for the Romanian citizens, for their dignity, values and living*.

In respect of the content of the citizen rights and freedoms, a content which implicitly leads to the accomplishment of these rights, the same author classified the citizen rights and freedoms into several categories: *"A first category is formed by inviolabilities, meaning those rights and freedoms which, through their content, ensure the life, the possibility of free movement, the physical and psychological safety, as well as the safety of an individual's home. We include in this category: the right to life, the right to physical integrity, the right to psychological integrity, the personal freedom, the right to defend oneself, the right of free movement, the right of protection for one's intimate, family and private life, the inviolability of the home. The second category is formed by social-economic and cultural rights and freedoms, meaning those rights and freedoms which, through their content, ensure social and material conditions for living, education and the possibility to protect them. We include in*

this category: the right to learning; the access to culture; the right to protect one's health; the right to a healthy environment; the right to work and to the social protection of labour; the right to strike; the right to property; the right to inherit; the right to a decent living; to right to marry; children's and youth's right to protection and assistance; the right of people with disabilities to special protection. The third category covers exclusively political rights, meaning those rights which, through their content, may be exercised by citizens only for participation in the governance. We include in this category: the right to vote, the right to be elected (inclusively to the European Parliament). The fourth category is that of social-political rights and freedoms, meaning those rights and freedoms which, through their content, may be exercised by citizens at their choice, either by solving some social and spiritual problems, or by participating in the governance. These rights and freedoms give the possibility to express thoughts and opinions, and for this reason they are often called freedoms of opinion. We include in this category: the freedom of conscience, the freedom of expression, the right to information, the freedom of meeting, the right to association, the secrecy of correspondence. Finally, the fifth category is formed by the rights - guarantees, meaning those rights which, through their content, mainly play the role of constitutional guarantees. We include in this category: the right of petition, the right of a person aggrieved by a public authority." (Muraru & Tănăsescu, 2016, pp. 155-156)

A third author said about the right of petition that *"it has some special significance for the relations between a person and the public authorities, being not only a means to request them to fulfil the duties that fall on them, but also a means of control for their activity."* (Deleanu, 2006, p. 529)

A fourth author, with regard to the right of petition, held that *"citizens' petitions may tend to enforce not only rights, but also some simple personal interests. Consequently, even if a personal interest, which is not protected by the possibility, sanctioned by the law, to request a third party to accomplish an action or to refrain from it, is not a subjective right, it can however be protected through the right of petition."* (Drăganu, 1997, p. 185)

The same author also held that, in respect of the right of petition, *"it can be applied both in the political field, and in the economic, social and cultural one, which confers as a matter of fact its characteristic of social-political right."* (Drăganu, 1997, p. 185)

In our opinion, citizens benefit from the right of petition, as a fundamental right, this being a subjective citizen right, *a right which is essential to the protection of fundamental rights and represents a juridical warranty for citizens, ensuring and guaranteeing the good administration by the state in favour of its citizens*.

The subjective right characteristic of the right of petition gives *some prerogatives to the citizen to benefit from its regulatory force, to expect some appropriate behaviour from the passive subject, and in case that the passive subject does not fulfil its duty, the citizen may appeal to the coercive force of the state to have his right accomplished and defended*.

According to paragraph 4 of Article 51 of the Constitution of Romania, *"the exercise of the right of petition is free of charge"* and so it ensures the citizen's free and unconditioned right of access before public authorities. At the same time, according to paragraph 4 of the same article *"public authorities are obligated to answer petitions within the terms and under the conditions established by the law"*, ensuring for the citizen, through the fundamental law, also the right to receive an answer to the requests addressed to public authorities within the term provided by law.

The public authorities that have been approached have the obligation to answer a citizen who formulated a petition within 30 days from its registration at the latest, no matter if the solution is

favourable or unfavourable, according to Article 8 of the Government Decree no. 27/2002[1] on the settling of petitions, approved with changes and additions by Law 233/2002.

The Constitutional Court of Romania pronounced a decision to settle an exception of unconstitutionality concerned with the fact that "*the object of the Government Decree no. 27/2002 is to regulate how citizens exercise their right to address petitions formulated in their name to public authorities and institutions, as well as how these petitions are settled, as an expression of the right of petition stipulated by Article 51 of the Constitution, determining the responsibilities of the public authorities and institutions to which the petitions are addressed, as well as the terms in which they have to settle the petitions, as provided for in paragraph (4) of the same article."*[2]

Pursuant to Article 2 of the regulatory document mentioned above *"petition is understood as being the request, the complaint, the announcement or the proposal formulated in writing, or by electronic mail, which a citizen or a legally established organisation may address to central and local public authorities and institutions, to decentralised public services of the ministries and of other central bodies, to national companies, to companies of county or local interest, as well as to autonomous municipal companies, hereinafter called public authorities and institutions."*

Therefore, several types of petitions and how they are to be settled by the public authorities have been brought under regulation, granting the citizen's right to address any public authority and determining in this respect also the obligation of such authorities to answer the citizens' petitions, so guaranteeing for the citizens the good administration of their interests by the public authorities.

Every public institution had the obligation under the provisions of the Government Decision 27/2002 to organise a separate compartment for public relations and to establish a working procedure for the settlement of petitions. Moreover, the aforesaid document has also provided for the sanctions for the public servants who do not comply with the terms for the settlement of petitions, who settle them beyond the legal framework or do not comply with the procedure for the registration and distribution of petitions.

The right of petition has also been granted by the Constitution of the Republic of Moldova[3] in Article 52 which states that: *"(1) Citizens have the right to address public authorities through petitions formulated only in the name of their signatories. (2) Legally established organisations have the right to address petitions exclusively in the name of the groups they represent."*

With regard to Article 52 of the Constitution of the Republic of Moldova, precisely the right of petition, we retain that this is a right granted to citizens and legally established organisations.

The examination of anonymous petitions was declared unconstitutional by the Constitutional Court of the Republic of Moldova: *"Citizens have the right to address public authorities through petitions formulated only in the name of their signatories (...) it is therefore clear that any petition is to be signed, so it must contain the identification data of the petitioner. The Court held that, through its*

[1] Government Decision no. 27/2002 on the settling of petitions, approved with changes and additions by Law 233/2002, published in Monitorul Oficial al României, Part I, no. 84 of 1 February 2002.
[2] The Decision of the Constitutional Court of Romania no. 307 of 29 March 2007, published in Monitorul Oficial, Part I, no. 279 of 26 April 2007.
[3] The Constitution of the Republic of Moldova, published in Monitorul Oficial no. 1 of the Republic of Moldova on 12 August 1994.

express formulation, the constitutional text neither establishes, nor provides legal protection for a right to anonymous petitioning."[1]

Upon the completion of this study, we could see the need of the citizen to benefit from good administration by public authorities, to have his needs understood, to receive answers to his petitions and to receive clarifications from a public institution for any possible ambiguity.

In our opinion, good administration is ensured through the accomplishment of the rights that are guarantees. Therefore, the rights that are guarantees ensure the accomplishment of good administration. The protection of citizen rights before public authorities is provided at constitutional level through the right of petition and the right of a person aggrieved by a public authority.

The right to good administration was consecrated *expressis verbis* in Article 41 of the Charter of Fundamental Rights of the European Union. [42] This article is included in Chapter V of the Charter named *Citizens' Rights.* Once the Lisbon Treaty came into effect, the Charter of Fundamental Rights of the European Union [43] became *legally binding*, and this has led to some *substantial reinforcement of the role of the rule of law* in the governance of the European Union.

The right to good administration was also stipulated in the Recommendation CM/Rec (2007)7 of the Committee of Ministers of the member states of the Council of Europe. [44]

The Committee of Ministers, in their Recommendation, considered *"that good administration is an aspect of good governance; that it is not just concerned with legal arrangements; that it depends on the quality of organisation and management; that it must meet the requirements of effectiveness, efficiency and relevance to the needs of society; that it must maintain, uphold and safeguard public property and other public interests; that it must comply with budgetary requirements; and that it must preclude all forms of corruption."*[2]

Moreover, the Committee of Ministers, in the Preamble of the Recommendation, stated that *good administration is dependent on adequate human resources available to the public authorities and on the qualities and appropriate training of public officials.*

3. Conclusions

The purpose of this paper was to analyse the juridical warranties of the right of petition in the Romanian constitutional doctrine.

This research is important considering the current situation of the Romanian society, and the citizen's need to improve the quality of life, the relation with the public authorities and the respect for his fundamental rights.

In a constitutional state, good administration is ensured through the accomplishment of the rights that are guarantees. Therefore, the protection of citizen rights before the public authorities is provided at constitutional level by granting the right of petition.

Upon the completion of this study, we could see the need of the citizen to benefit from good

[1] Decision no. 25 of 17.09.2013 for the control of the constitutionality of some provisions referring to the examination of anonymous petitions, published in Monitorul Oficial of the Republic of Moldova no. 276-280/44 of 29.11.2013.
[2] Recommendation CM/Rec(2007)7 of the Committee of Ministers to the member states of the Council of Europe, adopted by the Committee of Ministers on 20 June 2007 at the 999bis Meeting of the Deputies of the Ministers of the member states of the Council of Europe. Web Page. Retrieved from https://wcd.coe.int/ViewDoc.jsp?p=&id=1155877&Site=CM&direct=true, date: 03.31.2018.

administration by public authorities, to have his needs understood, to receive answers to his petitions and to receive clarifications from a Romanian public institution for any possible ambiguity when he needs them.

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Probative Value of Data Obtained Through Technical Surveillance

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Abstract: The present paper aims at analyzing the probative value of data obtained through technical surveillance, as the efficiency of the fight against corruption and organized crime calls for the use of modern investigative means and judicial bodies increasingly resort to the use of technical surveillance to obtain evidence in criminal proceedings. Statistical data from the courts attests to the large number of requests for authorization of interception of communications, a context in which we can state that this measure became a routine measure in criminal cases. Usage of intercepted communications as evidence obtained in other cases raises serious questions as to ensuring the proportionality of the interference with the right to privacy and with the pursued scope which must be legitimate, concrete, known, verified and analyzed by the judge at the time of authorization and not a future one, hypothetically, which may later arise in other causes. Another question marks the legal basis, in terms of quality and compatibility with the principle of the preeminence of law, the storage and archiving of communications for a long time, for use in other future causes. The academic and practical interest of the present study lies in the fact that it addresses both law theorists and practitioners in the field as it analyzes how judicial bodies can use data relevant to the criminal process, obtained through modern surveillance techniques.

Keywords: technical surveillance; interception; wiretap; probative value

1. Valuation of Legally Obtained Data Resulting from the Technical Surveillance as Evidence

Intercepted and recorded conversations or communications relating to the deed that is the object of the prosecution or which contribute to the identification or localization of persons, are transcribed by the prosecutor or the criminal investigation body in a minute mentioning the issued warrant, telephone numbers, identifying information of systems or access points, the names of the person who made the communications and the date and time of each call or communication. The minutes are authenticated by the prosecutor.

The minutes obtained under the Code of Criminal Procedure constitute written evidence on the facts and circumstances found during the use of technical surveillance measures. (Gradinaru, 2014)

A copy of the support containing the data from the technical surveillance shall be attached to the minutes in a sealed envelope with the seal of the criminal prosecution body. Given that the intercept operation is not susceptible to being fixed on a particular support, what is preserved is the recording.

Referred to the majority opinion, according to which the minutes of the recordings of communications and conversations are means of proof, an antinomic point of view was also stated. Thus, it is argued

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that drafting minutes and transcripts are only a guarantee and a certification that the records were done correctly, as well as a mean to facilitate their consultation, but they are not evidences in criminal cases.

As for the written content of the conversation, it must be done under certain conditions. Thus, "the reproduction is made in the literal form of the content of the conversation, keeping within the permissible limits the specificity of the speech of the persons involved, preserving the regionalisms, the slogan or the jargon terms, the pronouns of pronunciation". One should not neglect the use of punctuation, phraseology in rendering expression nuances, or the tone of voice, which in certain situations, could lead to a different connotation of the conversation in relation to the meaning of the message transmitted by the interlocutors. It is also necessary to take into account the explanation of some words - regionalisms, acronyms, technical or argotic terms, which can lead to a subjective interpretation of the dialogue, as it happens in many cases in practice. (Girbulet & Gradinaru, 2012)

From this perspective, we believe that, in order to establish the truth and correct assessment of the evidence, it is very important that audio recordings contain the conversations entirely, not just fragmentarily, as is often the case in practice.

In fact, art. 143 par. 4 of the Criminal procedure code no longer unequivocally establishes the need for full transcription of recorded conversations and not just passages from them. The legislator renounces the attribute "integral" which gives rise to the ambiguity. Our claims are based on the provisions of Art. 142 para. 6 of the Criminal procedure code, which imply the existence of new evidence to show that no essential issues related to finding the truth have been selected and rendered so that the judge can request the sealed files from the prosecutor's office.

The report is certified for authenticity by the prosecutor, thereby understanding the prosecutor who carries out or supervises the criminal prosecution, and the legislator renounces the prosecutor's individualization from this perspective in the context in which he expressly conditions the performance of these probationary procedures to start criminal prosecution. In the absence of certification of the minutes by the prosecutor, we find that the courts (Decision no. 275, 2010) have argued the removal of the recordings from evidence when they have appreciated the solution, given that the purpose of certification is to guarantee the reality and accuracy of the information contained in the minutes.

2. Probative Value in Terms Of Record Authenticity

In order for this investigation technique to become a verifiable evidence, the data resulting from the use of the technical surveillance measures should not be altered in any way and retain the original support on which they have been recorded to meet the requirements laid down in jurisprudence of the European Court of Justice. (Gradinaru, 2012)

Under the conditions of a society in which technology is advanced, the risk of altering this evidence is real, so the task of criminal investigating officers alone is to secure their content.

A possible expertise in voice and speech has as its object, according to the Forensic Dictionary, "the scientific research of a complex of individual general characteristics, relatively unchanging voice and speech for the authentication of the phonogram of gender, identity, disguise of voice and speech; imitation of voice".

In order to meet this requirement, the original record must remain "unaltered" as a support and content.

The attempt of a person to reproduce in the process of speech the general and individual characteristics, relatively unchanging the voice of another person, by imitation or by technical means, can be demonstrated by forensic expertise, which is why the legislator admitted the verification of these means of proof. (Gradinaru, 2011)

With such a regulation, it is necessary to set up a "national interception structure" with possible territorial subdivisions to which criminal investigation bodies and prosecutors are detached, so that the legal requirements for carrying out such probative procedures are met.

It should also be noted that, in any case, the judicial authorities must pay particular attention to the risk of forgery of records, which is often done by taking over only parts of conversations or communications that have taken place in the past, and declaring them to be newly registered or removing parts of conversations or communications, or even transposing or removing images. (Gradinaru, 2012)

Thus, an audio recording is considered genuine if it was made simultaneously with the acoustic events contained therein and is not a copy, if it does not contain any interventions (erasures, insertions, interleaving, phrases or counterfeit elements) and if it was performed with the technical equipment submitted by the registrant.

Therefore, art. 172 et seq. of the Criminal procedure code, provide the possibility of technical expertise of the originality and continuity of the records, at the request of the prosecutor, of the parties or ex officio, in case there are doubts about the correctness of the recordings, in whole or in part, especially if they are not corroborated with all the administered evidences.

Therefore, we consider that audio or video recordings can be used as evidence in the criminal trial by themselves, unless challenged and confirmed by technical expertise, if there were doubts about their compliance with reality. If the expertise reveals the lack of authenticity of the records, they cannot be retained as means of proof in solving the criminal case, thereby removing any probative value of the interceptions and intercepted communications in the case by applying art. 102 par. 2 of the Criminal procedure code.

3. Usage as Evidence Exclusively of the Intercepted Communications that have been transcribed in a Certified Minute

The evidence has no established value in advance, the assessment of each evidence is carried out by the judicial bodies after examination of all the evidence administered and, on the other hand, the evidence obtained illegally cannot be used in the criminal proceedings. (Gradinaru, 2012)

Thus, recordings of communications or conversations can be used as means of evidence if from their content can be extracted facts or circumstances likely to contribute to finding the truth. They are not evidence by simply making them, but only if they are recorded in a procedural act, that is, the minute of transcription, and if there are facts or circumstances likely to contribute to finding the truth. (Gradinaru, 2016)

Therefore, the doctrine highlighted that audio-video recordings of conversations and communications are "subject to the principle of free choice of evidence. As a consequence, they have the same probative value as any other evidence, and may be retained by the judicial bodies in the determination of the factual situation of a criminal case but also they can be reasonably removed". (Udroiu, 2014)

We appreciate, in terms of the probative value of the evidence provided by art. 143 par. 4 of the Criminal procedure code that in some situations, which are extremely rare in practice, intercepted and recorded conversations or communications can provide valuable information as direct evidence. This hypothesis intervenes only in the context in which their content reveals the constitutive elements of the offense that is the subject of the criminal case and the guilt of the defendant. However, in most cases, the conversations recorded and reproduced in full in the minutes provided by art. 143 paragraph 4 of the Criminal procedure code can only constitute indirect evidence, which must be corroborated with other direct or indirect evidence from the criminal case. (Girbulet & Gradinaru, 2012)

According to an opinion, "the certification operation is intended guarantee the reality and accuracy of the information it contains. The lack of such certification, considered possible more at a theoretical level and which can easily be covered, could be sanctioned by the relative nullity provided by art. 282 of the Criminal procedure code".

It is appreciated in the literature (Gradinaru, 2012) that according to the provisions of art. 102 par. 2 of the Criminal procedure code, the legislator provided for a specific procedural penalty, which acts and has the effects of absolute nullity. "It is sufficient to prove that the evidence was obtained in violation of the provisions governing the way in which it was obtained in order to be of no probative value, with the consequence that it could not be used in the criminal proceedings without the need for proof of a prejudice".

We consider that the lack of certification of the minutes of transcription of the intercepted conversations attracts their relative nullity, the harm being evident by not verifying them by the prosecutor, the only procedural remedy consisting in their removal from the material evidence.

4. Probative Value of Information Obtained from the use of Technical Surveillance Measures by the Romanian Intelligence Service

The Law on Romanian National Security provides in the provisions of Art. 21 that the data and information of national security interest resulting from the authorized activities, if it indicates the preparation or committing of an act provided by the criminal law, are transcribed in writing and transmitted to the criminal prosecution bodies, according to art. 61 of the Criminal procedure code.

In addition, Law no. 14/1992 on the organization and functioning of the Romanian Intelligence Service stipulates in art. 11 the fact that, if the specific activities result in data and information indicating the preparation or committing of an act provided by the criminal law, they are transmitted to the criminal prosecution bodies under the conditions provided by art. 61 of the Criminal procedure code.

Under such conditions, referring to the provisions of art. 61 of the Criminal procedure code we note that the acts issued by the operative agents with attributions on the line of national security are acts of discovery and if they fulfill the conditions of para. 1 of the same law may be the basis for the referral of the criminal investigation bodies. (Gradinaru, 2014)

The records drawn up by the intelligence service operatives in which the results of the technical surveillance are recorded bear the names of the discovery documents and they can constitute evidence only insofar as the facts are perceived personally by the official who draws up the document or in case of interception and registration communications, relevant information from a criminal point of view is

not the result of immediate personal observation, but derives from conversations carried out by suspects or subjects of surveillance. (Gradinaru, 2013)

Therefore, we consider that the documents in which the results of the interception and recording of communications operations carried out pursuant to Law no. 51/1991 cannot be assimilated to the minutes of transcription or certification of registrations, within the meaning of Article 143 of the Criminal procedure code, these acts of inquiry by means of which the special investigative procedures are recorded have the legal nature of documents outside the criminal trial, drawn up by bodies other than the judiciary ones.

Under such circumstances, we believe that the information contained in the discovery documents cannot be used in the criminal case, but can only help to organize the framework needed to obtain the relevant evidence from another source (for example, pursuing the flagrant crime).

Problems highlighted in practice (Gradinaru, 2013) are related to how intelligence services and intelligence agents understand to select information items relevant to establishing the existence or non-existence of a crime and to clarify the circumstances of the case, from the communications of the persons monitored throughout the period of time specified in the warrant for the authorization of surveillance measures.

Sometimes in practice the informational process in the field of state security is confused with the evidence from the criminal procedural law, given that the documents, in which the results of the interception and recording of the conversations or communications of the person under the Law no. 51/1991, are transcribed are assimilated to the minutes of transcription and certification of registrations within the meaning of art. 143 of the Criminal procedure code. In fact, the certification of records becomes a formal activity by the prosecutor who keeps the full content of the "transcript note", without being able to check the possible forms of handling the records received from the secret services.

All these aspects of the cases still pending in court in different procedural stages, attest to the fact that information resulting from national security investigation techniques is increasingly used in the probation of criminal cases - representing the basis of indictments - without proving the lawfulness of the way in which they were obtained, a circumstance which presupposes, first of all, the verification of the authorization act.

As regards the technical staff called upon to assist the wiretapping, the legal provisions prohibit them from assuming their powers as a criminal investigative body, the interception operation being exclusively within the competence of the prosecutor or the criminal investigation body, the specialized workers within the police or specialized authorities of the state, which were expressly delegated by the prosecutor.

Under such conditions, if the Romanian Intelligence Service performs interceptions, the information obtained with such warrants cannot be capitalized in criminal cases because they have not been previously obtained in a criminal case.

The absence of a criminal case presupposes that criminal investigation cannot be carried out, so the information thus obtained can only be at the base of the commencement of criminal prosecution. Thus, the prosecutor to whom this information is presented may use them to justify the provisional injunction on the basis of which he has intercepted and for requesting the judge's authorization for technical surveillance.

In this respect, we consider that it is necessary, by legal provisions, to expressly determine the possibility and the conditions for the subsequent use, in criminal cases of ordinary law, as means of proof, of transcripts of communications initially intercepted according with an authorization issued under special legislation related to national security. Such a regulation is necessary in view of: establishing adequate safeguards for the person who was affected by such an interference with his right to privacy, removing the possibility of different interpretations, as to the lawfulness of the use of such recording in other cases and clarifying how the court invested with a case in which such transcripts are used would have the possibility to verify whether or not the interception of communications was legally based on a national security clearance, art. 352 par. 11 of the Criminal procedure code not being clear about these issues.

5. Probative Value of Data Resulting from Technical Surveillance Measures Used in other Cases

From the point of view of the probative value of these means of proof, we need to analyze the provisions of art. 142 para. 5 of the Criminal procedure code, which stipulate that the data resulting from the technical surveillance measures may also be used in another criminal case if they contain conclusive and useful data or information regarding the preparation or perpetration of another offense mentioned in art. 139 par. 2 of the Criminal procedure code.

In doctrine (Gradinaru, 2015) it is noted that the text does not distinguish regarding the data obtained from the technical surveillance, "which leads to the conclusion that all, whether they regard the criminal trial in which they were disposed, or that they are collateral, as is the case with those who do not regard the crime subject of the prosecution or does not contribute to identifying or locating the participants, can be used as evidence in other cases as well".

Also from the perspective of art. 142 para. 5 of the Criminal procedure code we consider that the situation of third parties communicating with the person whose conversations are intercepted and recorded and in respect of which there is the possibility of committing numerous abuses must be analyzed. We assume that these persons rights are flagrantly violated, in addition to the right to privacy, all the guarantees provided by the European Convention and the Constitution in the matter of the right to a fair trial, since in such situations there is no authorization for the interception of the person's communications. (Girbulet & Gradinaru, 2012)

Under such circumstances, we appreciate that these recordings cannot be used as evidence against third parties to which we have referred, only at most, as mere information for possible ex officio referral.

The use of data from technical surveillance as evidence in other cases raises serious questions as to "ensuring the proportionality of the interference with the right to privacy and with the aim pursued", this goal being a legitimate, concrete, known, verified and analyzed by the judge at the time of issuing the warrant and not a future, hypothetically one, which may later arise in other cases. Another question marks the legal basis, in terms of quality and compatibility with the principle of the preeminence of law, the keeping and archiving of communications for a long time, for use in other future causes.

In this matter, the position of the European Court of Human Rights is in the sense that it is contrary to art. 8 of the Convention in the event that some of the applicant's conversations were intercepted and recorded, one of which led to the criminal proceedings against him, although the intercepted telephone line was that of a third person. (Kruslin v. France, 1990)

At the same time, the European Court of Human Rights found violation of art. 8 in Lambert v. France, concerning a judgment of the French Court of Cassation which refuses a person the right to criticize the telephone records to which he was subjected on the ground that they were made from a third party's telephone line. Thus, the Court has appreciated that the French courts have "depleted of the content of the protective mechanism" of the Convention, depriving the protection of the law of a large number of persons (Lambert v. France, 1998), namely those who communicate on other people's telephone line.

In the same sense, a part of the French doctrine states that, if the prosecution continues, the recorded conversations can serve as evidence for the facts that justified the technical surveillance measure, but they cannot be used to prove offenses that were not included in the judge's authorization.

In this respect, we highlight the need to repeal the provisions of Art. 142 para. 5 of the Criminal procedure code, which allow implicit preservation, and archiving of the conversations and communications intercepted and registered in a case, as well as their use in another criminal case. First, we point out that this text is inconsistent with art. 142 para. 6 (which states that data that do not relate to the crime subject of the prosecution or do not contribute to the identification and localization of the participants are archived separately, being destroyed one year after the final settlement of the case) and art. 145 (which obliges the prosecutor to notify the supervised person of this circumstance, which means that in the case referred to in Article 142 paragraph 5, the notification will no longer take place, provided that the data will be used in another file, different from the one in which the not to indict solution was ordered). Secondly, we believe that the text is arbitrary and allows the use of any intercepted communications authorized in a case at any time, in other cases, where the legal requirements for obtaining the warrant may not be met. (Girbulet & Gradinaru, 2012)

We observe that the failure to comply with the provisions on the performance and recovery of data resulting from the surveillance measures is sanctioned by the legislator through the institution of the Preliminary Chamber, which by its rules eliminates the possibility of subsequent resumption of the file to the prosecuting court at the trial stage, the legality of the evidence at this stage and implicitly if the rules on the procedure for issuing the warrant and the authorization are respected.

Regarding this procedure, we support the view expressed in the literature that the verification of the lawfulness of the administration of evidence and of the prosecution, in the absence of the prosecutor, the defendant and the injured party may have negative consequences.

6. The Probative Value of Records Submitted by the Parties

It must be subject to analysis as to the value of the evidence and the state also the audio or video recordings submitted by the parties which, according to art. 139 par. 3 of the Criminal procedure code can be means of proof. It is important to note in this respect that these records are, in most cases, made prior to the commencement of criminal prosecution and even before any investigative act, and can serve as evidence when dealing with their own conversations or communications "which they have carried with third parties".

The doctrine (Udroiu & Predescu, 2008) criticized the provisions of art. 139 paragraph 3 of the Criminal procedure code, according to which the parties or any other persons may make recordings of their communications or conversations with third parties without the authorization of the court, irrespective of the nature of the offense or the existence or non-existence of criminal proceedings, considering that "arbitrary interference with the right to private life is allowed, with the registered

persons being deprived of the minimum protection required by the preeminence of the right in a democratic society".

In this regard, when recording with devices (e.g. a tape recorder) used by the whistleblower or any other person in a conversation with the suspect or the defendant, it is appreciated in the literature that it does not meet the requirements of art. 139 par. 3 of the Criminal procedure code and cannot be means of proof because it is obtained in violation of the provisions of art. 26 par. 1 of the Constitution and art. 101 par. 3 of the Criminal procedure code given that it can be obtained by instigation.

It is considered that "the record provided by the denouncer to the criminal prosecution authorities, being obtained in secret, in violation of the values observed and defended by the Constitution and in order to obtain evidence against the defendant, following his determination to commit an offense, cannot be qualified as means of proof", since the requirements of the art. 139 par. 3 of the Criminal procedure code are not met. (Gradinaru, 2017)

We can argue that this type of record cannot be used for the purposes of obtaining evidence also motivated by the fact that it was not carried out with the lawful prosecution initiated, that is, in the criminal proceedings, but on the contrary for the purpose of starting the criminal proceedings.

We agree with the view expressed in the scientific literature (Gradinaru, 2014), according to which it is useless to enumerate, in the art. 97 paragraph 2 lit. e) of the Criminal procedure code of both the written documents, as well as the expert reports and the minutes, motivated by the fact that they fall also into the category of documents. We also point out a lack of correlation with the provisions of art. 139 par. 3 of the Criminal procedure code, which provide that records made by parties or other persons, when dealing with their own conversations or communications they have with third parties, constitute evidence, with those of art. 97 paragraph 2 of the Criminal procedure code, which, as we have seen, no longer include the evidence among the means of proof. Our assertions arise where, whether performed by authorized parties or organs, audio or video recordings cannot differ in their legal nature, being provided as probative methods and as evidence.

In view of the fact that, in practice, telephone listings are used as proof of value, we emphasize the need for an explicit regulation of the conditions, the cases and the time limits in which they can be stored, by the mobile companies or by other authorized agencies, request and use of the list of telephone conversations carried out by a person, the telephone numbers between them, the hours at which they took place and the locations from and to which the telephone signal was issued. (Gradinaru, 2011)

These explicit regulations are imposed in the context in which the Constitutional Court admitted on 8.07.2014 the exception of the unconstitutionality of the provisions of Law no. 82/2012 regarding the retention of the data generated or processed by the providers of public electronic communications networks and of the providers of publicly available electronic communications services, as well as the modification and completion of the Law no. 506/2004 regarding the processing of personal data and the protection of privacy in the electronic communications sector.

For the same reason, we also consider that it is necessary to explicitly regulate the conditions in which criminal investigating authorities can "read" the data (the list of calls and messages made or received, or the pictures and audio-video recordings made by the mobile phone by the legitimate holder) from the mobile phones of a person, since in practice there are still many situations in which this is done without the judge's authorization, considering, on the one hand, that the relevant provisions (Articles 54-57) of Law no. 161/2003 are not incidents since the phone cannot be considered as a "computer

system or data storage device" and, on the other hand, that this "reading" activity does not involve access to an information system or its research.

Conclusions

Conducting technical surveillance can take place only under the conditions and as per limits established by law, otherwise these will be removed from the trial, the solution of returning the case to the prosecutor being unacceptable.

Intercepting and recording conversations or communications performed by phone or any other electronic means can be made only in case of crimes expressly provided by law or in case of serious crimes, and not for any crimes.

It is necessary that the court orders playing audio-video recordings or listen to the audio recordings, thus perceiving the evidences thoroughly and having a greater capability to find the truth than in the situation in which these evidences are perceived from the transcripts.

The institution for certifying the recordings was regulated for attesting the authenticity of the transcripts of the conversations or communications, to eliminate any possibility of alteration or counterfeiting. This regulation represents in fact an a posteriori guarantee in conducting the wiretap and their transcription in the context in which the expertise can be conducted by an independent and impartial authority.

Taking into account the aforementioned aspects, we notice that the legislator, at the moment of drafting the text of the law, wanted to regulate an additional condition for the administration of the relevant facts obtained by electronic surveillance, the purpose being to provide additional safeguards against arbitrariness by confirming the authenticity of the facts found by the prosecutor in his transcripts (reports).

More than that, in the absence of performing a selection of recordings used as evidence, of the transcription of this information in minutes (reports), and of validating these documents without attestation by the prosecution, the recordings, even if they were legally obtained, have no value in terms of probation.

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The Fundamental Right to a Healthy and Ecologically Harmonious Environment

Liliana Niculescu[1]

Abstract: The right to a healty enviroment is a fundamental right of very person in a state. It is absolutely natural for each person to demand/to live in a healty and unpolluted enviroment. The fight for the prevention of pollution and the elimination of its consequences should be a duty of every citizen of state. The establishing by law of numerous obligations to protect the enviroment, both by state and private companies does not diminish the importance of the moral and legal obligation of every citizen to protect the enviroment. The state recognise the right of every person to a healthy and ecologically balanced enviroment, providing the legal framework for exerting this right. The constitutional recognition of such a right is important for the economy, for enviromental legislation and for the enviromental protection/policy in general.

Keywords: enviroment; enviromental protection; pollution; healthy enviroment; ecologically balanced

1. Introduction

1.1. Preliminaries

Out of the corpus of fundamental rights and freedoms of men, that are internationally acknowledged and also by over-national institutions, the right to a healthy and ecologically harmonious environment represents the dynamic transposing of the superior interest of our generation into a general juridical and objective norm of law meant to "ensure an acceptable environment even at the global level, that encourages the development[2] of all the people in the world.

By acknowledging and admitting the fact that the right to a healthy environment represents a fundamental right, crowned with the more and more frequent Constitutional establishment, allows us to hope for the surpassing of the procedural and jurisprudential limits of the sphere of the respective right in order to also ensure it by some expressly given directive within the European Convention in order to protect the fundamental rights and freedoms of men. *A fortiori* the passing through this first stage – the legislative establishment will determine the national legislator to establish new duties meant to ensure the proper juridical context that would turn this right to advantage.

It was firstly internationally proclaimed at the First World Conference of the United Nations regarding the environment (Stockholm, June 1972) and adopted at the level of the states, and there is a certain difference between the national and the international legislation, the communitarian one. This difference appears because of the difficulties in effectively and materially ensuring this right and the

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[2] The African Charta of the rights of men and the peoples, 1981, art. 24.

lack of establishing a concrete threshold starting from which any prejudice provoked in terms of the environment represents a violation of a certain right that man has regarding the environment. (Duțu, 2010, p. 122 apud Sands, 1995, p. 222)

Within the context where the ecological issues take shape more and more we may notice that the fundamental right to a healthy and ecologically harmonious environment does not protect only a particular common interest, but it is of interest to the humankind as a whole. Its exceptional value is underlined by the status of the environment as the common heritage of the humankind. (Duțu, 2010, p. 112)

We may also notice that the right to a healthy environment can be correlated to the general and negative obligation not to prejudice its components in such a way that a pronounced decrease of its capacity to regenerate the ecosystems would not occur and the state of the environment would not be endangered as a result of man's abusive interference. The right to a healthy environment also implies accomplishing certain obligations so that the environment should be protected. Because the fundamental rights represent the content of the relationships between the physical persons and the state, it means that the obligations correlated to these rights belong to the state that recognizes them and guarantees them. In this way, the obligations of the states to take the legal, administrative, and any other measures that are necessary for the implementation of the right to a healthy environment is provisioned. The measures in discussion here have to have as a purpose the provenance of the degradation of the environment, the establishing of the necessary remedies and the settlement of the long-lasting employment of the natural resources. (Marinescu, 2008, p. 395)

In correlation with the right of ownership and in analogy with the right to health, the right to a healthy and ecologically harmonious environment for a good life regains an increasingly pronounced position within the whole of the fundamental rights that is indispensable to the surviving of the human being as a species among other species. (Duțu, 2010, p. 122) In this way, the present paper intends to offer an incursion within the historical and social-economical context wherein the idea of legally provisioning this essential right sprang as well as of presenting the way in which the vital right of the actual and future generation – the right to a healthy and ecologically harmonious environment – is admitted and guaranteed at the procedural and jurisprudential levels.

2. The Premises of the Appearance of the Right to a Healthy and Ecologically Harmonious Environment

The necessity for introducing a right or, in other words, a certain juridical norm meant to protect the inhabitants of the planet from the toxic effects of pollution is tightly related to the abusive intruding of man on the components of the environment. The main premises of the introducing of the fundamental right to a healthy and ecologically harmonious environment are indissolubly related to the causes and consequences of the degradation of the environment.

There are multiple causes that generate the degradation of the environment and they have serious consequences on the environment and human health. For instance, the demographic evolution determined the increase in the quantity of spoilage generated by human activity, and the accelerated development of the economy has as a result the increasing in the demand for natural resources and their irrational exploitation.

The improper administration of the chemical substances in agriculture causes the progressive degradation of the soil (salinization, compaction etc.) and the soil, once infected, provides toxic food.

As a result, a healthy environment as well as an ecologically equilibrated environment is out of the question within the present context of discussion.

The consequences of the degradation of the environment are seen within the ecological field as adverse reactions of nature against the mankind. The increase in radioactivity of the atmosphere, the soil, and the water, as a result of the nuclear weapons testing, of the accidents from the nuclear power stations have an extremely serious impact on the environment, especially on human health as well as on everything that is alive. The increase of CO, CO_2, NO_2 in the atmospheric concentration as a result of the discharging of the industrial gas and of the exhaust gas led to the global warming, the icebergs melting, the increase in the level of the World Ocean and at a larger frequency of the natural disasters, and the shortage of drinkable water becomes a serious issue. Confronted with the situation when we are to create legislative strategies, the general desire that the anthropic factor should take responsibility for its interventions and be sanctioned for the direct and continuous degradation of the environment appears. On the other hand, the following question arises: "Which is the limit that in case of a considerable prejudice caused to the environment represents a violation of a human right to a healthy environment? In other words, this incertitude regarding the state of the environment and the lack of a global legal establishment painfully confronted us with the ecological crisis of 1960 and only then made us realize that the right to a healthy environment is an essential, and not a common one.

3. The First Steps towards Legal Establishment

The beginning of the ecological crisis is tightly related to the consequences of the Second World War, more precisely, to the period after the 60's. The turn regarding the future of the Earth determined a state of conflict between the human and the natural entities in such a way that the maintaining of the ecological harmony was all of a sudden threatened. Meaning, under such circumstances, the necessity of the legal establishment of the right under discussion appeared, and the first steps left deep traces both within the constitutional provisions of many states and at the level of the strategies of the over-national organisms. As a result, the ecological issue was included among the major preoccupations regarding cooperation both at the national and international levels.

We are interested in this section to actually find the answer to two questions: "Which event is related to the international accreditation of this right?" and "When did the first legal establishment take place?" The long awaited answers started to take shape only after a decade of discussions, debates and propositions on the occasion of which they decided to organize a first conference regarding the environment in its entirety, and the host city was also designated the city of the Nobel prizes that is Stockholm, Sweden. In 1972, the debated had a positive influence on the social-economic tendencies and the legal-constitutional establishments regarding the protection of the environment so that a Declaration regarding the environment was written whose first article mentions the following: "The human being has a fundamental right to freedom, equality and satisfactory living conditions within an environment whose quality allows one to live in dignity and well-being. One has the solemn duty to protect and ameliorate the environment for the present and future generations". The first principle of the declaration shows both the values deeply rooted within the fundaments of the right such as freedom, equality, and dignity, and the appearance of a new right regarding the satisfactory living conditions and well-being within "an environment whose quality (...)".

By imposing itself as a fundamental right of the third generation, the right to a healthy environment not only is a juridical institution *in vogue,* but also is deeply rooted within the nowadays social and

economic realities.[1] Yet, the first establishment of the right to a healthy and ecologically harmonious environment took shape when the African Charta of the rights of men and the peoples appeared in 1981. This provision resides within article 24 that provisions that: „All the peoples have the right to a healthy global satisfactory environment favourable to their development". As a result, it is about a collective right with general and global bearings.

The next provision of the fundamental right can be identified within the Additional Protocol to the American Convention regarding the Human Rights, adopted in San Salvador on the 17th of November 1988, regarding the economic, social and cultural rights. Article 11 of the document "The Right to a Healthy Environment" elucidated two fundamental issues: 1. "Any person has the right to live in a healthy environment and to take advantage from the essential collective equipment"; 2. "The Partner States will encourage the protection, preservation, and the amelioration of the environment".

An important moment in the process of stimulating and promoting the strategies for the protection of the environment and for the ensuring of a healthy environment wherein the human beings on the Earth should lead a life without any pollution at all (be it chemical, thermic, bacteriological, or radioactive) was marked by the proposition of the elaboration of an additional protocol to the European Convention of the Human Rights regarding the conservation of nature (1970), meant to establish and guarantee the right to a healthy and unspoiled environment. Yet, notwithstanding the innovative element deeply involved in the writing of the additional protocol, the majority of the partner states were reserved about this right's guaranteeing. In this way, there is no express establishment within the Convention even in our days.

Unlike, the European Convention, there are other regional instruments that expressly ensure this right such as The African Charta of the Rights of the Peoples and The American Convention of the Human Rights. (Duțu, 2010, p. 124) When it comes to explaining this difference, apparently surprising, between the North and the South regarding the establishment of the fundamental right to a healthy environment is relatively simple: if in the case of the European Convention the provision regarding this right automatically also meant its guaranteeing through the especially established mechanism by means of the document itself, in the other cases (the two regional instruments, African and American) it has a purely declarative character. None the less, even in the case of the San Salvador Protocol, regarding the right to a healthy environment, it does not offer the individual the right to act in front of the inter-American Commission of the human rights in his/her defence.

By analysing the multitude of international documents adopted by the United Nations we may distinguish that in the last two decades a special attention was given to the establishment of the right to a healthy, clean and ecologically harmonious environment. The idea of legally establishing this right represented an object of research and debate, especially after 1990, when the majority of the world states remarked a profound decreasing in or a complete damage of the quality of the environment that surrounds us both as a result of the natural processes and of the abusive interference of man. In this way, the authorities established an objective by which to promote the protection of the environment and the ensuring of all the rights referring to a healthy environment by finding the limit of the maximum admissible concentration (CMA) for a chemical substance to be considered a pollutant. These normative limitations are different from the atmospheric component to the hidrical, edaphical, or of the alimentary products. For instance, article 2 of Decision no. 472 of June, 9 2000 regarding some measures of protection of the quality of the water resources underline the following: 1. The

[1] The Right to a Healthy Environment Within the Constitutions of some Countries of the European Union by Senior Lecturer Matei Diaconu, PhD.

maximum admissible concentrations of the pollutants contained by damaged waters, evacuated into the water resources, in permeable soils or certain depressions provided with natural discharge, as well as the sewerage system, are established for the area of discharge depending on the capacity to receive of the receptors and they are entered into the notifications and the authorizations for the mastering of the waters freed towards the beneficiaries, and the next paragraph shows the commitment of the state to designate an organism of control for the state of the waters in Romania at a certain time and which may ensure a satisfactory atmosphere and adequate conditions for the human beings and for the living organisms: 2. The National Company "Romanian Waters" SA intends by the national system of surveillance of the quality of the waters to see the state of the quality of the resources of water that are at the surface or underneath, as well as the way in which the concentrations of pollutants are respected as they are entered in the official papers emitted for the beneficiaries so that the quality of the waters should be protected.

Even if the steps towards legal establishment of the right to a healthy and ecologically harmonious environment were often accompanied by a multitude of hesitations at the level of guaranteeing this right, still they managed to make the right in discussion to be considered an essential one through certain normative acts having a fundamental character – The African Charta of the Rights of the Man and the Peoples, 1981, article 24 and the American Convention relative to the Human Rights. We hope that, in spite of all the impediments created by the mechanism itself by which the right to a healthy and ecologically harmonious environment was established by the European Convention of the Human Rights, the right to a healthy and ecologically harmonious environment should be established through a provision expressly formulated and by its content.

4. The Features of the Right to a Healthy and Ecologically Harmonious Environment

The right to a healthy and ecologically harmonious environment presents certain distinct features that singularizes its quintessence and successfully places it next to the other fundamental rights: the right to human dignity, to life, to the integrity of the person, to freedom and safety, to marriage and education:

1. The right to a healthy and ecologically harmonious environment is a *natural right,* in a tight connection to the right to property;
2. The right to a healthy and ecologically harmonious environment can be regarded as a *civil right claim,* compared to the right to health. By analogy to this, the doctrine considers it important to reposition it among the constitutional objectives;
3. From another perspective, there is an opinion according to which the right to a healthy and ecologically harmonious environment is also a *subjective right* whose respecting by third parties can be required by any physical or juridical person, public or private;
4. Created by the jurisprudence of the European Court of the Rights of the Human Rights by means of interpretation, article 8, paragraph 1 and article 6 of the European Convention of the Human Rights, the right to a healthy and ecologically harmonious environment is considered an *individual right* from the category of the "civil rights". As it is not part of the rights considered to be untouchable, it can make the object of certain derogations in exceptional circumstances (art.15 of the Convention), and the partner states cannot limit it but by the law (art.8 parag.2) and if it "represents a measure that in a democratic society is necessary for the national security, the public safety, or the economic safety of the country or for the protection of the rights and freedoms of the citizens".

We may appreciate that presently the CEDO jurisprudence crystalized in order to guarantee the protection of the environment as an individual right by mentioning three aspects (Duțu, 2010, p. 122):

1. Its belonging to the content of the right guaranteed by article 8, paragraph 1 of the Convention;
2. The existence of a right to be informed regarding the quality of the environment and the dangers for the environment;
3. The existence of a right to a fair process regarding the above mentioned.

The fundamental right to a healthy environment is a right that presupposes the following rights:

- To live in an non-polluted, not degraded environment;
- At a high level of health, unaffected by the degradation of the environment;
- To have access to the adequate resources of water and food;
- To a healthy work environment;
- To living conditions, or of using the fields, and to conditions of living within a healthy environment;
- Not to be exploited as a result of the developing of the environmental activities, except the justified cases and the right of those expropriated within the conditions established by the law, and to get the correspondingly redresses;
- To assistance in case of natural disasters or caused by the humans;
- To beneficiate from exploiting nature and its resources for a long time;
- To the preservation of the representative elements of nature and so on.[1]

5. Who is entitled to a Healthy and Ecologically Harmonious Environment?

From the point of view of the juridical literature, those entitled to a healthy and ecologically harmonious environment can be considered, on the one hand, the individuals who are the unique beneficiaries from this fundamental right and, on the other hand, the nature (that also includes the human beings) has to be protected. But, form a juridical point of view, only man can be entitled to a healthy environment.

Another dispute was born starting from the discussion whether the right to a healthy environment is an individual or a collective right that is part of the group of the rights of solidarity. Although we cannot contest neither the individual character nor the collective character of the fundamental right to a healthy environment we notice that the circumstances created by the issue of the environment at the end of the 20th century, of signalling all over the world about the vital necessity to protect the environment, it tends to detach itself from the category of the rights of solidarity, by expressing itself more and more as an individual subjective right, acknowledged and established by the law.

We may also remark that from the first line of the Romanian Constitution results that all the persons are entitled to this right. Because it does not say if it is about Romanian citizens exclusively, it can be

[1] http://revista.universuljuridic.ro/dreptul-la-un-mediu-sanatos-este-un-drept-fundamental/.

interpreted in the following way: this right is recognized to all the physical persons who are inhabiting the Romanian territory, no matter if they are Romanian citizens, foreign citizens, or stateless.[1]

6. The Jurisprudential Way by Which the Right to a Healthy and Ecologically Harmonious Environment was Recognized and Guaranteed

The CEDO jurisprudence developed a larger, nuanced, and flexible conception of the notion of private life with the meaning art.8 parag.1 of the European Convention that allowed it to be extended indirectly to the right to a healthy environment.

In this way, starting with the 70s, the Commission managed to gradually and more and more expressly admit that the pollutions affected the right to private life of the complainants and that, for instance, "a huge pollution could undoubtedly have a negative impact upon the physical wellbeing of a person and, as result, affect one's private live and also "can deprive the person of the possibility to enjoy the serenity of one's home". In its turn, the Court admitted next that "the noise provoked by airplanes diminished the quality of the private life and the serenity of one's home".

The right to a healthy and ecologically harmonious environment entered via interpretation article 8, paragraph 1 through the cause Lopez-Ostra against the Spain.

The decision of principle of December, 9, 1994 decided that the prejudices caused to the environment can cause damage to the wellbeing of a person and can deprive the individuals from their normal domiciliary habits, that presupposes to bluster their private and family lives, even though it does not represent a serious danger for the health of the person in discussion. As a result, the European legislator determined that the right of any person "to the respect of one's private, family and home life" also involves the right to live in a healthy and ecologically harmonious environment.

Another cause as much interesting by its jurisprudential development in terms of the environmental issues was created by the decision made regarding the business Guerra and co against Italy. Starting from the premise of the positive measures that the state has to take in order to ensure the effectiveness of the right to respecting one's private and family life, the Court stated that Italy broke article 8 of the Convention because of its essential authorities relativeness towards the major risks caused by the implanting of a chemical factory in the proximity of their village. Therefore, the stare as partner of the Convention has the positive obligation to not only take measures in order to make the pollution stop or reduce it (the cause Lopez-Ostra against Spain), but also to offer information about the serious risks of pollution. It is important to notice the fact that the community legislator justified his/her decision on the basis of article 8, and not on article 10 of the Convention, as it is considered to be inapplicable and having consequences associated with its meanings.

The CEDO decision in the case Lopez-Ostra against Spain (1994) attached via jurisprudential means the issue of the protection of the environment to the technique of the positive obligations that provisioned that the states that were part of the Convention should acquit of the obligation to adopt "positive measures" meant to ensure the effectiveness of the protected rights, including against the negative actions of the third parties. This offers the way to sanction the prejudices brought to the environment that find their source in the weakness of the public authorities and/or in the deeds of the individuals.

[1] The Right to a Healthy Environment within the Constitutions of some Countries of the EU Lect. univ. dr. Matei D.

The CEDO jurisprudence went even further by establishing that when a government engages itself into the developing of certain dangerous activities, such as the nuclear experience, susceptible to have "hidden evil consequences" on the health of the persons that take part into those, the respecting of article 8 presupposes creating a certain "effective and accessible procedure" that would allow to all those interested to require to be communicated the entire lot of pertinent information. (Mc Ginley and Egan against the Great Britain).

Also, it was considered that article 10 of the Convention imposes that the states should not only give information on the issues regarding the environment accessible to the public, but also positive obligations regarding the collecting, elaborating, and broadcasting the information that by its nature are not directly accessible and could not be otherwise brought to the knowledge of the public opinion but by means of the actions of the public authorities (the business Guerra against Italy). In this way, the existence of a real right to information regarding the environment was recognized.

Nevertheless, the jurisprudence of the European Court of the Human Rights also signalled many more cases when article 8, line 1 of the Convention were broken when the right that we are interested in was indirectly exploited. We shall insist upon the cases Moreno Gomez against Spain; Giacomelli against Italy; Ockan against Turkey and Lediayeva, Dobrokotova, Zolotareva, and Romashina against Russia.

7. The Constitutional Legal Recognizing and Guaranteeing the Fundamental Right to a Healthy Environment in Romania

After almost three decades and a half since the first conference of the United Nations regarding the environment took place and since the adopting of the first internal law regarding the protection of the environment, also in Romania the right to a healthy environment took shape as an independent branch of right, having a distinct character, and the fundamental right to a healthy and ecologically harmonious environment was recognized and guaranteed by the Constitution. The respective situation can be considered the result of a long term process developed under the influence of more factors and with the contribution of multiple actors. In this way, article 35 of the Romanian Constitution, revised and republished in 2003, the article named "The Right to a Healthy Environment" provisions that: 1. The State recognizes the right of each person to a healthy and ecologically harmonious environment; 2. The State ensures the legal context for the bearing of this right. 3. The physical and juridical persons have the obligation to protect and ameliorate the environment.

The accelerated of the appearance among the Romanians of the major preoccupations regarding the protection of the environment represented the process itself of adherence to the European Union that under the pressure of some tough ecological realities wanted to create, along with the work conditions favourable to its citizens, a healthy and ecologically harmonious environment, as well. Radical transformations took place at the level of the juridical provisions regarding the environment, and the entire process of legal metamorphosis also favoured the springing of certain concepts and principles in everyone's consciousness regarding the environment: the principle of conservation, the principle of ameliorating, of precaution, and the protection of the environment, and the principle that "the pollutant pays". (Duțu, 2010, pp. 112-120) The culmination of these efforts of the international institutions was the establishment and the constitutional guaranteeing accompanied by a significant legislative bundle subsequent of the fundamental right to a healthy and ecologically harmonious environment. In this way, the spirit of the Romanian constitutional establishment is given by the European tendencies in the field because a large part of the countries member of the European Union already guaranteed by their fundamental laws in more or less similar terms the right to a healthy environment. Anyway, the

formulation in the Romanian Constitution has a certain degree of generality meant to generate ambiguities.[1]

Nevertheless, the guaranteeing such a right does not mean that it is also effective. The primary issue becomes now that of the development of all the mechanisms necessary to the guaranteeing the effectiveness of its significances.

As a conclusion, the process of establishing and guaranteeing the right to a healthy environment has also known a similar evolution in Romania, similar to that of the other European states: a progressive emergence at the legislative level potentiated by the ratification of the international documents on the issue and the preparing of the Romanian adherence to the European Union, as well as by its recognizing as having an over legislative value within the jurisprudence of the European Charta of the Human Rights (CEDO), and its crowning by its constitutional recognition.

8. Conclusions

By sketching a retrospective in the past, we shall notice that the state of the environment became a very important aspect of the human rights and that the actual tendencies successfully places it among the fundamental rights, having their own and independent status.

Belonging to the third generation, the right to a healthy and ecologically harmonious environment known a dynamic evolution in terms of its guaranteeing and effectiveness through procedural and jurisprudential ways. In this way, the right to a healthy environment was asserted by means of the interpretation of article 8.1 of the European Convention of the Human Rights, as it did not have an express establishing as a component of the right to a private and family life, and giving it an indirect protection.

As a result, we conclude that the including of the right at the national level within the Constitution within just two decades accelerated its development at the regional and international level. At the same time, the appearance of the global ecological issues (the desertification, the climate changes, the destroying of the ozone layer etc.) favoured the consolidation of its status as a fundamental right and as a right to survival of the mankind.

Regarding the right to environment, the CEDO jurisprudence especially ensured the procedural guarantees this right, respectively the right to be informed regarding the risks of pollution and the quality of the environment, the right to a fair trial, and, last but not least, the obligation of the states to adopt “positive measures” meant to ensure the effectiveness of the right to a healthy environment.

Also, the original way to appeal to the content of other fundamental rights shaped even from the beginning its touching points with other fundamental human rights, the enrichment of the content and the reciprocal influence in realizing their significances. Complemented with the provisions of the positive law, these jurisprudential observations demonstrates that the right to a healthy environment and the quality of life intercross and influence each other, and the serious prejudices against the environment can affect the wellbeing of a person, which interferes with one’s private life, here including the right to live in a healthy and ecologically harmonious environment within the right to private and family life, and the right to property.

[1] The Right to a Healthy Environment within the Constitutions of certain Countries of the EU, Lect. univ. dr. Matei Diaconu, p. 1.

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Controversial Issues on the Requests and the Exceptions Invoked in the Preliminary Chamber Procedure - Jurisprudential Issues

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Abstract: The present paper aims to analyze the stage of the preliminary chamber, phase of the criminal trial introduced by the Romanian legislator with the adoption of the New Criminal Procedure Code. Preliminary chamber procedure is an element of novelty in the criminal process so law practitioners have encountered numerous difficulties in applying the new provisions.If some of these difficulties were remedied either by the Constitutional Court or by the High Court of Cassation and Justice through the procedure for resolving issues of law, a large part of the difficulty in interpreting the provisions governing the preliminary-ruling procedure was left to the national jurisprudence.Present study aims at revealing the most frequent controversial issues encountered in the practice of the courts, but especially in highlighting the non-unitary interpretation generated by their jurisprudence.The academic and practical interest lies in the fact that the present work can be a useful legal instrument in unifying the non-unitary practice, all the more so as it analyzes the solutions ordered by courts of any degree and on the whole territory of the country.

Keywords: preliminary chamber; exclusion of evidence; nullity; requests and exceptions

Introduction

The institution of the preliminary chamber procedure was introduced into the Romanian criminal procedural system with the entry into force of the New Criminal Procedure Code.[2]

The explanatory memorandum to the draft of the new Criminal Procedure Code[3] reveals that the Romanian legislator, trough the preliminary chamber phase in the criminal trial, aimed to meet the requirements of legality, celerity and fairness of the criminal trial.

Therefore, the preliminary chamber is a new, innovative institution that aims to create a modern legislative framework that removes the excessive length of proceedings in the trial phase. By regulating the procedure of the preliminary chamber, it is intended to resolve the issues of the lawfulness of the indictment and of the lawfulness of the administration of evidence, ensuring the premises for the prompt resolution of the cases. In this way, some of the deficiencies that led to the conviction of Romania by the European Court of Human Rights for the violation of the excessive duration of the criminal trial are eliminated.

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[2] Criminal Procedure Code adopted by Law no. 135 from 01.07.2010, published in the Official Monitor, Part I no. 486 of 15.07.2010, entered into force on 01.02.2014.
[3] The explanatory memorandum to the draft of the new Criminal Procedure Code available online at: http://www.cdep.ro/proiecte/2009/400/10/2/em412.pdf.

We note that the object of this new procedure was established by the initiator[1] of this legislative proposal and consists in the verification of the legality and laufulness of the indictment. This institution is known in many European systems (Italy, Serbia, Kosovo, France) and is also regulated in the Statute of the International Criminal Court and aims to verify the existence of sufficient evidence of the criminal charge justifying the conduct of the trial phase.

Thus, by the content of the provisions governing the preliminary chamber, by the solutions which may be ordered, are set out the criteria by which it is determined whether the procedure in the course of criminal proceedings was fair in order to justify the criminal trial.

1. Jurisprudential Issues Regarding the Unlawfulness of the Indictment Invoked in the Preliminary Proceedings

According to art. 342 of the Criminal Procedure Code, the subject-matter of the proceedings of the preliminary chamber is the verification, after the indictment, of the lawfulness of the court's referral.

The indictment must detail and accurately describe the allegations made against the defendant, including:

1. presenting the factual situation with which the court will be heard. Thus, the prosecutor must analyze in detail the means of evidence administered to retain the factual situation on which the charge is based, to state the reasons for which some evidence is retained or for which others are removed, as well as to highlight the defendants' defense, or withholding its defense. (Udroiu, 2016)

2. full legal classification; The "legal" section of the indictment presupposes: the analysis of the constitutive elements of the offenses for which the prosecution has been carried out: the objective side, the subjective side (including where they are not met); analysis of worsening states (relapse, continued form, intermediate plurality) or attenuation (tentative) of punishment.

3. the civil aspects;

4. the means of evidence administered during the criminal prosecution;

5. data on the defendant;

6. data on the respective criminal prosecution: means of filing (complaint/denunciation/office); the order by which the prosecution was initiated; the order that further prosecution of the suspect was ordered; the ordinance by which the criminal action was initiated; the ordinance extending the criminal prosecution/criminal action or the change of legal classification was ordered; the preventive measures, mentioning the date on which the last extension of the preventive arrest/home arrest measure expires, namely judicial control; precautionary measures ordered. (Udroiu, 2016)

7. the enacting terms which will include: the injunction; the defendant sent to trial in a state of liberty or preventive arrest/home arrest; offense and full legal classification; other solutions provided by art. 327 letter b), art. 328 para. 3 of the Criminal procedure code; severance; legal costs; the names and forenames of the persons to be cited in court, indicating their quality in the proceedings, and the place where they are to be cited; the referral order of the competent court;

[1] Government Decision no. 829/2007 for the approval of the preliminary theses of the draft for a new Criminal Procedure code, published in the Official Monitor, Part I no. 556 of 14.08.2007.

By the indictment, the prosecutor may order adjudication and prosecution of criminal offenses for some of the facts for which the prosecution was carried out.

The indictment is subject to verification as to the legality and laufullness of the hierarchically superior prosecutor, namely the chief prosecutor of the Prosecutor's Office attached to the High Court of Cassation and Justice.

As regards the unlawfulness of the act of referring the court, the judicial practice revealed the requirements the indictment must meet in terms of legality in relation to the criticisms made by the defense in the sense of the prosecutor's omission to analyze the constituent elements of the offense which is the object of the judgment, such an analysis is not mandatory in the circumstances in which the prosecutor describes the factual situation and makes the necessary reference to the legal classification. (Iordache, 2014)

On the other hand, Oradea Court of Appeal (Decision no. 135, 2015) considered these exigencies not enough and ordered: *"to remedy the irregularities contained in the indictment no. 47/D/P/2014 dated 26 June 2015 of the DIICOT - Oradea Territorial Service for the clear exposure of the constituent elements of the offense both in the exhibition part and in the "legal" section namely the money laundering provided by art. 29 paragraph 1 letter a) of the Law no. 656/2002 held against RAZ and Ţ. R.M., expressly mentioning the sums of money in respect of which activities were carried out that are circumscribed to the material element of the said offense, as well as in what they concretely consisted of these activities. Pursuant to Article 347 paragraph 3 of the Code of Criminal Procedure referred to in Article 345 (2) and (3) of the Code of Criminal Procedure, the notification of the decision to the DIICOT - Oradea Territorial Service in order to remedy the irregularity of the notice of act".*

Also, the preliminary chamber judge at Suceava Court of Appeal (Decision no. 17, 2015) has analyzed all the elements which led to the conclusion of the lawfulness of the indictment:

"The analysis of the content of the indictment leads to the conclusion that the court document satisfies the fairness requirements of the proceedings and ensures a correct and complete information to the defendants of the accusations made against them and that the description of the facts is in accordance with the procedural acts relating to the conduct of the criminal proceedings (initiation of prosecution, extension of the prosecution and prosecution of the criminal action against the defendant).

The actions that have led to the criminal prosecution of the defendants are determined by a concrete way of committing offenses and a fixation of the spatio-temporal coordinates, which also result from the systematic examination of the mentions of the notification act by fitting them into the context factually or by reporting to the economy of related facts.

Regarding the legal classification of the facts, the preliminary chamber judge finds that in the act of referring the court both in the exposition and in the section "The legal framing of the facts" there are legal qualification operations of all the deeds retained by the defendants.

The indictment must also indicate the name and quality of the persons to be cited in the court, as well as the place where they are to be cited, as well as the precautionary measures, and this document includes all these elements.

In exercising the function of supporting the criminal action, the act of referring the court must contain a clear and complete description of the facts and circumstances extracted on the basis of the evidence in the criminal investigation phase, the analysis of the evidence, the lawfulness of the deeds and the other aspects that contribute to the good conduct of the criminal process".

In judicial practice (Decision no. 20, 2014), it was also shown that *"The defendant's requests regarding the incidence of a case that prevents the criminal action from being initiated, by expressly referring to the provisions of art. 16 par. I lit. b) Criminal Procedure Code, the lack of predictability of the incriminating legal norm, the succession in time of the legal provisions in the matter, the failure to meet the constitutive elements of the offense of conflict of interest from the point of view of the objective and subjective aspect of the offense, the wrong qualification of the active subject of the offense, are in fact critics regarding the substance of the case, and not of the lawfulness of the court's referral. As regards the assessment of the way the criminal investigation body interprets the evidence, this can not lead to the unlawfulness of the evidence gathered during the criminal prosecution".*

In this respect, it is worth noting that the indictment is a procedural act of a form and content that presents a specific legal technique. (Iordache, 2014)

2. Possibility to File Requests in the Preliminary Chamber

Where the case file contains interceptions from another case, performed under a technical surveillance warrant issued under the national security law, the parties may request the judge of the preliminary chamber to declassify:

- the request of the Prosecutor's Office for authorization of the national security warrant;
- the rulling by which the High Court of Cassation and Justice (hereinafter HCCJ) had authorized the technical surveillance measure.

If the records were not obtained in a criminal case, the documents drawn up by the Romanian Intelligence Service (hereinafter RIS) on their basis are only acts of discovery, according to art. 61 of the Criminal Code, acts that could be the basis of the notification of the criminal prosecution bodies, but can not have probative value in the criminal trial.

It is necessary for the prosecutor and thereafter the judge of the preliminary chamber to analyze the lawfulness of obtaining these records.

2.1. Legal Basis

Article 345 para. 1 in conjunction with art. 352 par. 11 of the Criminal Procedure Code: *"Where classified information is essential to resolving the case, the court shall, as a matter of urgency, request, where appropriate, total declassification, partial declassification or change to another classification or access to those classified by the lawyer of the defendant".*

Article 93, paragraph 12 of the Internal Rules of Courts: "?*In cases concerning proposals and notifications regarding the approval of searches and the use of special surveillance and research methods and techniques, as well as the issuance of a referral order, the consultation and the issuance of copies of the acts and rulings thereof are allowed only to the persons at par. 3 (the lawyers, parties or representatives of the parties, the appointed experts and interpreters concerned) only after the authorized activities have been completed and the period for which the measures have been approved expired and only if they do not affect the proper conduct of the criminal proceedings. In the same way, the court's special documents and records relating to these files can be consulted".*

Even if all the conditions necessary for the issuing of the warrant on which the recordings were made are fulfilled, the prosecutor and the preliminary chamber judge must also consider the condition of a criminal case having as object the crimes stipulated by art. 3 of Law 51/1991.

Without the preliminary chamber judge examining the legality of obtaining these records and without considering whether they were obtained as evidence in a criminal proceeding, they can not be used in the criminal trial.

2.2. Non-unitary Jurisprudence

"Given that the file is missing from the request of the Prosecutor's Office for the interception and recording of telephone conversations, as well as the decision by which the HCCJ admitted it, nor is the court number indicated by the Decision from 21 June 2012, has accepted the request made by the defendant BD through his lawyer, and asked the HCCJ to submit the relevant documents.

By address no. (...), the HCCJ informed the court that these documents were classified as State Secret Class, the Strict Secret level and for this reason were not submitted.

In such a situation, the court was unable to assess the lawfulness of obtaining the authorization to intercept and record telephone conversations". (Criminal sentence no. 973, 2012)

In another case, the preliminary judge of the Iaşi Court of Appeal *"qualified the defendant's requests as requests for the taking of evidence and ordered their rejection by reference to the subject matter of the preliminary chamber as regulated by the provisions of art. 342-346 Criminal Procedure Code".* (Decision no. 2016, 2016)

On the other hand, ICCJ, in case file no. 1380/1/2016, by the Decision of 25.05.2016 admitted the request for declassification and ordered the return *"with address to the Classified Documents Compartment of the High Court of Cassation and Justice and calls for steps to be taken to declassify the national safety warrant. .. in the case of the said PA and of the conclusion which gave rise to the issuance of this mandate, as well as the declassification of the decision on the basis of which the warrant no... was issued, stating that the evidence in the case file was obtained on the basis of the mandate".*

2.3. Non-unitary Jurisprudence within the HCCJ

"Admitted in part the requests and exceptions made by the defendants DMG, OOC regarding the interception of telephone conversations, used as evidence in the file no. 95/P/2011, handled by the Prosecutor's Office attached to the High Court of Cassation and Justice - National Anticorruption Directorate - The Pitesti Territorial Service in which the indictment was issued on November 18, 2015. Asks the prosecutor to request the partial declassification and subsequently submit to the file the authorization to intercept and record the communication of the conversations in case of authorization 003068/15 08 2007 and of the report requesting the measure. According to art. 345 paragraph 3 of the Criminal Procedure Code, the prosecutor will remedy the irregularities found and will file the documents requested under item I". (Decision of 19.02.2016, 2016)

Given that the prosecutor did not comply with the demands of the judge, in the same case file, the court stated: *"admits, in part, the exceptions formulated by the defendants. Excludes from the evidentiary material the interceptions and recordings of communications performed under mandate no. 003068 of 15.08.2007 issued by the High Court of Cassation and Justice".* (Decision no. 287, 2016)

Furthermore, in appeal procedure, another judge from HCCJ ruled: *"Admits the appeal filed by the Prosecutor's Office attached to the High Court of Cassation and Justice - National Anticorruption Directorate against the order no. 287 of April 6, 2016, pronounced by the Preliminary Chamber judge*

in file no. 4215/1/2015. It partially cancels the disputed decision. Dismisses as unfounded the requests and exceptions made by the defendants D. M. G., O. O. C., regarding the interceptions and recordings of communications performed under mandate no. 003068 of 15 August 2007". (Decision no. 143, 2016)

Thus, we observe that, even within the High Court of Cassation and Justice, in the same case, but in different procedural stages, the optics of the courts are not unitary.

3. Defense Access to Data from Technical Surveillance

To the extent that among the evidence submitted by the prosecutor there are also evidence obtained through technical surveillance, the lawyer of the defendant, for the observance of the right to a fair trial and the principle of equality of arms, may file before the judge of the preliminary chamber various requests regarding the optical devices and playback reports:

- The request to make available to the defendant copies of the optical media containing the records;
- Application for the release of photocopies according to the criminal prosecution volumes containing the minutes;
- Request to issue an address for forwarding to the case file original files containing records to compare with those in the case file.

3.1. The Request to make Available to the Defendant Copies of the Optical Media Containing the Records

Legal Basis

Article 97 par 2 lett. f) corroborated with art. 143 par. 2 of the Criminal procedure code in relation to the principle of equality of arms (Article 6 (1) and Article 6 (3) (d) of the ECHR).

Article 162, paragraph (1) of the Rules of Internal Order of the Courts stipulating that: *"Copies on the hard copy or on certified copies thereof in criminal cases shall be released only to the parties or their representatives, with the approval of the preliminary chamber judge …"*

The usefulness and relevance of this request lies in the possibility of analyzing the legality of the transcripts in relation to the data inserted in their content, by comparison with the optical supports, their files and constructive series.

3.2. Application for the Release of Photocopies According to the Criminal Prosecution Volumes Containing the Minutes

Judicial practice has demonstrated that such an application has been formulated by defense to carry out verifications.

Thus, a first aspect that needs to be verified is the correspondence between the constructive series of optical supports mentioned in the minutes and the constructive series of the optical supports in the case file.

Also, in order to avoid the suspicion of falsifying the content of the conversation either by deleting elements or by adding phrases from other conversations carried in another context, defense can analyze the content of the conversation played in the verbal record of the case by comparison with the file containing the record.

Legal Basis

Article 94, paragraph 2 of the Criminal Procedure Code concerning the right of the lawyer to study the documents of the case, the right to record data or information in the file, and to obtain photocopies at the expense of the client.

Article 93, paragraph 10 of the Internal Rules of the Courts: *„In cases where (...) the use of special methods and techniques of surveillance or research, (...) the consultation and the issuance of copies of the acts and rulings thereof are permissible only for the persons referred to in paragraph (3) only after completion of the authorized activities and the expiry of the period for which the measures were granted and only if they do not affect the proper conduct of the criminal proceedings".*

4. Administration of new Documents in the Preliminary Chamber

Administration of the evidence with new documents, which are not in the possession of the parties, but to other judicial bodies. Obligation of the court to issue an address at the request of the parties

Article 345 para. 1 Criminal Procedure Code: *„at the deadline set in accordance with art. 344 par. (4) the Preliminary Chamber judge shall settle the requests and exceptions invoked or the exceptions raised ex officio in the council chamber on the basis of the works and material in the criminal investigation file and any new documents submitted to the parties and the victim, if present, as well as the prosecutor".*

The legislator limited the domain of the evidence that can be administered in the preliminary chamber procedure to the lawfulness of the court's referral, as well as to the verification of the lawfulness of the administration of evidence and the execution of the acts by the criminal prosecution bodies.

In the preliminary chamber procedure, only new documents may be administered in accordance with the law. The novelty of the documents has a much wider sphere, by "new documents", we understand both the documents that date after the indictment and the documents that have been given before, but which have not been administered in the criminal investigation phase.

We consider that the meaning of new documents is not limited to the documents actually in the possession of the parties but they can be:

- documents that are in the possession of other persons, natural or legal, evidence that can be requested according to art. 170 par. 1 second sentence of the Criminal Procedure Code;
- information held by natural and legal persons or judicial bodies that can be filed in the form of addresses addressed to the court;
- computer data that is stored in a computer system or on a data storage medium that is susceptible to being printed on paper (e-mail, SMS);

Also, new documents that can be administered in the preliminary chamber procedure may also include: subscriber, user and service data held, owned or controlled by providers of public electronic communications networks or electronic communications service provider intended for the public, other than the content of the communications and than those provided in art. 138 par. (1) lit. j) of the Criminal Procedure Code.

For example, by requesting the submission of data from the electronic communications provider or the telephone converser to the case file, it can be proven that a particular telephone number belongs to another person or as a particular conversation (referred to in the indictment) has not occurred at a certain date or has never occurred.

There are numerous cases in which the defendant can not bring evidence of the illegality of the administration of evidence during the prosecution because they are either in another court or in the prosecutor's office or other specialized bodies of the state.

The only way in which the defendant can prove the unlawful administration of the evidence is by means of requests to the court to ask for relations or information from institutions that have said documents or information.

We consider that those requests are admissible only in the preliminary proceedings procedure since only at this stage of the trial the judge can fully analyze the lawfulness of the evidence administration and may sanction the illegality of the evidence.

Rejection of these requests not only lacks the defendant's effective defense in the preliminary chamber procedure but is likely to infringe the right to a fair trial.

5. Analysis of the Limits of Competence of the Judge of Rights and Freedoms in the Preliminary Chamber Procedure

5.1. The Possibility of the Preliminary Chamber Judge to Analyze the Limits of the Compentence of the Judge for Rights and Freedoms and to Order the Annulment of the Acts Performed by Him in Breach of His/Her Competence

According to art. 53 of th Code of Criminal Procedure, *"the judge of rights and freedoms is the judge who, within the court, according to its competence, solves in the course of the criminal prosecution the applications, proposals, complaints or any other notifications regarding the approval of the use of special methods and techniques of surveillance or research or other probative procedures under the law".*

The appointment of a special magistrate - the judge of rights and freedoms and the judge of the preliminary chamber, together with the other two already existing, the prosecution function and the judiciary - is in the nature of fitting the legislation accordingly to establish a balance between the requirements for an effective criminal procedure in order to protect the basic procedural rights as well as the fundamental human rights for the participants in the criminal trial and the unitary observance of the principles defining the equitable procedure.

The principle of loyalty has an explicit consecration in the Code of Criminal Procedure, but also in the judicial practice of the last 50 years. Its origin lies in the principle of legality, which is also demonstrated by the etymology of the word "loyalty", which derives from the Latin law (legality). Therefore, loyalty is a component of legality viewed in a broad sense.

The principle of loyalty is a component of the right to a fair trial, benefiting from a legal commitment at the jurisprudential level. ECHR jurisprudence developed on this principle does not restrict its components to the three modes mentioned in paragraph (1) - (3) of art. 101 of the Criminal procedure code, but includes the loyalty aspects within a generic analysis (of the implicit guarantees) that it carries on the realm of art. 6 parag. 1, in terms of fairness of procedures as a whole.

Therefore, even if it is not expressly mentioned in the art. 102, given the relationship between legality and loyalty, the legality is related to injury, and the unlawful and unfair administration of evidence can cause such harm, it can be argued that the sanction of nullity for violation of the loyalty principle of administration of evidence obviously transpires.

5.2. Non-unitary Jurisprudence

"Admite excepţia nulităţii absolute invocată din oficiu cu privire la autorizarea percheziţiilor domiciliare şi a supravegherii tehnice. În baza art. 281 alin. 1 lit. b Codul de procedura penala rap. la art. 102 alin. 3 şi 4 Codul de procedura penala constată nule absolut probele obţinute prin procedeele probatorii ale percheziţiei domiciliare şi supravegherii tehnice, ori pe baza probelor obţinute prin aceste procedee probatorii şi în consecinţă exclude din materialul probator următoarele: - înscrisurile ridicate cu ocazia percheziţiilor din 26.11.2016, aşa cum sunt enumerate în procesele verbale aflate la filele 13-20, 67-69 şi 81-84 din vol. III, dos. u.p.; - procesul-verbal de percheziţie domiciliară din 26.11.2015 privind aspecte de la percheziţia efectuată la aceeaşi dată la imobilul ... şi planşa fotografică aflate la filele 13-20 şi respectiv 22-32 din vol. III, dos. u.p.; - procesul verbal de percheziţie domiciliară din 26.11.2016 privind aspecte de la percheziţia efectuată la aceeaşi dată la imobilul din com. S, sat S, jud. V, aflat la filele 67-69 din vol. III, dos. u.p. - procesul verbal de percheziţie domiciliară din 26.11.2016 privind aspecte de la percheziţia efectuată la imobilul din mun. F, jud. V, aflat la filele 78-79 din vol. III, dos. u.p - raportul de constatare nr. 638663/14.01.2016, aflat la filele 1-58 din vol. II, dos. u.p/Admits the exception to the absolute nullity invoked ex officio concerning the authorization of home searches and technical surveilance. Based on art. 281 par. 1 lett. b) of the Criminal procedure code reff. to art. 102 par. 3 and 4 of the Criminal Procedure code, establishes absolutely void the evidences obtained through the evidential procedures of the home search and technical surveillance, or on the basis of the evidence obtained through these evidentiary procedures, and consequently excludes from the evidentiary material the following: - the documents filed in the searches of 26.11.2016 , as listed in the forms at pages 13-20, 67-69 and 81-84 of volume III of the prosecution file; - the home search report of 26.11.2015 on aspects of the search made on the same date on the property ... and the photographic sheet at the 13-20 and 22-32 tabs of volume III of the prosecution file; - the home search report of 26.11.2016 regarding the searches made at the same date on the building in S, village S, district V, located at the tabs 67-69 of volume III of the prosecution file, - the home search report of 26.11.2016 on aspects of the search made at the building in F, V county, at sheets 78-79 of volume III of the prosecution file, - Report of Finding no. 638663/14.01.2016, found at sheets 1-58 of volume II of the prosecution file" (Decision of 25.05.2016, 2016).

As the representatives of the Prosecutor's Office explained, the exception relates to the fact that the evidence, the search and the technical surveillance in this case were authorized by the Focşani Court, given that, in the opinion of the Preliminary Chamber Judge, they should have been authorized by Vrancea Court. The difference done in this respect, precisely the aggravating form of the unlawful participation in the offense of abuse of office, which raises the jurisdiction of the Tribunal as a superior court. Prosecutors have stated that at the time when those evidence was obtained, the criminal prosecution was initiated „in rem" regarding the crime and not the person, and the qualification of the legal framing was made later.

"In order to rule in this manner, the preliminary chamber judge to examine the request for the absolute nullity of the criminal conviction no. 29 / I / 22.09.2014 of the judge of rights and freedoms within the Court of Law (file no.) And exclusion of some evidence, formulated in the light of the

provisions of art. 345 par. (1) and art. C.proc. pen, found that they are not founded, according to the provisions of art. 141 C.p.p.

Therefore, ascertaining the legality and the laufullness of the criminal conviction no. 29/I/22.09.2014 of the judge of rights and freedoms within the Z. Court, the application for finding the absolute nullity of this criminal conviction and excluding all the evidence obtained as a result of the provisional authorization of the use of the technical surveillance measures was rejected, respectivelyof the interception and recording of telephone calls made from the telephone number no_, belonging to the defendant AF M". (Decision no. 86, 2015)

In another point of view, a preliminary chamber judge stated that *"on these matters, the requests made were the in fact means of appeal against the final judgments of the judges of rights and freedoms, which authorized part of the interceptions in the case. A first aspect concerns the fact that, from a procedural point of view, those judgments can not be discussed as to their lawfulness in the preliminary procedure, and the Preliminary Chamber judge cannot rule on their legality, not exercising the role of a judicial review body, filtering on matters exclusively related to the legality of acts of the prosecutor. The purpose of the preliminary proceedings is to verify the lawfulness of the acts of the prosecutor and not to discuss the legality of certain final judgments of the rights and freedoms. If the legislature considered it necessary, it would have included an appeal against this type of conclusion, but according to the criminal procedure these are final".* (Decision no. 39, 2016)

The Preliminary Chamber judge at the Court of Appeal, contrary to the assessment of the Preliminary Chamber judge from the first court, points out that in the preliminary procedure, will be analyzed both the legality of the administration of evidence by the criminal prosecution bodies (by reference to the act by which the evidence or the evidence-based procedure, and/or by reference to the act by which the evidence was administered) and the lawfulness of the decisions by which the judge of rights and freedoms has given, authorized or confirmed different probative procedures, respectively the means of evidence obtained by the approved probative procedure.

"A preliminary chamber judge has no jurisdiction to verify the merits of the judge of the rights and freedoms judgments as regards the fulfillment of the substantive conditions necessary for the assent, confirmation or authorization of the probationary procedure (for example, it cannot be ascertained whether at the time of the probationary procedure, resulting in reasonable suspicion of the commission of a crime or the fulfillment of the conditions of proportionality and subsidiarity).

The issues raised by the defendant-contestant NG, through his lawyers, concern issues regarding the merits of the judgments of the judges of rights and freedoms of Bucharest Tribunal dated 11.02.2015, 13.02.2015, 27.02.2015, 27.03.2015 and 28.04 .2015, respectively their lack of reasoning in relation to the lack of analysis of the conditions of necessity, proportionality and subsidiarity of the supervision measures, and thus exceeds the competence of checking the preliminary chamber judge, the reasoning being the same with regard to the correction of the material errors". (Decision no. 39, 2016)

5.3. Material Competence of the Judge of Rights and Freedoms

Prerequisite situation:

The judge of rights and freedoms, during the prosecution, following the request of the prosecutor, ordered the approval of the technical surveillance measures.

The Judge's decision is motivated by reference to facts and legal framing other than those indicated by the prosecutor in the request and most important the necessity, proportionality and subsidiarity of the measures have not been analyzed.

Subsequently, the technical surveillance measures are carried out on the basis of these warrants until the expiry of the authorized period.

After the criminal prosecution is completed, the indictment is drawn up, the case reaching the preliminary chamber.

The defense invokes before the judge of the preliminary chamber the nullity of the rulings of the judge of rights and freedoms given that they were issued with reference to offenses other than those for which the defendant was prosecuted.

During the preliminary camera procedure, the judge of rights and freedoms issues a material error correction, replacing the reasoning in the disputed conclusion.

5.4. Critical Incident

Motivating a decision with reference to other facts and analyzing proportionality, subsidiarity and the need to authorize technical surveillance measures for offenses other than those described in the indictment cannot constitute material error.

Decision of material error is the result of a new deliberation and reassessment of the factual situation initially analyzed by the judge of rights and freedoms at the moment of the approval of the technical surveillance.

The maximum deadline until which a correction of the "material error" could be issued is given as of the court referral date, which is the date from which the prosecution is deemed to be completed and the date when the material competence of the any judge of rights and freedoms in relation to the cause of the judgment ends.

Any decision issued by a judge of rights and freedoms after the court has been notified cannot have legal effects, being issued in violation of the jurisdictional competence in relation to the procedural stage and in flagrant contradiction with the principle of separation of judicial functions.

To consider that after the court's referral, in the preliminary chamber procedure, when the preliminary chamber judge checks the lawfulness of the administration of the evidence, a judge, namely the judge of rights and freedoms, may cover the nullity of the act by which the administration of the evidence was granted, the issuance of a material error correction sentence means a lack of object of the preliminary chamber procedure and an unlawful interference in the jurisdiction of the preliminary chamber judge.

"Covering the absolute nullity" of a judge of rights and freedoms decision is a flagrant violation of the right to a fair trial of the defendant who is in a situation where, although evidence against him has been unlawfully granted, although he has challenged them the preliminary chamber judge, those evidence will remain in the case.

The doctrine (Mateuţ, 2012) shows that: *"if a piece of evidence has been submitted to the judge in breach of the procedural provisions or if an admissible evidence in principle before him has been subject to irregular administration, sanctions must be imposed"*.

5.5. Non-unitary Jurisprudence

"Indeed, even if one could discuss this legality, with the answer to the exceptions, the NAD representatives filed five sentences of the same judges of rights and freedoms, correcting the obvious

material error, stating that the judgments should be considered as a whole and not separately as it did.

It should also be underlined that Art. 278 of the Criminal Procedure code does not provide for a time limit until the material error can be corrected by the criminal investigating body, the judge of rights and freedoms, the preliminary judge of the court or the court that drafted the act". (Decision no. 39, 2016)

While the legislator did not provide for a deadline for the material error correction procedure, technical surveillance measures can no longer be amended to make material misstatements after all technical surveillance has been completed and after the null decision has entered the legal circuit and has produced effects.

In other words, the "error" already committed in the procedure for the administration of evidence cannot be "repaired" after the finalization of the criminal prosecution but only sanctioned by the preliminary chamber judge with the exclusion of the evidence thus obtained.

6. Exclusion of Recordings

Exclusion of interceptions made by RIS under a national security warrant and used in other cases under Art. 142 para. 5 of the Criminal Procedure Code

Legal basis:

Article 140 par. 1 of the Criminal Procedure Code: *"technical surveillance measures may be ordered during criminal prosecution, for a maximum of 30 days at the request of the prosecutor, by the judge of rights and freedoms".*

Article 142 par. 5 of the Criminal Procedure Code: *"the data resulting from the technical surveillance measures may also be used in another criminal case if they contain conclusive and useful data or information regarding the preparation or perpetration of another offense mentioned in art. 139 par. (2)".*

The legislator imposed the condition that the technical surveillance should be available only in a criminal case, namely a case in which the prosecution was initiated.

It is obvious that in order for the data to be „used in another criminal case" it is necessary that they were legally obtained in a first criminal case, namely a criminal case in which the prosecution was started.

Only in the preliminary chamber procedure the judge of the preliminary chamber can analyze the legality of the evidence obtained during the criminal investigation phase.

If the RIS performs interceptions, information obtained under national security warrants cannot be used in other criminal cases because they have not been obtained in criminal cases.

The absence of a criminal case implies that no criminal investigation can be carried out, so the information thus obtained can only be the basis of the initiation of a criminal prosecution.

The prosecutor to whom this information is presented may use them to justify the provisional authorization on the basis of which the interception and the application requesting the judge's authorization of the interceptions.

Even assuming that are met all the conditions necessary for issuing the warrants on which the records were made, the preliminary chamber judge is obliged to analyze also the condition of a criminal case having as object the offenses provided by art. 3 of Law 51/1991.

If the records were not obtained in a criminal case, the acts drawn up by the RIS on their basis are only acts of discovery, according to art. 61 Criminal Procedure Code, acts that could be the basis of the notification of the criminal investigation bodies, but cannot have probative value in the criminal trial.

"The basis of the use in file no. 57/P/2015 of the National Anticorruption Directorate - Central Structure of the evidence obtained through the implementation of warrant no. ... of 24.12.2013 issued by the competent judge of the High Court of Cassation and Justice is the provisions of art. 139 par. 3 Code of criminal procedure, not the provisions of art. 142 para. 5 Criminal Procedure Code, as a consequence, is not necessary, as a consequence, an ongoing criminal trial, within which the request for issuance of the national security mandate is made.

Thus, the only condition to be considered from the point of view of admissibility as evidence of registered conversations/registrations made on the basis of a national security warrant is the existence of the mandate issued by the judge of the High Court of Cassation and Justice, a condition in the present case - Volume IX of the criminal investigation file was deposited the mandate no. .../ 24.12.2013, declassified, issued by the competent judge of the High Court of Cassation and Justice, the contents of which include the basis of the issue, respectively the provisions of art. 3 lit. f) and i) of the Law no. 51/1991 on the national safety of Romania.

The law allows the use of any legally registered record, regardless of the context in which it was obtained or the data subject". (Decision no. 39, 2016)

We consider that unless the preliminary chamber judge examines the legality of obtaining these records and without considering whether they have been obtained as evidence in a criminal proceeding, they can not be used in the case.

National case law (Decision no. 575, 2016) shows that: *„admits, in part, the claims and the exceptions invoked by the defendants S.C.M., M.M.F. and B.L. The inadmissibility of the indictment no. 81/P/2011 of 16 December 2015 of the Prosecutor's Office attached to the High Court of Cassation and Justice - the National Anticorruption Directorate - the Timisoara Territorial Service, regarding the description of the facts for which the three defendants were prosecuted. Excludes from the evidentiary material interceptions and recordings of communications under mandates no. ..., no. .... and no. ... issued by the High Court of Cassation and Justice. Returns the case on defendants S.C.M., M. M. F. and B.L. at the Prosecutor's Office attached to the High Court of Cassation and Justice - National Anticorruption Directorate - Timisoara Territorial Service in order to restore criminal prosecution in file no. 81/P/ 2011 of the same Prosecutor's Office observing the procedural rights of the parties".*

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REALITIES AND PERSPECTIVES

The Notions of Blockchain and Smart Contract from the Point of view of the Intellectual Property Right

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Abstract: The paper proposes a legal definition of the notions of blockchain and smart contract from the point of view of the intellectual property right.Therefore, this research brings to light the effects of new technology on the positive law and, above all, on the notion of contract.By applying the blockchain technique, the parties optimize costs and significantly reduce the time needed to produce legal effects, particularly by eliminating third parties.However, this technique creates a real series of legal issues that already give jurists the opportunity to develop new theories of law by finding solutions to them.

Keywords: blockchain; smart contract; intellectual property right

Introduction

In evolution, the human being sought as far as possible to find ways to facilitate their existence. That began to create, currently to be dependent on technology that - you have to admit, it is an integral part of our daily lives.

Undoubtedly, accuracy and speed of computer systems, the programming language created by human genius, leading to exponential growth of society as a whole.

Creations and inventions have impacted so important to man, that he felt the need to protect the essential means, both legal involving coercive force of the state and with technology, which has led to the definition networks chains data and intelligent contracts, in addition to many other technological means of protection.

Considering the above, we proposed below, to perform a **first tempo** analysis of what blockchain site and smart contracts, ducking us on the general aspects and in a **second tempo** to present their application, as they relate to intellectual property rights and other key areas of society.

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1. General Aspects of Blockchain Technology and Smart-Contracts

1.1. Harnessing Technology Fundamentals Chain Data

1.1.1. The Concept and Origin of Blockchain

Data chains are essentially electronic registries that facilitate recording of transactions and the tracing of property in the commercial agreements between the parties. Noteworthy is the fact that access to such records is strictly controlled by parties to the transaction, and it can be distributed to any third parties, only by those who have completed their agreement will, under that blockchain.

Transactions through data chains are using crypto-currencies. Of these methods, undoubtedly the best known and publicized monetary unit virtual is Bitcoin site - money that has been created based and technology blockchain, the latter having a role registry to track and operations using Bitcoin's .

1.1.2. The Shortcomings of the Current Trading System and the Benefits of using Blockchain Technology

Classical methods to record transactions and to track goods from the manufacturer to the supplier and the consumer then has a number of shortcomings. Those involved in these procedures are forced to create their own registers in which to record information on traded goods, their price, features, areas in which they must be transported, etc.

This method of trading is quite costly, as all these intermediate operations registration, checks etc. involving staff or intermediaries - hence, create new contracts that will involve expenses themselves.

The inefficiency of traditional methods nuanced issues arising out of the delay in carrying out the contract in efforts to secure the multiple copy of all data records for all parties involved in the transaction.

Using technology chain data - to establish a commercial contract is a method involving efficiency and very low cost because it eliminated bureaucracy (records in multiple copies) and there is no need to resort to intermediaries for transactions, which are included in electronic registers directly by the parties to the contract/transaction

1.1.3. Building Confidence through Data Chains

“Confidence in the technology blockchain” presents as advantages of the following: reduced time of the transactions, reducing costs, advanced network security, enhanced privacy, audit efficiency, increased operational efficiency.

Increased safety and trust among participants in transactions on blockchain is obvious because every transaction is inextricably linked to another transaction correlative, and any attempt to commit an act of corruption is immediately noticed by all participants, is highlighted and shared in registers (shared ledgers).

Building confidence through chain data is based on a number of *fundamental attributes*: sustainable and shared, secure, private and indelibly, transparent and verifiable, based on the agreement of will and transactional synchronized and flexible.

1.1.4. How Does the Blockchain Work

Within blockchain platforms, data transactions are stored in data blocks that are linked together by operations and form a virtual chain. The number of transactions increases, will increase proportionately and data chain (not rewrite input than existing ones).

Data blocks, records and confirm the date and sequence of transactions that are entered in the data chain, the latter being governed by rules established by consensus. Each data block contains a fingerprint reader/unique identifier containing both date and subject to valid transactions and fingerprint (brand) on previously block.

Conceptele cheie utilizate în tehnologia blockchain sunt: registrele partajate, autorizarea, consensul, contractele inteligente. Scopul SMART-CONTRACTELOR este acela de a conferi o securitate sporită, de a reduce costurile și întârzierile asociate cu contractele tradiționale/ *Blockchain key concepts* used in technology are shared ledgers, authorization, consent, smart contracts. SMART-Contracts goal is to provide better security, reduce costs and delays associated with traditional contracts.

1.2. What Are Smart-Contracts?

1.2.1. The Concept of SMART-CONTRACT

Smart-contract is a computer program that adds information in digital transactions that are executed in a chain of data. This allows more complex transactions than simple exchange of crypto-currency for a product or service.

1.2.2. Smart-Contracts Advantages

Following examination of the blockchain platforms and how they can be used with smart-contracts, we can mention the *following advantages*: autonomy, trust, records backup, safety, speed, cost reduction, precision.

1.2.3. Disadvantages and Problems Identified in the SMART-CONTRACTS

Disadvantages and *problems* encountered within smart-contracts are:

- users are quite reluctant, suspicious about applications of this type of contract in terms of its safety, are quite difficult to understand the operation without engineering knowledge of programming languages;
- making last-minute changes;
- storing and saving data through intelligent and blockchain contracts are safe and free of any distortion, as long as the code (programming language) is written precisely and perfectly;
- third parties involved in smart-contracts will not disappear completely, but their role will be entirely new.

1.2.4. The Future of Smart-Contracts and its Applicability in the Field of Intellectual Property

Discussing about smart contracts to totally replace traditional contracts, creates an impossible scenario. We appreciate that the next step for their implementation, is the application of a *hybrid contract* that combines traditional and smart contract being checked and secured and tested blockchain/legal utillizat by Hard copies.

Ii. Blockchain Technology and Smart Contract in Terms of the Intellectual Property Law Rules

2.1. Legal Analysis of the Data Chain Technology and Smart-Contracts Related to the Copyright and Industrial Property Rights

2.1.1. The Object of Copyright and Industrial Property Rights in the Smart-Contracts

The object of copyright is represented by the copyrighted literary, artistic and scientific. These works enjoy legal protection from the moment of their creation. Authors can choose to protect their works individually or to apply to the **Romanian Copyright Office.**

At this point, enter stage blockchain technology and smart contracts. The authors could register work as soon as it begins to be created in blockchain platform, performed by ORDA, without wasting time and incur expenditures intermediaries for factual record by submitting applications. By accessing chains data, ORDA, producers, publishers, media companies could negotiate and contract directly with authors by requesting permission to access blockchain's created them, these negotiations finding and purpose as concluding a contract clever directly copyright beneficiary under the supervision of the government. In this way, consumers can pay for the products directly to the copyright owner.

Subject matter of industrial property consists of actual industrial creations (inventions) and hallmarks. Legal protection of industrial property right arises on application by the inventor to patent his invention or for registration of the mark. On application to the **State Office for Inventions and Trademarks** and its registration in the **Official Bulletin of Industrial Property**, is born a priority right for the inventor and the patent itself the invention materializes after plans invention are analyzed by special committees.

If industrial property rights, more useful would be enforcing contracts hybrid is to create a chain of data recording applications, permits and plans in OBIP and after obtaining the patent, companies or individuals who hold the title of patent use agreements traditional to exploit their inventions or creating intelligent contracts with beneficiaries or consumers, depending on the activity, thus developing their own blockchain sites.

2.1.2. Enforcement of Intellectual Property Law Principles through Smart Contracts

Because blockchain technology and intelligent features can work contracts in this area, they will have to comply with the four fundamental principles of intellectual property law:

- national treatment – this principle give the holders of intellectual property rights, which obtained those rights in the country of origin to benefit from them in all EU countries;
- priority right – this right is the privilege of a person who has filed a patent application and created a legal deposit (to submit all documentation to obtain patent/register a mark) in a European Union country to have priority you are patented invention to any person who meets the same procedures, the same invention, then the privileged in any Union country;
- independence of patents and marks – this principle confers independence of each patent/trademark in every European Union country.

2.1.3. Issues Concerning Intellectual Property Rights on Blockchain Platforms and Smart Contracts

Specifically, data platforms chains are registers used by companies/institutions/individuals to record transactions and smart contracts, under which they were made. *Participants* in a data network chains

are: users, the observer, the developer network, data network operator chains, traditional processing platforms, traditional data sources, authority certificates.

I do not think it will put the issue of copyright or industrial property rights on smart contracts, since the latter produces effects exactly traditional contracts. They also help strengthen the legal protection of these rights and contracts are encumbered intelligent and clauses relating to the legal effect that the parties wish to produce.

2.2. The Potential of Blockchain and Smart-Contracts - Use Cases

2.2.1. Intellectual Property Law Domain

Regarding the applicability of intelligent platforms blockchain and contracts, there are two situations: c**opyright in an *artistic work (music)*** and **industrial property rights of a *new brand of car (innovative)***.

2.2.2. Trade Domain

In the process of moving goods across state borders, authorization is required from numerous institutions (customs, port authorities, shippers). By blockchain, these permits are electronically signed and visible to all, saving time and resources.

2.2.3. Insurance Domain

Insurers need an efficient method for compensating customers and a way to check the accomplishment of the incident, whose risk is insured. Automated procedure for compensation and insurance conditions are recorded in a smart-contract, stored on blockchain. When an event occurs announced (organ police report, weather events, etc.), the insurance policy is automatically enforced and compensation calculated under the terms entered in the smart-contract, the customer is paid in a very short time.

2.2.4. Health Domain

Healthcare industry needs a reliable and efficient system to manage medical records to make payments to hospitals, to determine the amount of compensation payable by insurance policies life / health and record other complex transactions (purchase of medical equipment). Currently, registration is done by creating medical records databases and access is allowed only to those hospitals that provide health services. Centralize costly, inefficient and vulnerable to security breaches.

*Sistemul blockchain și smart-contractele oferă sistemului de sănătate, atât garanția, cât și rapiditatea, atât de necesare. Prin platformele blockchain, se poate menționa pentru fiecare pacient în parte întreg istoricul medical, cu multiple posibilități de modificare/vizualizare de către pacient, medici, asiguratori, spitale etc, oferind în același timp un mecanism sigur de înregistrare/*The smart -contracts and blockchain provides to the healthcare system, both security and speed, as required. By platforms blockchain may be mentioned for each patient throughout medical history, with multiple modification/viewing by patients, physicians, insurers, hospitals etc., while providing a secure mechanism for registration.

Conclusions

Summarizing the analysis in this paper, the chains data networks and smart contracts, we see ways gradually blockchain company will use technology - as complementary or even to replace existing traditional contracts.

We consider appropriate *legislation regulating the procedures* for creating platforms blockchain type public institutions to give citizens confidence in this type of recording system and emphasizes efficiency.

In conclusion, we consider the application of a hybrid contract, a combination of contract law traditionally regulated its forms in the Civil Code and registered in the shared ledgers, created through government institutions to try reducing tax evasion, moonlighting for to be able to track goods from the civil circuit and to be able to just settle any disputes between the parties to a contract or between state and citizens.

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Confidentiality of Employment Relationships

Radu Răzvan Popescu[1]

Abstract: Objectives Throughout the duration of the individual employment contract, both the employee and the employer, comes into possession of data and information that is private. Prior Work This kind of information that is confidential is practically divided from a legal nature perspective into three categories: confidential data under the loyalty obligation, data and information that are not disclosed due to the existence of a confidentiality clause and those data and information that, according to the special law, are classified as secret service or state secret. At the same time, the employer is under the obligation to keep the confidentiality of personal data and information that he she finds about his/her employees. Results the length of these periods in which parties have to maintain confidentiality is another issue that has given rise to disputes both in the literature and practice of the courts of justice. Value we think this article is an important step in the disclosure of the problem eraised by this two concepts.

Keywords: confidentiality clause; damages of interests; service secret; loyalty obligation

According to labour legislation in Romania, respectively the Labour Code - Law no.5 3/2003[2], the employee has a **fidelity obligation** towards his employer, regulated through art. 39 para. 2 letter d, and the **obligation to observe the work secret** (art.39 para.2 letter f), but the employer also undertakes to ensure the **confidentiality of the personal data of its employees** (art. 40 para. 2 letter i).

In addition, between the two parties a commitment/negotiated clause may occur, by means of which it is established that throughout the entire duration of the individual employment contract and after its termination no data or information known during the running of the contract will be transmitted, in the conditions set through internal regulations, applicable collective employment contracts or individual employment contracts.

Not last, according to the European Union regulations, starting with the date of 25th of May 2018, Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data[3] enters into effect.

In art. 88 of this Regulation it is established that by law or by means of collective agreements, the member states may *Member States may, by law or by collective agreements, provide for more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data in the employment context, in particular for the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law or by collective agreements, management, planning and organization of work, equality and diversity in the*

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[2] Republished in the Official Gazette no. 345 of 18 May 2011, as subsequently modified and completed.
[3] Published in JO L 119/1, through which Directive 95/46/EC was abrogated.

workplace, health and safety at work, protection of employer's or customer's property and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship. Those rules shall include suitable and specific measures to safeguard the data subject's human dignity, legitimate interests and fundamental rights, with particular regard to the transparency of processing, the transfer of personal data within a group of undertakings, or a group of enterprises engaged in a joint economic activity and monitoring systems at the work place.

A. The principle of good faith between the parties must be correlated with the employer's fidelity obligation towards his employer. The fidelity obligation is an essential obligation of the employee, who must refrain, during the employment relationship, from committing any deed which might damage the interests of his employer. Thus, the fidelity obligation comprises, on the one hand, *non-competition*, respectively the employee's obligation to not compete against his employer, during the employment relationship (particularly due to the conclusion of an individual employment contract) and, on the other hand, presupposes the employee's *confidentiality*, respectively his obligation to not disclose certain secrets of the employer.

Hence, the fidelity obligation is a legal (contractual) obligation, created at the moment of signing the individual employment contract by the employee, without the employer being forced to pay the employee any amount of money, in addition (to the negotiated salary), for the observance of the data confidentiality and for forbidding the disloyal competition deeds throughout the contract execution. This obligation must not be confounded with the non-competition or the confidentiality clauses, distinctly regulated by the Labour Code in art. 21-24 and 26 (Ștefănescu, 2017), applying strictly throughout the existence of the individual employment contract.

As expresses in the specialty literature (Țiclea, 2016), the employee must be faithful, loyal, must refrain from any action which would be detrimental to the interests of his employer, in the contrary case, the employer having the possibility to disciplinarily sanction the employee. (Țop, 2015)

The existence of a fidelity obligation cannot prevent the employee from working in addition with another employer, according to his professional training. In this situation, basically, the employee must not compete, really and directly, with the first employer.

B. By means of the confidentiality clause established by art. 26 para. (1) of the Labour Code, it is stated that *through the entire duration of the individual employment contract and after its termination, the parties agree to not transmit data or information they learned during the execution of the contract, in the conditions set through internal regulations, applicable collective employment contracts or individual employment contracts.*

Firstly, it is noticed that the scope of the confidentiality clause is much wider than the sphere of the two legal obligations. Hence, the confidentiality clause does not superimpose on the employee's fidelity obligation [art. 39 para. (2) letter d)] or on the employer's obligation to ensure the confidentiality of the employees' personal data [art. 40 para. (2) letter i)], not does it pertain to the classified information or to those secrets established through Law no. 182/2002 on the protection of classified information[1], but its purpose is to establish for the employee additional information he is contractually bound to not disclose.

Both the employee and the employer are equally held to observe such a clause, which can be inserted in the content of the individual employment contract only with the parties' consent.

[1] Published in the Official Gazette no. 248 of 12 April 2002.

The confidentiality clause may produce effects also after the termination of the individual employment contract, but, unlike the non-competition clause, it must pre-exist this moment, in order to produce effects.

It is seen that in case of this clause, the lawmaker did not establish the obligation of an equivalent contribution, in money or in kind, from the employer to the employee, from the moment of accepting in the content of the individual employment contract of the insertion of such a clause. Of course, nothing opposes such equivalent contribution from the employer, but, the sense of this regulation is to offer mutual protection, whose terms are set through the parties' agreement, without the need, in principle, for the parties, to obtain other advantages.

The breaching of the confidentiality clause by either party brings forth the obligation of the defaulting party to pay damages [art. 26 para. (2) of the Labour Code] and if the legal conditions are met, the employee may also be disciplinarily sanctioned (the deed must have been committed during the running of the individual employment contract). Thus, the injured party will notify the competent court and will have to proof the existence of the clause, the infringement of his right and the occurrence of the damage (it is not possible to insert in the individual employment contract of a criminal clause consisting in the setting of a fixed amount, which is going to be paid by the employee in the case of his non-observance of the confidentiality clause; this criminal clause may exist only regarding the employer's liability) (Popescu, 2008).

C. According to Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, the ***controller*** is any natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purposes and means of the processing of personal data.[1]

Each employer has, according to the provisions of Government Decision no. 905/2017[2] *on the general register for the recording of employees, the obligation to compile a personal/professional file for each of its employees, with the observance of the*l egal provisions on the protection of personal data.

Therefore, the use of **Revisal and the obligation to have these files of the employees, make the employer a personal data operator.**

According to Regulation 2016/679 *on the protection of natural persons with regard to the processing of personal data and on the free movement of such data* by ***personal data*** is understood any information any information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

At the same time, ***personal data processing*** means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

[1] It abrogates Law no.677/2001 for the protection of persons regarding the processing of personal data and the free movement of such data, published in the Official Gazette no. 790 of 12 December 2001, as subsequently modified and completed; the Regulation is applicable, directly, in all EU countries, without the need of being transposed.
[2] Published in the Official Gazette no. 1005 of 19 December 2017.

In processing personal data, the employer must be guided by and must observe a series of principles, respectively:

- the data must be processed lawfully[1], fairly and in a transparent manner in relation to the data subject;
- the data is collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes;
- the data must be accurate and updated whenever necessary;
- to be kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed;
- to be processed in a manner that ensures appropriate security of the personal data.

If the employer does not employ the person appearing for the interview/exam/competition, either due to the fact that the candidate does not fit the job requirements, or in the context of his refusal to sign the individual employment contract, the employer has the obligation to erase the candidates' personal data, except for the case when their consent is obtained to keep the data and it justifies a legitimate interest. In this particular case, it is necessary that the employer specifies to the candidates the categories of data kept, the storage period, the person's right to obtain at any time the deletion of this information, as well as any other rights due to him in his capacity as data subject.

Another exceptional situation is represented by the employer's possibility to install a video monitoring system at the work place. In this case, the National Authority for the Supervision of Personal Data Processing (ANSPDCP) must be notified because the *implementation of such systems may present hazard for the rights and liberties of the data subjects, as employees; the provisions of the Labour Code or any other normative acts regulating the statute, rights and obligations of the employees must be observed, the consultation of their representatives or of the trade union they are part of being necessary, as applicable.*

According to art.40 para. 2 letter i of the Labour Code, the employer ensures the confidentiality of personal data for all its employees. Thus, the employee has the right to be informed regarding the manner in which his data was processed, but also an intervention rights, being able to request, in the conditions of the law, the deletion of certain data he considers sensitive. We consider that, in order to avoid any possible misunderstanding regarding the processing of personal data of the employee, the employer must request, in writing, his consent for future processing of his data.

Thus, comparable to the field of competition, the breaches against the provisions of the Regulation may be sanctioned with fines in value of up to 20,000,000 euro or, in case of an enterprise, up to 4% of the worldwide turnover of the group of companies the respective entity belongs to, corresponding to the previous financial exercise, taking into account the higher value, for the non-observance of the

[1] **Processing shall be lawful** only if and to the extent that at least one of the following applies**:**
(a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
(c) processing is necessary for compliance with a legal obligation to which the controller is subject;
(d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;
(e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

basic principles of data processing, the non-observance of the rights of the data subjects or the breach of the obligations regarding cross-border data transfers.

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REALITIES AND PERSPECTIVES

Delimitation of Public Property.
The Correlation Public Property-Public Domain

Vasilica Negruț[1]

Abstract: The implementation of Law no. 287/2009 on the Civil Code (through Law No. 71/2011) imposed a new scope of the matter, as by this normative act an important part of the Law no. 213/1998, which until that date was considered to be the main regulation, derogating from the common law, intended for the legal regime applicable to public property. In this respect, it was questioned the reasons of regulating public property by the New Civil Code, which, in Art. 2 par. (1) establishes the subject matter of this normative act: "The provisions of this Code regulate the patrimonial and non-patrimonial relations between persons as subjects of civil law". The controversies in the doctrine, as well as the "parallelisms, the inconsistencies and the contradictions between the different normative acts in the field of property" have led to the inclusion in the Government Decision no. 196/2016 for the approval of the preliminary theses of the draft of Administrative Code an chapter on the exercise of the public and private property right of the State and of the administrative-territorial units.

Keywords: property law; public property; public domain

1. General Considerations on Public Property

Implementation of Law no. 287/2009 on the Civil Code (through Law No. 71/2011) imposed a new core of the matter, as by this normative act an important part of the Law no. 213/1998 was repealed, which until that date it was considered to be the main regulation, derogating from the common law, designed for the legal regime applicable to public property.

In this respect, the question of the rationale of regulating public property was raised by the New Civil Code, which, in Art. 2 par. (1) establishes the subject matter of this normative act: "The provisions of this Code regulate the patrimonial and non-patrimonial relations between persons as subjects of civil law".

The controversies in the doctrine, as well as the "parallelisms, the inconsistencies and the contradictions between the different normative acts in the field of property" have led to the inclusion in the Government Decision no. 196/2016 for the approval of the preliminary theses of the draft Administrative Code of the chapter on the exercise of the public and private property right of the State and of the administrative-territorial units.

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The existence of regulations with a special feature in this field is justified by the general public interest, which the public administration has to accomplish, as shown in the specialized literature (Bălan, 2007, p. 3).

In the common language, the notions of property and ownership seem to be confused, but it cannot be marked as equal the property as an economic relationship and property right as a legal relationship (Bîrsan, 2015, p. 33).

According to art. 858 of the Civil Code, "public property is the right of ownership belonging to the state or to an administrative-territorial unit on assets which, by their nature or by the declaration of law, are of use or of public interest, provided they are acquired by one of the modes provided by law".

Under another wording, art. 554 par. (1) of the Civil Code has an almost similar content: "The property of the state and of the administrative-territorial units which, by their nature or by the law, are of use or of public interest form the subject of public property, but only if they were legally acquired by them".

As it can be seen, the definition of public property, inspired by civilian doctrine, sets out two elements specific to the legal regime applicable to it: subjects of public property law (state and administrative-territorial units); the scope of public property, delimited on the basis of the criteria of domaniality.

According to civil law authors, "the right of public property is the property right in which its attributes are exercised by the state and the administrative-territorial units and which are in the public domain, being inalienable, imprescriptible and imperceptible" (Ungureanu & Munteanu, 232) or, in another definition, "the right of public property is that subjective right of property belonging to the State or the administrative-territorial units on assets which, either by their nature or by a provision of law, are of use and of public utility, provided that they have been acquired in one of the ways provided by law" (Bîrsan, 2013, p.164).

2. Delimitation of Public Property. Public Property-Public Domain Correlation

The notion of domain originates in the Latin word "dominium," which means mastery, ownership. In the course of time, in our legal system, synonyms were used or in close connection with each other: public and private domains; administrative domain; public and private property, and so on. (Podaru, 2011, p. 5).

The notion of public domaniality is the result of numerous research by doctrines, authors of public law and private law (Giurgiu, 1997, p. 12). The well-known Professor Victor Prudhon, in his work The Public Domain Treaty, advocated the need to allow an exorbitant legal regime from civil law for certain public assets. Prudhon has the merit of highlighting the relativity of the principle of inalienability of the public domain, considering that it applies for as long as the public service to which the asset of the public domain is entrusted (Iorgovan, 2005, p. 136).

To this notion it has contributed, to a large extent, the jurisprudence, sharing the theories elaborated in this respect in its solutions.

The domaniality theory is an essential change to property in civil law (Giurgiu, 1997, p. 12).

As the reputable professor Jean Vermeulen points out, "the discussions that arise around the notion of a public domain are not only of a theoretical, doctrinal interest, but of a practical interest, the public domain being subjected to a special legal regime that estranges from not only the legal regime of

individual property, but also from the legal regime of the private domain of the state subject to the provisions of the common law" (Vermeulen, 1947, p. 181).

Professor Ion Filipescu considered that all property subject to public property rights are "domineering assets" and make up the "administrative" domain, within it some public property being "public domain", while others are "private domains". The thesis of Professor Ion Filipescu considers the French law according to which the public property designates all the assets belonging to the public authorities or institutions (Filipescu, 1994, pp. 75-76).

The assets that make up the administrative area are divided into two categories: some of which are governed by private law rules, others designed for the use of the public, which are not susceptible to individual appropriation, forming the public domain. Its delimitation is made under conditions that differ from the limitations provided by the Civil Code for private property, and the disputes that arise in connection with public assets attract the material jurisdiction of the administrative contentious.

In the specialized literature, it is appreciated that the notion of the public domain should be applied to "the whole of the assets used or exploited by, or for, the human collectivities" (Oroveanu, 1994, p. 417).

The distinction between the public domain and the private domain was made on the basis of the provisions of art. 476 of the old Civil Code, considering that the public domain consists of the goods affected by the general and unsuspecting use of private property. According to this article, "the highways, small roads and streets that are in charge of the state, navigable rivers and streams, shores, shore additions and seaports, natural or artificial ports, shores where the ships can be from all parts of Romania's territory, which are not private property, are considered annexes of public domain."

After 1989, Law no. 18/1991 distinguishes between lands of public domain and lands of private domain.

The opinions expressed after 1990 on the notions of "public property" and "public domain" are found in several relevant theses: a) the thesis according to which the two notions are equivalent, supported both by authors of administrative law and by authors of Civil law (Mircea Preda, Valentin Prisăcaru, Eugen Chelaru, Gabriel Boroi); b) the thesis according to which the public domain is the exclusive object of the public property law (Corneliu Bîrsan, Valeriu Stoica, Marian Nicolae); c) the thesis which establishes the existence of a relation from the whole to a part, the notion of domain being wider than the notion of public property (Antonie Iorgovan); the identification of a broad sense and a narrow sense of the notion of a public domain (Liviu Pop) (Apostol Tofan, 2015, p. 264).

In contemporary doctrine, the phrase "public domain" has a broader meaning (Iorgovan, 2005, p. 173), which includes not only public property, as listed in Law no. 213/1998, but also the categories of assets in private property of significance and importance that go beyond the interests of their proprietor, leading to the coexistence of two different regimes applicable to them, namely the common law (as it is a right of private property) and an exorbitant regime, which includes public power rules (Vedinaş & Ciobanu, 2011, p. 74).

Therefore, the notion of a public domain is not limited only to public property, but in some aspects belongs to the public domain and assets (mobile or immovable) which is privately owned. These assets, to which a mixed (private and public law) regime applies and which can be found in the property of any subject of law, are included in the national cultural heritage, "being national values to be passed on from generation to generation "have always been the subject of special protection (Iorgovan, 2005, p. 173). In André de Laubadère's view, all of these special rules, derogations from the

common law constitute the "regime of domainiality" (Laubadère & Gaudermet & Venezia, 1988, p. 336).

In the opinion of another author, the notion of a public domain and even of domaniality would rather have a historical connotation, essential in fact being the legal regime applicable to the assets forming the public domain of the state and of the administrative-territorial units, as well that of the assets that make up their private domain (Bîrsan, 2013, p. 161).

The notions of public property and public domain, respectively private and private property, are not synonymous.

Public property is a legal institution, and the public domain is a totality of assets that represent the object of ownership (Balan, 2007, p. 44).

The public domain, in a narrow sense, encompasses all the assets which represent the object of the public property right of the state or of the administrative-territorial units, assets which, according to the law or by their nature or purpose, are of public use or interest (Pop, 2001, p. 70).

In the broad sense, the public domain includes, in addition to public property assets, private property assets which, due to its importance to society, is subject, in part by law, to a legal regime governed by public law (Pop, 2001, p. 70).

In a much broader definition, the broad public domain consists of "public or private assets which, by their nature or by the express provision of the law, must be preserved and transmitted to future generations, representing values intended to be used in the public interest, and subject to an administrative regime or a mixed regime in which the regime of power is dominant, being owned or, as the case may be, guarded by legal persons governed by public law" (Iorgovan, 2005, p. 173).

As far as we are concerned, we consider that the notions of public domain and public property are not identical, but it is necessary to highlight a unitary point of view, as it has also been emphasized in the literature.

3. The Content and Limitations of the Public Property Right

After the entry into force of the Constitution, it can be seen that the exercise of public property prerogatives (possession, use and disposition) presupposes their exercise under the regime of public law.

Art. 2 of the Law no. 213/1998 (repealed by the New Civil Code) specifies the ways of exercising the prerogatives of the public property right in the sense that the state or administrative-territorial units exercise the possession, the use and the disposition on the assets that make up the public domain within the limits and under the law.

On the ways of exercising the prerogatives of the public property right, according to art. 136 par. (4) second sentence of the Constitution, "Under the terms of the organic law, public property may be given to the administration of autonomous regimes or public institutions or may be leased or rented; they can also be put into free use for public utility institutions."

The right to administer public property assets is constituted under the terms of the organic law, as being a real right, opposed to erga omnes, less to the holder of the right of public ownership.

The right to lease on public property assets is born on the basis of the concession contract, being a real right that includes the attributes of the right to possess, use and disposition exercised on a temporary basis.

The right to use free of charge is constituted by the administrative act of public administration authorities, being a real right, opposed to erga omnes, free of charge, in favor of a private non-profit legal person.

The rental of public property assets is approved by the authorities designated by organic law and is achieved by public auction.

Regarding the limits of exercising the right of public property, art. 862 of the Civil Code stipulates that the exercise of the public property right is achieved within the limits provided by the new Civil Code and the Law, being subject to any restrictions for respecting the private property right insofar as they are compatible with the public use or interest for whom the affected assets are destined.

In the event of incompatibility, it shall be established by agreement between the holder of the public property and the person concerned or, in case of divergence, by judicial means. In such cases, the person concerned is entitled to a fair and prompt compensation from the public property owner.

The limits of the exercise of the right of public ownership take into account the extent to which the limitations are compatible with the use or the public interest to which the goods are intended. The law may limit the exercise of the right to property either in the public interest or in the private interest (article 602).

The Civil Code regulates in Art. 602-625 three categories of limits, namely legal limits, conventional limits and judicial limits (Bîrsan, 2013, p.164). Among the legal limits listed in the Civil Code, we mention public interest or private interest, rules on environmental protection and good neighborliness, rules on water use, rules on distance and intermediate works required for certain constructions, works and plantations, as well as certain limitations regarding the right to pass. Also the legal right to transfer to utilities, the right of re-entry into possession, the state of necessity, as well as certain special rules established by "the provisions of the special laws on the legal regime of certain assets, such as land and buildings of any kind, the forests, the assets from the national cultural patrimony, the sacred goods of the religious cults, and others alike" (article 625 of the Civil Code).

In principle, it is mentioned in the doctrine that the limitations mentioned are not incompatible with the right to public property (Bîrsan, 2013, p. 164).

Conventional limits can be established by legal acts, if public order and good morals are not violated (article 626). Unlike the legal limits, the conventional limits are incompatible with the right of public property, as the owner of the public property right cannot conclude a convention by which he renounces the exercise of the attributes of this right (Bîrsan, 2013, p.164).

The legal limits are intended to overcome the normal inconveniences of the neighborhood (article 630 of the Civil Code), whereby the court may, for reasons of fairness, oblige the owner to "compensate for the injured party and to restore the situation if it is possible".

4. Conclusions

As a conclusion to those mentioned, the property institution is sometimes encountered in the sphere of civil law, sometimes in the field of administrative law or at the border between them. Essentially, public property is a constitutional institution. The notions of public domain and public property are not identical, but it is necessary to highlight a unitary point of view, as it has been emphasized in the specialized literature.

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Evading Removal Measures on the Romanian Territory according to the Romanian Law

Ion Rusu[1]

Abstract: Motivated by the lack of this incrimination in the 1969 Criminal Code, in this paper we have proceeded in examining the offense of evading removal measures in the country. In the paper we have considered the examination of the pre-existing elements of the offense, of its constitutive content, as well as of the legislative precedents. We also considered the examination of the similarities and differences between the two texts, which are absolutely necessary in the application of the more favorable criminal law in transitory situations. The novelties concern both the examination of the constitutive content of the offense and the comparative examination of the two crimes. The work may be useful to the university environment as well as practitioners in this field.

Keywords: the objective side; the subjective side; the legislative precedents

1. Introduction

The offense of evading removal measures on the Romanian territory is part of the group of offenses related to state authority and border, a group mentioned separately under Title III of the Special Part of the Criminal Code.

Provided in art. 265 of the Criminal Code, the offense consists in the act of a foreign citizen against whom the measure of the removal from the territory of Romania was ordered, or the prohibition of the right of residence was ordered, to avoid the fulfillment of the obligations established by the competent authorities.

According to the recent doctrine, "After the entry into force of the Criminal Code, in 2014, by G.O. no. 25/2014 regarding the employment and detachment of foreigners on the territory of Romania and for the modification and completion of some normative acts regarding the aliens' regime in Romania, the normative framework for fulfilling the criminal norm of art. 265 Criminal Code has been consistently modified in a manner that influences the very content of the offense. For example, the notion of removal from Romania was replaced by three notions of return, expulsion and removal under escort" (Gorunescu et al., 2016, p. 387).

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2. The Criminal Code in Force in Relation to the Previous Law

Although in the Criminal Code of 1969 it was not provided for, the previous law provides for such an offense referred to in the provisions of art. 138 from E.G.O no. 194/2002, on the regime of aliens in Romania, in a similar wording.

The text in question was repealed by art. 120 point 1 of the Law no. 187/2012 for the implementation of Law no. 286/2009 on the Criminal Code.

The comparative analysis of the two incriminations allows us to observe elements of resemblance and difference, which are of major importance in the process of identifying and applying the more favorable criminal law in the transient situation in which we are.

Among the elements of resemblance we mention:

- maintaining the same marginal title of the offense;

- maintaining in the legal content of the offense of the phrase "prohibition of the right of residence";

- maintaining the term for avoiding the execution of the obligations established by the Romanian judicial authorities.

Among the elements of difference, we mention:

- replacing the terms "expulsion", "return" with the term "removal measure";

- renouncing the words "temporary domicile or residence";

- Substantial reduction of the special limits of punishment (imprisonment from 6 months to 5 years and respectively 3 months to 2 years imprisonment or fine).

3. Preexisting Elements

3.1. Legal Object

The special legal object of the crime consists the social relations regarding the assurance of respecting the established legal regime regarding the right of residence of the foreign citizens on the territory of Romania (Gorunescu et al., 2016, p. 38).

3.2. The Material Object

The examined offense does not have a material object, because the action of the active subject is not directed against a particular determined object.

3.3. The Subjects of the Offense

The active subject of the offense can only be a foreign citizen against whom the measure of removal from the territory of Romania has been ordered, or the right to stay on Romanian territory has been forbidden.

The passive subject is the Romanian state in its capacity as the holder of the social value protected by the norm of incrimination, represented this time by the General Inspectorate for Immigration within the Ministry of Internal Affairs.

4. Structure and Legal Content of the Offense

4.1. The Premise Situation

In the case of the offense under consideration the *premise situation* presupposes "the existence of obligations established by law by the competent state authorities in connection with the removal of foreign citizens from the country or with regard to which the measure of removal from the territory of the country was ordered" (Griga et al., 2016, p. 69).

4.2. The Constitutive Content

4.2.1. The Objective Side

The material element of the objective side consists of an action or inaction of evading a foreign citizen from the execution of the obligations established by the competent Romanian authorities regarding the measure of removal from the territory of Romania or the prohibition of the right of residence in Romania.

Essential requirement. In order to complete the objective aspect of the examined offense, it is necessary to fulfill an essential requirement consisting in the existence of a decision of the competent Romanian judicial authority ordering the removal from Romania or the prohibition of the right of residence of a foreign citizen in Romania.

Both of these measures are ordered as a result of non-observance by the foreign citizen of conditions imposed by the Romanian law in this field.

We consider that the examination of this essential requirement requires understanding of the words "removal from Romania" and "prohibition of the right of residence", in the light of the normative acts regulating the activity in the field, namely G.E.O. no. 194/2002 on the regime of aliens in Romania, modified and completed successively by several normative acts, with emphasis on G.O no. 25/2014 regarding the employment and detachment of foreigners on the territory of Romania and for the modification and completion of some normative acts regarding the regime of aliens in Romania.[1]

Thus, these two terms must be interpreted in terms of the notions of return, expulsion and escorting, notions referred to in G.E.O. no. 194/2002.

Return is understood as the "voluntary return or escorting process of a foreigner in a third country, namely the country of origin, the transit country established according to the agreements to which Romania or the European Union are parties or another third country in which the alien decides to return and to accept it" (Gorunescu et al., 2016, p. 388).

Expulsion "is defined as the enforcement of the complementary punishments for the prohibition of the exercise of the alien's right to be on the territory of Romania, applied according to the provisions of art. 65 par. (2) or art. 66 par. (1) lit. c) Criminal Code" (Gorunescu et al., 2016, p. 388).

Removal under escort "is highlighted by the same normative act as the execution of the removal measures, namely the return or expulsion, by accompanying the foreigners outside Romania" (Gorunescu et al., 2016, p. 388).

We also appreciate that "the three definitions are not likely to bring clarity to the rule of incrimination in art. 265 Criminal Code, since there are overlapping areas between them" (Gorunescu et al., 2016, p. 388).

[1] Published in the Official Monitor of Romania, Part I, no. 640 of August 30, 2014.

However, the interpretation of the two phrases (*the measure of removal from Romania* and the *prohibition of the right of residence*) must be made in the light of the provisions of the framework law (G.E.O. no 194/2002 on the regime of aliens in Romania).

The immediate consequence is the state of danger for the state authority with attributions in the field, namely the General Inspectorate for Immigration, an institution that has to ensure the enforcement of the legal norms regulating the execution of the measure of removal from the territory of Romania of persons who do not have Romanian citizenship or against whom the measure of prohibition of the right to stay in Romania was ordered.

The causal link results from the materiality of the act (resulting *ex re*).

4.2.2. The Subjective Side

The form of guilt with which the active subject of the offense acts is *direct intention.*

5. Forms, Ways, Sanctions

5.1. Forms

Although possible, both *preparation acts* and *attempts* are not punishable by law.

The consumption of the offense takes place at the moment when the incriminated action or inaction was executed and the immediate consequence occurred, namely the state of danger.

The offense under examination can also present a moment of exhaustion in the case of committing the offense in a continuous form when the act of eviction is prolonged in time until the alien's removal from the fulfillment of the obligations imposed by the Romanian authorities ceases.

In the case of committing the offense "in a continuous form, the moment of exhaustion coincides with the last act of eviction" (Griga et al., 2016, p. 70).

5.2. Ways

The examined offense presents only one normative way.

5.3. Sanctions

The sanction provided by law is imprisonment from 3 months to 2 years or a fine.

6. Complementary Explanations

6.1. Link to other offenses

The offense examined has some elements of resemblance and distinction with offenses that are part of this group.

6.2. Some Procedural Aspects

The criminal prosecution competence belongs to the criminal investigation bodies of the judicial police, and the criminal action is initiated ex officio.

Jurisdiction in the first instance belongs to the court.

7. Legislative and Transitional Situations

7.1. Legislative Precedents

In the Criminal Code of 1864 there was no such incrimination, but it was provided in art. 5 of the law on aliens of 7 April 1881, supplemented by the Law of 30 March 1915.

An incrimination close to that examined one was also found in art. 268 of the Carol II Criminal Code, although this concerns the deed of the expelled foreigner who returns in the country without authorization, the offense in question had the title of *unauthorized crossing of the border*.

Analyzing the text, the doctrine of time held that "the Romanian legislator, following the trend of modern laws, to justify the measure of expulsion, passed it among the security measures, giving the courts the right to pass it (article 79); and in order to ensure the respect of the passed safety measure, either by sentence or by authorities, he incriminated the fact of the stranger who, although expelled from the country by expulsion, would, without authorization or revocation of the measure, re-enter the country.

Under the old code, the courts had this right only for aliens declared vagabond (article 220 Criminal Code), but our Court of Cassation decided that the courts cannot rule expulsion even in this case, since this is a administrative measure, the government alone can rule the return to it.

The new code extended this right to the courts as well, for any alien offender.

An identical provision exists in art. 5 of the Law on Aliens of April 7, 1881, amended by that of March 20, 1915, a modification which regulated the control of aliens in the country.

By granting the courts the right to pronounce the expulsion measure, the code did not refute the right that it also has the administrative authorities by the 1881 law to decide to expel foreign non-fraudulent aliens, but whose stay in the country would not seem appropriate" (Ionescu-Dolj et al., 1937, p. 176).

7.2. Transitional Situations. Applying More Favorable Criminal Law

Although the special limits of punishment are lower in the new Criminal Code, however, depending on the concrete circumstances of committing each individual act, the more favorable criminal law will be the old law, given the existence of extenuating circumstances.

If there are no extenuating or aggravating circumstances retained, the more favorable criminal law will be the new law.

8. Conclusions

Although it was not provided for in the 1969 Criminal Code, the offense examined was mentioned, as we have already pointed out in art. 138 from G.E.O. no. 194/2002, regarding the regime of aliens in Romania, in a similar textual formulation.

During the examination we have highlighted the elements of similarity and difference between the two regulations, because their knowledge contributes to the identification and application of more favorable criminal law in transient situations.

At the same time, we have also highlighted the consistency of the Romanian legislator for incriminating this act over time.

We appreciate that, given the development of crime in this area, mentioning this crime in the Romanian Criminal Code is a necessity.

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