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THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Legal Sciences

Exchange of Information on Traffic Violations Affecting the Road Safety in the European Union

Minodora-Ioana Bălan-Rusu[1]

Abstract: In this paper we examine the provisions of European legislative act which provide the exchange of information between competent authorities at the level of Member States in the field of road safety, the importance of the research resulting in the need for insuring cooperation at EU level in this area as well. The conducted research continues others concerning the complex system of cooperation between EU Member States. The work may be useful to Romanian authorities involved in the enforcement of European legislative act, and also to those who conduct research in police and judicial cooperation. The results and the essential contribution of the work, its originality, consist of the general examination of the European legislative act, critical remarks and proposals of amending and supplementing the current provisions, which can cause difficulties in practice.

Keywords: police and judicial cooperation; crime; critical opinions

1. Introduction

The achievement of the EU assumed objective of establishing an area of freedom, security and justice requires an understanding from the Member States of these concepts based on freedom, democracy, human rights and fundamental freedoms principles and the rule of law. (Rusu, 2010, p. 24)

The legal cooperation in the European Union must be achieved in our opinion on two main directions, namely the judicial cooperation in criminal, civil or commercial matters and police cooperation.

Judicial cooperation especially in criminal matters cannot be achieved without improving the police cooperation system between the police authorities of each Member State, as, ultimately, the fulfillment of all decisions made by the courts or other judicial bodies with powers in the field is performed by the police.

One of the essential elements of police and judicial cooperation within the European Union is represented by the mutual recognition of judgments, a principle established in the conclusions of the European Council meeting which was held in Tampere on 15-16 October 1999 and reaffirmed in the Hague Programme of 4 to 5 November 2004 for strengthening freedom, security and justice in the European Union. (Rusu, 2010, p. 24)

The importance of police cooperation at EU level results in concrete tasks of this institution in the complex activity of preventing and combating crime of all kinds. The Police cooperation in the European Union is provided in the Treaty of Lisbon, under Title 5, entitled suggestively in this regard "Police Cooperation".

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According to the provisions of the Treaty of Lisbon, at the level of European Union within the framework of police cooperation there will be included all competent authorities of Member States, i.e. police services, customs and other specialized services in law enforcement in the domain of prevention, detection or investigation of offenses. (Boroi & Rusu, 2008, p. 499)

Currently, the cooperation of police units at the European Union level is ensured by the European Police Office.

According to the provisions of the Convention on establishing the European Police Office, the Europol's objective is to improve the relations of cooperation between Member States, the effectiveness and cooperation of competent authorities of Member States in preventing and combating terrorism, drug trafficking and other serious forms of international crime, where there is clear evidence regarding the involvement of organized crime structures and the damage of two or more Member States of the mentioned criminal activity, requiring joint involvement of Member States, due to the magnitude, significance and consequences of the considered crimes. (Boroi & Rusu, 2008, p. 509)

Given the above, it can be concluded that in terms of police cooperation in the European Union, this can be achieved on two distinct levels, namely: cooperation in preventing and combating serious crime forms, which is achieved through Europol and cooperation in other cases of police competence achieved in all cases by police units of the Member States (other than those mentioned in the first case). Given the object of the legislative act which is to be examined, the police cooperation regards other forms of criminality, other than of organized crime.

In order to ensure a higher degree of individual security to its citizens, at the EU's level it was adopted the Directive 2011/82/UE Parliament and the Council of 25 October 2011 to facilitate the cross-border exchange of information on traffic violations that affect the safety road.

In the present paper we will undertake an examination of the European legislative act, during which we will formulate some critical opinions as well, that seem to bring difficulties in practice.

2. Purpose, Scope, Definitions

The objective of the European legislative act is to ensure a high level of protection for all road users in the Union, facilitating the cross-border exchange of information on traffic violations affecting the road safety and, thus, the enforcement of sanctions when such violations are committed with a vehicle registered in another Member State, other than the Member State where the infringement was committed.

The above provisions shall be applied to the following violations of traffic regulations affecting the road safety:

- speeding;
- not wearing a seatbelt;
- jumping red traffic light;
- driving under the influence of alcohol;
- driving under the influence of drugs;
- not using crash helmets;
- use a forbidden lane circulating tracks;
- illegal use of a mobile telephone or communications devices while driving.

In order to avoid other interpretations than those intended by the legislator, there have been defined in the legislative act each of these violations, we will not dwell on that because the definition is identical to the Romanian legislation.

We believe however that it is necessary mentioning the three phrases, as defined in the European legislative act, i.e., national point of contact, automated search and vehicle owner. Thus, by the

"national contact point" we understand a competent authority designated for the exchange of DIV (vehicle registered holder).

"Automated search" means an online access procedure for consulting the database of one, several or all Member States or participating countries, and the "vehicle owner" means the person in whose name the vehicle is registered, as defined in the Member State law of registration.

3. Procedure for Exchange of Information

In the purpose of the investigations on violations of traffic regulations affecting the road safety, Member States shall allow access to the national contact points of other Member States, authorizing them to conduct automated searches on vehicle and on owners' data or vehicle's keepers.

The Member State in which the infringement was committed will use the data obtained in order to determine who is responsible for traffic violations affecting the road safety.

The Member States shall take all measures to ensure the exchange of interoperable electronic information, without an exchange of data between other databases. Each Member State shall bear its own costs arising from the administration, operation and maintenance of computer applications.

The decision to initiate or not the proceedings to the violation of unsafe road traffic belongs to the Member State in which the violation occurred.

If the Member State in which the violation occurred decides to initiate such proceedings, it shall notify in accordance with its internal law, the owner, vehicle's keepre or the person otherwise identified, suspected to have violated the traffic rules affecting safety road. This information relates, in accordance with the internal law and the legal consequences of violating those rules in the Member State where the infringement occurred under the internal law of that State.

When sending a letter to inform the owner, the vehicle owner or person otherwise identified, suspected to have committed traffic infringements affecting the road safety, the Member State where the violations were committed include, in accordance with its internal law, any relevant information, in particular the nature of traffic rule violation, the date and time of the committed offence, a reference to the provisions applicable (including their title) according to the national law that were violated and the appropriate sanction, and, where appropriate, data on the device used to detect the violations. In this case, the requesting Member State transmits the letter of information, in order to guarantee the fundamental rights, in the language of the registration document, if available, or in the official language of the Member State of registration.

As regards personal data the Member States shall take measures on processing in a suitable time, to amend where they are inaccurate, deleted or locked and when they are no longer needed. Also, the Member States shall take measures to protect the personal data in accordance with European standards and that they will be used only for achieving the purpose of the examined legislative act.

All persons concerned are entitled to obtain information on which the personal data are registered in the State of registration and sent to the Member State where the infringement was committed, including the requesting data and the competent authority of the Member State where the infringement was committed. In order to inform citizens of Member States, the Commission will publish on its website, in all official languages of the Union, a summary of the rules of Member States relating to the regulation of traffic.

4. Conclusions and Critical Opinions

The adoption of the examined legislative act represents an objective necessity, driven by the need to prevent and combat more effectively the acts of drivers affecting road safety. The legislative act in question is in its essence a European cooperation instrument of police cooperation between Member

States in the European Union. However, note that not all Member States have accepted its terms, except the United Kingdom, Northern Ireland and Denmark.

To summarize, the examined legislative act establishes a general procedure of police cooperation designed to help identify and punish the participants in trafficking or keepers or owners of vehicles for violating the legal rules affecting road safety.

Thus, according to the mentioned legislative act, the police authorities of the Member States shall take measures to contact the involved owner, keeper of the vehicle or otherwise identified person, suspected of committing an infringement of traffic affecting road safety, in order to transmit the information to the person on the procedures and legal consequences of infringement under the law of that Member State.

In this context, the Member States by their authorized institutions shall submit the information on violations of traffic regulations affecting road safety in the language of the registration document, the language that the person concerned understands in order to ensure correct transmission of information.

At the same time, the person concerned must have the opportunity to respond to the information, to request additional information, to pay the fine or to exercise the right of defense, especially when there is a slip in mistaking the identity.

No doubt the European legislative act is a novelty in EU police cooperation, having the final role to prevent and combat more effectively the infringements of road traffic safety within the European Union.

The examination of the European police cooperation instrument within the European Union, allows us to formulate critical opinions, designed to help improve the legislation in the field.

The first criticism concerns the exclusion from the scope of responsibility in the transport of hazardous prohibited materials or transport of hazardous materials in violation of safety requirements set by the state law in which the consignment was found.

We consider that such provisions were required, given that such transport in certain circumstances can become more dangerous than any of the rules of the European legislative act (speeding, drunk driving, not using crash helmets etc.).

On the other hand, examining the road rules that may be the object in police cooperation matters, we find that the legislative act does not make a clear difference between them. Thus, all road rules specified in the European legislative act can be established on spot by the police forces agencies within the State. Under these circumstances, we would naturally wonder what would be the efficiency of the European legislative act, which in this case it cannot be relied upon, as identifying and punishing the person in question is done on spot when the person is caught.

At the same time there are situations where certain infringements of the rules relating to road safety can be found and then committed. Thus, except for breaches of road safety by driving a vehicle under the influence of alcohol or drugs, all other violations can be established later. We believe that if they may be identified only through tools of identification by using facilities provided by the European legislative act and not those that can be found “in flagrante” under the criminal proceedings.

Of course, the identification of persons that directly participated in the infringement by which it is endangered the road safety or the owners or holders of vehicles involved, it may be achieved under the European legislative act at fact finding, when the involved people have used false identities, aspect involving subsequent verification in their country.

In this context we consider that the European legislative act would have to make a clear distinction between cases where it can make use of its provisions and exceptional situations. It is quite clear that solving the infringements according to which the road safety is affected, on spot, on the moment of fact finding, it does not require further verification in the home Member State of the ones involved, except in certain situations, which we consider to be an exception.

Another criticism regards the absence of rules on the legal person responsibility, in its quality of owner or keepers of the vehicle involved or participating directly in the offence. We insist upon this situation because the legal person responsibility varies from case to case, being required each time a pertinent analysis, based on the involvement degree of the legal person to the breach that affects road safety laws in a Member State.

Finally a last remark concerns the rights of the person concerned, regardless of its quality, the driver of the vehicle, its owner or its keeper. Thus, when the person contests taken action, to which court will the person address? To the Member State where the infringement was committed or the State of residence or home? We find that European legislative act does not solve this problem more so it did not even get it into account. We believe that in such a situation, given the existing facts, that person may only address to a competent court of the State where the crime was committed. But, in that case, the person concerned will have to contest a fine, during which you have to go to court, after being first identified, involving a number of expenses that will surely be greater than the amount of the applied fee. In these conditions, one may naturally wonder whether this right is respected. This issue is extremely sensitive, requiring a different approach which we will analyze in a future paper.

5. Bibliography

Rusu, Ion (2010). Monitoring the Probation Measures and Alternative Penalties in the European Union. Critical Remarks. *Acta Universitatis Danubius Juridica (VI)*, no. 1/2010, pp. 23-44.

Boroi, Alexandru; Rusu, Ion (2008). *Cooperarea judiciară internaţională în materie penală/International judicial cooperation in criminal matters.* Bucharest: C.H. Beck.

***Directive 2011/82/UE of Parliament and the Council of 25 October 2011 of facilitating cross-border exchange of information on traffic violations affecting road safety, published in the Official Journal of the European Union L 288 / 1 of 11.05.2011.

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European Warrant for Obtaining Evidence

Minodora-Ioana Bălan-Rusu[1]

Abstract: This paper concerns a general examination of the European legislative act regulating the activity of obtaining evidence for their use in criminal proceedings, its importance resulting from the novelty that it represents. The research may be useful both to Romanian and European judicial authorities with responsibilities for judicial cooperation in criminal matters and also to theorists that examine the complex cooperation system at EU level. The research results, the essential contribution, its originality consist of the critical general examination of the concerned normative act, and also the proposals to amend and supplement some provisions which may cause dysfunctions in practice.

Keywords: crime; judicial cooperation; proposals

1. Introduction

The development of European countries since the second half of last century has created new possibilities for moving people and goods in Europe, which caused new mutations in the structure of cross-border crime, mutations generally defined by the possibility of moving criminal elements, to ensure efficient organization and permanent logistics. (Rusu, 2010, p. 20)

In these very complex conditions, European countries, aware of the increasing perspective of cross-border crimes globalization and organized crime, they have increasingly insisted on initiating an organized framework for judicial cooperation in criminal matters.

The first and most important step in the improvement and modernization of the institution of extradition was made in the second half of last century by the European Council, by adopting the European Convention on Extradition on 13 December 1957. (Boroi & Rusu, 2008, p. 299)

By establishing the European Union among other facilities granted to their citizens, it also appeared the one of the free movement of persons and goods within the Union, an aspect which led inevitably to increasing crime of all kinds and especially the cross-border and organized crime.

The establishment of the European Union and subsequently the Schengen area created new possibilities of actions to the crime element and thus increase criminality, exacerbated possibilities of increasing the opportunities the action territory by the admitting new states. (Rusu, 2009, p. 19)

Although the system of cooperation in criminal matters between European countries, achieved by the compliance of European Convention on Extradition has worked for a while in good conditions, however, as time has passed it was proved to be increasingly ineffective. This conclusion had to find a solution, as the crime was in a constant increase.

The found solution was establishing a new surrender procedures of criminals between Member States to a procedure that would simplify the whole activity, so that all that all offenders that have committed

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crimes in the European Union would be identified and returned to the States where the crime was committed, for trial and conviction in the shortest time. (Rusu, 2009, p. 19)

In this very complex context, with major implications in the evolution of the European Union, it was adopted the Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant for obtaining evidence and surrender procedures between Member States.

The importance of this legal instrument for judicial cooperation in criminal matters arising from the innovations that it brings in the procedure of looking for wanted persons between Member States, by simplification and efficiency through judicial cooperation is achieved.

Among the innovations it brings the European arrest warrant for obtaining evidence in relation to extradition, we note the following:

- widening the scope of applicability by including new types of offenses of increased gravity;
- renouncing to verification procedure of double criminality for groups of offenses;
- simplifying the surrender procedures;
- increasing efficiency by shortening deadlines;
- simplifying the administrative stage;
- possibility of direct cooperation between competent judicial institutions;
- surrender of their citizens;
- complying with the provisions of the Framework Decision by all States (Rusu, 2009, p. 49).

Despite its significance, however, the most important form of judicial cooperation in criminal matters between Member States is considered to be the recognition and enforcement of criminal judgments emanating from another Member State. Surrender a person under a the European arrest warrant for obtaining evidence can be based only on its recognition and enforcement by the judicial authority of the executing Member State. In order to ensure an organized framework for judicial cooperation in criminal matters, at the level of European Union were subsequently added several acts. In this context, of improving cooperation relations between Member States it was adopted Framework Decision 2008/978/JHA of 18 December 2008 on the European Warrant for obtaining evidence for obtaining objects, documents and data for their use in criminal matters proceedings.

Under the mentioned European legislative act, the European Warrant for obtaining evidence may be used by Member States' judicial authorities in order to obtain any objects, documents and data for using them during criminal matters proceedings.

They are issued only by judges, courts, judges, prosecutors and other judicial authorities, the European Warrant for obtaining evidence may be issued for: obtaining objects, documents or data from a third party, coming after a search, including the suspect's residence, previous data on the use of any services including financial transactions, statements, interviews and hearings, historical records and other documents, including the results of special investigation techniques.

In this paper we proceed in examining the new forms of judicial cooperation in criminal matters between Member States, in what regards the legal nature, definition, scope, types of procedures, issuance and transfer of the European Warrant for obtaining evidence, subsequently we will examine other institutions of this form of cooperation.

2. The Need of Adopting, Defining and Execution Requirements

The objective of the examined European legislative act is to replace the system of mutual assistance in criminal matters for obtaining objects, documents or data between Member States.

The European Arrest Evidence must be issued only for obtaining objects, documents or data; the search is necessary and proportionate to the criminal or other proceedings concerned.

At the same time the issuance of such a document must be achieved by the issuing State only if the objects, documents or data could be obtained, in a compatible case, according to its internal law. In

other words, at the issuance of a European Evidence warrant issuing authority it must be considered also the possibility of executing a warrant under its own laws.

According to mentioned European legislative act, the European Warrant for obtaining evidence is a judicial decision issued by a competent authority of a Member State in order to obtain objects, documents and data from another Member State for their use in authorized expressly mentioned proceedings.

European Arrest Evidence will be executed based on the principle of mutual recognition under the provisions of the examined legislative act.

In order to avoid a unilateral interpretation that will not be in agreement with the European legislator's will within the legislative act there were defined some activities and institutions that we reproduce in order to understand the examined institution:

- *Issuing State* means the Member State that issued the European Warrant for obtaining evidence ;
- *Executing State* means the Member State in whose territory are the objects, documents or data or, in case of electronic data, the Member State in which they are directly accessible under the law of the executing State;
- *Issuing authority means:* A judge, a court, an instruction judge, prosecutor, or any other judicial authority, as defined by the law of the issuer, acting, in that case, as the authority leading the criminal investigation which is part, in accordance with the internal law, to dispose the obtaining evidence in cross-border cases;
- *Executing authority* means an authority which is, under the national legislation, implementing the examined European legislative act, the power to recognize or execute a European Warrant for obtaining evidence ;
- *Search* or *seizure* of include any measures Criminal Procedure from which a legal or natural person is required under legal constraint, to provide or participate in providing objects, documents or data, measures, which, in case of failure, can be enforceable without the consent of such person or it may lead to a penalty.

3. The Scope, Types of Procedures, the Content of the Warrant

The European Arrest Evidence may be issued in order to obtain, in the executing state objects, documents or data necessary for the issuing state for procedures expressly provided.

The European Arrest Evidence can not be issued for the purpose of requiring the executing authority the following:

- to organize query, take statements or initiate other types of hearings involving suspects, witnesses, experts or any other persons;
- carry out bodily examinations or obtain bodily material or biometric data directly on a person's body, including DNA samples and fingerprints;
- to obtain real time information through technical means and the interception of communications, under cover surveillance or monitoring bank accounts;
- to explore objects, documents and data;
- to obtain communications data retained by communications service providers of public electronic communications or by a public communication network.

Please note that the European Warrant for obtaining evidence may still be issued in connection with the above described, unless the objects, documents or data are already in the possession of the executing authority before issuing the warrant.

When the issuing authority indicates as such, the European Warrant for obtaining evidence may include any other objects, documents or data which the executing authority discovers during the

execution of the warrant, and that, without further inquiries it considers to be relevant for the procedures to which the warrant was issued.

Also, if the issuing authority requests it so, the European Warrant for obtaining evidence may include taking statements from persons present during its execution, which are directly related to the warrant.

Under the European legislative act, the European Warrant for obtaining evidence may be issued:

- on criminal proceedings initiated by a judicial authority or will be brought before a court on an offense under the national law of the issuing State;
- on proceedings initiated by the administrative authorities of facts which are subject to criminal sanctions under the national law of the issuing State as they represent infringements of the rules of law and in the case where the decision of the mentioned authorities may be subject to appeal before a competent court, particularly in criminal matters;
- in proceedings instituted by the judicial authorities on the facts which are subject to criminal sanctions under national law of the issuing State as it represents infringements of the rules of law and in the case where the decision of the mentioned authorities may be subject to further appeal to the a competent court, especially in criminal matters;
- In connection with the above, which relate to acts or offenses that can incur the liability of a legal entity or it may lead to criminal sanctions of a legal person of the issuing State.

In terms of the content of the warrant, it must be designed in accordance with Annex, it will be filled in, signed, and the content will be certified as correct by the issuing authority. The European Arrest Evidence will be prepared and translated by the issuing in the official language or the official language of the executing state.

4. Issue and Submission of European Warrant for Obtaining Evidence

For issuing the European warrant for obtaining evidence it is required that each Member State takes measures to ensure that it is issued only when the issuing authority considers to have been met the following conditions:

- obtaining the sought objects, documents or data is necessary and proportionate to the purposes and the procedures provided in the mentioned above legislative act;
- the objects, documents or data can be obtained under the law of the issuing state within compatible proceedings, if that would be available within the issuing State, even if they could use different procedural measures.

The European Arrest Warrant for obtaining Evidence may be submitted to the competent authority of a Member State in whose territory the competent authority of the issuing State has reasonable grounds to believe that the documents or data objects are relevant or not, if electronic data, as these data are directly accessible under the law of the executing State. The warrant will be sent without delay by any means which leaves a written record and under the conditions of allowing the executing State to establish authenticity. After transmitting, all subsequent official communications will take place directly between the two authorities (issuing and execution).

If deemed necessary, each Member State may designate one or more central authorities in order to grant specialized support to the authorities directly involved. If necessary, a Member State may entrust its central authority or authorities sending and receiving, by the administration, of the European Warrant for obtaining evidence and every official correspondence. Of course all these decisions must take into consideration the internal law of that State.

Transmission of the European Warrant for obtaining evidence may also be made via the secure telecommunications system of the European Judicial Network.

When out of various reasons the executing authority of the executing Member State is not known, the issuing authority shall make all necessary investigations, including the contact points of the European Judicial Network, in order to obtain the necessary information from the executing State.

In the case where the judicial authority of the executing State receives a European Warrant for obtaining evidence finds that it is not competent to execute it according to its national legislation, it will send the warrant to a competent authority and it shall inform about it the issuing authority.

Any difficulties that arise during the execution of the warrant shall be settled by the two authorities involved, or if not possible, through the intervention of central authorities of both Member States.

When out of various reasons the issuing judicial authority shall issue a warrant that supplements a previous one, or is the result of a freezing order transmitted under Framework Decision 2003/577/JHA, it will indicate this aspect in the content of the warrant.

If the issuing authority participates in the execution of the European Warrant for obtaining evidence in the executing State, it may submit a new warrant that complements the first, directly to the enforcement authority, while being on the territory of the executing state.

The personal data obtained can be used by the issuer for the following purposes:

- procedures for which the European warrant for obtaining evidence may be issued;
- other judicial and administrative proceedings directly related to the above;
- preventing a serious and imminent threat to public security.

The use in other purposes that those mentioned above of personal data may be used only with prior consent of the executing State, unless the issuing State has obtained the consent of the person in question.

5. Conclusions and Critical Opinions

In our opinion the adoption of this European Legislative Act it is absolutely necessary because of Member States' will to increase the specific activities of judicial cooperation in criminal matters, the aim being preventing and fighting against the crime of all kinds more effectively. Also adopting this European tool of judicial cooperation will contribute in achieving the objective assumed by the European Union that is to ensure an area of freedom, security and justice.

The examined the legislative act will facilitate obtaining objects, documents or other data absolutely necessary in the investigations or court proceedings, which represent evidence in the criminal proceedings of a natural or legal person in another state, other than where they were. Examining this legislative act allows us to formulate some critical opinions, which would contribute to improving the system of judicial cooperation, possibly by modifying and supplementing it. A first observation concerns the fact that by its norms, the legislative act s is not a clear distinction between objects, documents or data that need to be collected from businesses. We believe that in these circumstances, there should be adopted some clear provisions, especially given their distinct status towads individuals. The provision contained in article 7 of the examined legislative act implying that any issuance of the European Warrant on obtaining the evidence it should be reviewed and approved by another institution of the issuing Member State. We believe that such a provision is unnecessary, the self-responsibility belonging only to the issuing judicial authority and not to other administrative institutions. A final critical observation concerns the content of article 8 line (4) of the examined legislative act which provides that, under the executing judicial authority it is not known, the issuing authority shall make all the necessary investigations, including the contact points of the European Judicial Network. We believe that in such a case, the issuing authority should contact the Ministry of Justice of the issuing State, an institution that will carry through the necessary checks, service or specialized compartment. As a general conclusion we consider that the adoption of this legislative act it will contribute to improving the judicial cooperation system in criminal matters between Member States.

6. Bibliography

Rusu, Ion (2010). The European Arrest Warrant According to the Latest Changes and Additions. *Proceedings, 5th Edition of The International Conference. European Integration Realities and Perspectives*. Galati: Editura Universitară Danubius, pp. 19-27.

Boroi, Alexandru & Rusu, Ion (2008). *Cooperarea judiciară internaţională în materie penală/ International judicial cooperation in criminal matters.* Bucharest: C.H. Beck.

Rusu, Ion (2009). Mandatul European de arestare în urma modificărilor aduse de Legea nr. 222/2008/ The European arrest warrant following the changes to the Law no. 222/2008. *Caiete de Drept Penal/ Notes of Criminal Law no. 1/2009*. Bucharest: C.H. Beck, pp. 17-49.

***Framework Decision 2008/978/JHA of 18 December 2008 on the European warrant for obtaining evidence, objects, documents and data for use in criminal proceedings, published in the Official Journal of the European Union L 350 / 72 from 30.12.2008.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

The European Arrest Warrant

Minodora-Ioana Bălan-Rusu[1]

Abstract: In the paper it is generally examined the institution of the European arrest warrant according to the latest changes and additions through the adoption of a new European legislative act. The paper is a continuation of research in the area of judicial cooperation in criminal matters in the European Union. It may be useful to the judicial bodies with the responsibilities of issuing and executing a specific European arrest warrant and to academics and students in law schools. The research results, the essential contribution, the originality consist of the general examination of the institution, the critical remarks and proposals for amending and completing certain provisions insufficiently clear.

Keywords: crime; critical opinions; judicial cooperation

1. Introduction

The Romanian doctrine, as the European one, has revealed that the oldest and well known form of international judicial cooperation in criminal matters is considered to be the extradition.

In its historical evolution, the institution of extradition has been a permanent subject of negotiations between the world countries, the ultimate goal being to find the most effective ways to surrender offenders' refugee in another state. Bilateral agreements have resulted in treaties, conventions or other similar instruments that have played a decisive role in preventing and fighting crime more effectively. (Rusu, 2010, p. 19).

One of the fundamental problems that caused many political-legal discussions between the countries of the world was of course the extradition of their own citizens. (Boroi & Rusu, 2008, p. 299)

For a long time, all world countries (except U.S. and Britain, but only bilaterally and under certain conditions) did not accept the extradition of their citizens, moreover they did not committed even to judge according to the internal laws on those who have committed criminal acts in other states. (Boroi & Rusu, 2008, p. 299)

Developing world Member countries even since the beginning of the last century, especially since the second half, it has created new possibilities for moving people and goods, something that caused new mutations and the structure of cross-border crime, mutations generally defined by the possibility of moving criminal elements, for ensuring a high quality organization and logistics.

In this context particularly complex, aware of the increased danger represented by the attempt to globalize some serious forms of organized crime, among which we mention terrorism, drug trafficking, trafficking in arms and ammunition, human flesh etc., the European governments have continuously insisted upon the improvement of international judicial cooperation in criminal matters. (Rusu, 2010, p. 20)

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The first and the most important step in the direction of improvement and modernization of the institution of extradition was made in the second half of last century by the European Council, by adopting the European Convention on Extradition of 13 December 1957. (Boroi & Rusu, 2008, p. 299)

Although initially the mentioned European legislative act proved its effectiveness, contributing decisively to the improvement of complex business and crime prevention at the level of Europe, being subsequently updated by two additional protocols, however, in time this institution proved as such to have large gaps. (Rusu, 2009, p. 19)

The establishment of the European Union and subsequently the Schengen Area created new opportunities of criminal elements and implicitly the growth of crime, increased possibilities of territorial expansion of action by the admission to new states. In the new context created in the early XXIst century, the movement of offenders from one corner to another of Europe, is without any risk. (Rusu, 2009, p. 19)

Against this background, which led to increased crime, the European Union's objective of becoming an area of freedom, security and justice, seemed to be in danger. (Boroi & Rusu, 2008, p. 300)

No doubt the new security threats of Member States, this time more current and also dangerous, has prompted the establishment of new procedures between Member States, a procedure the simplifies the entire activity. In this context, very complex, with major implications regarding the evolution of the European Union, it was adopted the Framework Decision 2002/584/JHA of 13 July 2002 on the European arrest warrant and surrender procedures between Member States.

The importance of this international instrument stems from the novelty elements that they bring in the surrender procedure of criminals between Member States, by simplification and efficiency with which it is achieved within the EU judicial cooperation.

Among the innovations that the European arrest warrant brings (in relation to the institution of extradition), note the following:

- widening the scope to include new types of offenses of increased gravity;
- renouncing at verifying the double incrimination procedure for these groups of offenses;
- simplifying the surrender procedures;
- increase the efficiency by shortening deadlines;
- simplifying the administrative stage;
- possibility of direct cooperation between the judicial institutions;
- surrender their citizens;
- complying with the provisions of the Framework Decision by all Member States (Rusu, 2009, p. 49).

We can say that the establishment of the European arrest warrant replaces the extradition institution in the relations of cooperation in criminal matters between Member States of the European Union. Thus, under the procedural aspect, the EU Member States, the European arrest warrant has practically replaced the European Convention on Extradition, an international instrument remaining in force as being applicable in its relations between European Union Member State and another Member State not being EU member, or between two countries not members of the European Union, but only of the Council of Europe.

2. Acts that Allow Surrender

The examination of the mentioned European legislative act depositions leads to the conclusion that only a series of crimes, regarded as being more serious (included in several groups), regardless of the title that it is used in the legislation of the issuing state, if it is sanctioned by the law of the issuing State with a sentence or a custodial measure for a maximum period of at least three years, it will not be subject to checking the condition of double incrimination.

These types of offenses are expressly mentioned in article 2 line (2) of Framework Decision 2002/584/JHA, the European legislator can still leave the possibility of their extent depending on the overall evolution of the recorded crime in each Member State. (Rusu, 2010, p. 21)

Meanwhile, the European legislative act provides that for other offenses, other than those mentioned above, surrender is subordinated to the condition that the facts justifying the European arrest warrant would represent an offense under the laws of both countries involved, regardless of their constituent elements or their legal integration, a condition which is expressly stated in the international law and the Romanian and European doctrine as "double incrimination".

According to European legislative act, the Member States have two categories of reasons to refuse to execute a European arrest warrant, of which the first falls into the *mandatory reasons*, and the second into the optional reasons. (Boroi & Rusu, 2008, p. 313)

3. Mandatory and Optional Reasons for Refusing the Execution of the Warrant

The European legislative act provides that the executing judicial authority (of any Member State) will refuse to execute the European arrest warrant in the following cases:

a) when, according to the available information, that person was prosecuted for the same offense finally judged by a Member State, other than the issuer, under the condition that, if convicted, the penalty has been executed or currently being in execution, or may no longer be executed under the law of the convicting Member State;

b) the offense on which the European arrest warrant is covered by amnesty in the executing Member State where that State had jurisdiction to prosecute the offense under its criminal law;

c) the person who is the subject of European arrest warrant cannot, because of the age, be held criminally responsible for the acts mentioned in the warrant, under the law of the executing Member State.

We find therefore, that whenever the executing judicial authorities will notice the existence of one of the above mentioned situations, they will necessarily refuse to execute the European arrest warrant. The provisions of the European legislative act is mandatory, they can leave no room for interpretation, regardless of the common will of the States directly concerned, of course in concrete cases.

Optional Reasons

The European legislative act provides some optional grounds for refusal to execute a European arrest warrant by the judicial authority of the executing State, namely:

- when surrender is submitted to the condition upon the facts justifying the issuance of European arrest warrant it would represent an offense under the executing State law, regardless of their elements or legal classification, the act underlying the European arrest warrant is not a offense, in accordance with the law of the enforcement state; in exceptional cases relating to taxes, customs and exchange, the execution of European arrest warrant cannot be refused because the state law enforcement does not require the same type of fees or taxes or it does not contain the same type of rules on taxes, customs and foreign exchange just as the law of the issuing Member State;

- the person who is the subject of European arrest warrant is subject to criminal proceeding in the executing Member State for the same offense motivating the European arrest warrant;

- the judicial authorities of the executing Member State have decided either not to prosecute for the offense on which the European arrest warrant or to terminate it, or where the requested person has made a final judgment in a Member State for the same facts that prevent further proceedings;

- when the prosecution or punishment was prescribed in accordance with the executing Member State and the acts fall within the competence of that State, under its criminal law;

- when the information is available to the executing judicial authority that the requested person was finally judged for the same acts of a third country, under the condition that, in case of conviction, the sentence was executed or at that time was under execution or it may no longer be executed under the law of the sentencing country;

- when the European arrest warrant was issued for a penalty or a deprivation of liberty measure, then the requested person is staying in the executing Member State, is a national or resident thereof, and that State undertakes to execute the sentence or detention order in accordance with the national law;

- the European arrest warrant relates to offenses: in accordance with the executing Member State, the offenses have been committed wholly or partly within the executing Member State or in a place treated as such, or were committed outside the territory of the issuing Member State and the executing Member State's law does not allow prosecution for the same offenses when committed outside its territory.

So whenever it will be incident, in one of the reasons listed above, the executing Member State will have available two alternatives, namely: being denied the execution of warrants relying on the provisions of article 4 of the European legislative act (and other reasons justified by the provisions of its internal law), or proceed to the execution of the European arrest warrant, without justifying the reason. (Rusu, 2010, p. 23)

According to the interpretation of the provisions of the European legislative act, it results in both cases, that the executing Member State will proceed correctly, because as mentioned, these reasons that can be invoked are optional for the executing State, the responsibility for the adopted manner it belongs exclusivity to that state.

4. Changes and Additions to the European Legislative Act Framework

Both in doctrine and legal practice, observing some failure in the text of the Framework Decision 2002/584/JHA, on ensuring that the right of the person in question to be present at its trial, was later adopted Framework Decision 2009/299/JAI of the Council of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, strengthening the procedural rights of persons and encouraging the application of the principle of mutual recognition to decisions rendered in the absence of the person in question at the trial.

In our opinion, this change has occurred because, according to Framework Decision 2002/584/JHA, the executing authority may request the issuing authority to give certain assurances considered sufficient to ensure the person subject to the European arrest warrant, that will have the possibility to seek a retrial in the issuing Member State, being present when the judgment is passed. Regarding the *sufficient* nature of such insurance, we see that it was left to the executing judicial authority, without being provided other clear criteria based on which this authority may act.

On the other hand, note that the right of the accused person of being present in person at trial is included in the right to a fair trial according to article 6 of the Convention on Human Rights and Fundamental Freedoms. Meanwhile, note that while the Court ruled that the accused person's right to be present in person at trial is not absolute, it can give up, voluntarily and unconstrained by anyone expressly or impliedly, but clearly, to this right.

Given these considerations, the European legislative act mentioned above, there were some additions and changes to the optional supplementation refuse reasons of the European arrest warrant enforcement by a member state under certain conditions.

Thus, by the Council Framework Decision 2009/299/JAI, article 2, it was introduced a new article, namely the fourth, called "*Decisions rendered following a process in which the person was not present at the trial*".

These new provisions provide that the executing judicial authority may refuse to execute the European arrest warrant issued in the purpose of executing a penalty or a deprivation of liberty measure, if the person was not present at the trial when the judgment was passed.

From this general rule, an exception is the situation where the European arrest warrant states that the person, in accordance with further procedural requirements defined in the legislation of the issuing Member state, in useful time, it was summoned in person (and thus informed) with the date and place established for the trial which led to the decision, whether actually received by other means, any official information about the date and place of that process and it was informed that a decision can be rendered if it did not appear at trial, or, with knowledge of the established trial, instructed a lawyer (who may be appointed by the person or ex officio, to defend the process), which actually participated effectively to the trial defending the regarded person. (Rusu, 2010, p. 24)

Another exception to the above general rule refers to a situation where, after being passed the judgment and being expressly informed about its right to a retrial or to appeal, in which it is entitled to participate and which allows the case, including new evidence, to be reviewed and it may lead for the original decision to being reversed, the person has expressly stated that it does not contest the decision or it did not request the retrial or promote remedies in due time. (Rusu, 2010, p. 24)

A final exception concerns the situation where, although the person concerned was not informed with the decision, it was not delivered personally and immediately after delivery and it will expressly be informed about the right to a retrial or an appeal to which is entitled to be present and it will allow that the situation of the case, including new evidence to be reviewed and it may lead to the dissolution of the original case and also, it will be informed about the timeframe in which it should request a retrial or promotion of an appeal according to the European arrest warrant.

Also, in case the European arrest warrant is issued for a penalty or a deprivation of liberty measure, under the conditions mentioned above, and the person in question has not previously received any official information on the procedures proceedings against him, the person may request, when informed of the contents of the European arrest warrant, a copy of the judgment before being surrendered. On the receipt of information upon request, the issuing authority shall provide the wanted person a copy of the judgment by the executing authority. It is worth mentioning that the application of the requested person must not delay the surrender procedure or the decision to execute the European arrest warrant.

When the person surrendered under the same conditions (as above) requested a retrial or appeal, the person's detention awaiting retrial or an appeal is reviewed in accordance with the issuing Member State, to the completion of proceedings, either ex officio or at the request of the concerned person. Such review shall provide, in particular the possibility to suspend or discontinue the detention. Retrial or appeal will begin in due time after the surrender. (Rusu, 2010, p. 24)

5. Conclusions and Critical Remarks

The main changes and additions to the legislative act that regulates the delivery under a European arrest warrant, the European legislator has introduced other optional reasons, besides those already existing, which can lead to the refusal to execute a European arrest warrant issued by another Member State. These changes and additions provide better conditions and the right of the person under the European arrest warrant issued to enforce a penalty or a deprivation of liberty measure, for the retrial of the cause where it has been convicted in his absence at the trial.

This solution has imposed due to the European Court of Human Rights, which called respecting the provisions of article 6 of the Convention on Human Rights and Fundamental Freedoms, as well as criticisms on the doctrine.

Although the establishment of a European arrest warrant, as amended and supplemented (to which it was referred), represents in our opinion a great success in the complex work of preventing and

combating crime of all kinds in the European Union, the research of its provisions has lead to the conclusion of the existence of rules at least questionable, if not likely to change and complete.

A first critical opinion regards the failure of taking into account by the European legislator the ways of executing some custodial measures for offenders. Thus, out of the definition of a European arrest warrant, it results that it is executed for *the achievement of criminal investigation or for a penalty execution or a deprivation of liberty measure*. We note that the above provisions make no reference to safety measures that may be taken against a minor (according to our legislation, internment in a rehabilitation center and hospitalization in a medical-educational institute). In this situation, given that the European legislative act expressly states the cases where it is executed a European arrest warrant, where the warrant is required for the execution of educational measures, this will not be possible. Thus, the juvenile offender against whom it was taken such a measure and avoid the execution moving in another Member State cannot surrender to the executing state based on a European arrest warrant.

Of course the situation is different if against the minor it is achieved prosecution because, this time, the Member State in which he committed the offense may issue a European arrest warrant and the addressing Member State can execute it, in compliance with the mandatory or optional reasons for refusal.

This situation has not been noticed by any Romanian legislator, which in the special law defines the European arrest warrant in the same way, basically copying the text drafted by the European legislator and excluding the surrender of the minor offender to carry out a security measure.

Given the above, we believe it is urgent to complement the European legislative act according to the specified reasons, by including custodial educational measures among the reasons that a European arrest warrant may be issued and executed.

We also believe that our special law must be supplemented with the same provisions. A possible addition may be achieved only by the Romanian legislator for the above purposes that would lead to the execution by the Romanian judicial authorities of a European arrest warrant issued by another Member State, and hence the impossibility of requiring such a warrant execution, under current provisions of the European legislative act. However, in this situation (when the special law would be completed) there is the possibility of issuing by the Romanian judicial authorities a European arrest warrant and its execution and therefore, only when in the state law enforcement there are provisions on the execution of such warrant and in the case of minors against whom a custodial security measure was taken. (Rusu, 2010, p. 25)

The second critical opinion concerns the way in which the difference between some of the optional and mandatory grounds for the refusal of executing a European arrest warrant, an aspect mentioned in the European legislative act and Romanian special law.

Thus, one of the reasons provided in the European legislative act, at article 4, line (4), which provides that the addressed Member State may refuse to execute a European arrest warrant *when it was decided the prosecution or punishment under the law of the executing Member State and the acts fall within the competence of the Member State in accordance with its criminal law*.

In our opinion, in the case law, in such a situation it cannot be discussed an option of the executing Member State, but only a mandatory one. We argue this view on the grounds that in the case of criminal liability or penalty, the person concerned cannot tolerate any criminal sanction, except safety measures.

As a general conclusion, we consider that in order to ensure an effective judicial cooperation in criminal matters between Member States, it is absolutely necessary to amend and supplement the European legislative act and the special law, according to the achieved examination and suggestions.

6. Bibliography

Rusu, Ion (2010). The European Arrest Warrant According to the Latest Changes and Additions. *Proceedings, 5th Edition of The International Conferince, European Integration Realities and Perspectives*. Galati: Editura Universitară Danubius, pp. 19-27.

Boroi, Alexandru; Rusu, Ion (2008). *Cooperarea judiciară internaţională în materie penală/Judicial cooperation in criminal matters*. Bucharest: CH Beck.

Rusu, Ion (2009). Mandatul European de arestare în urma modificărilor aduse de Legea nr. 222/2008/The European arrest warrant following the changes to the Law no. 222/2008. *Caiete de Drept Penal/ Notes of Criminal Law no. 1/2009*. Bucharest: C.H. Beck, pp. 17-49.

***Framework Decision 2002/584/JHA of 13 June 2002, the European arrest warrant and surrender procedures between member States, published in Official Journal L 190/2002, p 1-20, the Framework Decision 2009/299/JAI 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2008/909/JHA and 2008/947/JHA, to strengthen the procedural rights of persons and fostering the application of mutual recognition on decisions in the absence of the person at the trial, published in the Official Journal of the European Union L 81/24 of 27.03.2.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

The New Romanian Criminal Code and the Current Romanian Criminal Code, Related to Prior Complaint in Case of Abuse of Office

Alexandru Boroi[1], Angelica Chirilă[2]

Abstract: According to paragraph 2, art. 258, Criminal Code, introduced by the sole article of Law. no. 58 as of 19th March 2008, published in the Official Gazette no. 228/25 as of March 2008, "In the case provided at para 1, for the facts set out in art. 246, 247 and 250 para. 1-4, the criminal proceedings shall be initiated at the prior complaint of the aggrieved party, except for those that have been committed by a person out of those mentioned in Article 147, para 1". Thus, the criminal proceedings shall be initiated at the prior complaint of the aggrieved party in case of *abuse of office against the interests of persons, abuse of office by limitation of some rights, abusive behavior,* when these crimes are committed by other officials, according to art. 147. para 2, Criminal Code. Changes brought by the Romanian Criminal legislator to art. 258, Criminal Code, had in view, obviously, the nature of the protected interest. The legislator appraised that there is no justification to further allow the initiation of ex officio criminal proceedings in case of injuring some private interests like those covered by these three articles (Articles 246, 247, 250, para. 1 - 4 Criminal Code). In the new Criminal Code, the legislator does no longer provides the condition of formulating the prior complaint in the case of perpetrating the facts of abuse of office by other officials or by other persons assimilated to public officials, as in the actual Criminal Code. As in the new Criminal Code it is not provided the existence of prior complaint of the aggrieved party, as condition of the fact of being susceptible of punishment and initiating the judicial procedure, in what concerns committing certain acts of abuse of office, makes that the actual Criminal Code becomes *mitior lex*.

Keywords: abuse of office; prior complaint; aggrieved party; more advantageous criminal law

1. General Considerations about the Prior Complaint

Lato sensu, any claim made by the person who was the victim of an offence is called a complaint. But when the law conditions the initiation of criminal proceedings by the intervention of a complaint, than the complaint is given the rating of prior, because it must precede any other procedural activity (Dongoroz, 1939, p. 580).

Professor Vintila Dongoroz shows that the prior complaint has as reason the need to enable the conciliation of the collective interests with the private interests, for those offenses to which protecting the latter prevails (Dongoroz, 1939, p. 581).

Arguments in supporting the conditioning of criminal accountability by the existence of a prior complaint for certain categories of offenses, although different in form, according to the types of criminal offenses, however, have a common feature, a common content - namely, the interest of **protecting individuals**, interest that becomes **social interest**, in relation to the consequences of the crime.

Criminal Law provides *in terminis* the offenses for which criminal proceedings shall be initiated at the prior complaint of the aggrieved party, the legislator itself delimiting the range of offenses for which

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criminal liability is dependent on the existence and maintenance of such a complaint, because it institutes an exception when starting the public action is left to the discretion of the aggrieved part.

In the offence indictment norm, it must be mentioned that the criminal proceedings for that office is initiated at prior complaint of the aggrieved party (Pascu, 2007, p. 374).

Practically, this condition delimits the range of offenses for which criminal liability is subject to the complaint, and the lack of prior complaint determines the removal of such liability (Dongoroz et al., 1970, p. 388), (Dima, 2007, p. 462), (Bică et al., 2007, p. 249).

In terms of technique's systematization, this condition is provided either by the same article that contains the indictment rule, at the end of the paragraph, as distinct hypothesis, or in another paragraph, usually at the end of the article, or in a different article, placed after the group of indictment rules, when the condition refers to more offences[1].

Obviously, the base of the regulation can only be the special part of the Criminal Code, special criminal or non-criminal laws that comprise provisions with criminal character.

The Constitutional Court's jurisprudence implies that the settlement of offences for which a precursory complaint is necessary, as well as of those when criminal prosecution is granted ex officio is an option of the legislator, and the distinction provided by law do neither mean privileges awarded to one of the parties in the penal process, nor discriminations[2].

2. The Prior Complaint in case of Abuse of Office in the Actual Romanian Criminal Code

According to paragraph 2, art. 258, Criminal Code, introduced by the sole article of Law. no. 58 as of 19th March 2008, published in the Official Gazette no. 228/25 as of March 2008, "In the case provided at para 1, for the facts set out in art. 246, 247 and 250 para. 1-4, the criminal proceedings shall be initiated at the prior complaint of the aggrieved party, except for those that have been committed by a person out of those mentioned in Article 147, para 1".

Thus, the criminal proceedings shall be initiated at the prior complaint of the aggrieved party in case of *abuse of office against the interests of persons, abuse of office by limitation of some rights, abusive behavior,* when these crimes are committed by other officials, according to art. 147. para 2, Criminal Code.

In case the criminal acts mentioned are committed by *public officials* mentioned in art. 147, para 1, Criminal Code, the criminal proceedings shall be initiated and they are exercised ex officio.

Thus, the criminal accountability for the acts under the provisions of art. 246, 247, 250, para1-4, Criminal Code, perpetrated by officials starting with 28th March, 2008, the date when the text of the law entered to force, is depended upon the existence (formulation) of prior complaint of the aggrieved party; in the absence of such complaint, it will be decided the termination of criminal prosecution or trial, as case may be (Sima, 2008, p. 120).

The changes brought by the Romanian Criminal legislator to art. 258 Criminal Code, had in view obviously, the nature of the protected interest. Moreover, in judicial practice, it was discussed often the issue whether the initiation of criminal proceedings, in case of such offences that injures a private

[1] This last technique of systematization is met in non-criminal special laws that comprise indictments. For example, Law no. 8/996 regarding the copyrights and related rights, art. 144; art. 277-297 from Law no. 53/2003 regarding Labor Code; art. 86 from Law no. 168/999 regarding solving the work conflicts. In Criminal law, for example, this technique is met in the case of punishing the theft at prior complaint, placing art. 210 after the law texts that comprise the indictment of simple theft and respectively, aggravated theft, it leads to the conclusion that previous complaint becomes a condition of punishment and proceeding both for simple and aggravated theft, when the conditions provided at art. 210, Criminal Code, are met.

[2] The Constitutional Court, decision no. 161/2000, published in the Official Journal no. 520/ 23.10.2000; The Constitutional Court, decision no. 197/2000, published in the Official Journal no. 543/ 01.11.2000

interest, should not have at its basis the previous complaints of the aggrieved party (Ciuncan, 2008, p. 105).

In the cases had in view, the social interest protected by criminal norm is a private one, and the aggrieved party has an essential role in the criminal investigation of these facts. Such a provision is also found in the case of some offenses against person or against property, mentioning that in the latter situation, the regulating regards the offenses against private property - breach of trust, fraudulent management, and destruction.

The legislator appraised that there is no justification to further allow the initiation ex officio of the criminal proceedings in case of injuring some private interests as those covered by the three articles (Articles 246, 247, 250, para. 1-4, Criminal Code.) (Ciuncan, 2008, p. 105). Neither the state, nor any person should substitute itself/himself/herself to the aggrieved party in case of abusive exercise of job requirements. It is natural also that failure to submit a prior complaint would prevent the initiation of criminal proceedings, and its withdrawal determines proceedings stoppage. Initiating ex officio the criminal proceedings in the cases mentioned makes room for abuse, under conditions where the investigation can be continued even against the legitimate interest of the aggrieved party.

From another point of view, prior complaint can be formulated only against an official, according to art. 147, para 2, Criminal Code, with the limitation imposed by art. 258 Criminal Code. According to art. 147, para 2, Criminal Code, "By *official*, it is understood *the person referred to in paragraph 1, as well as any employee* who performs a task under the service of a legal person, other than the ones provided at the previous paragraph", and according to paragraph 1, art. 147 Criminal Code, "by *public officials* it is understood any person that performs constantly or temporary, with any title, no matter how he/she was invested, a task of any nature, remunerated or not, under the service of a unit within those referred to by art. 143".

Having in view that the provisions of art. 258, paragraph 2, Criminal Code, makes exception from the situations when it is submitted a prior complaint for the abuse of office facts committed "by a person out of those provided by art. 147, paragraph 1", it results that the law text considers only the (other) officials, in the sense of art. 147, paragraph 2, second thesis.

3. The Abuse of Office in the New Romanian Criminal Code

Interesting to note is that, although art. 258 Criminal Code was completed in 2008 by Law no. 58, in 2009, by adopting a new Criminal Code by Law no. 286/2009, the criminal legislator changed its vision in this matter.

Thus, office offenses are regulated separately from the offenses in connection to the office (corruption offenses) in Chapter II of Title V from the new Criminal Code - special part ("Corruption and in office Offenses"- art. 289-309), the chapter covering the majority of existing offenses in the current Criminal Code, but it also brings novelties, in terms of systematizations and indictments, including offenses of misappropriation, misuse of position for sexual purposes, usurpation of office, violation of secrecy of correspondence, disclosure of state secrets, disclosure of secret office or nonpublic information, illegal obtaining of funds, embezzlement.

It should be emphasized that, in regulating the new Criminal Code, an important change was made (also) in what concerns the notion of *official*, in agreement with the solutions from other legislation. The notion of *official* shall designate, according to the provisions of art. 175, the person which performs attributions, with a permanent or temporary character, that allow him/her to take decisions, to participate to decisions taking or to influence taking them, within a legal person that develops an activity that it is not in the private domain.

At the same time, the legislator opted for *assimilating to officials* the physical persons that exercise *a profession of public interest*, for which a special certification is required from public authorities and which is subject to their control (notaries, Court Enforcement Officers, etc.). Although these persons

are not proper officials, they exercise public authority attributes that have been delegated through an act of the competent state authority and that are subject to its control, which justifies their assimilation to officials.

In what concerns the active subject in case of offenses in office, it is provided a case of reduction of sentence (with one third), as in the actual Criminal Code, if the facts are committed by "*other persons*" than public officials (*other officials or persons assimilated to public officials*), i.e. "*the persons* that perform, constantly or temporarily, with or without remuneration, a *job* of any kind under the *service* of a physical person out of those provided at art. 175 paragraph 2 or within any legal person" (art. 308, paragraph 1, the new Criminal Code).

The legislator does not provide also the condition of formulating the prior complaint in case of committing the facts of abuse of office by other officials or by the persons assimilated to public officials, as in the actual Criminal Code.

4. More Advantageous Criminal Law. Implications

As in the new Criminal Code it is not provided the existence of prior complaint of the aggrieved party, as condition of the fact of being susceptible of punishment and initiating the judicial procedure, in what concerns committing certain acts of abuse of office, makes that the actual Criminal Code becomes *mitior lex*.

In order to determine the more advantageous criminal law, doctrine and jurisprudence have established over time several criteria: conditions of indictment, criminal accountability conditions, and punishment.

An analysis of the law texts which provide the facts of abuse of office subject to the condition of prior complaint in the Criminal Code in force (abuse of office against the interests of persons, abuse of office by restriction of rights, abusive behavior) shows that, in principle, in terms of indictment conditions, they are the same in the two normative acts, even if the first two criminal offenses are reunited in the same article - art. 297 - (re)called marginally "*abuse of office*".

In this case, the law more advantageous will be that which provides more restrictive conditions for criminal accountability; the Criminal code in force, by providing the restrictive condition of prior complaint for criminal accountability will be the more advantageous law, as such, as relation to the new Criminal Code, which provides ex officio tracking of the respective offenses.

5. Conclusions

Regarding the application of criminal law in time, we point out one thing. It is known that prior complaint institution is a dual legal institution: the substantive criminal law and formal criminal. It is known that institution prior complaint is a dual legal institution: the substantive criminal law and formal criminal. If criminal legal norm refers to the conditions of criminal liability character liability - as was discussed in this approach, will prevail the substantial legal norm character, that will apply as a more favorable law. In this situation, will apply more favorable criminal law at any stage are the criminal proceedings, and the solution will be the cessation or termination of criminal prosecution, if not filed prior complaint.

If the complaint criminal legal norm concerns only the procedural aspect of the institution – hypothesis implies that the prior complaint is provided in both successive criminal law, but the application of criminal procedural rules differs, will apply the principle of immediate application of the standard criminal procedure.

6. Bibliography

Ciuncan, D. (2008). Plângerea prealabilă în cazul abuzului în serviciu/The prior complaint in case of abuse of office. *Revista de Drept Penal/Penal Law Review no. 3*, p. 105.

Bică, Gh.; Griga, I.; Paraschiv, G. & Alecu Gh. (2007). *Drept penal. Partea generală/ Criminal Law. General Part.* Bucharest: Editura Fundaţiei România de Mâine.

Pascu, I. (2007). *Drept penal. Partea generală/Criminal Law. General Part.* Bucharest: Hamangiu.

Sima, C. (2008). Aplicarea legii procesual penale în timp. Plângerea prealabilă/ The application of the criminal procedure law in time. The prior complaint. *Revista de Drept Penal/Penal Law Review no. 2*, p. 120.

Dima, T. (2007). *Drept penal. Partea generală/ Criminal Law. General Part.* Bucharest: Hamangiu.

Dongoroz, V.; Kahane, S.; Oancea, I.; Fodor, I.; Iliescu, N. & Bulai, C. et al. (1970). *Explicaţii teoretice ale Codului penal român. Partea generală/Theoretical Explanations of the Romanian Criminal Code. General Part*. Volume II. Bucharest: Editura Academiei RSR.

Dongoroz, V. (1939). *Drept penal. Tratat/Criminal Law. Treaty*. Bucharest.

*** The Constitutional Court, decision no. 161/2000, published in the Official Journal no. 520/ 23.10.2000.

*** The Constitutional Court, decision no. 197/2000, published in the Official Journal no. 543/ 01.11.2000.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Prescription of the High Risk Narcotics and Trading or Illicit Purchasing of High Risk Narcotics

Nicoleta-Elena Buzatu[1]

Abstract: The present essay will analyze the offence of prescribing high risk narcotics and trading or illicit purchasing of high risk narcotics, as it was regulated - together with other offences - by Law no 143 of July 26, 2000 on preventing and fighting against the traffic and illicit consumption of narcotics. The same law defines the meaning of such a phrase *"substances which are under national control"* by mentioning the fact that they are the narcotics and their precursors listed in Annexes I-IV of the law. The analysis of the offence of prescribing the high risk narcotics and trading or illicit purchasing of high risk narcotics is following the already known structure mentioned in the doctrine and which consists of: object and subjects of the offence, its constituent content: the objective side with its material element, the immediate consequence and causality connections; the subjective side of the offence, as well as forms and modalities of these offences, and the applicable sanctions, of course.

Keywords: offence; doctor; pharmacist; patient; consumer

1. Introduction

All through history the narcotics phenomenon witnessed an ascending evolution. In Antiquity they were used by the healers as medicine or in therapeutic aims. So, for example, in 2nd century BC, the Greek Physician Heraclid of Trent - known to be the best empirical physician, author of treaties on dietetics, surgery, therapeutics, toxicology, pharmacology, military medicine, etc. - used naturist remedies as: pepper, cinnamon and especially opium for sedation and hypnosis.

While being correctly and rationally administered, they played a benefic role in medicine. Yet, unfortunately, they started to be used abusively and, in the long run, they turned to be a really serious problem for the whole humanity, a real social plague. (Răşcanu, 2008) (Răşcanu & Zivari, 2002)

In the current speech the term *"narcotics"* means products and stupefacient or toxic substances, defined as such and, consequently, prohibited by the national and international legislations.

The specialized Health Agency of the United Nations - the World Health Organization - defines the *"drug"* as being that substance that once absorbed by a living body modifies one or more functions of the respective body. In conformity with the latest recommendations of this international body, the substances or classes of psychoactive substances (narcotics) that provoke such modifications and generate dependency are: alcohol, opiates, cannabis derivates, sedatives and hypnotics, cocaine, hallucinogens, tobacco, volatile solvents, as well as other psychoactive substances or substances belonging to other different classes, used by association.

Pharmaceutically speaking, the *"drug"* is a substance used in medicine, but whose abusive usage may lead to physical or psychical dependency or to serious mental disturbances, as perception or behaviour (Dascălu et al., 2009). In this context *"drugs"* are only those substances known also under the general name of *"stupefacients"*.

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In conformity with art 1 of Law no 143 of July 26, 2000 on fighting against traffic and illicit drugs consumption, *narcotics* are those plants and stupefacient and psychotropic substances or mixtures that contain such plants and substances listed in tables I-III of the Law. This law divides narcotics into two large categories:

The first category refers to *high risk drugs*: heroine, mescaline, morphine, amphetamine, cocaine, codeine, opium, phencyclidine, etc; the second category refers to the *drugs of risk*: cannabis, cannabis resin, diazepam, meprobamate, etc.

The traffic and illicit drugs consumption is sanctioned in both of the above mentioned situations and, the offence of prescription, trading and purchasing without any necessity or on the ground of a false receipt refers only to the high risk drugs.

In agreement with art 3 of the Code of Medial Deontology issued by the Romanian College of Physicians and published in the Official Gazette no 418 of May 18, 2005, man's health is the supreme target of the medical act. The obligation of any physician lays in defending man's physical and mental health, in alleviating his sufferings, in respecting human life and personality, with no discriminations, irrespective of age, sex, race, ethnicity, nationality, social, ideological and political orientation, in both peace or war circumstances. The respect owed to the individual continues even after the decease of the respective person.

Art 3 of the Code of College of Pharmacists, published in the Official Gazette no 490 of July 15, 2009, stipulates that, when exercising his profession, the pharmacist offers specialized health services to any patient or to the large public in general, with no discrimination at all. The relationships between the pharmacists and those who benefit by his services shall be based on trust for the professional experience of the pharmacist; this liability obliges the pharmacist to devote his whole experience to assuring and maintaining his professional and personal qualification to the highest level and to permanently update his professional knowledge.

2 Content

2.1. Legal Content

Art 6 of Law no 143/2000 defines the offence of prescribing high risk narcotics and trading or illicit purchasing of high risk narcotics as follows: "*The prescription of the high risk narcotics - recommended by the physician intentionally, without being absolutely necessary from the medical point of view - is sanctioned with 1-5 years of prison. The same punishment is applied to intentional trading or purchasing high risk narcotics in the basis of a medical receipt prescribed under the conditions of paragraph 1 or of a falsified medical receipt*".

2.2. Object of the Offence

The offence of prescribing high risk narcotics and trading or illicit purchasing high risk narcotics has *a main juridical object* and *a secondary juridical object*.

The main juridical object of the offence is given by the social relations referring to the public health, that are seriously endangered because of the non-observance of the juridical norms regulating the prescription by a physician of high risk narcotics without being absolutely necessary from the medical point of view, as well as by the trading or illicit purchasing of high risk narcotics in the basis of a prescribed or falsified medical receipt.

The secondary juridical object lies in the social relations referring to the psychical health of the individual who might become a consumer or an addict if the legal regulations are not respected with a view to the prescribing, trading and purchasing illicit high risk narcotics.

As for the *material object* of such an offence, the juridical literature revealed two opinions.

The first opinion (set forth by Ştefan, 2006) considers that the material object of such an offence is the very receipt signed by the physician, and not the prescribed stupefacient substances.

The other opinion, generally accepted (set forth by Stoica, 1976; Dima, 2002; Boroi & Neagu, 2001; Gârbuleţ, 2008) refers to the material object of the offence which is the very high risk narcotics submitted to the national control.

In the opinion stipulated in paragraph 1, the offence has no material object at all, as the action defining the material element of the objective side is not directed and exercised against the high risk narcotics as a material, corporeal existence (Diaconescu, 2004).

2.3. Subjects of the Offence

The term *"subjects of the offence"* are - in the criminal doctrine (Mitrache & Mitrache, 2010) - those individuals who are involved in committing an offence by either its very being put into operation or by the bearing of its consequences.

Depending on the way the deed was committed, *the active subject* of the offence is different. Thus, considering the modality of prescribing and trading, the active subject shall be a qualified person and he/she shall either be a physician - when prescribing a receipt - or a pharmacist - when selling the narcotics prescribed by the receipt. As for the way of obtaining, the active subject can be any person who achieves all the legal conditions as to assume a criminal responsibility. The offence can be committed in any of the ways of participations: co-authorship, instigation and complicity.

The offence regulated by art 6 of Law 143/2000 refers to a *main* and to a *secondary passive subject.* The main subject of the offence is the person to whom there have been prescribed by the physician - without being necessary - high risk narcotics and, consequently, whose health can be seriously be endangered by such a deed.

In the regulation of art 9 paragraph 2 of the Law, a main passive subject is the person who is to benefit by the high risk drugs traded or obtained in an illicit way and whose health is endangered if taken them.

The secondary subject of the offence, as regulated by art 6 paragraph 1 of Law no 143/2000, is the state in its quality of a general representative of society and which is mainly interested in taking care of the health of the population.

2.4. The Objective Aspect

The *material element* of the objective aspect refers to the behavioural act forbidden by the incriminating norm. The lawmaker means to criminally sanction the one who prescribes trades or makes use of high risk drugs.

By prescribing some medicine containing drugs submitted to the national control without being necessary, the law considers the respective physician developing a fraudulent and unconditioned activity as he enables any individual to receive a receipt allowing him to illicitly obtain the stupefacient product (Diaconescu, 1996).

Trading high risk narcotics is considered to be an offence, then when the active subject - that is the pharmacist - when receiving a receipt prescribing high risk narcotics realizes that they were not necessary if comparing then to the diagnosis and yet, he sells them instead of trying to clarify the situation.

To obtain high risk narcotics in the basis of a medical receipt abusively prescribed or falsified contains all the steps made by the active subject as to make the receipt work and to have the narcotics taken.

Once the high risk narcotics obtained in the basis of a falsified receipt there appears a special form of the use of forgery, which is more severely punished (Olteanu; Iacob, & Gorunescu, 2008). The *immediate consequence* is the state of risk endangering the public health because certain activities trasspassed the legal dispositions regarding the high risk narcotics submitted to the national control.

The *causality connection* in not to be proved, as it results *ex re*, from the very committed deed; so that, in the case this type offence is committed the danger is evident.

2.5. The Subjective Aspect

From the subjective point of view, the deeds incriminated by art 6 of Law no 143/2000 are done intentionally. The intention is recognized by the legislation (art 19, point 1 of the Penal Code) but also by the doctrine in two aspects: direct intention and indirect intention. The first aspect is foreseen because of the result of the deed and the pursuit of the result by the committed deed. The second aspect, that is the indirect intention, is foreseen by the doer in its result which is no longer pursued but accepted in its being possible when taking place.

For an offence mentioned in art 6 paragraph 2 thesis II to exist, the subjective element shall appear in the form of a direct intention.

2.6. Forms. Modalities. Punishable regime

Forms. The preparatory acts are possible and are punishable. They are assimilated to a punishable regime applied to a tentative, which is punishable.

An offence is fulfilled then when any of the incriminating activities is carried to an end and when an immediate consequence appears, that is the damaging state of the public heath.

There are stipulated three *possible norms* by which an offence can be committed: prescribing, trading and purchasing/obtaining high risk narcotics. Practically, each of these possibilities is susceptible to be achieved by a large scale of actions.

As for the *punishable regime*, the offence provided by art 6 of Law no 143/2000 is punished with 1-5 years of prison. In case of an aggravating modality, as provided in art 12 of Law no 143/2000, then when the victim dies, the offence is punished with 10-20 years of prison and the interdiction of certain rights.

In conformity with art 17 of Law no 143/2000 the narcotics as well as other goods that were the object of the respective offence are confiscated; in case they are not to be found, the convict is obliged to pay their equivalent value. At the same time, money, any kind of values or any other goods obtained through narcotics are confiscated, and the resulted sums are considered to belong to the state budget and placed in a special account.

3. Conclusion

In accordance with the national and European reports on narcotics, their consumption shows an ascending tendency underlined by the increased level of drugs confiscations. Firm steps are necessary to be taken, at the level of the whole society, for making the population aware about the risks brought about by the traffic and drugs consumption.

The necessity of incriminating and sanctioning the prescribing of high risk narcotics, the illicit trading and purchasing high risk narcotics took shape in the already analyzed legal text, more especially as this phenomenon endangers the public health.

The physician shall treat the disease of the patient under legal conditions. Moreover, he shall advice the patient to attend a specialized program of disintoxication then when it is necessary.

The lawmaker established a very severe procedure referring to the prescribing and the obtaining of the high risk narcotics, being aware of the dangerous consequences resulting from their being introduced into the legal circuit.

The medical prescription shall be issued in four copies: destined to the patient, to the pharmacy, to the health office; the last copy remains with the physician. The files of the medical prescriptions are yellow or green depending on the category the narcotics belong to. The medical prescription is not longer available in 10 or 30 days' time; in this situation the medicine can be taken from the pharmacy only in the basis of a new prescription. This procedure assures the control over the medical activity and over the activity of the pharmacists, as well. This procedure makes it more difficult for the addicts to abusively obtain high risk narcotics.

4. References

Boroi, A.; Neagu, N. & Sultănescu, V. R. (2001). *Offences Stipulated by Law no 143/2000 on Fighting Against the Traffic and Illicit Consumption of Narcotics.* Bucharest: Rosetti.

Dascălu, I., Ştefan, C.E., Ţone, C. & Surduleac, M. (2009). *Drugs and the Organized Crime* Craiova: Sitech.

Diaconescu, G. (1996). *Offences in the Special Laws and Extra-Criminal Laws*. Bucharest: All.

Diaconescu, H. (2004). *Corruption Trespasses and Those Assimilated or Connected to Them.* Bucharest: All Beck.

Dima, T. (2002). *Offences against Public Health Stipulated in Extra Criminal Laws (with reference to narcotics).* Bucharest: Lumina Lex.

Gârbuleţ, I. (2008). *Traffic and Illicit Drugs Consumption. Essay on Legislation, Doctrine and Jurisprudence.* Bucharest: Hamangiu.

Mitrache, C. & Mitrache, C. (2010). *Romanian Criminal Law General Part.* VIIIth Edition. Bucharest: Universul Juridic.

Olteanu, G.I.; Iacob, A. & Gorunescu, M. coord. (2008). Forensic Methodology. *Offense Structures and Illicit Activities They Carried.* Bucharest: AIT Laboratories S.R.L. Retrieved from www.itCode.ro, date: 18.01.2012.

Răşcanu, R. & Zivari, M. (2002). *Psychology and Psychopathology in Drugs Addiction.* Bucharest: Ars Docendi.

Răşcanu, R. (2008). *Dependency and Narcotics. Meliorating Theoretical and Clinic Aspects.* Bucharest: Bucharest University Printing House.

Ştefan, C. E. (2006). *Drugs Flagellum.* Bucharest: CERMAPRINT.

Stoica, O.A. (1976). *Criminal Law. Special Part.* Bucharest: Didactică Pedagogică.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

Checking Interceptions and Audio Video Recordings by the Court after Referral

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Abstract: In any event, the prosecutor and the judiciary should pay particular attention to the risk of their falsification, which can be achieved by taking only parts of conversations or communications that took place in the past and are declared to be registered recently, or by removing parts of conversations or communications, or even by the translation or removal of images. This is why the legislature provided an express provision for their verification. Provisions of art. 91^6 Paragraph 1 Criminal Procedure Code offers the possibility of a technical expertise regarding the originality and continuity of the records, at the prosecutor's request, the parties or ex officio, where there are doubts about the correctness of the registration in whole or in part, especially if not supported by all the evidence. Therefore, audio or video recordings serve themselves as evidence in criminal proceedings, if not appealed or confirmed by technical expertise, if there were doubts about their conformity with reality. In the event that there is lack of expertise from the authenticity of records, they will not be accepted as evidence in solving a criminal case, thus eliminating any probative value of the intercepted conversations and communications in that case, by applying article 64 Par. 2 Criminal Procedure Code.

Keywords: risk of falsification; certification; authenticity

1. Introduction

The institution for certifying the recordings was regulated for attesting the authenticity of the minutes-reports rendering the conversations or communications, to eliminate any possibility of alteration or counterfeiting them. However, there may be doubts about the reality and reliability of a recording, in which the legislature has provided, in art. 91^6 Paragraph 1 Criminal Procedure Code, the opportunity to submit its technical expertise, at the request of the prosecutor, the parties or ex officio. In this respect, practice shows that the court approve an inquiry on the authenticity of technical and forensic records and wire tapping[2]. This regulation is presented as a posteriori guarantee in making the interception and their transcription in the context in which the expertise is conducted by an independent and impartial authority.

2. Procedural Issues

According to Par. 3 of article 91^3 of the Criminal Procedure Code, the minutes-report shall be sent to court, alongside with the registration support, after its notification with judging the respective cause. In the doctrine (Volonciu & Barbu, 2007, p. 158) there were raised certain issues in terms of compliance with this legislation in the European Convention. It was found by the European Court, that

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[2] High Court of Cassation and Justice, criminal section, *Court order from 16 February 2011*, in *record no. 4489/1/2010*, unpublished; High Court of Cassation and Justice, criminal section, *Court order from 29 September 2010*, in *record no. 3318/1/2008*, unpublished; Court of Appeal Iasi, criminal section, *Court order from 28 April 2011*, in *record no. 8370/99/2007*; Court of Appeal Iasi, criminal section, *Court order from 30 May 2011*, in *record no. 236/45/2007*, unpublished.

among the guarantees provided by national regulations should be included the care for communicating all the records in their intact form[3], and must also be provisions for maintaining complete recordings intact and in order, for inspection the court and defense thereof[4].

In accordance with article 91[3], Paragraph 3 of the Criminal Procedure Code, the original support of the recorded conversations and communications which are intercepted is kept by the prosecution, both in the prosecution stage, and in the court, where the file was sent to court settlement. It is made available to the panel hearing the case, as required (Crişu, 2007, p. 242). In this respect, it is argued in the literature (Volonciu & Barbu, 2007, p. 161) that it is necessary for the court to have direct access to original media of the conversation recorded.

3. Aspects of Practice

Given that current technology allows easy falsification of records, where there are such suspicions, at the prosecutor's request, or the parties or ex officio, the court may order technical expertise of the recordings to verify their the authenticity and continuity. If it is found, after examination, the lack of authenticity of the records or interfering mixes in the text or removal of passages of conversation, they can not be retained in the case and can not be used as evidence (Theodoru, 2007, p. 403). In this respect, the courts have pronounced, holding that "because the defendant challenged both the call content, and how the alleged discussion was transcribed in the minutes/report mentioned above, indicating his name," CG ", in the recorded dialogue, there can be no proof of this transcription efficiency, without a technical expertise to establish the authenticity of the registration and without clearly identifying the voices of the persons registered; only on this can be drawn a transcript of the dialogue "(Supreme Court, Decision no. 2986/27 June 2000).

4. Ways to Challenge the Records

A condition for which records can be challenged is the lack of electronic signature. Thus, the Chairman of the Information and Communication Technology from the Chamber of Deputies appreciated the fact that, if the telephone records have no electronic signature, if used as evidence in proceedings, may be appealed. Thus, the file can be edited so that with the voice that carried the conversation, with the words spoken by one who carried the conversation can be constructed other phrases. This can be avoided by the approval of devices that are used for recordings. The file that is extracted from the telephone conversation must be signed electronically so that it can not be changed[5].

An original recording may have a real value, unquestionably, only through a survey of authentication that can be achieved only based on the original medium.

It is noted that the current criminal procedure law, as amended by Law no. 356/2006, requires as a guarantee to ensure the reality and authenticity of the intercepts and records, making available to the court of the original intercepts and records presented by the prosecution. So, from this perspective, the legislature knows and distinguishes between two legal concepts: the original support and the copy of the original medium.

There were many cases in the judicial practice[6] in which the NAD refused to provide the parties, the courts, and media experts, the original intercepts and records; these issues were popular because their

[3] European Court of Human Rights*, Kruslin vs. France cause,* Decision of 24 April 1990; *Huvig vs. France cause,* Decision of 24 April 1990; *Venezuela Contreras vs. Spain cause*, Decision of 30 July 1998, www. coe.int.

[4] European Court of Human Rights*, Prado Bugallo vs. Spain cause,* Decision of 18 February 2003; *Dumitru Popescu vs. Romania cause,* Decision of 26 April 2007, www. coe.int.

[5] Pambuccian V. - President of Information and Communications Technology Committee of the Chamber of Deputies, in *Audio recordings of criminal cases can not certify the identity voice- person in the absence electronic signatures and may be rejected as evidence in court,* www.luju.ro.

[6] European Court of Human Rights*, Dolenchi&David vs.N.A.D. cause*, cases in which N.A.D. refuse to provide to courts original recording media relied upon by the criminal investigation body, www. coe.int.

aim was to hide the fact that they were holding the interception equipment, recording and processing records, or even hiding distortion intercept and records (method of collages), for the purposes of judicial work of fabrications.

There have been expressed in the literature (Ghita, 2010) that, the absence of original media intercepts and records cited as evidence in a case, and refusal to allow the access of the parties and the courts to the original media, while the original media is a requirement of mandatory legal condition of validity of the interceptions and recordings presented as evidence, determine the absolute nullity of interceptions and recordings.
In practice[7], rules of evidence were removed from the transcript of the minutes-reports of telephone conversations intercepted and recorded, for the defendants had been violated the right to privacy as guaranteed by Art. 8, paragraph 1 of the European Convention on Human Rights, not being fulfilled the requirements of Art. 8, paragraph 2 of the Convention, the court finding it impossible to perform the examination.

5. Technical Expertise of Records

Currently, the control of the recording reliability is for the National Institute of Forensics Expertise, acting under the authority of the Ministry of Justice and whose experts have the quality of civil servants, being completely independent to the competent authorities in carrying out interceptions and transcripts of recorded conversations.

The voice and speech expertise involves authentication of audio and audio-video recordings and it is performed only on the original records. Within this it is checked whether records were made simultaneously with acoustic-video events that they contain with technical equipment and the method adopted by the party that produced that. In the absence of technical equipment there can be argued that expertise can not be done.

We highlight the fact that, it is now possible to expertise the sound traces to establish the identity of the person from which they are emanated, by analogy with the comparing model (Tulbure, 2006). Thus, another objective of the expertise may be to identify people by voice and speech by comparing a voice in the dispute with the voice recording of a suspect (for comparison), recorded under similar conditions (same technical equipment, the same transmission system etc.) or improve the quality of records. It is performed to increase the intelligibility of the records by reducing or eliminating some types of noise.

At the same time, the court may allow photo and video expertise. Thus, on a photo or video, the objectives of the expertise performed at the National Institute of Forensics Expertise are: the authenticity of photographic images or video - it is check if the record (photo or video) remained unaltered from the time of its shooting, if it was performed with the equipment shown and the method mentioned by who presented the registration.

According to the National Institute of Forensics Expertise, check control means to see if something is untrue, and to determine the authenticity involves determining whether something is consistent with truth. It is obvious that the synonymy of the two terms involves technical expertise in such cases and not the criminal one.

According to international standards such as the Audio Engineering Society (AES27-1996/r2007) authentic recording means "a sound recording made simultaneously with the events alleged to be true, completely and continuously performed by the method which was mentioned by the party who produced it, and was not subject to maneuvers of alteration, addition, deletion or editing.

[7] Neamţ Tribunal, criminal section, *Criminal sentence no. 116/P of 9 June 2010,* unpublished.

6. Conclusions

In the circumstances in which the expert findings indicate that the records are not authentic, some courts have held that although "the defendants recognize their voices on tape, the court shall not consider the evidence relevant, consisting of an audio recording which is not authentic, as long as a such a registration does not meet the following requirements: to be performed simultaneously with acoustic events contained on this and not be a copy, not to contain any interventions (deletions, insertions, intercalations of words, phrases or other counterfeit), to have been performed with technical equipment presented by those who showed the record"(Bucharest Tribunal, 1st criminal section, Criminal sentence no. 373/29 March 2006).

Related to the fact that, because of the lack of authenticity, the court removed such registration from evidence, the National Anticorruption Department affirms that, at present, all the NICE expertise refer to AES 27-1996 (r2007) standards, respectively to AES 43-2000, developed by the Audio Engineering Society (Prosecutor of the High Court of Cassation and Justice, National Anticorruption Department, Conclusions about the facts of the case, in record no. 236/45/2007).

According to the 3.2 of AES 27-1996 definition, the notion of authentic audio recording, consists in a recording taking place simultaneously with the recorded events, performed with the device indicated by the part and shows no inexplicable alterations or erasures. From this point of view, of the cumulative performance of the three conditions given above, the definition is perhaps valid only for sound recordings on magnetic tape (it may play a support role of authentic records).

The National Anticorruption Department considers that when digital support is used, the definition is devoid of any effect, as the terms ”original” and ”copy” are purely literary, or at least chronologically, as in terms of integrity the files so created, between the first and the following (by the trivial "copy-paste ") there is no difference in content.

We do not share this view, because it is essential to finding the truth, as audio recordings to be original, not mere copies. According to doctrine and practice, but also under art. 91^1 - 91^6 Criminal Procedure Code, if the recording is not authentic, it can not be accepted as evidence. (Petre & Grigoras, 2010).

This rule is contradicted by the conclusions of the above mentioned institution, even if there were no differences in content between the copy and the original, it is created a doubt about the existence of optical media originals, which flagrantly contravenes the provisions contained in Art. 91^3 Par. 3 Criminal Procedure Code, which claim to be original media, which is kept at the prosecution in a special place in a sealed envelope and will be provided to the court upon request.

7. References

Crisu, A. (2007). *Criminal procedural law. The general part, 2nd edition.* Bucharest: C.H. Beck.

Ghita, G. (2010). R.I.S. records used in criminal cases are not legal evidence. *Old Day Paper* of 22 April 2010.

Pambuccian, V. in *Audio recordings of criminal cases can not certify the identity voice- person in the absence electronic signatures and may be rejected as evidence in court*, retrievede from www.luju.ro.

Petre, A. & Grigoras, C. (2010). *Audio and Audio-Video Recordings. Evidence in Criminal Proceedings. Judicial Expertise*. Bucharest: C.H. Beck.

Theodoru, Gr. (2007). *Criminal procedural law treaty.* Bucharest: Hamangiu.

Tulbure, A. Şt. (2006). Interceptions and audio video recordings in German and Romanian law. *Journal of criminal law* no. 1/2006.

Volonciu, N. & Barbu, A. (2007). *The Code of Criminal Procedure commented. Art. 62 – 135. Evidences and means of proof*. Bucharest: Hamangiu.

***Bucharest Tribunal (2006) 1st criminal section, *Criminal sentence no. 373/29 March 2006*, unpublished.

***Court of Appeal Iasi, criminal section, (2011) *Court order from 28 April 2011*, in *record no. 8370/99/2007*, unpublished.

***Court of Appeal Iasi, criminal section, (2011) *Court order from 30 May 2011*, in *record no. 236/45/2007*, unpublished.

***High Court of Cassation and Justice, (2010) criminal section, *Court order from 16 February 2011*, in *record no. 4489/1/2010*, unpublished.

***High Court of Cassation and Justice, (2010) criminal section, *Court order from 29 September 2010*, in *record no. 3318/1/2008*, unpublished.

***Prosecutor of the High Court of Cassation and Justice, National Anticorruption Directorate, (2011) *Conclusions about the facts of the case,* in record no. 236/45/2007 of Court of Appeal Iasi.

***Supreme Court, (2000) Decisio no. 2986/27 June 2000, published in *Romanian Pandects* no. 2/2001.

***Neamt Tribunal, (2010), criminal section, *Criminal sentence no. 116/P of 9 June 2010,* unpublished.

*** European Court of Human Rights *Dumitru Popescu vs. Romania cause,* Decision of 26 April 2007, retrieved from www. coe.int.

***European Court of Human Rights*, Dolenchi&David vs.N.A.D. cause*, retrieved from www. coe.int.

***European Court of Human Rights*, Kruslin vs. France cause,* Decision of 24 April 1990, retrieved from www.coe.int.

***European Court of Human Rights *Huvig vs. France cause,* Decision of 24 April 1990, retrieved from www.coe.int.

***European Court of Human Rights*, Prado Bugallo vs. Spain cause,* Decision of 18 February 2003, retrieved from www.coe.int.

***European Court of Human Rights *Venezuela Contreras vs. Spain cause*, Decision of 30 July 1998, retrieved from www.coe.int.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Playing Full Written Records, an Indispensable Condition for Carrying Out Certification

Sandra Grădinaru[1]

Abstract: This paper aims at examining the procedure by which relevant information obtained by prosecution bodies through interception acquire a probative value through minutes of play. The exploatation of audio or video recordings in a probation plan implies, according to art. 91^3 Criminal Procedure Code, preparation by the prosecutor or employee of the judicial police appointed by the prosecutor, of the minutes of playing a full conversation or communication intercepted and recorded. These documents, provided that they comply with the law, is evidence, being part of the criminal prosecution handled in the case. From this perspective, we consider that, in order to establish the truth and a correct assessment of the evidence, it is very important for sound recordings to contain conversations in full, not piecemeal, as frequently happens in practice. In fact, art. 91^3 par. 1 from the Criminal Procedure Code unequivocally establishes the necessity of a full transcript of the recorded conversations not only some of these passages. On the other hand, under the full transcript, there is a risk of being violated article 8 of the Convention.

Keywords: authenticity; selection; transcription; classified information

1. Preliminary Issues

Article 91^3 of the Criminal Procedure Code, as amended by Law no. 356/2006[2], with marginal name "certification of records" is the based material. Although the legislature did not define the term "certification", this involves the following steps (Julean, 2010, p. 255): selecting by the prosecutor of the intercepted conversations or communications concerning the offense which is the subject of investigation or help in locating and identifying participants; the selected conversations or communications are rendered entirely in a report (minutes) by the prosecutor or employee of the judicial police appointed by it; the report is certified for authenticity by the prosecutor who performs or supervises the prosecution; to the report (minutes) it is attached, in a sealed envelope, a copy of the recording media conversation.

In the judicial practice, it was stated that "*in addition to initiation and control of the people called to make eavesdropping according to the law (art. 91^1 and 91^2 Criminal Procedure Code), the prosecutor is obliged to give an endorsement of legality, the legal operation being accomplished by certifying the records, according to Art. 91^3 Criminal Procedure Code. Thus, certification is not a mere formality, but an essential condition for guaranteeing the authenticity and consistency of the minutes (reports) of transcription in relation to records, knowing that such means of probation are allowed only when evidence meet the rigors of Art. 8 par. 2 C.E.D.O*" (Court of Appeal Iasi, Criminal Decision no. 141/03 march 2009).

Under the circumstances in which the interception and the audio or video recordings work to the limit of the Constitution, the conditions under which these cases can be made are espressly provided by law,

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[2] *Law no. 356/2006 on amending and supplementing the Criminal Procedure Code and amending of other laws* published in Official Gazette of Romania, Part I no. 677/7 august 2006.

being an investigative tool with greater difficulty in administration, it is required a greater attention from the prosecution bodies, both at the moment when the process evidence is used, and in transforming the obtained information into evidence.

2. The Certification

The certification, in terms of playing in full in the minutes (reports) of the conversations or communications intercepted and recorded regarding the deed that is the subject of investigation or help to identify or locate participants, establishes a guarantee that the prosecutor will not take over from a discussion cut passages, taken out of context, so as to determine the criminality of the act. Also, the requirement established by the legislature avoids the possibility to alterate the content of the intercepted and recorded conversations, the purpose being that of providing a different connotation than the actual message.

Fixing activities in the pleading registration aims, mainly, technical aspects of this operation, the reason considered by the legislature is to create an accurate picture of the chronology and the content of the operations resulted in obtaining those records.

In this respect, it sees the need for preparation of reports (minutes), including a comprehensive and detailed description of these undertaken activities and their outcome. The reason for recording the conversations or communications on various types of media is listening to or further viewing of the stored information, in order to playback the conversations under the writing form, to verify the identity between the content of the conversations and their written form, and to certify their authenticity (Stanciu, pp. 13-14), when given in the evidence.

According to the existing precedents, "nothing in the Code of Criminal Procedure allows the prosecution 'hearing' a phone conversation with the consent of one of the interlocutors, in the absence of authorization issued or confirmed by the judge, neither recording its content in a so-called act of finding other than full minutes of play, certified true" (Court of Appeal Bucharest, Criminal Decision no. 141/A/ 09 June 2009). Also, by playing intercepted conversations and communications in its entirety, in the written form, by minutes (reports) prepared and signed by the prosecutor and the employee in the competent judicial police, the requirements of art. 91^3 Criminal Procedure Code, concerning the legality of their certification, are met[1].

Evidence resulting from the process evidence of intercepting and recording of the conversations or communications is the report (minutes), in which the performed technical surveillance activities are mentioned.

3. Way to Transcribe Records in the Minutes

The minutes (reports), in which there are rendered the telephone conversations between the attorney and the part he represents or assists in the process, can not be used as evidence, unless in their contents there are data or information which seem conclusive and useful in the preparation or commission by a lawyer of an offense, for which technical supervision may be provided (Udroiu, 2010, p. 137).

In terms of written content of the playback calls, it must be done under certain conditions. Thus, the play is the literary form of the speech content, while maintaining, in acceptable limits, the specific speech of the people involved; there can be kept regionalisms, slang or jargon terms, peculiarities of pronunciation. Also, there should be mentioned many of the adjacent elements of individuality: the number and date of authorization, the issuing court name, case number and the name of the criminal prosecution, the names of the persons involved in the call and the circumstances in which registration

[1] Court of Appeal Ploiesti, criminal and cases involving minors and family section, *Criminal decision no. 114/15 September 2008;* Court of Appeal Brasov, Criminal and cases involving minors and family section, *Criminal decision no. 775/R/17 november 2009,* www.avocatura.com.

took place, details of the identity or quality of such persons, and time when that conversation started, its duration.It should not be overlooked how to use punctuation and phraseology in playing nuances of expression or even the tone of voice (Stanciu), which, in certain situations, could lead to a different connotation to the meaning of the conversation reported to the message of speakers. Also, it must be taken into account to explain some words - regionalisms, acronyms, technical terms or slang, which can lead to a subjective interpretation of the dialogue, as happens repeatedly in practice. At the same time, we need scoring breaks occurred in speech, and when they exceed a reasonable duration, indicating their duration.The compliance of the recording transcription also implies the case, when, due to ambient conditions or technical conditions (overlapping voices, strong background noise, distortion etc.), the words are not distinct, in which case it is absolutely necessary to specify that they are "unintelligible" (Dumitru, 2010, pp. 92-93).

4. Aspects of Legal Practice

However, in practice the playback conversations contained in therecords/minutes is often distorted, truncated, taken out of context, containing ambiguous talk in vague terms, leaving room for ambiguity.

Moreover, there were situations in which people have been prosecuted or even convicted based on subjective interpretations of calls, which can not be considered acceptable, given that the prosecution and the courts do not have skills in psychology, semantics or non-verbal or verbal communication or. We often notice in practice, indictments based solely on recordings, as well as interpretations, often without objectivity performed by some of the prosecutors, conditions which often would require some psychologists to confirm or refute the prosecutor's interpretation of the discussions transcribed in the reports (minutes), of playback.

In this respect, with the entry into force of Law no. 202/2010[1], we see that the text of art. 91^6 Criminal Procedure Code was amended, leaving the parties, the prosecutor or court, ex officio, the opportunity to expertise not only technically sound or video recordings, but also psychologically, in order to analyze gestures, mimicry, voice tone, pace, discussion, the position of the involved players.

We propose below to present a prime example[2] in which the interpretation of the facts made by the prosecutor in the indictment, reported to records, shows a lack of objectivity in interpretation, his subjective comments drawing the so-called criminal offense.

So, after playing a record passage, the prosecutor argues: "*we insist to see the naturalness with which P. explains to spouses F., as well as P.'s facial expression, his face betraying the mimics of a human delighted by that discussion and satisfied with its results*" (N.A.D. indictment 2006).

The ambient recordings made in that case were analyzed by specialists in psychology, communication theory, and from the opinion expressed by prof. Dr. John Dafinoiu, from "Alexandru Ioan Cuza" University, specialist in clinical psychology, it is retained the following: "The images are difficult to interpret as they have no clarity and stability. In general, the emotions expressed by mimics are difficult to interpret and, sometimes we witness at phenomena of projection (the one who makes the interpreter projects his own beliefs and emotions). Referring to Mr. P.'s facial expression that would express "delight" and "satisfaction with the results of discussion" (registration of 21/08/2006), he who makes such an interpretation assumes a very high risk of error, not only because of the difficulty to interpret any expression, but also because these expressions are part of the behavior prescribed to any official clerk: courtesy to citizens, the professional "smile" and so on.

Here are other subjective comments highlighted along in the indictment: "... he greeted with a friendly attitude ...", "...he had a natural reaction which revealed a criminal connivance between the two, it will be pointed out that this is the meaning of all discussions ..." (N.A.D. indictment 2006).

[1] *Law no. 202/2010 on measures to accelerate trial solving,* published in Official Gazette of Romania, Part I, no. 714/26 octomber 2010.
[2] Curtea of Appeal Iasi, *Court Order of 28 november 2011,* file no. 236/45/2007.

Regarding these comments, Professor. Dr. Adrian Miroiu retains the following: "The expressions used by Mr. P. showed a kindness that I could not interpret as a condition of the administrative act. ... In conclusion, Mr. P. discussions are ethical in terms of public servants by what he said clearly."

According to prof. dr. Aurora Liiceanu member of the Romanian Academy, a specialist in psychology: "the friendly attitude, kindness must be decoded as verbal and nonverbal indicators (...). Given that these indicators do not have degrees of intensity, but only express a communication of solicitude and respect for one that 'depends' on who is interpreted in this case, although a person depends on the civil servant, it is the civil servant who must be available to the people".

Taking into account those mentioned above, we consider that, given the minutes (report) is written evidence of the facts and circumstances found by interception, it is necessary that the prosecutor, or criminal investigation body that is specially designed, to highlight what he understands from the transcribed dialogue and the relevance in relation to factual context. Our support is the fact that in practice, most of the times, in the case file we find calls that are not relevant in terms of crime, the prosecutor highlighting passages that are not supported by his statements that led the prosecution.

This is also underlined by the legislature in art. 143 par. 1 of the new regulation, which claims that the minutes (report) shall include the result of the performed operations concerning the action that is the subject of investigation.

5. The Minutes of Playing Records, Evidence in Criminal Proceedings

However, the minutes (report) rendering calls and notices must have the content and form provided by art. 91 of the Criminal Procedure Code. In case of breach of these provisions, when writing the minutes/report, the provisions of art. 197 Criminal Procedure Code become incident, on procedural nullity.

The report (minutes) is written evidence of the facts and circumstances found during interception. It is estimated that, based on that report (minutes) the entitled person may challenge the interception by a complaint made under art. 275 and the following of the Criminal Procedure Code, in the criminal prosecution stage, or by specific means of judicial investigation, or remedies in court, in the trial stage (Volonciu & Barbu, 2007, p. 159). To this report (minutes) it is attached the support copy that contains the recording of the call, in a sealed envelope with the seal of the criminal investigation body (Jidovu, 2007*,* p. 205).

Moreover, the recording of communications on various media, as well as keeping them in conditions imposed by the Code of Criminal Procedure was regulated to ensure the possibility to be heard or viewed later, but, also, in order to be able to provide, if necessary, checking the correspondence between the content of the recordings and of the minutes (reports).

There were views (Bercheşan, 2001*,* p. 186) that the audio or video evidence is a double meaning. On the one hand, it is considered evidential value as written, in the form of minutes (reports) and full playback of recorded conversations in writing, for the criminal investigator to obtain the necessary elements for finding out the truth in that, on the other hand as a means of proof material, through the cassettes or rolls containing the recordings, in the sense of an object that contains or may provide data necessary to solve the case.

Interception operation is not likely to be fixed on a certain support, therefore what is preserved is the recording (Grofu, 2009, p. 218). Reported to the majority opinion, according to which the minutes (reports), containing the recorded and intercepted communications and call records, are evidence, it was set an antinomic point of view, too.

Thus, it is argued that the preparation of the minutes (reports) and recording in writing, is essentially just a warranty and a certification that the records were made correctly and a means to facilitate their consultation, but it is not a means of evidence. In formulating this view also contributes the fact that

the legislature accepts audio or video submitted by the parties, for which no authorization provided either the judiciary or the conclusion of a report (minutes) (Sava, 2002, p. 145).

The literature (Tulbure, 2006) has also emerged the opinion, according to which, the probative value of the transcriptions, of the the reports (minutes), is very low, so it must be removed if no other legal evidence. Essentially, only the report (minutes) is usable judicially.

On the other hand, as we are concerned, I agree that in reality, audio and video recordings "are methods of proof, because they consist of a series of technical operations, of recording and transcript, made by technicians with appropriate certifications, which is completed in minutes (reports), becoming evidence, in which the conversations and communications are recorded, or the images that are evidence" (Theodoru, 2007).

The literature (Crişu, 2011, p. 246.) appreciated that the minutes (reports), given the position and qualifications of preparers, provide a greater degree of confidence, but without having, legally, a different regime from other documents and implicitly from other evidence. By comparison with the French criminal procedure law on the issue of minutes (reports) as evidence, we find that the French doctrine considers that they are evidence until proven otherwise, beneficiaries had not benefited of a great probative value and the relevant issues within their contents have only the value of simple information which convinced the judge to base (Guinchard & Buisson, 2009, p. 455).

6. Recording State Secrets

Regarding the cases where the state secrets need to be recorded in its minutes (reports), they are governed by paragraph 2 of art. 91^3 Criminal Procedure Code, which includes specific provisions in this case of how to certify for authenticity. Thus, it is necessary to prepare a separate report (minutes), which, by reference to art. 91^3 par. 3 Criminal Procedure Code, must be kept under the legal provisions on documents containing classified information. The earlier legislation contained, unlike the existing one,provisions on both the "state secret" and the "professional secrecy", but only calls that contained state secrets were to be recorded in a separate report (minutes), those containing information about trade secrets being played in the usual manner. By comparison, it was noted that the current regulation is a restriction of the scope of the institution "professional secrecy" in criminal proceedings (Neagu, 2010, p. 499).

In accordance with art. 91^3 par. 2 Criminal Procedure Code, all persons having access to those minutes (reports) are required to be authorized according to specific procedures regarding the access to classified information. Also, under these provisions, it is required for the institutions to establish and ensure appropriate storage conditions of this information. To respect the right to a fair trial, as they are evidence in criminal proceedings, it is necessary to give the defense the opportunity to consult and to challenge, and this aspect involves either being declassified, in whole or part, the information contained in the minutes/reports or providing access to this report (minutes) both of the defendant and of his defender. Now, motivated by the fact that there are no specific provisions to declassify information in the interest of justice, these operations are carried out according to general rules, being particularly difficult the access to such information, not only of the defense but also of the judicial bodies (Volonciu & Barbu, 2007, pp. 159-160).

According to an opinion[1], a criminal file can not possibly contain classified information. If, hypothetically, a piece of information classified as state secret or as job secret comes to the attention of a prosecutor in one case, he must not bring it into discussion to the parties, he is also forbidden to rely on it in the proceedings, in this case the priority being the interest to protect the national security the and defense of the country.

[1] Accesible at www.mateut-budusan.ro.

7. Conclusions

Thus, we reveal the need for regulations to clarify these issues, given that any classification raises practical problems as to whether they are compatible and can be applied – also in the domain of the transcripts of the intercepted communications - the provisions of special legislation concerning the classified information.

So, we think it is necessary to know the people responsible for classifying documents and the procedure followed in such situations; which is the date by which a document is considered to be classified; if, under the declassication of the document, it is still followed the formal procedure of the special legislation and what is the manner in which it is done concretely. In our view, any document submitted to the courts should be declassified by the issuer (especially for professional confidentiality), the courts are only required to take measures to prevent leaks in the cases provided by law.

Also, unlike the current text of the law, which includes specific provisions for cases in which the state secrets to be recorded, the new Code does not expressly refer to a procedure followed in such circumstances. Thus, the present wording is made to the provisions of art. 97 par. 3 Criminal Procedure Code, requiring preparation of a separate report (minutes), to be kept with the legal provisions[1] on documents containing classified information.

In such circumstances, the new code provisions are lacking in the context in which the provisions of art. 8 of Law no. 14/1992 provide that there can be gathered, recorded and stored in secret files information related to the national security and no internal regulation mentions limits to be observed in that power.

Moreover, Romania has been condemned by the European Court[2] because the internal law does not define the kind of information that can be recorded, the categories of persons likely to be subject to surveillance measures, such as collecting and storing data, and any circumstances in which these measures can be taken or the procedure to be followed. Also, the law sets no limits on the age of the information held and how long that may be kept.

From this perspective, we consider that if the case file contains documents containing classified information, it is necessary to implement declassification proceedings of these ones, to ensure parties can exercise the rights to their defense.

Taking into account the aforementioned aspects, we notice that the legislature had in mind, when drafting the text of the law, to impose an additional condition for the recovery of the relevant issues obtained by tapping, the purpose being to provide additional safeguards against arbitrariness by confirming the authenticity of the facts found by the prosecutor in his minutes (reports).

More than that, in the absence of performing a selection of records of evidence, of the transcription of this information in protocols (minutes), and of validity of these documents without attestation by the prosecution, the recordings legally obtained have no value in terms of probation.

We appreciate, in terms of probative value of evidence provided in art. 91^1-91^6 Criminal Procedure Code, that in some cases, in fact extremely rare in practice, the intercepted and recorded conversations or communications can provide great probative value, which is direct evidence. This situation occurs only in conditions in which, from their contents results both the constituent meeting of the offense which is the subject case, and the defendant's guilt. Most times, however, the calls recorded and rendered entirely in the minutes (reports) provided by art. 91^3 Criminal Procedure Code, may establish only circumstantial evidence, that will be combined with other direct or indirect evidence of the criminal case (Garbuleț & Grădinaru, 2012).

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[1] *Law no. 182/2002 concerning the protection of classified information,* published in Official Gazette of Romania, Part I nr. 248/12 april 2002 and its secondary legislation, particularly *Government Decision no. 585/2002*.

[2] European Court of Human Rights*, Rotaru vs. Romania cause,* Decision of 29 march 2000, published in Official Gazette of Romania, Part I, no. 19/11 january 2001, in that it was decided that there has been a violation of Art. 8 of the Convention.

8. References

Bercheşan, V. (2001). *Criminal Investigation (Criminology, theory and practice).Complete guide on criminal investigation*. Bucharest: Icar Publishing House.

Crişu, A. (2011). *Criminal procedural law. Revised and updated edition in accordance with Law no. 202/2010*. Bucharest: Hamangiu.

Dumitru, D. (2010). *Interception and recording of communications tactics.* Chişinău, pp. 92-93, retrieved from www.cnaa.md.

Gârbuleţ, I. & Grădinaru, S. (2012). The Evidential Value of Audio Recordings or Video Recordings. *Curentul Juridic Journal*, no. 1/2012.

Grofu, N. (2009). Audio or video recordings and sound or image recordings – distinctions in case of flagrant crime ascertaining. *Law Journal* no. 9/2009.

Guinchard, S., Buisson, J. (2009). *Criminal procedure*. Paris: LexisNexis Litec.

Jidovu, N. (2007). *Criminal procedural law. Second edition.* Bucharest: C.H. Beck.

Julean, D. (2010). *Criminal procedural law. General Part.* Timisoara: West University Publishing House.

Mateuţ, Gh. *Illegally obtained means of proof*, in *Comercial Criminal Law Journal,* retrieved from www.mateut-budusan.ro.

Neagu, I. (2010). *Criminal procedural law treaty. General part.* Bucharest: Universul Juridic.

Sava, A. (2002). *Assessment of evidence in criminal trials*. Iaşi: Junimea.

Stanciu, D. *Theoretical and practical considerations on audio and video interceptions and recordings in the Romanian criminal trial,* pp. 13-14*,* retrieved from www.univnt.ro.

Theodoru, Gr. (2007). *Criminal procedural law treaty.* Bucharest: Hamangiu.

Tulbure, A. St. (2006). Audio and video interceptions and recordings in German and Romanian law. *Journal of Criminal Law*, no. 1/2006.

Udroiu, M. (2010). *Criminal procedure. General Part. Special part.* Bucharest: C.H. Beck.

Volonciu, N. & Barbu, A. (2007). *The Code of Criminal Procedure commented. Art. 62 – 135. Evidences and means of proof*. Bucharest: Hamangiu.

****Law no. 182/2002 concerning the protection of classified information* published in Official Gazette of Romania, Part I nr. 248/12 april 2002 and its secondary legislation, particularly *Government Decision no. 585/2002*.

****Law no. 202/2010 on measures to accelerate trial solving,* published in Official Gazette of Romania, Part I, no. 714/26 octomber 2010.

****Law no. 356/2006 on amending and supplementing the Criminal Procedure Code and amending of other laws*, published in Official Gazette of Romania, Part I no. 677/7 August 2006.

***Court of Appeal Braşov (2009), criminal and cases involving minors and family section, *Criminal decision no. 775/R/17 November 2009,* retrieved from www.avocatura.com.

***Court of Appeal Bucharest (2009), criminal section, *Criminal Decision no. 141/A/ 09 june 2009,* retrieved from www.jurisprudenta.org.

***Court of Appeal Iasi (2009), criminal section, *Criminal Decision no. 141/03 march 2009,* retrieved from www.jurisprudenta.org.

***Curtea of Appeal Iaşi, (2009) *Court Order of 28 November 2011,* file no. 236/45/2007.

***Court of Appeal Ploieşti (2008), criminal and cases involving minors and family section*, Criminal decision no. 114/15 september 2008,* retrieved from www.avocatura.com.

***European Court of Human Rights*,* (2001) *Rotaru vs. Romania cause,* Decision of 29 march 2000, published in Official Gazette of Romania, Part I, no. 19/11 january 2001.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Performances and Deficiencies of the Regulation of the Phenomenon of Family Violence in the Republic of Moldova

Diana Ionita[1]

Abstract: The family protection and support, the development and consolidation of family solidarity, based on friendship, affection, moral and material encouragement of family members is a national goal. The acts of violence among members of one family can seriously affect the very existence of the family, frequently causing the dismemberment of it. The deeply *harmful effects of violence* among members of one family, both for them and for society, as well as the recrudescence of such violent acts imposed as a major priority the prevention and combating of this form of the violence. *Family violence* is a *social problem* and, at the same time, a serious violation of human rights, being exercised in different forms: the punishment of minors, the restriction of the woman's (man's) independence, the non-respect of the rights, feelings, opinions, expectations of the woman (man), violence among brothers, abuse against elderly family members etc.. It is also a social relation whose consequences cannot be ignored at the level of political decision, from the perspective of accession to the European Union's structures of our country.

Keywords: violence; family; aggressor; victim; moral; abuse

La protection et le soutien de la famille, le développement et la consolidation de la solidarité familiale, fondée sur l'amitié, l'affection, *l'appui moral et matériel* des membres de la famille *constitue un objectif national. Les actes de violence* commis entre les membres d'une même famille *peuvent gravement affecter l'existence* même de la famille causant fréquemment le démembrement de celle-ci.

Les conséquences très nocives de *la violence* commis entre les membres d'une même famille, tant pour eux que pour la société dans son ensemble, ainsi que la recrudescence de tels actes de violence ont imposés, comme une nécessité de premier ordre, la prévention et la lutte contre la violence.

La violence domestique constitue un problème social, et en même temps, une grave violation des droits de l'homme, étant exercée sous différentes formes: la punition des mineurs, *la restriction de l'indépendance* de la femme (d'homme), le non respect des droits, des sentiments, des opinions, des attentes de la femme (d'homme), la violence entre les frères, les abus commis envers les membres âgés de la famille etc.

Elle represente aussi un rapport social dont les conséquences ne peuvent pas être ignorées au niveau de la décision politique, dans la perspective d'adhésion du notre pays aux structures de l'*Union* Européenne.

Selon une étude, de 20% à 50% de femmes dans le monde entier sont victimes de violence conjugale. N'importe qui peut être victime de violence conjugale, la violence peut se produire à la maison, au travail ou n'importe où, dans n'importe quelle famille, riche ou pauvre, dans la

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ville ou dans le village, ses victimes peuvent être de n'importe quelle religion ou nationalité. La violence affecte les personnes que vous connaissez, mais en particulier les femmes et les enfants.

L'humanité ne s'est pas débarrassée *en totalité* d'une série d'atrocités d'un passé récent ou plus lointain, comme la violence en famille (en particulier contre les femmes et les enfants), l'esclavage, dans une formule plus récente du *trafic* d'êtres *humains*, même si la civilisation humaine a déjà entrée dans le troisième millénaire et aujourd'hui on a du mal à trouver quelqu'un qui ne sait pas ce qu'est la lumière électrique, l'avion, la télévision, le vaisseau spatial, l'ordinateur ou l'internet.

Si nous nous référons à l'histoire de la violence domestique, il a été conclu que celle-ci est apparue dans les sociétés où la femme était subordonnée à l'homme, les convictions *grâce auxquelles se faisait cette subordination* étaient les suivantes:

L'hiérarchie - se réfère à un système où peu de gens se trouvent au sommet de la pyramide et exercent le contrôle des ressources de base: de la nourriture, des biens, des centres de santé, de l'éducation, de l'argent et des emplois. De cette manière, respectivement, il s'exerçait le contrôlé et de la population qui en avait besoin. L'accès au groupe de direction, habituellement, se produisait par la naissance dans une classe supérieure, d'autres possibilités étaient très rares.

Le patriarcat – est un système d'autorité qui introduit les personnes de sexe masculin au pouvoir, en insistant sur le fait que seulement ceux qui sont nés dans la classe supérieure appartenant à la lignée *mâle* sont en mesure de contrôler les ressources de base. Le système ne permet pas aux femmes d'avoir accès à aucune ressource de base ou d'avoir des droits ou des privilèges, en limitant *même et* la possibilité d'obtenir la garde de leurs enfants.

Dans l'éspace roumain du *Moyen Âge* la vie citadine était moins répandue, car le développement des marchés et des villes était entravé par les conséquences désastreuses de la domination ottomane. L'agriculture et l'élevage étaient pratiquées par un grand nombre d'habitants de la ville, phénomène qui a déterminé le grand historien Vasile Parvan d'affirmer que"les Roumains ont toujours été une nation de paysans".

Dans une société rurale troublé, marquée par la décadence des paysans libres et l'*asservissement* des *paysans*, ou la principale préoccupation de l'homme était de fournir les moyens matériels pour assurer la vie de sa famille et de payer l'impôt seigneurial, le statut social des femmes était tributaire d'un paradigme basé sur les coutumes, certains d'entre eux en profitant de l'approbation de l'Église.

La femme de *cette période était* exclue de la vie publique et la *plupart du temps se trouvait dans* l'espace domestique. Elle était considérée comme une personne moins douée physiquement et intellectuellement, compte tenu de "l'impuissance et la faiblesse de sa nature" et "qu'elle est plus sotte et plus frivole que l'homme", la femme est soumise à l'autorité masculine dans la famille, représentée au cours de la vie par le père, le frère et le mari. Pour une femme, il était *impossible d'avoir* ses *propres objectifs o*u des aspirations personnelles. Exclusivement les hommes jouissaient de ces droits.

Dans le concept du matrimoine de la société médiévale, ayant des racines dans l'esprit des traditions anciennes, la mission des femmes était de procréer, la maternité étant leur véritable identité. Depuis des temps immémoriaux, le rôle principal attribué à la femme était de maintenir l'espèce, son image étant reproduit en idoles de fécondité et adoré comme ça. Cette *époque*, cependant, plus que d'autre, a réduit le destin de la femme à celui de simple

reproductrice. La vie adulte de la femme était une succession de naissances et d'allaitement, ce qui ne l'exonérait pas des tâches ménagères et du *travail* aux *champs*, presque équivalents aux travaux des hommes. Dans de telles circonstances, il n'est pas étonnant que les monastères deviennent une alternative pour les femmes qui voulaient s'éloigner des *tâches sociales* ou qui cherchaient à échapper à la violence domestique. En faisant face aux difficultés de la vie, la femme-paysanne a représentée pour cette époque, ainsi que pour toutes les époques de l'histoire, le symbole du zèle au travail, du dévouement, de la ténacité, de l'humilité et de la douceur de la nation.

Si nous nous référons aux caractéristiques de la violence domestique, on peut affirmer que la violence domestique se produit toujours dans le cadre d'une relation intime, dans un espace restreint et privé. (*Ce type de violence se produit en public très rarement*) Les actions qui accompagnent la violence sont: l'intimidation et la manipulation, l'isolement et la séquestration, le contrôle de l'argent et la maltraitance des enfants.

Défini comme un acte de comportement, la violence domestique *possède un caractère*: instrumental, intentionnel et appris.

Instrumental – l'agresseur contrôle la victime et obtient ce qu'il veut. Les comportements deviennent fonctionnels (persistent) s'ils ont aussi un résultat escompté. Un comportement qui n'a pas les résultats escomptés pour celui qui l'appliquent tend à ne se répéter pas après une certaine période de temps. De même, les comportements violents tolérés par la non-intervention ou consolidés persistent et s'accentuent.

Intentionnel - se produit avec l'intention de contrôle et de domination, de maintenir le pouvoir, par le fait d'être répété (qui n'est pas un cas isolé) donne un caractère d'intention que l'agresseur ne reconnaît généralement pas, mais peut être identifié par les résultats qu'elle produit. Par exemple, pourquoi un agresseur ne commet pas des actes de violence similaires envers son chef au bureau ou envers une *personne inconnue*, si nous partons de l'idée qu'il ne peut pas contrôler sa colère?

Appris – *la violence conjugale n'est pas innée.* Les enfants apprennent par imitation, la famille représente un modèle d'ou l'enfant prend des valeurs, des connaissances et des comportements. 60% des adultes qui sont violents avec leurs partenaires ont *été élevés dans une famille* avec violence. *D'autre part, comme c'est un comportement appris,* il peut être modifié grâce à un nouveau processus d'apprentissage. La preuve que la violence n'est pas génétique est le pourcentage de 40% des enfants qui grandissent dans des foyers violents et qui ne deviennent pas des agresseurs.

Les éléments spécifiques qui distinguent la violence domestique d'autres formes d'agression:

- l'accès permanent de l'agresseur à la victime;
- l'existence d'un cycle de la violence (la répétition en temps, *avec une fréquence et une* gravité *accrues*);
- les changements de personnalité des ceux qui sont impliqués, avec une réduction de leurs efficacité dans l'accomplissement de fonctions sociales;
- l'implication du tout le système familial;
- les relations émotionnelles entre les deux parties sont manifestes ou latentes;
- le caractère privé, la victime a un accès reduit aux sources de soutien;
- la tendance des autres de ne pas intervenir, la tolérance sociale à l'égard du phénomène;

- les aspects de torture de la victime;
- le manque de spécialistes et de services appropriée;
- généralement, la victime est de sexe féminin (91% des cas) la violence *étant* enracinée dans l'inégalité entre les sexes et les structures traditionnelles de pouvoir institutionnalisé.

Dans le contexte de la prévention des actes de violence en famille, reconnue comme un phénomène anti-social d'ampleur en République de Moldova*, on peut mentionner que la* République de Moldova a signé une série d'actes à caractère international qui ont comme objectif la promotion des droits de l'homme et des libertés fondamentales, tels que: La Déclaration universelle des droits de l'homme (1948); La Convention sur l'élimination de toutes les formes de discrimination à l'égard des femmes 1979 (CEDAW - ratifiée par *la* République de Moldova en 1994); La Recommandation générale no 19 du Comité des Nations Unies sur l'élimination de toutes les formes de discrimination à l'égard les femmes (session 11 de 1992); La Déclaration du Conseil de l'Europe sur l'élimination de la violence contre les femmes, 1993; La Déclaration et le Programme d'action de Beijing 1995; Les recommandations du Comité des Nations Unies sur le Rapport gouvernemental (2006), visant l'implémentation de la CEDAW, la Convention des Nations Unies relative aux droits de l'enfant, 1989, New York.

Dans le contexte de la ratification du cadre normatif international, étant un Etat indépendant, avec des aspirations démocratiques d'un *Etat* de *droit nous nous sommes* assumés l'obligation positive d'adapter le cadre juridique national aux normes internationales aussi bien à caractère universel qu'au caractère européen.

La Constitution garantit le droit à la vie, à la sécurité, à la vie privée et familiale, *en même temps* à l'étape actuelle le cadre juridique *autochtone destiné à* prévenir et combattre la violence domestique est créé en plus de: La Loi sur la prévention et la lutte contre la violence domestique (no 45 du 01.03.2007); La Loi sur la garantie de l'égalité des chances entre les femmes et les hommes (no 5 du 09.02.2006); Le Plan National "La promotion de l'égalité des sexes pour la période 2006 - 2009" (approuvé par la Décision du Gouvernement no. 984 du 25.08.2006); La stratégie nationale sur la santé reproductive pour 2005-2015 (approuvée par la Décision du Gouvernement no. 913 du 26.08.2005); *La Politique Nationale de Santé* (approuvée par la Décision du Gouvernement no. 886 du 06.08.2007); Le projet de la politique d'assurance de l'égalité entre les sexes dans la période 2009-2015 (un domaine d'approche tient de la *prévention et la lutte contre le trafic des êtres humains et la violence envers les femmes, y compris en famille*)

Conformément aux modifications (Loi no. 167/2010*) du Code de la famille de la R. Moldova, le délai pour la réconciliation ne peut pas* être imposé par *l'instance juridique dans «les cas de divorce* liés à la *violence* familiale confirmés par des preuves*» En même temps,* **la violence domestique** est pénalement puni par l'art. no 201/1 du Code pénal de la R.Moldova (changements introduits par la Loi no. 167 du 07/09/2010) et représente "l'action ou la non-action intentionnelle, manifestée *physiquement ou verbalement,* commise par un membre de la famille contre un autre membre de la famille, qui provoque des douleurs physiques, résultant en des blessures légères, *blessures psychiques* ou un *préjudice matériel* ou *moral*".

Dans la loi actuelle pénale de la R. Moldova la violence en famille est incriminée par l'art. 201/1 du Code Pénal RM dans une variante type et deux avec des circonstances aggravantes.

Conform à la législation (Loi sur la prévention et la lutte contre la violence domestique (n ° 45 du 01.03.2007) on distingue plusieurs formes de violence:

- *la violence physique* – le dommage délibéré de l*'intégrité corporelle* ou de *santé, actions comme:* frapper, bousculer, secouer, gifler, tirer des cheveux, piquer, couper, brûler, étouffer, mordre sous toute forme et de n'importe quelle intensité, empoisonner, intoxiquer et d'autres actions à effet similaire;
- *la violence sexuelle* - tout acte de violence à caratère sexuel ou tout comportement sexuel illégal au sein de la famille ou dans le cadre des autres relations interpersonnelles, telles que le viol conjugal, l'interdiction de l'utilisation de méthodes contraceptives, le harcèlement sexuel, tout comportement sexuel *non* désiré, *imposé, l'obligation de pratiquer la prostitution,* tout comportement sexuel illégal par rapport à un membre mineure de la famille, y compris caresses, baisers, images pornographiques et *tout autre* toucher *non désiré* à connotation sexuelle, d'autres actions à effet similaire;
- *la violence psychologique* – par le fait d'imposer sa *volonté ou le* contrôle personnel; de provoquer des *états de tension* et de souffrance psychique en offensant, en se moquant, en jurant, en insultant, en surnommant, en *chantageant, en* détruisant d'une manière démonstrative les objets, en menaçant, en *montrant ostensiblement* des armes ou en frappant les animaux domestiques, en négligeant, en s'impliquant dans la vie personnelle; *des actes* de *jalousie;* par le fait d'imposer l'isolement, la *détention,* y compris à la maison familiale, l'isolement de la famille, de la communauté, des amis; l' interdiction de se réaliser professionnellement, de *fréquenter les institutions d'apprentissage; la dépossession des actes d'identité; la privation délibérée de l'accès à l'information;* d'autres actions à effet similaire;
- *la violence spirituelle* – la sous-estimation ou la diminution de l'importance de la satisfaction des besoins spirituels et moraux en interdisant, en limitant, en ridiculisant, en pénalisant les aspirations des membres de la famille, l'interdiction, la limitation, la ridiculisation ou la punition de l'accès aux valeurs culturelles, ethniques, linguistiquse ou religieuses; par le fait d'imposer un système de valeurs inacceptables pour une autre personne; d'autres actions à effet similaire ou ayant des répercussions similaires;
- *la violence économique* - *la privation de moyens économiques, y* compris l'absence de moyens d'existence primaire tels que la nourriture, les médicaments, les objets de première nécessité; l'abus de différentes situations de supériorité pour soustraire des biens d'une personne; l'interdiction du droit de posséder, d'utiliser et disposer des biens communs; le contrôle inéquitable des biens et des ressources communes; le refus de soutenir la famille; par le fait d'imposer aux travaux difficiles et nocives au détriment de la santé, y compris un membre mineur de la famille, d'autres actions à effet similaire.

Les activités visant à prévenir et combattre la violence domestique se réalisent en vertu des principes suivants: la légalité, l'égalité, *la confidentialité,* l'accès libre à la justice, la protection et la sécurité de la victime, la coopération de l'administration publique avec la société civile et les organisations *internationales*.

Conformément à l'article 12 de la Loi sur la prévention et la lutte contre la violence domestique les pesonnes qui peuvent signaler le cas sont: la victime; dans les *situations de crise* les membres de la famille; les *fonctionnaires* et les professionnels qui entrent en contact avec la victime; l'autorité de tutelle; d'autres personnes qui peuvent fournir des informations sur le danger imminent de subir des *actes de violence* ou des actes *déjà commis*. La plainte contre les actes de violence en famille se dépose: à l'organe des affaires internes; à l*'instance judiciaire;* à l'*assistance sociale; à* l'*administration publique locale.* Le dépôt de la plainte se fait à l'adresse: du domicile de la victime; *de séjour temporaire* de la victime si celle-ci a quitté la maison pour éviter la violence; *de la résidence de l'agresseur; où la victime* a demandé de l'aide; *où* a eu lieu l'acte de violence.

Les mesures de protection s'appliquent par l'*instance judiciaire par l'émission* d'une "Ordonnance de protection" dans les 24 heures *après la réception de la plainte* même sans l'agresseur. Ces mesures peuvent *être*:

- l'obligation de quitter temporairement le domicile commun ou de rester loin de la maison de la victime;
- l'obligation de rester loin de la victime, à une distance qui permettrait d'assurer la sécurité de la victime;
- l'obligation de ne pas communiquer avec la victime, aves ses enfants ou d'autres personnes qui sont à la charge de celle-ci etc.

La durée d'application des mesures de protection est de *jusqu'à* trois mois, mais peut être prolongée comme suite à une demande répétée ou dans le cas de non respect des conditions imposées par l'*instance judiciaire.* La procédure d'application de l'Ordonnance de protection peut être intentée:

- dans le cadre d'un procès pénal - art. 215` *Code* de *procédure pénale;*
- dans une procédure civile – *Code* de *procédure civile* (art. 318/1 – 318/6).

Dans une procédure pénale doit exister un procès pénal intenté; la demande / la sollicitation expresse de la victime d'être protégée contre l'abuseur *étant dû à la présence* d'un risque imminent de violence. La demande/la sollicitation *d'émettre une ordonnance* peut être faite à l'organe *de poursuite pénale, au* procureur ou directement à *l'instance judiciaire dans le cas où le dossier est transmis déjà* à l'ins*tance.* L'organe *de poursuite pénale, le procureur qui a* reçu la demande de la victime la transmettra à *l'instance judiciaire* immédiatement pour l'examiner dans les 24 heures.

En cas de réconciliation entre les parties si dans la famille a eu lieu une violence «*le procureur ou l'instance judiciaire examinera si la volonté de reconciliation est exprimé librement, en s'assurant que la victime a bénéficiée d'une réelle assistance et protection*» article 276 alinéa 5 *Code* de *procédure pénale.*

La violation des mesures de protection établies par ordonnance de protection est l'un des motifs de *la rétention* et d'arrestation préventive de l'agresseur (article 165 alinéa 2 p. 2; article 185 alinéa 2 p. 3 *Code* de *procédure pénale*) En cas de *suspension conditionnelle* de la poursuite pénale, le procureur peut établir comme obligation à l'inculpé "*de participer à un programme spécial de traitement ou de conciliation pour réduire le comportement violent*" (article 511 alinéa 1 p. 5 *Code* de *procédure pénale)*

Le dépôt de la demande à l'instance (dans le cadre une procédure civile) concernant l'émission de l'ordonnance de protection est généralement faite par: la victime, le représentant légal de celle-ci; l'organisme de tutelle et de curatelle – dans le cas d'un mineur; dans le cas où la victime ne peur pas déposer la demande personnellement, à sa sollicitation, la demande peut être déposé par le procureur, l'organe d'aide sociale où par la police. La demande déposée *à l'instance est exonérée* de la *taxe d'État.*

L'instance judiciaire peut solliciter au service d'aide sociale ou à la police de présenter un rapport de caractérisation de la famille et de l'agresseur ou d'autres actes nécessaires pour prononcer une décision.

Ceci *étant exposé,* à l'étape actuelle, comme résultats de plusieurs interviews, a été constaté que plus de 70% du nombre total de victimes de violence domestique n'ont pas sollicitées assistance pour diverses raisons, comme, par exemple: la peur et la honte de ce que dira "le

village", -"j'ai essayé de parler aux parents de mon mari, mais en vain", -"on m'a dit que c'est moi qui est coupable", - "c'est la croix que je dois porter" ou " je ne crois pas que quelqu'un peut m'aider", " je ne sais pas où pourrais-je m'adresser".

Bien que la Loi sur la prévention et la lutte contre la violence domestique a été approuvée et promulguée, il n'y a pas encore de mécanismes distinctes pour son *implémentation,* respectivement, ne sont pas créés les *outils appropriés de régulation, ce que* permettra aux différentes catégories de groupes professionnels d'entreprendre des actions concrètes dans ce domaine, en portant ainsi responsabilité pour cela. Il manque une coordination efficace des activités qui s'organisent dans le domaine. Nous nous référons en particulier à la coordination des activités entre les organisations au niveau local. Si au niveau central, dans le cas des donateurs, des organisations internationales existent une coordination des *activités déroulées, alors au niveau des* agences d'implémentation souvant elle manque. Dans les médias de Moldova se ressent l'absence des articles de sensibilisation des *facteurs de décision* sur *le problème* de la violence domestique, ainsi que des articles d'experts qui expliqueraient les dispositions des actes normatifs du domaine. Le système de référence pour les victimes de la violence conjugale (femmes) est insuffisamment développé. Il manque un cadre de réglementation de l'identification, l'*évidence*/la surveillance, la référence des cas de violence domestique (femmes). Il manque des normes de qualité pour la prestation de services.

La société continue à considérer la violence domestique comme une question qui tient de l'intérieur de la famille, en préférant ne pas prendre une attitude et, évidemment, elle essaie au moins de prendre des mesures contre ce phénomène. Les services existants assurent seulement l'intervention en cas de crise, alors que les besoins de la victime sont beaucoup plus grands et nécessitent plus de temps (non pas seulement trois mois) pour être satisfaits, alors que les services d'assistance à long terme, de durée (y compris le processus de suivi) manquent complètement. Le cadre légal existant met en valeur seulement la gamme de sévices d'aide pour les victimes et non pas pour les agresseurs, ainsi, en luttant avec les conséquences du comportement défectueux et non pas avec les causes, les indices de la Rèpublique de Moldova dans ce contexte restent assez élevés.

References

Liiceanu, Aurora & Saucan, Doina Ştefana (2004). *La violence domestique et la criminalité féminine/ Domestic violence and female crime*. Bucharest.

Revenco, Ana; Nisain-Nichitin, Daniela & Zaporojan Pirgari, Angelina (2007). *Evaluation rapide du problème de la violence domestique en République de Moldova/ Rapid assessment of the problem of domestic violence in Moldova*. Chişinău.

Schornstein, Sherri L. (2003). *La violence domestique et l'assistance médicale*/*Domestic violence and medical assistance*. Chisinau.

*** (1999). *Guide sur les études des genres et d'études des femmes/ Guide on gender studies and women's studies*. Chisinau.

Pisclacova, Marina & Sinelinicov, Andrei (2009). *Le territoire de la silence: les droits des femmes et le problème de la violence envers les femmes en Russie/The territory of the silence: women's rights and the problem of violence against women in Russia*. Moscow.

*** www.ortodoxia.md.

*** www.apropo.ro.

*** www.raportal.ro.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

The Criminal Protection of the Financial Interests of the European Union in the Romanian Legislation

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Abstract: The idea of criminal protection of the financial interests of the European Communities appeared as a result of allotting their own funds by means of the first project of amending the Treaty of August 6th 1976 which modified the Treaties regarding the establishment of the European Communities. Nowadays, one of the major problems that the European Union is facing is the frauds committed to the detriment of the Union budget. The offences bilking the Union budget are extremely dangerous, not only by the amount of the damage caused, but also by the high degree of organizing such offences. Romania has made significant efforts to align its legislation in this matter to the community legislation, such efforts resulting in the introduction of a new section in Law no. 78/2000 regarding prevention, discovery and sanction of corruption offences – section named "Offences affecting the financial interests of the European Communities". This work will analyze those offences provided in Law no. 78/2000, committed against the financial interests of the European Communities, such analyze including also the relevant judicial training in the matter.

Keywords: European Union; offenses; financial interests

1. Introduction

Preventing and sanctioning offences affecting the financial interests of the European bodies is a main concern which has been materialized in many acts at the level of European institutions[3]. Such concern was caused both by the need to improve the criminal legislation regarding corruption prevention and control, and by the proliferation of corruption offences - a phenomenon manifested in Romania, too.

The most important legal measure adopted by our country was adding new articles to Law no. 78/2000 (the framework law regarding corruption sanctioning in Romania[4]), aiming at new incriminations, on the one hand, and at extending the area of the active subject of corruption offences to some categories of persons provided in the Criminal convention regarding corruption, in the Convention regarding the protection of the financial interests of the European Communities[5] and in its additional protocols. This significant and original addition for the Romanian legislation was made by means of Law no. 161/2003[6] by introducing section 4[1] named „*Offences against the financial interests of the European*

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[3] The criminal convention regarding corruption, of the European Council, ratified by Romania by Law no. 27/2002 or the Convention regarding the protection of the financial interests of the European Communities and its additional protocols, drawn up based on article K.3 from the Treaty of the European Union.

[4] Law 78/2000 published in Official Journal no. 219/18 May 2000, but the text of the initial document suffered subsequently a series of modifications and additions. They appeared by Government ordinance no. 83/2000, approved with modifications by Law no. 334/2001, the Emergency Government Ordinance no. 43/2002, approved with modifications by Law no. 503/2002, with further modifications, Law no. 161/2003, with further modifications, Law no. 521/2004, the Emergency Government Ordinance no. 124/2005, the Emergency Government Ordinance no. 50/2006, Law no. 69/2007.

[5] According to art. 46 it introduced in TUE by the Treaty of Lisbon "The union has legal status" replacing the European Communities; see (Vîlcu, 2010, p. 119)

[6] Law no. 161/2003 regarding some measures to ensure the transparency in exerting public dignities, public positions and in the business environment, preventing and sanctioning corruption, published in Official Journal no. 279 of 21 April 2003.

Communities". Each offence included in this section will largely be analyzed below.

2. The Offence of Failure to Comply with the Rules Related to Obtaining Funds from the European Community Budgets (Art. 18[1] from Law 78/2000)

It is an offence – using of presenting of false, inexact or incomplete documents or declarations, which has as result the illegitimate obtaining funds from the general budget of the European Communities or from the budget administrated by them or on their behalf [para. (1)].

It is also an offence – The deliberately overlooking of providing the information required according to the law, with the purpose of obtaining funds from the general budget of the European Communities or from the budget administrated by them or on their behalf [para. (2)].

If the deeds provided above generated particularly serious consequences, the punishment shall be higher. (3)][1].

The specific legal object is represented by the social relationships appearing and developing with reference to the financial interests of the European Communities. In the legal literature, they said that subsidiarily the social relationships are defended, relationships regarding the public trust in the authenticity and credibility of the documents and declarations made to obtain such funds. (Dobrinoiu, 2004, pp. 651-664)

The material object is represented by false documents used or by those acts recording false declarations when the declaration is accompanied by an act, too. It is to mention that the aimed funds do not represent a material object of the offence because they intend to obtain them by the criminal-related activity. If they are obtained illegally, they could be considered as a product of the offence.

Paragraph 1 does not provide any condition regarding the *active subject*. We think that, not depending on circumstances, it could be an executive within an economic organization, state institution, but also a natural or legal person private law who aims at obtaining funds from the European Communities budget following the representation of some false documents.

As for the *passive subject*, it is represented by the European Communities whose budget is defrauded by the active subject's deed.

The *material element* of this first offence is alternative, being represented by an action and inaction. The action can take two forms: *using* of false documents and *presenting* false declarations.

Regarding the offence to forge the documentation submitted or used to obtain illegal funds from the general budget of the European Communities or from the budgets managed by them or on their behalf, the legal practice decided that it is the offence of forgery under private signature provided by art. 290 of Criminal Code – offence which is not merged in the offence provided by art. 18[1] from Law 78/2000 – case when the author is liable for both offences considered multiple offences.[2] Also, the legal practice decided that the offence of forgery under private signature provided by art. 290 of Criminal Code can be committed in a continuous form, if the author, based on the same criminal-related resolution, forges several documents (i.e. 94 farming agreements) that he/she subsequently uses to obtain the funds (i.e. of SAPARD funds).[3]

For the offence provided by art. 18[1] from law 78/2000 to exist, it is necessary that the deeds committed to have as result getting of funds from the general budget of the European Communities or from the

[1] According to art 146 of Criminal Code., by particularly serious consequences, one understands a material damage higher than ROL 200,000 lei or a particularly serious disturbance of the activity, caused to a public authority or to any of the units referred to in art. 145 C. pen., or to other legal or natural person.

[2] Criminal judgment no.161 of 7 March 2008 of the Court of Sector 2 Bucharest – final by criminal decision nr. 1673 of 21 October 2010 of the Court of Appeal Bucharest. See in this regard (Trancă, 2011, p.170 – 177)

[3] Criminal decision no. 607/R of 16 March 2011 of the Court of Appeal Bucureşti. See (Trancă, 2011, p.206 – 217) There is also the criminal decision of the Court of Appeal Piteşti no. 1092/R of 18 October 2011 – non-published.

budgets managed by them or on their behalf, thus affecting the „costs" section of such budgets, meaning „subsidies" or „aids".[1] It is also to be mentioned that such subsidies or aids are not provided to be granted to satisfy personal interests, but to satisfy the common general interest of financing the common policy in agriculture or of contributing to the renewal or reinforcement of economic, social or cultural cohesion in the European Union, being included in certain programmes, such as: PHARE[2], ISPA[3], SAPARD[4]. To get such funds, a certain procedure should be followed. The natural or legal persons interested should perform certain projects and submit a particular documentation. Documentation should include a series of acts, deeds or circumstances to be analyzed by the competent authorities of the European Communities, and the funds requested shall be granted based on them. That is why all declarations, documents and any other acts used should correspond to the reality.

As for the inaction by means of which the material element of the offence is achieved, according to paragraph (2) – it is an offence the *overlooking* of providing certain data requested by law, thus aiming at obtaining illegal funds. It is the situation when the active subject knows that he/she has to provide such data, but he is ware that by providing them, he/she will not get such funds. In such alternative modality, the offence exists only if the overlooking has as result the getting of illegal funds.

The *immediate follow-up* is materialized in effectively getting such illegal funds. As it is a result offence, they have to prove the cause-effect link. So, they have to prove that the incriminated action or inaction has as result getting illegal funds from the budget of the European Communities.

The subjective side. The form of guilt used to commit this offence is the direct or indirect intention for committed offences and just direct intention for overlooked offences. In case of very serious consequences produced, the offence is committed with *praeterintention*.

The *preparation acts* for such offence are possible, but not incriminated, and *attempt* is punished. We consider that the offence is consumed at the moment when such funds are actually delivered from the general budget of the European Communities or from the budgets administrated by them or on their behalf into the beneficiaries' accounts. If the offences are committed as continuous offence, there will also be a depletion moment, the legal practice being relevant in this regard.[5]

The offences provided in para. (1) and (2) will be punished with imprisonment from 3 to 15 years, and the one provided in para. (3) will be punished with imprisonment from 10 to 20 years. In all cases, the lawmaker provided the application of the additional punishment of restraining of certain rights, too.

[1] They are paid from the European fund of orientation and agricultural guarantees and from the Structural Funds: the European social fund, the regional development European fund etc.

[2] *PHARE* (Pologne et Hongrie — Aide â Restructuration Economique) is a programme launched by the European Community in 1990, whose destination is Poland and Hungary. Subsequently, it extended to the other candidate states from the Central and Eastern Europe to join EU, becoming the major instrument of technical financial assistance offered by UE to restructure the economies of those countries and to create the infrastructure necessary to join the European Union.

[3] *ISPA* (Pre-Joining Structural Instrument) is a programme came into force starting with 2000. Its objective was the development of the transport infrastructure and environment protection in the candidate states.

[4] *SAPARD* is an operational programme from 2000. Its purpose is to support the agriculture and the rural development in the countries from the Central and Eastern Europe.

[5] Criminal judgment no.161 of 7 March 2008 of the Court of Sector 2 Bucharest – by criminal decision nr. 1673 of 21 October 2010 of the Court of Appeal Bucharest. See in this regard (Trancă, 2011, p. 170 – 177)

3. The Offence of Illegal Diminishing of Resources from the Budgets of the European Communities[1] (Art. 18^3 from Law 78/2000)

According to art. 18^3 para. (1) it is an offence - Using or presenting of false, inexact or incomplete documents or declarations, if the deed has as result the diminishing of the resources from the general budget of the European Communities or from the budget administrated by them or on their behalf.

Para. (2) sanctions the overlooking of deliberately providing the information required according to the law, if the deed has as result the illegal diminishing of the resources from the general budget of the European Communities or from the budget administrated by them or on their behalf.

According to para. (3) they sanction even more the offences provided in para. (1) and (2), if they generated particularly serious consequences.

Compared to the previous offence, this offence has several differences, as follows:

- Although the incriminated deeds are identical to the ones within the previous offence, we have to take into account they are committed under a different context. Such deeds affect the income section of the budget of the European Communities.

- The immediate follow-up is the illegal diminishing of the resources from the general budget of the European Communities or from the budget administrated by them or on their behalf.[2]

As for the previous offence, the offence can be committed under the form of attempt which is also punished. The offence is consumed at the moment when the illegal diminishing of the resources was produced, from the general budget of the European Communities or from the budget administrated by them or on their behalf.

The punishment for the simple normative modalities [para. (1)] and assimilated [alin. (2)] is imprisonment from 3 to 15 years and restraining of certain rights. The offence provided in para. (3) is punished with imprisonment from 10 to 20 years and restraining of certain rights.

4. The Offence of Changing the Destination of Funds from the Budget of the European Communities (art. 18^2 from Law 78/2000)

According to art. 18^2 para. (1) it is an offence - Changing the destination of the funds obtained from the general budget of the European Communities or from the budget administrated by them or on their behalf, without observing the law.

According to para. (3) it is also an offence - Changing the destination of a legal obtained benefit, without observing the law, if the deed has as result the illegal diminishing of the resources from the general budget of the European Communities or from the budget administrated by them or on their behalf.

According to para. (2), the offence is more serious as the deed provided in para. 1 generated particularly serious consequences.

[1] The offence provided in art 18^3 was taken from din art. 1 pt. 1 let. b from the Convention regarding the protection of the financial interests of the European Communities, providing: „For this convention, the fraud affecting the financial interests of the European Communities shall be, in terms of resources, any deliberate action or overlooking regarding using or presenting of false, inexact or incomplete documents or declarations, which has as result the illegal diminishing of the resources from the general budget of the European Communities or from the budget administrated by them or on their behalf, non-communication of any information by breaching a specific obligation, with the same result, changing the destination of a legally obtained benefit, with the same result".

[2] It is to be mentioned that the main "resources" of the European communities are: a percent of VAT collected at national level, a percent from the gross domestic product and traditional own resources (customs rights charged for the import in the European Union of products originating in other countries than third countries; the fees provided within the common organization of markets; fines on competitive matter, etc.).

The *specific legal object* is represented by those social relationships appearing and developing with reference to the defense of the budget of the European Communities and of the budgets administrated by them or on their behalf. (Neagu, 2009, p. 651-664)

It is also to be mentioned that by the deed incriminated in para. (1), the budget is defrauded at its income section.

The *material object* is represented by the funds obtained or by the legally obtained benefits (according to the final paragraph).

The *active subject* is qualified and can be:

- the person who obtained funds from the general budget of the European Communities or from the budgets administrated by them or on their behalf and to whom he/she changes their destination illegally;

- the person who obtained any other benefit legally.

Thus, the active subject can be both a public servant and a natural person, because such funds can be obtained *based on projects* both by state institutions (for example, FARE funds) and by natural persons (foe example, SAPARD funds).

The *passive subject* is represented by the European Communities.

The *material element* is represented by an action, i.e. changing the destination of funds, committed without observing the law. For the offence to exist, it is essential that such funds should come from the general budget of the European Communities or from the budgets administrated by them or on their behalf.

According to para. (5), it is also an offence changing the destination of a legal obtained benefit, without observing the law. The benefit should not necessarily come from the European Communities as subsidies or aids. It can come from any legal activity of the author, but obtaining such benefit should create to the author the obligation to pay some duties to general budget of the European Communities or to the budgets administrated by them or on their behalf (for example, import customs duties). Getting a legal benefit generates the payment obligation of a duty. It such duty is not paid and the money is used in other purposes, then we have the offence we are analyzing. So, there will be an offence only if the deed has as result the illegal diminishing of the resources from the general budget of the European Communities or from the budgets administrated by them or on their behalf. The criminal-related activity consists in taking out the funds or the legal obtained benefits from the patrimony area where they belonged, which can result in producing some possible damages to the European Community or can even cause the illegal diminishing of the resources from the general budget of the European Communities or from the budgets administrated by them or on their behalf [in case of para. (3)].

The *immediate follow-up* represents the establishment of the fact that the destination of the funds was changed – in which case the budget of the Unions is affected at the „costs" section. For para. (3), the follow-up is represented by the actual diminishing of the resources from the general budget of the European Communities or from the budgets administrated by them or on their behalf. The follow-up influences the above mentioned budgets under the "income" or "resource" sections.[1]

The *cause effect link* comes from the materiality of the deed. For para. (3), it should be proved the fact that the mentioned action produced an illegal diminishing of the resources from the general budget of the European Communities or from the budgets administrated by them or on their behalf.

The *subjective side*. The form of guilt is direct or indirect.

[1] The resources referred to by this offence (and the one provided in art. 18^3) are considered only the customs duties charged for the import in the European Union of products originating in other countries than third countries, agricultural fees charged for the import of agricultural products originating from third countries and the fees stipulated within the common market.

The *preparation acts* for such offence are possible, but not incriminated, and attempt is punished. The offence is consumed when illegal change of destination of funds or of other legal obtained benefits takes place. The analyzed offence is susceptible of depletion if the offence was committed in a continuous form. The legal practice decided that the change of destination of two succeeding tranches of one single financing, obtained following a single contract, determines the conclusion that both material actions were committed based on the same criminal-related resolution.[1]

The punishment for para. (1) and (3) is punishment from 6 months to 5 years, and for para. (2) is from 5 to 15 years and restraining some rights.

5. The Carelessness Affecting the Financial Interests of the European Communities (art. 18^5 from Law 78/2000)

According to art. 18^5, it is an offence – the guilty non-observing of an office duty, by non-performing it or deficient performing it, by a director, administrator or the person with decisional or control attributions within an economic agent, if it had as result the commission of one of the offences provided in art. 18^1-18^3 or the commission of a corruption or money laundering offence in connection with the funds of the European Communities, by a person subordinate to him/her and who acted on behalf of that specific economic agent.

The *special legal object* is represented by the social relationships regarding the assurance that the persons with decisional or control attributions within an economic agent observe the obligation to accomplish correctly the attributions they have in order not to affect the financial interests of the European Communities.

In case the action representing the material element exerted over a thing (the careless of some assets – computer, cars – the offence has a *material object*.

The *active subject* is qualified, depending on circumstances mentioned in the text. Thus, the offence can be committed by the director, administrator or the person with decisional or control attributions within an economic agent.

The passive subject is represented by the European Communities.

The *material element* is represented by non-observing an office duty by the director, administrator or the person with decisional or control attributions within an economic agent, by non-performing it or deficient performing. Non-performing an office duty means overlooking, non-performing an action that should have been performed or the state of passivity of the author. Non-pe4rforming of a duty can be total or partial, it can aim at one single duty or more. Deficient performing of an office duty supposes its performance in other ways.

The *immediate follow-up* is explicitly shown in the incrimination rule and consists in committing one of the offences provided in art. 18^1 – 18^3. Being a result offence, it is necessary to establish the *cause effect link* between the author's action, inaction and the follow-up requested by the incrimination rule. They have to establish that, following the author's activity, his/her subordinate committed one of the above mentioned offences.

The form of culpability is guilt. The subjective element is achieved in all cases where the author foresaw the possibility of occurring the specific consequences of such offence, but he/she thought that they would not occur or did not foresee them, although he/she should have and could have foreseen them. Being committed without guilt, the offence is not susceptible of any preparatory acts or attempt. This offence is consumed at the moment when the incriminated action was performed or when the deadline for performing it expired and one of the requested immediate follow-ups took place. The punishment is imprisonment from6 months to 5 years and restraining certain rights.

[1] Criminal judgment no.2062 of 6 November 2009 of the Court of Sector 4 Bucharest – final by criminal decision no. 390 of 21 February 2011 of the Court of Appeal Bucharest. See in this regard (Trancă, 2011, p.201 – 206).

5. Conclusions

As a conclusion of the above, we consider that the analysis of those offences provided by Section 4^1 of Law no. 78/2000 is timely. Although introduced in April 2003, the analyzed offences have a more and more frequent application in judicial practice, both in the activity of the Anticorruption National Department – as a structure of the prosecutor's office specialized in performing the criminal investigation for such offences, and in the activity of the courts of law, where fighting the corruption phenomenon is made by final decisions.

6. Bibliography

Dobrinoiu, V. & collaborators (2004). *Drept Penal, Partea specială, vol. II, Capitolul IV- Crime şi delicte contra intereselor financiare ale Comunităţilor Europene / Criminal Law, Special Part, vol. II, the Chapter IV Crimes and offenses against the financial interests of the European Communities.* Bucharest: Lumina Lex.

Neagu, N. *&* collaborators (2009). *Legea nr. 78/2000 pentru prevenirea, descoperirea şi sancţionarea faptelor de corupţie / Law no. 78/2000 on preventing, investigating and punishing corruption.* Bucharest: Wolters Kluver.

Trancă, A. (2011). *Infracţiuni de corupţie prevăzute în Legea 78/2000 / Corruption offenses provided in the Law no 78/2000*. Bucharest: Hamangiu.

Vîlcu, E. (2010). *Drept comunitar instituţional. Curs universitar / As the institutional community. University course.* Second edition revised and added. Craiova: Sitech.

***Law no. 27/2002 or the Convention regarding the protection of the financial interests of the European Communities and its additional protocols.

***Law 78/2000 published in Official Journal no. 219/18 May 2000.

***Law no. 161/2003 published in Official Journal no. 279 of 21 April 2003.

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REALITIES AND PERSPECTIVES

Prediction and Prevention of Sexual Assaults on Children

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Abstract: Unfortunately, in the reality of modern society, more and more negative phenomena appear, which affect us directly or indirectly, both directly us and the direction to which the society is heading, the most affected being the children. Their vulnerability makes them targets of various types of abuses and aggressions committed by adults. The studies show an alarming dynamics of some phenomena where the children have an important place among the victims. Unfortunately, in Romania, this phenomenon has not been one of the priorities. In this study, we shall try to identify the reasons that represent the basis of children victimization, the immediate and long term effects upon the victims, the social environment that favors it as well as the prevention and fighting measures against these aggressions.

Keywords: child abuse; sexual abuse; prophylaxis

1. Introduction

Giving and defending children's right to a private life, to intimacy and a normal life, we have the guarantee that they shall have an optimum development in normal conditions, being able to prevent the situations when his existence and development are endangered due to abuses in general, the sexual ones in particular..

The effects of sexual abuses are profound and negative, and many times they follow the under age child in all his growing stages, including maturity, in most cases the victim becoming, in time, a copy of his aggressor. From this we can infer the importance of a proper treatment of sexual abuse and pay a special attention to the traumas experienced in childhood.

The best method of treatment and prevention is to know and understand the child's needs based on his development stages, a correct understanding by parents and adults with whom he interacts (educators, teachers, social workers, psychologists, or other health professionals), an important role among them being played also by mass-media as aggressions can be identified or prevented in their early stages.

Another important aspect is related to abusers. The measure consisting only of deprivation of liberty is not enough, the statistical data showing that many of the abusers commit the same crimes once they are released from prison. Considering that the way this problem is approached in USA is not a solution as there the convicted pedophiles (and here we also include incestuous fathers) are stigmatized this meaning that they have the obligation to inform local authorities if they move to another community, and in their turn and by open means (newspapers, posters, notifications to educational institutions) the authorities inform that "a pedophile' is living near or among the people belonging to that community. If in terms of child protection this practice has results, we cannot say the same thing from the other perspective, namely the rehabilitation and social reintegration of an abuser. The abusers' problem has been discussed for a long time in some countries, and an alternative was the chemical castration.

The pedophiles, incestuous fathers or violators, those who suffer from an anomaly of sexual preferences have to be listened and helped not stigmatized or ignored. The doctors have a leading role

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in this mission, namely to give them care and necessary treatment, or using the already existing treatment at their disposal and there is no doubt that in the near future other solutions will come to daylight.

Only repression does not prevent the repetition of an offence as it was until not long ago in the Romanian judicial system. *To sentence a pervert without helping him means to see the list of his victims increase after him being released from prison. Therefore, we have to understand the matter of sexual perversity in all its complexity, even with his horrible aspect. (*Astărăstoae, & Scripcaru, 2005)

The solution is not to close our eyes even if we prefer looking away and to forget or ignore the fact that our ways crosses day by day with the way of sexual perverts who are "*close to you, close to us, some of them being put behind bars only temporarily….while other will appear tomorrow in the newspapers"*. (Cioclei, 2007)

In those to come we will present some sexual assaults prevention programs as well as rehabilitation programs for the victims, which have been elaborated by prestigious international specialists, supported and implemented by various international and national organizations including "Save the Children". These programs are addressed to children, parents, journalists, psychologists and teachers. In this chapter of our work, we shall analyze each of them for the purpose of a maximum efficiency in preventing sexual assaults on children.

2. Family

The family represents the vital social group in which the child benefits from care, protection and education and to the family, the center of concern should be the child. The diversification of family models increased at the same time with the social changes, the new family forms (single-parent families, cohabitation, the liberty of women of having children without being married) coexisting with the traditional family.

The personality of a child is a product resulted from a multitude of factors, familial and extra-familial (school, community), but the familial factors are definitely the most important for the child to grow in harmony. That is why we consider necessary to detail an "education method" for parents in order to prevent abuses of any kind, but especially sexual abuses on children, the latter having the most obvious consequences upon the entire development of the child.

Generally, the familial environment is made up of:

- family members having complex relationships on whose functionality the efficiency and success in child's social integration, targeting and development are based;
- living space with all facilities available that may or may not meet the family needs.

The family is the most suitable to meet the child's needs as they are the closest to him and his needs from the affective point of view, because only affection can help a parent intuit the child's needs and his childhood state. Material security, education and love are instruments that help the family ensure a harmonious development of the child.

The professionals have settled a set of family educational.

1. Love your child:

- accept him the way he is;
- enjoy him and do not hurt him, do not punish him unjustly, do not humiliate him, give him the chance to love you.

2. Protect your child, protect him from physical and spiritual dangers, give up your own interests if necessary, even risking your own life;

3. Be a good example for your child so that he lives in a family in which honor, honesty, modesty and harmony reign;

4. Play with your child;

5. Work with your child.

6. Let the child acquire life experience even if he suffers as the over-protected child, safe from any danger, sometimes may become a social invalid

7. Show your child the limits of human freedom

8. Teach him to be obedient

9. Expect from your child only the appreciations he can give, as per his experience and maturity.

10. Offer your child experiences having the value of memories, family celebrations, trips, travels, vacations, shows, sport manifestations as the child nurtures as an adult, from experiences that give him the opportunity to know the world.

The specialists have marked another series of rules for the parents whose child was sexually abused, namely:

- continue to believe your child and do not accuse him for what happened;
- consult the doctor about the need for appropriate medical examination and/ or treatment;
- train your child to tell you exactly if the aggressor is trying once again to have sexual contact with him or if he bothers the child in any way;
- tell the child repeatedly that he is safe;
- answer calm and naturally to the questions and sentiments the child expresses about molestation, but do not insist on him to talk about it;
- respect the child's right to private life, and confidentiality and forbid the questioning of the child by persons indirectly involved in investigating the case;
- the parents or other persons taking care of the child have to encourage him to observe the rules of the house (regular duties, bed time, rules, etc.);
- the parents have to inform the child's sisters/ brothers that something happened to him but now he is safe and everything will be all right. Do not discuss the details of the aggression with the child's brothers and sisters. Make sure that all the children in the family have received enough information so that they can avoid the aggressor;
- the parents should make time to discuss the situation with a trusted person – a family member, a priest, a councilor (but not in the presence of the child). Talk about and express what you feel.

3. The Psychologist

The psychologist is the one who should be involved both in the abuse evaluation process and in the recovery process of the child who had suffered a form of abuse. Within this process, he may perform a psychological evaluation of the child, which can be very useful for understanding:

- the mechanisms on which the behavior and attitude of the child are based;
- the effects of the abuse on the child's psychological-social development;
- the factors determining the appearance of abusive behaviors on children.

At the same time, the psychologist is seen as a specialist in child's development, and he may be considered an expert if his involvement is needed from the legal point of view. Ideally, the psychological evaluation has to include an interview with the parents, a cognitive development test,

personality tests, measuring ranges for various symptoms and observations of child-parent interaction. The psychological evaluation data are cumulated with the data from the other specialists involved.

Express the child's feelings, and help him to accept them, and especially continue the regular activities up to the abuse moment and his reintegration into society are the main targets of a therapist in terms of rehabilitating the child, targets that will be reached by means of a specialized help and by means of therapy. Therapies are varied, the cognitive-behavioral ones being the most common, this meaning that the child can be easily influenced and the purpose of this kind of therapies is to find the subject's autosuggestion and changing possibilities.

4. Medical Staff

The object of the sexual abuse is involving children in sexual activities that they do not fully perceive and understand and therefore their consent is not advised. For a doctor, is very important to take into consideration any complaint of a child that claims that he has been the victim of a sexual abuse. At the same time, it is very important not to put the diagnostic of sexual abuse without evidence to prove that, which imply a social investigation of the family's situation and the psychological and somatic exam of the child.

The forensic examination is one of the most important steps of an investigation and a good coordination of the team members investigating the case is absolutely necessary. If the signs of a sexual abuse are obvious, it is necessary that the forensic expert takes all the confidentiality measures so as to protect the victim's image and at the same time to gain the child's trust by telling him that what had happened will remain confidential and that the perpetrator shall pay for his deed.

The symptoms of a sexual abuse that can be noticed might be physical or behavioral, as we have detailed in a previous chapter.

Preventive medical attitude towards the abuse:

- history – through which the history and the factors that led to the affection for which the child came. it is necessary to talk to the child before the parents do, if the abuse was physical, and this should be an opportunity of affective closeness not an investigation;
- the general medical examination shall describe the status of the child, including clinical elements that may represent the sexual abuse syndrome;
- the specialty medical examination in which psychiatrists, forensic experts, etc. are involved;
- para-clinical examinations having the role of constituting forensic evidence;
- psychological therapy;
- epicrisis – description of child's evolution during medical care.

The family doctor is the most important medical professional in terms of preventing sexual abuses. He should have an open communication with the parents, cooperating also with the authorities, the social worker and with police in order to take the earliest actions.

5. Educational Staff

They have an important role in children development, the teachers being many times a model to follow for a child. The teachers must develop and maintain an open relationship with the children, to gain their trust and to notice any modification in their behavior so that afterwards they can contact the parents and even authorities, if necessary.

The role of the teacher is very important in finding out the abuse cases. Quality and quantity diversification of a child's relations with the environment may determine many cases when the child is physically, psychically or sexually abused. The teacher may have some clues in terms of an abuse produced on children if they present abuse specific symptoms. It is absolutely necessary to know these signs in order to prevent the abuse and, subsequently, to intervene in such cases.

As the child is in contact with his teachers various hours per day, he can manifest his frustration and fears during the classes, by an aggressive behavior, interiorization, decrease of concentration capacity or decrease of performance. All these signs have to be taken into consideration by the teachers and then resolved by contacting directly the persons involved in child's development.

The teachers may find out about an abuse by discussing with the other students/ colleagues or directly observing the child. These symptoms may consist of:

- isolation from the group;
- verbal and behavioral aggressiveness;
- excessively vulgar language;
- running away from home;
- absenteeism;
- sexual behavior inappropriate to his age;
- difficulties in communication.

In these cases, the teacher must contact the family in order to solve this case. In worse cases, the teacher can contact the school councilor or directly the police.

6. Social Workers

As a necessity to solving the social-human problems specific to the transition period, the social care system has developed significantly. The problem of children that are victims of abuses has increased seriously in the last period, which determined the social care programs to take some measures. In Romania there is still not a national intervention and prevention plan adopted and implemented for the abused children and a practical action guide, and this raises new problems in assuring an efficient protection in such cases.

7. Mass-Media

It is very difficult for a journalist to measure his words as sexual abuse is a forbidden subject, the sexual life itself being a subject very difficult to speak about. The journalist is asked to look at the child as he is, a becoming adult, whose life is just beginning, and not to avoid the incriminatory deeds or to evade the truth. A journalist has to inform public opinion about the matters of interest without exposing the child and to increase the effects of his trauma. In what follows, we shall concentrate mainly on protecting the child's image in the press. We live in a world dominated by media, sometimes a world created by it. Even if we are not aware, most of our knowledge or attitude is acquired by mass communication means. Mass-media represents an important factor in extending the reality we are living in, in enlarging the horizon of knowledge and in modifying social behavior.

The reality that reaches the general public through written or audio-visual press bears the print of journalism. Thus, the facts, attitudes, events with their real meaning pass through the filter of journalist's personality before they reach the general public. The message he sends is finally his own representation about the subject put in public debate. Due to this reason, it is very important that the journalist has those qualities that should influence positively the modeling of public behavior and simultaneously to be aware of his own responsibility.

Being a person in full formation process, the child needs protection and calm, and using an event in his life, publishing it regardless of the initial purpose, may have a disastrous effect upon his further development. Thus, in case he suffered a sexual abuse, the feeling of self-blame is extremely powerful. If other persons get to find out about what happened in his life, he shall add a new dimension to his inner feelings; that is the image others have about him. In any abuse situation when a child is involved, it is recommended that his identity should remain unknown.

8. The Police

Taking into consideration the fact that the social support of the child is focused at the family, social and school level, the role of the Internal Affairs Ministry is connected to analyzing the abuse of a child in two complementary directions:

A. Immediate intervention in obvious cases of abuse that endanger the security, development and integrity of the child. This dimension refers to the visible side of what contours the child's abuse and relates to a quick application of the provisions in the legislation;

B. Active participation of police force to the process of preventing abuses on children, re-dimensioning of the services towards population, also including the child's support groups in the positive influencing part (family, school, neighbors, friends etc.). Also the involvement of police officers is very important, acting in principle, with the other institutions in order to prevent abuses on children, which together with the child's family may prevent a possible abuse or may prosecute the offender and mainly, it can re-integrate the victim and "treat" it as soon as possible. Each of the above mentioned is very important but if they do not act inter-dependently on more levels at the same time, the odds are very small. That is why it is very important to have a close cooperation between the family, doctors, police, journalists and social workers.

9. Conclusions

The subject approached is very important as knowing some specific elements may lead to finding out about an abuse, and therefore, we consider necessary a perfect coordination between the institutions that may fight against, prevent and punish this kind of abuses, the families of children/victims and the social environment they are part of, each of them having an extremely important contribution in finding about an abuse, helping the victim and the abuser (as his punishment is not enough) in order to re-integrate them into society, as well as removing as much as possible the traumas suffered by the under age child.

We consider that, for a high efficiency in preventing and fighting against these phenomena, there is necessary to have a legislative framework that should create the premises of a better cooperation between the state's institutions, those with which the under age child has direct contact as well as those that have attributions in identifying and punishing the offender, his counseling, treatment and reeducation programs being extremely important. It is obvious that the offenders are some individuals whose psychic integrity is affected one way or another, and to punish an abuser without trying to help him, by giving necessary treatment or care, mainly by implementing some efficient therapy solutions does not lead but to postpone on shorter or longer term the increase of his victims' list.

10. References

Astărăstoae, V. & Scripcaru, Gheorghe, V. (2005). *Medicina legala pentru jurişti/Forensic/Legal medicine for lawyers*. Iasi: Polirom.

Cioclei, V. (2007). *Drept Penal – Parte Specială. Infracţiunile contra persoanei/ Criminal Law - Special Party. Offenses against the person*. Bucharest: Universul Juridic.

Fulga, I., Nechita, A. & Ceavdari, N. (2006). *Some considerations regarding intra-familial child sexual abuse,* The Annals of «Dunarea de Jos» University, XVII, Year V, no. 7, Galati.

Fulga**,** I.**;** Nechita, A.; Savciuc, V. & Ceavdari, N. (2006). *Morphological patterns of child sexual abuse.* The Annals of «Dunarea de Jos» University, XVII, Year V, no. 7, Galati.

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REALITIES AND PERSPECTIVES

The Issue of Competition between Penal Norms and Nonpenal Norms in the Process of Defending the Order of Right Against the Illegality Related to the Crediting Process

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Abstract: The author tackles the issue of competition between penal norms and nonpenal norms in the process of defending the order of right against the illegality related to the crediting process. The interference of penal right spheres and the ones of other branches of law (firstly the civil right) is specific for the process of defending against the economic offences. Or, to obtain and grant a credit firstly constitute the settlement object of the civil law. The author analyzes different situations and underlines that the civic responsibility doesn't automatically exclude the possibility of applying the penal responsibility. Also, the „banking" responsibility that is specific to the banking law is analyzed and its relation with the other responsibilities is revealed. The author comes to the conclusion that it is not necessary to unincriminate the deeds stipulated in art.238 and 239 of the Criminal Code of Republic of Moldova. An evident social necessity for juridical-penal defence of the rights and interests of honest participants at crediting relations exists. The existence and application of these norms constitus a guarantee of preventing and combating the illegalities related to crediting, characterized by a high prejudicial level, that are commited by the dishonest participants. The prejudicial level is the criterion that permits the application by itself either of the „banking" responsibility or penal responsibility. In the same time, each of the specified juridical responsibility forms may be accomapnied by the civic responsibility.

Keywords: child abuse; sexual abuse; prophylaxis

In a civil society, guided by the principles of the rule of law, where there persists the separation of powers and full respect of the fundamental rights and freedoms, the law is called to contribute to making full use of all physical and spiritual features of a human being. Society no longer stands at one pole of a contradiction and the individual is not thrown to the other pole. After V. Dzodiev, the civil society incorporates in itself a lot of relationships that are not mediated by the state between the free an equal individuals, acting in the market economy. We believe that this definition covers not the civil society as a whole, but only its "social linchpin", consisting of a relationship of a private nature. In reality, within the movement of the individual towards the society and the society to the individual, the state cannot be left aside.

The amplification and the increased protection of the rights of members of the Moldovan society is a way to ensure, by law, the improvement of the actual contents of the relationship individual - state - society. There is an increasing demand for solving cases of competition between rules belonging to different branches of law that protect the same rights of the members of the society. In the context of this study, a problem of particular interest is the investigation of criminal procedures and rules of competition in the defense of non-criminal legal order against illegalities related to crediting.

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In this respect, it is necessary to mention the view point of the criminal doctrine, according to which the rules providing for liability for offenses committed in the banking sphere should be decriminalized, this would in no way jeopardize the interests of any person, society and state, as the facts mentioned are liable to legal and other influence (e.g. legal and civil nature). Is the decriminalization of rules, providing for accountability for crimes related to crediting, more positive than negative?

In trying to find an answer to this question, we seek the opinion of M. Eliescu, referring to the rules governing the competition between criminal and civil liability rules establishment: "But the border between the two responsibilities is not on the whole flat. The current law, today, considers the idea of compensation belonging to the criminal law, by repairing a social damage caused by crime, through appropriate measures, safety measures... The liability imposed by criminal law and the liability dealt with in civil law interfere. Most of the offences are also crimes or civil cvasioffences, which compel for compensation or repair".

It is therefore possible to have a criminal liability and extra-criminal liability aggregation (the latter form of liability is determined by the rules of civil law, banking law, financial law, commercial law, tax law etc..). From this perspective, of particularly relevance is the view point of G. Vrabie and S. Popescu, who among the general principles of liability, nominate "Principles of a single violation, where a legal norm corresponds to a single imputation of liability, which does not exclude the possibility of overlapping the forms of legal liability, where one and the same act violates two or more legal rules "(the emphasis belongs to us - N).

For the defense against economic offenses (including offenses related to credit) the interference of criminal law and other branches of law is very common (above all - of civil law). However, obtaining and providing a credit is primarily subject to regulatory civil law. The appropriate civil legal rules are incorporated in Section 3 of "bank credit" in Chapter XXIV "contracts and bank operations" and, to some extent in Chapter VII "loans" of Title III of Book Three "obligations" of Civil Code of the Republic of Moldova. Hence, getting a credit or a loan is the subjected to legal and contractual and failure to respect the contractual obligations entails contractual liability.

However, if the application of civil liability does not exclude the application of criminal liability, then what should be the criteria for a crime to be susceptible not only to civil legal influence, but also criminal legal influence? Referring specifically to crimes related to crediting - "Obtaining a credit by fraud" (art.238 CC RM) and "Breaking the crediting rules" (Article 239 CC RM) - can provide the following answer: criminality of the offense, provided for in CC RM art.238, is determined by deceiving the victim by the offender, not any disclosure - in order to obtain a loan or increase its share or obtaining a loan in favorable terms – requires criminal law intervention, only in the case when the information given is knowingly false, this intervention is justified. As for the criminality of the offense referred to in Article 239 CC RM, it is determined by the presence of intentional violation of the rules of credit, seconded by causing damage to a large financial institution, not any credit granting determines intervention of criminal law, only if the loan was accompanied by violation of credit, and in addition, significant damages have been caused to the institutions, criminal law intervention is justified.

In other words, if the breach of civil law rule is accompanied by fraud or breach of trust, there are grounds for application of criminal liability. Tackling the competition rules of criminal and civil law in the determination of liability for acts of getting credit by deception, V. Stati states: "This action cannot be regarded as a breach of contractual obligation. The Criminal Law delineates the moment of its consummation before signing the credit agreement, at the stage of verification by the financial institution of the loan documents. If the fraud is not detected at this stage, since the contractual relations between the borrower and financial institution have been established, it is not possible to consider the situation breach of contractual obligation. However, precision forces us to recognize that the detection of fraud after having concluded the credit agreement, by application of criminal liability may not exclude civil liability. This is because the presences of signs of crime, under art.238 CP RM, do not exclude the presence of a default under the credit agreement.

However, it is more important to establish that the application of civil liability does not automatically exclude the possibility of applying criminal liability. Honesty, reliability, compliance with the requirements constitute the exigencies that a civilized market cannot do without. Flagrant disregard of these requirements may be the reason for applying legal and criminal measures. In this respect, we comply with the views of I. Deleanu "citizens ... must exercise their constitutional rights and liberties in good faith, without infringing the rights and freedoms of others. The idea involved the penalization for "abuse of rights" or, otherwise the "abusive exercise" of law. Indeed, while exercising his rights, the holder must act in that socio-economic or political purpose for which the law has recognized and guaranteed those rights. Deviation from the right ratio legis means the abnormal exercise of the right and therefore is reprehensible".

We believe that both acquiring a credit by deception (art.238 CP RM) and by violating the crediting norms (Article 239 hp MR), deflection of the right ratio legis of the underlying objective is obvious. Moreover, this deviation is so serious that it requires criminal law intervention.

In the specific literature on the subject, it is widely recognized that social danger (prejudice), a the material point of a fact, is the criterion that allows delineation of different types of illegalities. That the level of prejudice constitutes the indices that conditions the intensity of the legal measures. The deception and abuse of trust offenses under art.238 and 239 CC RM, is a sufficient basis to apply to such offenses legal and criminal measures.

Non application of these measures would mean to adhere to „vigilantibus, et non dormientibus, jura subveniunt; servat lex, succurunt jura subveniunt" ("laws serve only those who are watching them, not sleep, laws are written only for those who care about their interests "). In the market economy, it would be totally inappropriate to qualify facts by the degree of their prejudice, based on the criteria of the perpetrator's ability to deceive, alongside with the credibility and lack of experience of the victim.

The concept, based on such criteria would impact negatively not only the process of implementation of art.238 and 239 CC RM, but also the development of economic relations. This is because the economic cycle is based on trust. Lack of it hampers and slows significantly the circuit, and thus producing a negative impact on every member of the society. Therefore, providing solid legal and criminal market economic relations is a crucial goal of the present moment. What should be the legal and criminal influence degree so as not to undermine the ability of self -regulation in the market economy? Throughout history this degree was established empirically, in expressing the relation between public law and private law. However, such involvement of the criminal law is necessary in order to provide effective protection within the market economy against the achievement of the principles of operation and development. However, this should not mean unconstitutional measures, specific or planned economy, to substitute the legal and civil norms by legal and criminal rules. Application of the latter, has reason only in the case when the freedom of the market economic relations and property rights are abused. However, criminal enforcement is not the abolition of market economy relations or liquidation of ownership.

Delimitation of the offenses related to credit and infringements of civil law is based on qualitative criteria, meaning the existence (or absence) of fraud or breach of trust. In the case when these indications of fraud exist the criminal law response is required. The existence or absence of quantitative criteria - the amount of the damage caused to the victim or the perpetrator income size - is the subsequent existence or lack of quality criteria specified above. The reparation of the damage caused to the victim and collection of income received by the perpetrator should be subject to civil law, in the case when the quantitative criteria mentioned above lack.

So, the main distinction between legal and civil influence and the criminal influence consists in that the former the subjective violated right is restored and the damage is repaired. On the other side, under the hypothesis of legal and criminal influence, the offender is punished. So in the first case the subject property is subject to influence, and in the second case even the subject person

is subject to influence.

In the literature sometimes the division of the functions between the two forms of legal influence is perceived incorrectly. Thus, N.I. Pikurov does not support the view that the role of criminal law is only in determining penalties for violations of subjective rights. According to this author, the possible connection of criminal rules to regulating the relations, arising from a contract, on strengthening the criminal liability for actions that show a real risk of violation of legal and civil bonds is not excluded As an example, is the rule establishing criminal liability for illegal obtaining of a credit (art. 176 Criminal Code of Russian Federation): "At the first glance, in this case, criminal law enters the sphere of exclusively legal and civil regulation, due to the conditions for concluding a contract. Thus, the criminal law persists until the actual cause of injury happens... The illegal act of obtaining a loan is closer to the regulatory method of criminal law than that of civil law. This is because the manner in which the offender is creating a situation likely to cause damage to heritage, creates the illusion that they could rely on being able to restoring the subjective violated rights when the given the damage is caused.

The allegation of criminal law to regulating the relations, arising from a contract (in case of a bank credit agreement), on strengthening the criminal liability for failure to respect the legal and civil liabilities is considered unfounded. The criminal law is not, by definition, regulating some specific social relations. The function of criminal law is to protect social values and social relations associated with them, in accordance with paragraph (1) Article 2 CC RM. Connecting the criminal law to regulating social relations would be possible if the rules of criminal law would give new rights or would incumbent new bonds to the parties to the contract. However, this hypothesis is unattainable. The bond commits an offense related to crediting as subject to state coercion as criminal responsibility. This obligation, however, is fully consistent with the defense function of criminal law, not being specific to regulatory function of the civil law and other non-criminal law branches.

Studying the role of criminal law in the system of law branches, V.V. Malţev stated: "In defense of the social relationships, governed by civil law, the nature of these relationships cannot be left without consideration (subject to legal and criminal defense), thus, the character of the rules of civil law... . Therefore, under the circumstances, civil law is given priority over criminal law. But this priority does not turn into a vertical relationship of "subordination", since the legal force of these branches of law is equal".

In the same rut, A.E. Jalinski believes that cutting processes of collisions between criminal and civil law should be based on the priority of civil law as far as the juridical evaluation of the action concerns, which appears as a legal fact, and accordingly on the accessory nature of criminal law."

A.G. Bezverhov, although he does not use the term "priority" specifies: "The essence of the patrimonial crime is determined above all, by the nature of those relations which they affect ... Any thesis, stated in the sphere of criminal law must be correlated with the fundamental principles that govern the patrimonial relations".

In his turn, A.M. Yakovlev expressed the following point of view: "Today, when after the economic crisis in 1998, there re-appeared calls of amplification of state regulation of the economic relations, we should emphasize that, under the successful development of economy, the power state regulation of the economy consists in the assuring of the effective application in practice of the norms of the Civil Code. Trying to influence upon the economic relations by threatening with punishment restriction, means to contribute to the market restriction, of the civil circuit".

Thus, the cited authors choose the primacy of the juridical - civil regulation of the economic activity.

In contrast, other authors propose the combining of the juridical –penal with the juridical-civil one for the defense of the economic relations. Thus, P. Iani says: "It causes objections the vision on the criminal law as law incidental, adjacent, as a law that can be applied only if the civil law does not contradict". Sharing a similar view, A.V. Naumov considers: "There is no branch of law the norms of which would not be be embedded organically within the norms of criminal law. In these cases the conditions of criminal liability for the committing of prejudicial acts are contained not only in the criminal norms, but in the norms of other branches of law as well". We consider it more acceptable the

position expressed by P.Iani and A.V.Naumov because, as S. Poleakov affirms, it does not contradicts Article 6 of the Convention for the defense of Human Rights and fundamental freedoms. We mention that within the according norm it is established the principle in accordance with which everyone has the right to a fair hearing. In this regard S.Poleakov records: "The intervention of the state in cases involving private rights may violate this principle. In civil legal relations, the state interests should not prevail over the interests of the sides. Therefore, the special position of the state fro the defense of its interests in civil cases do not correspond to the request of equality of parties and can not be considered fair".

In response to those specified, it must be said that indeed, the unreasonable interference of the judicial authorities in civil law employment relationships often occurs consciously.

The persons who are not sure of the correctness of their arguments and of the success in resolving the civil trial sometimes apply to illegal methods in order to attract the local authority to their side. However, this does not mean that when, in addition to evidence of a breach of the rules of civil law, were discovered when an element of an economic crime, the state should not interfere. In this situation there are two hypostases that should not be confused: in the first stance, specific to the civil trial, the two parties - the plaintiff and defendant – are equal in their procedural rights, under Article 26 of the Code of Civil Procedure of the Republic of Moldova on 30.05.2003; in the second stance, specific to the penal trial, the two parties - the accused and the victim - can not be considered equal. The principle of equality requires that equal situations are treated equally and unequal situations – differently. The offender and the victim are placed in unequal positions. The first person affected some social relations and values protected by criminal law, and the second person suffered a physical injury, patrimonial or moral. That is why, in the presence of some sufficient reasons one the same person may be subject to both civil and criminal liability.

Regarding the question about the corresponding or non-corresponding of the parallel application of the criminal and civil liability with the stipulations of the Convention for the Protection of the fundamental human rights and freedoms, it is necessary to specify the following: The European Court of Human Rights claims in the solving of the problems, the legal principle of security in the juridical reports (the decision of 25/07/2002, Sovtransavto Holding v. Ukraine), and another cardinal principle in criminal matters, according to which the State, as guarantor of public order, is free to adopt criminal necessary measures (the decision of 06/09/1998, Incal v. Turkey). Moreover, there were cases when states were convicted because they did not adopt a criminal law effective enough to protect the rights guaranteed by the Convention (judgment of 03/26/1985 X and Y v. Netherlands).

In this respect, we believe that art.238 and 239 PC of RM are rules effective enough to protect the rights guaranteed by the Convention on Human Rights and fundamental freedoms. Mainly, it is intended to protect the right of property: according to the First Protocol to the Convention on Human Rights and fundamental freedoms, any physical or legal person has the right to respect his own goods; no one can be deprived of his property except in the public interest and as provided by law and general principles of international law (Article 1). Also, we believe that RM art.238 and 239 PC correspond to the security principle within juridical reports and to the principle of freedom of the state to adopt necessary penal measures. Yet, the honest and good faith participants to the economic relations should be provided security against dishonest participants' acts and those of bad faith to the same relationships. The legal and penal measures to ensure this security, expressed in the application of the art.238 and 239 PC of RM, derives from the freedom of the Moldovan legislator that is harmonized with the respect to the international obligations of the Republic of Moldova.

Developing this idea, we are convinced that the that freedom of Moldovan legislator, manifested in the adoption of CP art.238 RM - "Obtaining credit by fraud" - is fully consistent with Article 1 of the additional Protocol No. 4 to the Convention of fundamental Human Rights and freedoms: "No one shall be deprived of his liberty because it is not able to fulfill a contractual obligation".

In this respect, we agree with the view according to which that disposition is not applied to the fraudulent or intentional un-execution of an obligation, because in the art.238 PC of RM is meant

namely such a breach of the contractual obligation. About this it is spoken in the phrase "knowingly presenting false information» from the relevant article.

A similar phrase, which would indicate to the manifestation of intent and fraud by the executor, was not in art.155 ³ "Disposal or non- giving of the credit" of the Criminal Code of 1961, regarding some ways of the appropriate act. Or, according to this article it was provided criminal liability for the use of the credit means contrary to the indicated destination, either the loan of the credit and of the rates in the terms and conditions stipulated in the credit agreement if by these actions to the financial institution there have been caused large-scale damage.

The direct meaning of the phrase "or forgiveness of the loan and interest in the terms and conditions stipulated in the credit agreement" shows that it relates to a dispute arising from contractual obligations and therefore follows to be punished according to the stipulations of the Civil Code. There is no any indication that would print criminal illicitly to the modality described in the phrase cited above. Foreseeing as punishment for such an act the deprivation of liberty for three to seven years, the Moldovan legislature ignored its international acts to which Moldova is party.

From these reasons, on 02/04/2002, the Constitutional Court of the Republic of Moldova adopted the decision on No.17 for the review of the constitutionality of some stipulations of ³ art.155 of the Criminal Code, revised by Law nr.1436-XIII from 24.12.1997 "For the modification and the supplementation of the Criminal Code.» Thus, the Constitutional Court found that the sentence "or loan forgiveness and interest in the terms and conditions stipulated in the credit agreement" in art.155 of the Criminal RM ³ of 1961 contravenes to the Article 1 of the additional Protocol No. 4 to the Convention of fundamental Human Rights and freedoms. Consequently, the Constitutional Court declared this phrase unconstitutional.

Considering this, courts that have examined the causes of criminal offense referred in art.155 ³ PC RM from 1961, disposed of the acquittal of the defendants. However, there are cases where the judgment was made according to art.155 ³PC RM 1961, although the materials do not cause that person would be convicted and executed or intentionally fraudulent loan repayment obligations.

Thus, we can conclude: if the relations between participants – equal economically and legally in law – to the economic activity covered by the legal regulation, when the interest of the free producers boost the entire economy, the will exercised by these participants is conducted and regulated by civil law. At the same time if economic activity appears as an effective economic interest not individually, but the state's interest (in an indication that supplies the contract), then the state's will realization is provided by the specter of criminal liability.

The corresponding execution of the contract conditions is the foundation of normal economic activity in the context of the market economy relations. Under paragraph (2) CC art.572 RM the obligation must be must be executed properly, with good faith, at the place and in the time set. According to paragraph (1) and (2) CC art.602 RM defaults include any breach of obligations, including poor or late performance, if not executing the obligation, the debtor is bound to compensate the creditor for damage if not prove that the failure is not attributable obligation.

Despite the variety of cases of non-contractual obligations (violation of economic rights, causing damage, etc..), the state involvement in the development of civil law relations between subjects independent and equal legal rights is justified only if - in addition to the restoring of the right violated, damage etc.. – is justified also the punishment of the perpetrator. In these circumstances, is it correct to speak of the existence of competition of rules in the criminal and civil rules of safeguarding law against illegal acts related to credit?

In order to answer this question it is necessary to identify the legal significance of the concept of competition. In this context, T.G. Chernenko believes that for competition, one of the competing standards and should be given priority.

Also, L.D. Gauhmansees the essence of competition in choosing one of two competing standards.

It is necessary to mention that N.S. Taganţev said: "If illegality requires both punishable violation of the norm, as well as causing as causing damage patrimony, then the illegality is complex, incorporating criminal illegality and civil legality ..." Thus, the legitimacy of applying liability along with criminal liability - subject to specific forms of legal liability function first mentioned - also exclude such a relation between the civil rules and criminal rules like competition. Or, the function of liability is a restorative compensational one. It is this specific function is given under exclusion of liability legal form that among those whose co-report is characterized by the principle "non bis in idem" ("not be punished twice for the same offense"). The lability function is not to punish, but to restore to the injured party the rights.

The lack of theinter-branch competition of those rules of civil law and rules of criminal law, which establish liability, excluding the need to develop procedures and rules to resolve the competition. When committing an act, which contains both signs of a breach of civil law rules, as well as economic elements of an offense, is correct to speak not about the competition rules and regulations civil criminal, but about the complex application of both.

But in the case of a problem related to illegalities to credit it appears not only the application of criminal liability but of civil liability too. It can be applied also the "bank" responsibility "bank", specific to the branch banking law. Especially in the context of crime, under Article 239 hp RM (partially - the offense referred to in art.238 CP RM, while gaining credit by fraud is done by a commercial bank from another commercial bank or National Bank of Moldova), is relevant to disclose the nature of criminal liability and the proportion between the "bank". Can the rules - under criminal law and banking law belonging - to be applied in parallel? Or should there be a choice between two types of rules for determining the legal liability of different shapes?

The rules, which establish liability under "bank", including credit-related illegalities are b) paragraph. (1) Article 10 and Article 38 of the Financial Institutions Act, adopted by the Moldovan Parliament on 21.07.1995.

Specifically, under the item b) par.(1) Article 10 of Law the nominated National Bank of Moldova bank may withdraw approval if the violations were listed in Article 38 of the same law.

In the article 38 of the Law on Financial institutions there are listed the following liability likely illegal "bank" actions: the violation of the Financial Institutions Law, the legal acts of National Bank of Moldova; breach of permit conditions or fiduciary obligations; engaging in risky or suspicious transactions; reporting omission, delay reporting or erroneous reporting of the prudential indicators and other requirements provided in regulations of the National Bank; Failure to remedy established by the National Bank.

Among the remedial measures and sanctions imposed by the National Bank in the responsibility "bank" from the financial institution, its owners or administrators of Article 38 of Law financial institutions lists: the issuing of a warning; b) the completion of a financial institution providing remedial agreement; c) issuing of the order to terminate violations, carrying out remedial measures and sanctions; d) the application and imposition of the fine to indisputable financial institution to 0.3% of its capital; e) the restriction or suspension of financial institution; f) the withdrawal of ETV.

In the same time, we emphasize that, in accordance with par. (4) Article 38 of the above-named law, the measures and penalties provided for in this Article shall not exclude other measures and sanctions under the law.

We consider the formulation of this paragraph imprecise and generating abuses. Compared to the same person - or entity - can not be applied in parallel liability "bank" and criminal liability. At the same time, compared to the same person can be applied simultaneously responsible "bank" or civil liability. Or, both liability position "bank" as well as as criminal liability is a repressive function of punishment. So it is a totally different function such as liability, often having a restorative-compensational character. Therefore, the design competition of the rules governing the criminal liability and liability rules governing the "bank" is valid in the same natural or legal persons of the

same: one and the same individual (owner or manager of financial institution) and the same person legal (financial institution) can not be simultaneously subject to remedial measures or sanctions provided in Article 38 of Law on Financial Institutions and criminal liability under art.238or 239 PC of RM. Or, the description of remedial measures and sanctions mentioned are obvious repressive character of punishment, but not the restorative, compensatory character. The application of parallel liability "bank" and criminal liability to the same person would be a breach of the principle "non bis indem".

At the same time, it would not be not violation of this rule the application only to responsibility "bank" individual in parallel with the application to the legal person of criminal responsibility. Or vice versa.

It should be noted, that in the section "Ensuring legality, there are guaranteed the rights and freedoms. The continuous improvement of national framework "of the work program of the Government of Moldova for 2005-2009" Country Modernization - Welfare of People 'focus, among others, the "evaluation of the national legislation for the purposes of reformulation of ambiguous stipulations, which allow their double improper interpretation and application."

From the above considerations, we have the option for the completion of the paragraphs. (4)Article 38 of the Financial Institutions Act, as follows: "Compared to the same person - or entity - can be used alongside the measures or penalties provided for in this article, and criminal liability or other legal liability assuming coercion".

Conclusion

In conclusion, we consider it is not necessary the discrimination of the facts underart.238 and 239 PC RM. There is a clear social need in the criminal defense of the legal rights and interests of participants of good faith within the credit relations. The existence and application of these rules is a guarantee to prevent and combat irregularities related to credit, characterized by a high degree of prejudiciability that are committed by the participants of bad faith in the named relations. The degree of "guiltiness" is the criterion that permits the independent application, for illegally related to credit, either of the "bank" responsibility or criminal liability. At the same time, each of the specified forms of legal liability may be accompanied civil liability.

References

(1996). *The Official Monitor of Republic of Moldova*, No 1.

(1998). *Course of sovietic criminal law. General part*. Vol. I. Edited by M.D. Shargorodskii, N.A. Beleaev. St. Petersburg: LGU, p. 170.

(1998). *International treaties to which Moldova is part*. Vol.I. – Chisinau: Moldpres. Official Monitor of Republic of Moldova, p. 341-358.

(1998). *International treaties to which Moldova is part*. Vol.I. Chisinau: Moldpres, Official Monitor of Republic of Moldova, p. 539-560.

(1999). *The course of criminal law. General Part*. Vol.I, Edited by N.F. Kuznetsov, I.M. Teajkov. – Moskow: Zertsalo, p. 160.

(2000) *General theory of state and law. Academic course*. Vol. II. – Moskow: Zertsalo, p. 584.

(2000). *The criminal law of Russia*, Vol. I. Edited by A.N. Ignatov, I.A. Krasikov. Moskow: Norma, p. 66.

(2002). The Official Monitor of Republic of Moldova, No. 50-52.

(2003). The official gazette of the Republic of Moldova, No. 111-115.

Aistova L. (2004). The ratio of private and public law of crimes in the sphere of economic activity. *Criminal law*. №4, p. 4.

Alexeev S.S. (1992). *General theory of law*. Vol. II. Moskow: Juridical literature, p. 173.

Archive of Chisinau City Centre District Court. – File №1-195, 2003.

Archive of Chisinau City Centre District Court. – File №1-225, 2002;

Archive of Chisinau City Centre District Court. – File №1-446, 2001.

Bezverhov A.T. (2001). The interaction of criminal and civil law in the sphere of property relations. The *lawyer of the XXI century: reality and prospects. All-Russian scientific-practical conference* (19-20th April, 2001). Ekaterinburg, p. 327-331.

Case *Incal versus Turkey* // www.worldlii.org/eu/cases/ECHR/1998/48.html.

Case *Sovtransavto Holding versus Ukraine* // www.worldlii.org/eu/cases/ECHR/2002/621.html.

Case *X and Y versus The Netherlands* // www.worldlii.org/eu/cases/ECHR/1985/4.html.

Cernenko T.G. (1998). *Qualifying offenses: theory*. Kemerov, p. 213-215.

Deleanu I. (1993). *Constitutional law and political institutions*. Vol.II, Iasi: Chemarea, p. 86-87.

Dzodziev V. (1996). *The problems of establishing a democratic government in Russia*. Moskow: Ad marginem, , p.165-166.

Eliescu M *(1972). Tort Liability.* Bucharest: Academy Edition, p. 31-33.

Gauhman L.D. (2001). *Qualifying offenses: the law, the theory, the practice*. Moskow, p. 294-301.

Government Action Programme 2005-2009. *Country modernization – people welfare*. http://e-gov.moldova.md/moldova(test).nsf.

Iakovlev A.M. (1999). The legislative definition of crimes in the sphere of economic activity. *The state and the law*, №11, p. 40-43.

Iany P. (2001). Problems of criminal liability for economic crimes. *Legitimac*y, №1, p. 3-6.

Jalinskii A.E. (1999). About the relationship of criminal and civil law in the sphere of economy. *The state and the law*, №12, p. 47-51.

Maltsev V.V. (2000). The concept and location of criminal law in the areas of law. *The state and the law*, №5, p. 50-54.

Naumov A.V. (1999). *Russian criminal law. General part*. Moskow, p. 84.

Pikurov N. I. (1998). Theoretical problems of inter-industry linkages of criminal law: *Dissertation for the degree of Doctor of Law*. Volgograd, p. 42-43.

Poleakov S. (2000). You can not substitute the civil law relations with the criminal. *Russian Justice*, №9, p. 19-20.

Stati V. (2004). The problem of correspondence between social needs and assessing how the legislature threat the seriousness of the offense under the art.238 PC RM. *Scientific Annals of the USM. Series "Socioumanistic sciences".* Vol. I, Chisinau: CEP USM, p. 322-328.

Tagantsev N.S. (1994). *Russian criminal law. Lectures. General part*. Vol. I. Moskow.

Vrabie G., Popescu S. (1993). *General theory of law.* Iasi: Stephan Procopiu, p. 150.

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Extended Seizure and Sale of Seized Assets before Pronouncing a Final Conviction

Monica Pocora[1], Mihail-Silviu Pocora[2], Georgeta Modiga[3]

Abstract: This study aims at emphasizing the controversies arising during extended seizure and during the sale of seized assets before pronouncing a final conviction. The study starts from the fundamental difference between special seizure and "extended", further corroborating Decision – Framework of European Council on assets confiscation, constitutional provisions that the "the property obtained legally will not be seized and the acquisition legality is presumed", the reverse of proof obligation and the phrase "court may confiscate the "other assets", is easily understandable and interpretable otherwise, that can be seize any property, from anyone, if the judge is "convinced" that they provide from illicit activities. The method used during the study is observation. It is required the establishment and use of some ways to protect innocent citizens by the possibility of reversing proof obligation. Therefore, we believe that regulations on extended seizure are designed to unavailable and confiscate properties illegally obtained, but they can leave to increase the Court competence, beyond the real belief and conviction.

Keywords: unavailable assets; property; serious crimes; conviction

1. Introduction

Starting from the fundamental difference between the special seizure and "extended", namely, that regarding to proven way of assets illicit origin which has to be confiscated, this study aims to highlight the controversies appeared during extended seizure. Corroborating the Decision - Framework of European Council on assets confiscation, constitutional provisions that the " *the property obtained legally will not be seized and the acquisition legality is presumed* ", reversing of prove obligation and the phrase "*the Court may confiscate "other goods*", is easy to understand, and otherwise interpretable, that can be seize any property from anyone, if the judge is "convinced" that the property provide from illicit activities. This, also because any legal framework does not include the basic of judge conviction and ways of defense of individual against are carry these measures.

Asset forfeiture generally, is intended to unavailable assets, until a final Court decision of establishing the guilt, of conviction, after then they can be seized. The sale of seized assets before pronouncing a final conviction is found in a Law Project and provides the possibility of sale the assets by retaining the corresponding amount to the state, and if later, the defendant is found guilty, the amount is further remain to the state and if the individual is found not guilty, the amount will be returned to the owner of assets. In analyzing these situations, it

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appears both controversy and legal interpretations, if they can be considered as appropriate, adequate - for long term, or hasty – for short term.

Romania is the only state from EU which has not implemented the extended seizure in Criminal Code until now, due to voids of constitutional disposals. Moreover, extended seizure was proposed both by the Government and the Ministry of Justice as a Criminal Code amendment. It should be noted that, are not considered as object confiscation, the property obtained *through corruption* or *assets acquired by financial and economic crimes.* Thus, extended seizure is devoid of content. Usually, the phrase *"the seizure of illegal property"* is refers to property obtained through corruption or economic and financial crimes.

Therefore, on 6th July 2011 the Romanian Government adopted the text of a Law Project, which aims to stipulate the extended seizure and its implementation in Romanian legislation of Decision – Framework since 2005 (Decision – Framework no. 2005/212/JHA) on property confiscation, ways and assets related to crime. The Law Project adopted aims that extended seizure to include corruption crimes and economic and financial crimes.

A natural question that may arise is: Why was necessary to adopt such a late Law Project for amending the New Criminal Code[1] *which promotes extended confiscation* and it was not established by Law no. 286/2009?

2. The Difference between Special Seizure and Extended Seizure

Since the beginning of this study, it has made the distinction between special seizure which arise from the committed offense and extended confiscation, which refers not only to property obtained directly from namely offense for which exist a conviction.

Special seizure is the only safety measure with patrimonial character and it means the free and forced transition to the state property of certain assets which belongs to the person who committed an offense under the criminal law, which possession by the offender, due to its legal nature or their connection with the offense committed is dangerous for possibility of committing new offenses under criminal law (Bulai & Bulai, 2007)

3. Decision – Framework no. 2005/212/JHA– Basis of Extended Confiscation

Although this Decision was adopted after a relatively long period of a previous (Framework Decision no. 2001/500/JHA of Council on Laundering money, find out, sequestrate, seizure of means and crime results)[2], during its preamble are found the same arguments that led to its creation as an action way. It is indicates that instruments which exist in this area have are not contributed sufficiently to ensure an effective cross border cooperation in confiscation matters, whereas a various number of Member States are not yet able to seize crimes products relating to all crimes sanctioned by detention sentences longer than one year.

Thus, the purpose of the Decision-Framework is to guarantee that all Member States has effective rules on confiscation matters related with crime, among others, in terms of prove obligation regarding the origin of assets held by a convicted person for a crime relating to organized crime (Judicial and Prosecutorial Commission , 2010).

[1] Law no. 286/2009 on the Criminal Code, published in the Official Gazette of Romania, Part I, no. 510, 24 of July, 2009
[2] J.O. no. *L 068 on 15th March, 2005, p. 49- 51.*

Similarly to the previous Decision, *"the seizure"* is indicated to be a punishment or a measure ordered by a court as following a proceeding in relation to a crime or crimes, resulting in final a deprivation of namely asset.

Decision- Framework 2005/212/JHA provides that each Member State shall take necessary measures to enable it the seizure, in whole or in part, the ways or products as a crime result, which are punishable with detention sentence longer than one year, or property with a value corresponds to those products, and definitions given to used terms are identical to those already established.

On the technique used, is indicate a list of offenses for which can be justified the measure adoption, but in all cases, each Member State shall take necessary measures to allow it that, under this Article, to seize at least:

a) if a national court is fully convinced, based on specific facts, that namely assets are the result of criminal activity proceeded by a convicted persons during the previous period of conviction for the namely offense which is considered reasonable by the court, taking into account the case circumstances, or alternatively,
b) if a national court is fully convinced, based on specific facts, that namely assets are the result of similar criminal activities proceeded by the convicted person during a period prior to conviction for the namely offense which is considered reasonable by the court, taking into account the case circumstances, or alternatively;
c) if is established that property value is disproportionate relating to the legal incomes of the convicted person and a national court is fully convinced, based on specific facts, that namely assets are the result of criminal activity proceeded by the person convicted.

From analyzing the provisions of this Decision, are found that is no change in seizure matters, *but* is *made a generalization of possibility to apply such a sanction.* If a person is convicted for certain serious and very grave crimes, are not only seized the assets which were the crime subject, but also the assets obtained from similar activities for which is not pronouncing a conviction, if are specific facts through the court is convinced by them illicit obtaining (The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans, 2011).

The measure is not located strictly in money laundering matter, but is placed in a general framework, and can be used certainly, with other conditions compliance established by the legal way, as such.

Another important step during chronology of extended seizure establishing, is the publication in the Official Gazette of Romania of HG no. 1183/2008 for approval the prior thesis of Criminal Code which provides explicitly the obligation of committee to elaborate the Project for ensure implementation within it, Decision- Framework 2005/212/JHA of Council. One year later, was adopted without modification by the Romanian Government, the Criminal Code project as it was developed by the Ministry of Justice, on 25 of February, 2009. The project contains the explicitly regulation of extended seizure, as follows the implementation of Decision- Framework 2005/212/JHA (Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan, 2007).

4. Extended Seizure - within the Law Project for Amending and Supplementing the Criminal Code and Law no. 286/2009 on Criminal Code

On 6th of July the Law Project for amending and supplementing the Criminal Code and Law no. 286/2009, was approved by the Romanian Government Bill. The Project is ingeminates totally the initial form of Art. 113, called *extended seizure*. According to this legal text, seizure may be ordered "*If an individual is convicted for an committed offense for which the law prescribes a detention sentence longer than five years and which is liable to obtain a material benefit, the court may also order the confiscation of other assets, if the following conditions are carried out:*

a) the property obtained by the convicted person, in a period of five years before and, if is appropriate, after the moment of committed crime until the date of the criminal action movement, is really exceed the income obtained by it through illicit ways;

b) the court is convinced that namely assets come from illicit activities such as those which the sentence is pronounced. Also, is taking into account the value of property transferred by the convicted person or a third legal person on the convicted person has the control. A final provision is refers that the seizure could not exceed the value of assets during the period specified in paragraph (1) which exceeds the level of illicit income of convicted person."

By analyzing the texts mentioned above, it can be find out that extended seizure is relates only to those persons who are convicted for criminal offenses and who could not justify the property, it does not refer to all citizens which acquire properties legally, but only those who could not justify their property (Confiscation of illegally obtained property, 2011). It is also a natural and appropriate regulation. But what is void is provision according to which, the judge may order the measure if it has the *"conviction"* that the property is obtained from illicit activities. Moreover, is *not shown* during any *legal text contents the basis of judge conviction and the protection ways of persons against the measure is carried out.*

5. The Sale of Seized Assets before Pronouncing a Final Conviction

Regarding the *sale of seized* assets Art. 10 para.2 of GEO 14/2007 on regulate the manner and conditions of turn account the assets included under the law, in private property of the state, stipulates among other things that "The seized assets by the local public administration are returned to turn account legal bodies and the amount obtained from their sale will go to the local budget .... ". In this regard, was forwarded a *Law Project for amending and supplementing certain normative acts in order to improve the capitalization of assets entering under the law, in private property of the state,* which establishing fast procedures for recovery the amount of movable assets seized by sequestration during the criminal proceedings before pronouncing a final judgment as follows:

- to the property owner's request or when there is his consent or
- when there is no consent of the owner but, by passing time there is a risk that the value of seized assets to decrease significantly, or whenever their conservation would require additional costs for storage (i.e. Inflammable products, petroleum or cars).

In these cases, the amount resulted from the sale of assets shall be registered on the name of accused individual, defendant or civilly responsible person as results the judiciary order.

Also, during the criminal proceedings, is establish the possibility of criminal investigation body or the court who order the seizure to order immediately the destruction of tobacco processed if they not meet the legal requirements for marketing.

Taking into account both the effects of extended confiscation, and sale of seized assets before pronouncing a final sentencing it can be discuss the compliance or violation of the innocence presumption" which order that the proven obligation has to be at accusation and any doubt to be profitable to the accused" by the court and the legislature (Ramascanu, 2005). The solution may be adequate and appreciated in case of pronouncing a conviction judgment and does not require any debate. But the controversy may occur in case of pronouncing a non guilty judgment, or criminal proceedings cessation through the perpetrator death[1].

We believe these situations could not have solutions favorable to the non guilty presumption, being considered that the state's interest is to put good use of products by priority. Although the ownership right is inviolable, it is necessary to establish and use certain ways to protect the innocent citizens, their property to be guaranteed, but at the same time, in certain circumstances, when is talking about committed crimes, persons convicted for corruption, it can be reversed the obligation of proven and they can make the proof of property legally obtaining. Thus, we could say that our country is governed by European legislation implemented in the public interest and not in the politician interest. Thus, we believe that regulations on extended confiscation are designed to become unavailable and confiscate properties illegally obtained wealth, but, equally, we believe that there are the legislative voids, giving way to extend the court competence beyond on basis conviction or beliefs.

6. References

Bulai, C. & Bulai, B. (2007). *Manual de drept penal./ Criminal Law Textbook.* Bucharest: Universul Juridic.

Ramascanu, B. (2005). *Procedura contraventionala judiciara in lumina jurisprudentei CEDO/ Contravention judicial procedure on jurisprudence of ECHR.* Bucharest: Themis, Journal of the National Institute of Magistrates.

*** (2011). *Confiscation of illegally obtained property.* Prishtina: Kosovar Institute for Policy Research and Development.

*** (2010). *Judicial and Prosecutorial Commission.* The Independent Judicial and Prosecutorial Commission.

*** (2007). *Stolen Asset Recovery (StAR) Initiative: Challenges, Opportunities, and Action Plan.* Vienna: United Nations Office on Drugs and Crime.

*** (2011). *The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans.* Parliamentary Assembly of Council of Europe.

[1] Art 10, para. 1, lett. g) C. proc.pen. in conjunction with the personal character of criminal liability.

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The Criminality and its Psychological Features

George Dorel Popa[1], Carmen Mariana Neagu[2]

Abstract: Preventing and fighting crime preoccupied and concerned humanity along its history. This concern is fully justified because the crime is serious harm of the human interests, endangering fundamental values and it is affecting the proper functioning of the social system. But what constitutes criminal behavior and how the individual gets the specialized skills in the area of criminality? What is its specificity? Any society appreciates the behavior of its members in terms of their compliance to the moral and legal rules. Failure to follow these rules will lead to coercive or punitive measures. The collective programming of the mind gives pattern for the individual behavior and about how the individual reacts. The reaction is observable in the diversity of cultural patterns of individuals forming a society. A study recently elaborated by the Journal of the Association for Psychological claims that people belonging to the different cultures perceive the aspects of reality in a different way. The researchers found differences in how different cultures think about other cultures. The originality of this paper is consisting in understanding of criminality using the three factors that define the formation and development of human personality. The added value of the paper come from interdisciplinary presentation of the scourge of this age - criminality.

Keywords: criminality; punishment; behavior; legal rules; psychology

1. Biological Component

This paper highlights the conditions and factors that cause some psychological elements that lead to crime. Evaluation of the nature of the human psyche and its ways of expression is the way the judicial psychology develops its specific psychological concepts. This paper shows that legal psychology is a special science studying psychosocial phenomena and in the same time, facts of individual, group or collective. These phenomena arise from the communication and interaction between people in all their social activities and appear in their conceptions, motivations, attitudes, beliefs, behaviors and mentalities. Some of these are in accordance with rules established by society, but other are not fold on these social standards. Study of crime and its psychological features could be a key for solving many problems. This work may contribute to complex work of police, prosecutors or judicial psychologists who daily fight against crime and its social consequences.Crime gets social characteristics of special importance for the whole society, because the consequences "might be crucial for the working way of the system" – (Anechitoae et al., 2007, pp. 32-40). The specialists involved in studying the phenomenon of crime are primarily interested in causal explanation of it, but also in the psychological aspects of criminality and criminal.

Social environment we are born and raised is a crucial element of our future behavior. People who are born and live in an environment marked by crime are likely to commit crimes in a much higher rate than those born and educated in a moral environment.

Cultural differences are obviously very deep in our thinking way, challenging the commonsense. In this context, the main question is whether the way people react is predetermined (found in ontogenesis of individual group membership) or receive fingerprint of the society where the person has been born

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and educated? The theory of social action of Talcott Parsons shows that human actions are determined by the interaction of different systems: the "behavioral system" of biological needs, the "personality system" of individual's characteristics affecting their functioning in the social world and the "social system" of patterns.

At the intersection point of these influences we find the member of society, respecting rules in order to be integrated. But what happens to those who deviate from the rules imposed by society? What is an acceptable behavior and what should be punished? If cultural element is the key factor that differentiates categories of people, cultural differences will be a crucial element in influencing the way penalty will be received. In this context, nations, regions, ethnicities, religions, occupations, organizations and genders will be an influencing factor of the way penalty will be interpreted by the individual and by the group.

Another important aspect is the affiliation to a particular gender. This distinction between masculine and feminine is found in the Geert Hofstede's theory about cultural difference. According to Hofstede's theory, we have "male pattern society "led by values like assertiveness, performance, success and competition. Thus in the common sense it can be appreciated that in majority of societies, masculinity is associated with crime. The total number of males among those sanctioned by society is noticeably higher than the number of punished females. For an overview of human activity in general and in particularly analyzing the criminal activity, we enunciate the simplest definition of the human individual as psycho-social being. This criminal feature of the human beings has been studied over the time and some results have become famous. The famous Lombroso dealt specifically on the physical component. He made measurements of the skulls of many criminals dead or alive. Lombroso initiated the hypothesis that criminal disposition is predetermined by certain physical features. Recent studies of the genetics disprove this hypothesis.

The current studies in the area of genetics and aggressive behavior mostly provided more questions trying to answer the question: "is there a possible aggression genes?" The geneticists sustain that, the idea of "aggression gene" doesn't make any sense. Altered behavior is something entirely different than an altered physiological response or disease. It is generally accepted that a simplistic deterministic view of behavior is wrong and moreover a multitude of genetic and non-genetic factors lead to criminal behaviors. There are many possible environmental influences on an individual which make the genetic influences on aggressive behavior to be very dynamic. Development and individual behavior is influenced by "biological, psychological, social, economical environment" (Braşoveanu, 2007).

There are many theories on the topic of heredity and the influence of genetics on the overall character of human beings. One of the studies was performed recently (where family psychology vs. biological heredity in determining criminal behavior has been examined). This study was carried out using identical twins that were adopted by two different families and raised apart from each other. It was observed that adopted children are as aggressive as their adoptive parents rather than their biological parents. The results from both studies indicate that environment and genetic disposition are equally responsible in shaping human behavior. From the psychological point of view personality theories assume that certain predispositions or personality features, increase the chances of criminal behavior. There are two important factors that seem to influence the individual social behavior. First is the moral development factor. Theorists relate these stages of cognitive development to stages of moral development. At the beginning, rules are given by powerful individuals situated near the children. In the early level of development, children permanently search the pleasure and try to avoid punishment. Children at this level consider the needs of others only to the extent that meeting those needs will help the child fulfill his or her own needs. During the next period, which is characterized by conformity to social rules, the child demonstrates respect for duties and recommendations of the authority because is seeking the approval of the authority. As the children grow old the moral judgment is motivated by respect for legally determined rules and an understanding that these rules exist to benefit all. Step by step, universal principles are internalized.

2. Sociological Component

The second factor is the social learning. A kid learns how to behave based on how parents respond to the person's compliance with regulations. The system of reward and penalties indicate at the beginning of the life what an appropriate behavior is. Permanent application of rewards and sanctions will lead to the internalization of these rules and regulations. Using this system, children begin to control themselves accordingly to moral and legal codes. Numerous studies show that delinquents were treated differently by their parents than the non-delinquents youths. These studies suggest that social learning is related to criminal behavior. Those studies suggest social learning is related to criminal behavior.

We are social beings and the criminal predisposition is transmitted by other individuals. Socialization is taking place throughout our lives. Socialization is present in every aspect of life and education. Significant example is the case of "wolf children". They are raised in a group socially. Wolves are organized in packs, are social beings and have a well established hierarchy. Each wolf play certain roles in the group, accepted due to the fact that individuals rejected do not survive alone. Every society educates its members in the spirit of the rules to ensure its proper functioning. It is not enough just to be part of a social organization but to be fully integrated into that organization. Through education, individual acquires necessary knowledge in order to adapt and integrate. There are several factors that impact an individual's destiny and through various studies and theoretical models it becomes obviously that one single factor is impossible to determine the destiny of one individual, in order to become criminal.

The central points of this theory are: the human being is a rational actor, rationality involves calculation, and people freely choose all behavior, both conforming and deviant, based on their rational calculations. One of the important elements of calculation involves an important decision: pleasure versus punishment, choice will be directed towards the maximization of individual pleasure, choice can be controlled through the perception and understanding of the potential punish. Punishment will follow any violation of the social values and the society is responsible for maintaining order and preserving the common good through a system of laws. The swiftness, severity, and certainty of punishment are the key elements in understanding a law's ability to control human behavior. That is why, the understanding of personal choice is commonly based in a conception of rationality or rational choice. In completing this theory on the external "causes" of crime focused attention on the factors that impose upon and constrain the rational choice of individuals. Another point of view is given by the psychological positivism, theorized by Alexander Lacassagne. His assertion is that the causation of criminality is rooted in offender mental illness or personality disorders as schizophrenia, bi-polar disorder, psychopathic personality, antisocial personality disorder, depression and neuroticism. These disorders may be the result of sociological or biological factors such as physical or sexual abuse, parental criminology and intelligence level. Psychological positivism analyzes criminality as the result of an internal and unavoidable cause versus that of a controlled decision.

3. Psychological Component

There are studies supporting the hypothesis that certain personality features can be associated with criminal behavior. Impulsiveness, specific for volcanic type is characterized by increased responsiveness to certain stimuli and a visible manifestation in behavior. Impulsiveness is frequently associated deviant behavior, but this varies from person to person. A study aimed to examine the relationship between impulsivity and criminal behavior has demonstrated a direct connection between these two elements. Impulsivity is often associated with negative emotions that enhance its effects. There is also a correlation between impulsivity, negative emotions and frustration tolerance. When is registered a high level of impulsivity, negative emotions recorded significant increases. Therefore specialists consider that in the absence of strong social control, criminal tendencies can occur. But it must be noted that both elements are influenced by environmental factors, most commonly they are

affected by the family of origin or the family environment (psychological or physical abuse or abandonment). Another feature that can support this criminal behavior is "hard sensation" seeking or addiction to adrenaline. There are people who can not live without the adrenaline. Thus, there are people acquiring these sensations as a result of aggression, others by consuming prohibited substances. In any circumstances, risk is sought or caused by this type of person. Researchers often argue that "sensation seekers" have an average or under average IQ, and, the more impulsive person is, the more dependent on adrenaline will be.

Studies show also, there are some features the potential criminals do not have. The first such feature is the consciousness. This feature involves an accumulation of traits such as discipline, organization, responsibility and trust. Altruism that requires personal sacrifice, or give up its good to offer help to other people is also an incompatible feature for offender profile. Morality, which involves complying with rules imposed even if the rules are coming in conflict with individual desires. Morality requires compliance with a code of moral rules, for example the code of good manners and to have a certain acceptable behavior in society.

Social environment we are born and raised is a crucial element of our future behavior. People who are born and live in an environment marked by crime are likely to commit crimes in a much higher rate than those born and educated in a moral environment.

4. Conclusions

Operating system categories with legal psychology belongs largely to general and social psychology. Therefore, psychology is an interdisciplinary domain. This science uses and will use concepts from other fields of psychology: experimental psychology, differential psychology, cognitive psychology, medical psychology, psychopathology, military psychology, psychology of behavior, etc. Legal psychology is to: organize and improve functional conceptual system, validation of conceptual models, and development of theoretical models. Legal psychology of the future should be centered on the criminality and its psychological features and must establish the following *priorities*: developing a specific methodology to investigate the psychological reality of the judiciary system; providing useful information on the physical reality of the judicial system in order to establish the truth; development of psychosocial programs to prevent crime and recidivism; develop strategies to educate criminals; develop programs for social reintegration of criminals; providing psychological support, substantiate both the police officers and criminals.

The future will prove if indeed legal psychology will develop enough to efficiently prevent the commission of crimes and whether the company will find effective solutions to "treat the disease of criminality" as a whole.

Bibliography

Braşoveanu, Florica (2007). Environement protection – the essential condition of the life quality in the context of integration of Romania in European Union. *Analele Universitatii Ovidius Constanta, Seria: Drept si Stiinte Administrative/ Ovidius University Annals, Series: Law and Science, no. 1, 2007*, Ovidius University Press.

Anechitoae, C.; Stan, Mădălina & Casapu, Mariana (2007). The „sui generis"rights of the data produsers (I). *The Romanian Review of Copyright*, The fourth years, no. 2 (11), 32-40.

Turcu Ion & Stan, Mădălina (2007). *Lumini şi umbre în zona crepusculară. Reflecţii privind diagnosticul legal al sancţiunii actelor debitorului în perioada suspect/ Lights and shadows in the twilight zone. Reflections on the diagnosis debtor legal sanction during suspicious acts.* International Conference „Conséquences politico-juridiques de l'intégration des états dans l'Union Européenne. L'Europe dans la société de l'information/ International Conference "Impact of legal-political integration of states in the European Union. Europe in the information society.

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The Continued Form of Some Crimes Against Property. Theoretical and Practical Aspects Through the New Criminal Code

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Abstract: In the present study I undertake an analysis of legal regulations and solutions delivered by the courts for crimes against property, who were committed in a continued form. The starting point in developing the study was the definition of the continued offense, contained in the Criminal Code in force and to which some changes have been made in the new Criminal Code, and the opinions existing in the criminal literature regarding this concept. Using case study, I have analyzed the solutions delivered by the courts of different levels and I found out that there were given different solutions to situations alike because of the lack of one important item from the definition of the continued offense, item that has been introduced in the new Criminal Code. This paper is of interest both for theorists and for practitioners in criminal law because it is a useful tool in the analysis of the regulations contained in the new Criminal Code relative to the continued offense.

Keywords: repeated acts; offences in contest; passive subject

1. Introduction

The new Criminal Code contains several provisions some of which represent a novelty, such as defining the crime committed by omission, according to Art. 17, while others are designed to improve the way in which institutions established in the Romanian criminal law are regulated in the law in question. Illustrative in this respect is the definition of the continued offense, provided in Art. 35. Paragraph (1) of the new Criminal Code.

In the existing Criminal Code it is found the definition of the continued offense in Art. 41 paragraph (1), but based on this definition the courts of various degrees have offered distinct solutions to similar situations because of currently missing from the definition of a very important element whose presence would clarify the situation.

Thus, the legislator of the new Criminal Code took into account of the issues raised over time in theory and in legal practice and completed the definition of the continued offense by adding a provision relative to the uniqueness of the passive subject.

2. The Analysis of the Continued Form of Some Offenses Against Property

2.1. The Definition of the Continued Offense

The continued offense, along with the complex offense, the progressive offense and the offense committed by habit is a form of the legal unit of crime. As stipulated in Art. 41 para. (1) of the Criminal Code in force "in the case of the continued offense and of the complex offense we can not talk about the existence of crime plurality".

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Under paragraph. (2) of Art. 41 of the Criminal Code in force, the offense is continued when a person commits, at different time intervals, but having the same criminal resolution, acts or omissions which present individually the content of the same offense".

2.2. Conditions for the Existence of the Continued Offense

Therefore, out of the definition that the legislator has given in the Criminal Code in force, we draw the conditions that have to be met in order to be in the presence of the continued offense.

Thus the first condition is that of the unit of active subject, in the sense that the acts must be committed by the same person. The unity of the active subject is not equivalent to its uniqueness. I say this because two or more people together can also commit a crime in a continued form as co-authors.[1] An example would be stealing repeatedly by three persons with the same criminal resolution, at different time intervals, a quantity of grain from a storage of a company.

A second condition derived from the definition given by the legislator in the Criminal Code in force is relative to the fact that the acts that compose the continued offense must be committed at different time intervals. The legislator did not specify exactly how spaced in time this intervals should be. But if the acts that are committed are too close to each other from the time interval point of view, the offense will not be considered to be a continued one because in this situation all the acts will be part of a single offense. So, for example, this is the case of somebody stealing several goods having the same owner in the same circumstances.[2] On the other hand, if the intervals between the acts are too apart in time, it is again questionable the continued form of the offense because it would be difficult to prove that there has been kept the same criminal resolution.

A third condition to be satisfied for the existence of the continued crime is the unity of criminal resolution.

The last condition, according to the Criminal Code in force, is relative to the idea that acts or omissions committed individually have the content of the same offense. Given these circumstances, it is interesting to see how the provisions of the Criminal Code in force have been translated into legal practice by applying them to various specific causes.

It is a very important element missing from the definition of the continued offense, as it is provided in the Criminal Code in force, which has generated over time several situations in which there have been given different solutions to similar cases. This element reffers to the uniqueness of the passive subject, meaning that there will be a continued offense of theft, for instance, if the act committed by a person at different time intervals, with the same criminal resolution, will affect the property of one person, be it physical or legal. Otherwise, the impairment of more people by harming each and one of their property by different actions by the same person, the same active subject, means that the offenses will be withheld in contest. Thus there will no longer be a legal unit of the offense but instead we will talk about a multitude of crimes.

[1] The defendants A.C. and C.M. have been charged with the commission of the crime of aggravated theft in a continued form because on the night of July 20, 1995, based on collusion and having a single criminal resolution they stole various goods from a car by burglary and tried to acquire goods from four other cars. Supreme Court of Justice., Criminal Division, decision no. 403 of February 19, 1997, ,,Problems of Law" in the Supreme Court jurisprudence in criminal matters, 1990-2000 (cited in Dobrinoiu, V. & Conea, N. & Romiţan, C.P. & Dobrinoiu, M., 2003).

[2] The defendant C.F. was charged because by night, along with others, entered by burglary inside a company from where he has stolen car repair tools, belonging to an injured party, which he carried to the car left down the road and then he returned to the room, where they took a battery belonging to another injured party. In this case, even if there are two injured parties, the conditions of real competition offenses were not covered according with Art. 33 point a) of the Criminal Code, nor the conditions of the continued offense under art. 41 para. (2) of the Criminal Code into force because the defendant has not repeated the acts based on separate criminal resolution, and on the other hand, the two concrete activities of stolen of goods took place in the same circumstances of place and time, in unbroken succession imposed by the way the execution of the offense as a whole was intended. Court of Appeal Craiova, Crim. Dec. no. 1232 of November 8, 2001, The Law Journal no. 9/2002 (cited in Dobrinoiu, V. & Conea, N. & Romiţan, C.P. & Dobrinoiu, M., 2003).

The legal situation was remedied in the new Criminal Code, represented by Law no. 286/2009[1], as in Art. 35 para. (1) it is provided that "the offense is continued when a person commits at different time intervals, but having the same resolution and against the same passive subject, acts or omissions which have individually the content of the same offense".

2.3. Aspects of Legal Practice. Assumptions

Analyzing the relevant case law in this area, I have identified several specific assumptions to which the provisions relating to the continued offense were applied or not.

A first hypothesis is that of the court who withheld the commission of a single crime, in a continued form, although the acts have affected the property of two or more persons. In a case there were established the following facts: in a period of ten months, repeatedly and having the same criminal resolution the defendant N.V. committed numerous thefts from individuals and companies, the total value of stolen goods being quite high. From the evidence, the court withheld the commission of one theft in a continued form as provided in the Art. 41 para. (2) of the Criminal Code in force, although there were several injured parties, given the way of action and the perseverance of the defendant in committing the acts and the short time between his actions, the means used, but also the facts that all his actions were committed at night, aspects that characterize the unique criminal resolution.[2]

In another case the court noted the commission of a single theft, in repeated acts, in the responsibility of a defendant who, for three years, entered into 57 residences by burglary, especially at night and by using drills and levers that power locks, and stole high-value goods. Although the court stated that every act of theft out of the home meets the elements of the offense of theft, yet it was in favor of the commission of one offense in a continued form in the detriment of the offenses withheld in contest, with the argument of the defendant's unique criminal resolution inferred from the evidence contained in the file regarding the means of burglary used to commit the acts during the night and that the goods were valued afterwards by a company established for this purpose.[3]

Similarly, the court held in the charge of the defendant N.G. the offense of theft as it is referred to in Art. 208 para. (1) of the Criminal Code in force, having a continued form, because, being on vacation on the beach, he removed in several different days from tents placed in a camping a number of items belonging to persons occupying these tents.[4]

By the Decision no. 541 of February 5, 2003,[5] the High Court of Cassation and Justice, Criminal Division, upheld the appeal and sentenced the defendant P.E. for committing the offense of aggravated theft, provided in the Art. 208 para. (1) related to Art. 209 para. (1) letter e) of the Criminal Code in force - act committed in public - because in the period May 4 to 15, 2001 he stole from the communal grazing two cattle and a horse belonging to injured parties.

A second hypothesis is that of the court who withheld offenses in contest instead of one criminal offense in a continued form, having in mind that there were several passive subjects.

An example is the decision no. 1477/1983 of the Criminal Section of the Supreme Court in which the court sentenced the defendant A.I. for committing 17 offenses of aggravated theft withheld in contest, facts provided by Art. 208 para. (1) related to Art. 209 of the Criminal Code in force, with the application of Art. 33 point a) and Art. 34 of the Criminal Code, because the defendant has stolen from various people in shops or in means of transportation wallets and identification papers and various

[1] Published in the Official Gazette of Romania no. 510 of July 24, 2009.
[2] Supreme Court of Justice, Criminal Division, Decision no. 2403 of May, 30, 2000, ,,Problems of Law" in the Supreme Court jurisprudence in criminal matters, 1990-2000, (cited in Dobrinoiu et al., 2003).
[3] Supreme Court of Justice, Criminal Division, Decision no. 2305 of June, 8, 1999, ,,Problems of Law" in the Supreme Court jurisprudence in criminal matters, 1990-2000, (cited in Dobrinoiu et al., 2003).
[4] Constanta County Tribunal, criminal decision no. 100/1991, The Law Journal no. 7-8/1991 (cited in Dobrinoiu et al., 2003).
[5] (Supreme Court of Justice, 2003).

other goods carried by persons. The court decision, made at the expense of retaining a single crime of theft committed in repeated acts, was based on the evidence in question regarding he fact that the theft was committed with the harm of different people's property in different places and at considerable intervals of time, taking advantage of every given favorable condition, without having from the beginning the concrete representation of the facts that he performed[1], situation that brings us to mind the lack of a single criminal resolution.

A third hypothesis is that of the court who withheld the commission of a single crime, in a continued form, with a single passive subject, respectively a single property affected.

The defendants I.N. and V.M. were prosecuted for the commission of the crime of breaking the seals in competition with the aggravated theft, in the continued form, as they, knowing that in the railway wagons are certain goods, went several times during the night at those wagons and, by removing the seals, stole things. The single criminal resolution characterizing the continued offense according to Art. 41 para. (2) of the Criminal Code was proven in this case by the evidence relative to the large number of thefts committed by using similar methods and prior knowledge of the material object of the facts.[2]

We believe that the court may withheld in contest two or more crimes on the assumption that, although we have one passive subject, so a single property affected, the actions of the active subject, repeated at different intervals of time, have individually the content of the same offense, but we do not have a single criminal resolution.

By the Decision no. 2745 of May 20, 2004,[3] the High Court of Cassation and Justice, Criminal Division, held that the action of the defendant who, having the same criminal resolution, instigated the theft of petroleum products and then he himself stole such products, meets the elements of the offense of aggravated theft in the continued form, the quality of instigator of the crime of theft being absorbed by that of author.

A fourth hypothesis is that of the court who withheld the commission of two crimes in contest and not of a crime in a continued form, because there were two passive subjects.

By the Decision no. 3389 of June 18, 2004,[4] the High Court of Cassation and Justice, Criminal Division, addressing to the prosecutor's appeal, held that the violent theft of goods from two injured parties, even if all assets acquired belonged to one of them, in different contexts, at a different interval of time, in different ways and in different places, are two offenses of robbery, withheld in real contest, not a crime of robbery in a continued form because the perpetrator has acted on the basis of different resolutions, renewed every time when the opportunity to commit a new criminal offense arose, not having an overall representation of the future criminal activity from the beginning.

3. Conclusions

A unified point of view of the High Court of Cassation and Justice has been outlined in the sense of believing that there have been withheld more crimes in contest whenever the assets that have been affected belonged to more people and there has been withheld a single crime in continued form whenever the acts or omissions were repeated at different intervals of time and having the same criminal resolution, acts or omissions which represent individually the content of the same offense and being only one passive subject.

[1] Decision no. 1477/1983 of the Criminal Section of the Supreme Court ((cited in Dobrinoiu et al., 2003).
[2] Supreme Court, Criminal Division, decision no. 447/1981, The Romanian Journal of Law no. 3/1982 (cited in Dobrinoiu et al., 2003).
[3] (Supreme Court of Justice, 2004).
[4] (Supreme Court of Justice, 2004).

The entry into force of the new Criminal Code will lead to proper legal classification of facts that are repeated whether as a single offense committed in a continued form, whether as two or more offenses withheld in contest.

This is also important from another perspective, namely through the sanction to be applied.

According with Art. 42 of the Criminal Code in force, the continued offense is punishable with the sanction prescribed by law for the offense, to which a requested bonus can be added, in accordance with Art. 34 (our note - the main sentence in case of crimes withheld in contest committed by individuals) or, where applicable, Art. 401 para. (1) (our note - the penalty in case of the withheld of offenses in contest that have been committed by a legal person) ".

According with Art. 36 of the new Criminal Code "the continued offense is punishable with the penalty provided by the law for the offense that has been committed, whose maximum may be increased by up to three years if imprisonment, respectively with more than one third if the fine ".

The main penalty in case of offenses withheld in contest when there were established only penalties of imprisonment is represented, according to Art. 39 para. (1) letter b) of the new Criminal Code, by the worst punishment, plus a bonus of one third of all other penalties set". When there have been settled only fines, according to Art. 39 para. (1) letter c) of the new Criminal Code, the heaviest penalty will be applied, plus a bonus of one third of all other penalties set ".

Comparing the new Criminal Code provisions relating to the punishment applicable to the continued offense in the case of concurrent offenses, it is easy to see that the offenses withheld in contest are more severely punished, given the greater social danger they pose to society. So it is very important to apply a punishment proportionate to the offense committed, thus respecting the principle of criminal law, ie the principle of individualization of criminal sanctions so that they fulfill their purpose to prevent commission of new crimes.[1]

4. References

Bulai, C. & Bulai, B.N. (2007). *Handbook of Criminal Law. The General Part*. Bucharest: Universul Juridic.

Dobrinoiu, V.; Conea, N.; Romiţan, C.P. & Dobrinoiu, M. (2003). *Criminal cases reviewed - the special part.* Bucharest: Signs.

***Supreme Court of Justice. (2003). *Decision no. 541/2003.* Retrieved January 12, 2012 from http://www.scj.ro/SP%20rezumate%202003/SP%20r%20541%202003.htm.

***Supreme Court of Justice. (2004). *Decision no. 2745/2004.* Retrieved February 5, 2012 from http://www.scj.ro/SP%20rezumate%202004/SP%20r%202745%202004.htm.

***Supreme Court of Justice. (2004). *Decision no. 3389/2004.* Retrieved February 5, 2012 from http://www.scj.ro/SP%20rezumate%202004/SP%20r%203389%202004.htm.

[1] The principle of individualization of criminal sanctions (Bulai & Bulai, 2007).

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REALITIES AND PERSPECTIVES

The Recognition of Forensic Psychiatric Expertise in European Union

Ion Rusu[1]

Abstract: In this paper we examine the internal and European provisions governing the institution of recognizing the forensic psychiatric expertise in the European Union, based on the European and internal legislation in the field. We previously conducted research on the recognition of judgments and judicial foreign acts emanating from another Member State, research that have resulted in studies and articles published in national or international specialized journals or proceedings. The work is useful for practitioners who work in this area, and also for those interested in researching this institution. The essential contribution of this paper consists of the examination of the institution recognition in the light of the national and the European legislation, the critical observations relating to certain provisions of the European legislative acts and proposals for completing and amending the European legal instruments.

Keywords: critical opinion; judgment; judicial cooperation; EU

1. Introduction

In our opinion, the biggest problem of the European Union, after the economic one, is represented by the growth of crime of all types and implicitly the concrete methods adopted by the Member States to prevent and fight against crimes in European Area.

This very complex activity, with major implications in economic and political stability of the Member States, and European institutions, is required to be solved urgently, as the lack of reaction of European governments can compromise the European construction as a whole.

A very complex matter of preventing and fighting against crime of all kinds, and in particular terrorism, trafficking of arms, ammunition, explosives, drugs, human beings and other manifestations of organized crime can be solved only by increasing specific activities of judicial cooperation in criminal matters between Member States.

We believe that the most important form of legal cooperation in criminal matters between the Member States is and will always be the recognition of each Member State of judgments and other judicial documents issued in another Member State. (Rusu & Rusu, 2010, p. 224)

So, there is the question of recognition and enforcement of two distinct categories of legal acts, namely, final judgments and other judicial documents that produce legal effects in the issuing State. In both cases, these two categories of judicial acts will have to produce legal effects in the issuing State, identical (as those produced in the executing State), in other words it should be recognized and enforced in their entirety, by any other State.

Consistent with its European aspirations, but also aware of the need to strengthen the specific activities to prevent and fight against crime of all kinds, Romania adopted Law no 302/2004 on international

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judicial cooperation in criminal matters with subsequent amendments, republished, a regulatory framework that governs all judicial activity in the field. (Boroi & Rusu, 2010, p. 14)

Under the special law, the Romanian judiciary authorities, the responsible authorities of another State (even outside the EU), will recognize and enforce a judgment or a judicial criminal act emanating from a competent authority, complying to certain conditions, upon which we will not insist, because they are not the subject to this proposed research.

Regarding the recognition in another state of judicial act issued by a competent authority of the Romanian state, in which case we do not include the forensic psychiatric expertise, the law provides that it shall be achieved by complying with the applicable international treaty.

We note that, although Title V of the law is entitled "Recognition and Enforcement of criminal decisions and judicial documents," therein is not even one provision for the recognition of judicial acts, the rest referring only to judgments.

After examining and inter-relating the mentioned legal texts, for the Romanian legislator, it has proven to be a constant concern only the recognition and enforcement of final judgments and less the recognition of documents issued by competent authorities in Romania, including here the psychiatric and forensic examination.

At EU level, in order to recognize the final judgments, in 2008 two acts were adopted, both supplemented and amended in 2009, by another legislative act.

Thus, there were adopted the Framework Decision 2008/909/JHA of 27 November 2008, Framework Decision 2008/947/JHA of 27 November 2008 and 2009/299/JAI Council Framework Decision of 26 February 2009. The purpose of adopting the three legislative acts is to enhance the recognition and enforcement of judgments to become final, in any Member State, to facilitate the social rehabilitation of the convict, in strict compliance with the European Convention on Human Rights and Fundamental Freedoms.

Our purpose is not to examine these very important legislative acts, with major implications in the entire activity of judicial cooperation in criminal matters between Member States, but only mention that they have not been implemented currently in our legislation. However, under the Constitution, our internal legislation and EU basic treaties, namely the Treaty on European Union and the Treaty on functioning the European Union, both modified and supplemented by the Treaty of Lisbon, these regulations have legal effects also in Romania.

We note however that the European legislator, under the three legislative acts did not provide the recognition of some legal acts, but the recognition of final judgments.

No doubt there is a forensic psychiatric expertise outside the criminal trial that cannot be taken into account, as that report is included in the case file, file which certifies that judgment.

The direct link exists between such internal legislative act, the three European legislative acts and the recognition of forensic psychiatric expertise which we will examine subsequently, through the existing internal and European legal framework.

2. General Considerations on Forensic Psychiatric Expertise

According to the legal stipulations, in Romania the forensic activity is *an integral part of healthcare and is an inquiry, examination, findings*, *laboratory tests and other forensic work on living bodies, corpse, biological products and material evidence in order to establish the truth in cases of offenses against life, body and health integrity of people or in other circumstances stipulated by law, and in conducting forensic psychiatric expertise and filiations research.*

Also *the forensic activity provides scientific evidence to the prosecution, courts, and upon request to those interested in solving criminal cases, civil or other nature, contributing to specific means provided by law, in establishing the truth.*

In this legislative context, one of the main tasks of forensic institutions is that of performing *forensic examinations and findings of the disposal of the prosecution or the courts, and also in cases of inadequate care or where appropriate, there are required forensic psychiatric expertise*.

The expertise commission is mandatory in the cases where the law requires, and when it is *to assess a person's mental capacity in order to determine the elements needed to assess the criminal or civil liability.*

A forensic psychiatric examination is performed only by a direct person, through a Commission consisting of a coroner, who is chairman of the committee, and two psychiatrists.

According to the depositions of the law, in order to clarify the facts or circumstances of the case, to find for the truth, there are necessary the expert knowledge, the prosecutor or the court orders, upon request or ex officio, an expertise. As for a psychiatric expertise, it is mandatory for offenses of aggravated murder cases and when the prosecution or the court has doubt about the defendant's mental state. In these situations, the expertise is performed in specialized medical institutions, ordering the defendant the internment of the offender in due time.

Regarding the forensic psychiatric expertise, it can be achieved by the "Mina Minovici" National Institute of Legal Medicine in Bucharest, forensic institutes of academic medical centers and county forensic services.

According to the law, when the prosecution or the court finds, upon request or ex officio, that the expertise is not complete, it orders an additional survey by the same expert or by another. The law provides the possibility to perform a new expertise, when the prosecution or the court has doubts about the accuracy of the conclusions of the expert report.

When making application for a new forensic psychiatric expertise, it will be performed by another medical commission.

At central level, it operates the higher forensic Commission, which scientifically verifies and approves, at the request of the legal bodies, the findings of various forensic acts and it decide on possible conflicting conclusions of expertise with the new forensic results or other forensic acts.

Monitoring and evaluating the forensic activity is achieved by joint commission consisting of forensic specialists from the Ministry of Health and legal experts of the Justice Ministry, established by joint order of the two ministries. The joint commission is established whenever there are indications of committing irregularities in conducting forensic activity, and one of the two ministries requires some verifications.

3. The Recognition of Forensic Psychiatric Expertise Performed in Romania by the Competent Legal Authorities of the EU Member State

From the earlier overview of the organization and operation of forensic activity in Romania, it results that it is integral part of health care system and at the same time it carries out the expertise and other works, which acts collectively forensic at the request of judicial authorities (or other natural or legal entity).

These activities are embodied in expert and findings reports, certificates, test reports and notifications. In order to avoid some unilateral interpretations that are not in agreement with the will of the legislator, the acts have been defined specifically, definition that we present below.

Thus, the forensic expertise report is *the document prepared by an expert on the demand of the prosecution or the court which includes data on the expert examination. A forensic examination is carried out in cases provided in article 116 and 117 of the Criminal Procedure Code*.

The Report finding forensic is *the document written by the coroner on the demand of the prosecution or the court which includes data on the carried out investigation. Forensic finding is made in the cases provided in article 112 and 114 of the Criminal Procedure Code.*

The Medical certificate is *the document written by the coroner on the demand of the interested persons including data on forensic examination.*

The analysis bulletin is *the document written by the forensic specialists or competent people in the forensic institutions, at the request of interested persons, including data on complementary examination.*

Forensic notification *is the document prepared by the High forensic Commission as well as review boards and control of medical documents at the request of judicial authorities, endorsing the content and conclusions of forensic documents; they recommend further surveys or draw their conclusions*.

Next we will consider the report of forensic psychiatric expertise, from two perspectives, namely as forensic document certifying the carrying out of the expert forensic psychiatric expertise imposed by the judicial bodies through ordinance, respectively, means of evidence in the forensic notification achieved by the High Forensic Commission.

In this context, practically the document can be a means of evidence in the criminal proceedings, it is the forensic psychiatric report, a document that, records, among other issues, also the conclusions of the experts in the matter of subject expertise.

We mention also that under the law, the medical examiner is an expert in this juncture, a quality involving a series of rights and obligations.

From the mentioned provisions of the European legislative acts, it results that the general rule in the European Union is the judgments by which there are ordered penalties or other custodial or non-custodial measures, which recognized and enforced in all Member States (under certain conditions).

In our analysis we consider those situations where the Romanian courts have ordered some forensic psychiatric expertise, and the expertise report was considered as evidence under which they issued the judgment of conviction of a physical entity.

An important aspect to be considered is that, as part of the case file, the forensic psychiatric report is recognized implicitly with the recognition of judgment when ordering a custodial or non-custodial measure or any another extent.

In order to examine the legal implications on the recognition ratio of forensic psychiatric expertise in Romania issued by a competent judicial authority of any Member State, it will have to consider a series of domain-specific features.

The special situation that we consider now is when by a final court decision in Romania, it is sentenced a citizen of another Member State, in the case file that there is a report of forensic psychiatric expertise, a report resulted following the request to carry out a forensic psychiatric expert by the prosecution or the court. In this case, the forensic psychiatric expertise is sought by the prosecutor or the court, according to article 117, paragraph (1) Criminal Procedure Code, because one of these organs has doubts about the defendant's mental state. In other words, the prosecutor or the court will require the expertise to determine whether the defendant had criminal liability when the crime for which it is investigated was committed.

In this case, after the final court decision to a custodial sentence, according to the Framework Decision 2008/909/JHA, it (the judgment in question), at the request of the convicted person or ex officio will be passed by the Romanian judicial authority with a certificate to the Member State whose citizen is convicted, in order to acknowledge it and subsequently to enforce it.

We emphasize that in these circumstances, the judicial body empowered by the executing State will consider the recognition of the judgment, in its complexity, and not according to the administrated and existing evidence in the case file. No doubt that recognizing the final judgment rendered by a Romanian court, involves an implicit recognition of all existing evidence on case file, evidence under which the individual concerned was convicted.

Next, we will examine the case where, after the recognition of the Romanian judgment by the executing Member State and transferring the convicted person during the execution of the sentence, the convicted requests for retrial and to carry out a forensic psychiatric expertise, arguing that at time of the offense he suffered some mental disorders, and the psychiatric forensic examination carried out in Romania did not find this very important issue, which represented the main evidence that resulted in taking the measure of conviction.

In this context, the authority of the executing Member State will have three options, namely: it will not approve the convict's request, as the recognition of a final judgment issued by the Romanian court justifies the involvement and the recognition of the forensic psychiatric expertise (as existing evidence in the case file); it will accept the request of the convict, having carried out a forensic psychiatric expertise by the competent authorities of that state, or it will ask the Romanian judicial authorities to check and approve scientifically the report's conclusions, by the High Forensic Commission in Romania.

We specify that the European legislative act framework does not provide for such situations, noting only the compulsory recognition and enforcement of judgments, not of forensic documents.

No doubt that in this situation, without having clear provisions in the European legislative act, each Member State will consider first its own legislation, always acting according to it.

However, we consider that in such a situation it is ruled out the possibility of ordering by the competent court the disposition to undertake a new forensic psychiatric expertise by a competent authority of the executing Member State.

We argue this opinion on the following considerations:

- the existence of a coherent legislative framework, with a proper organization and operation system of forensic activity;
- the possibility of checking and notifying of the forensic psychiatric documents by the High Forensic Commission;
- the possibility of making new forensic psychiatric expertise, at the request of the legal bodies or person concerned, the regulated and legal opportunity before passing a court decision;
- the high level of development of medical sciences in Romania, the recognition of professional competence of Romanian forensic experts at European level;
- the existence of modern criminal procedure, with explicit provisions on the rights of defense of suspects and defendants;
- lack of procedures developed at European level, about the possibility of examining the existing evidence in a case file where it has already been taken a decision which became final when the competent court in the executing State has available only that judgment and the certificate that it accompanies.

In our opinion, being excluded the possibility of disposing the development of a new forensic psychiatric expertise available to the competent judicial bodies of the executing State, it will remain the other two mentioned variants. Thus, if the request of the convicted is rejected, the required solution is to demand a verification and approval of forensic psychiatric expertise by the High forensic Commission.

Under the above mentioned arguments, we consider that the request for verification and approval of the forensic psychiatric report by the High forensic Commission is the optimal solution that can be adopted by the competent Member State of execution to such judgment, in the case where the convicted does not reject the request. This decision is in our opinion, an act of partial recognition of forensic document issued in Romania, a matter that does not contravene to EU legal acts in force; on the contrary, it contributes to the execution of its provisions. On the other hand, the action of rejecting the application of performing a new forensic psychiatric expertise, and (to some extent), the application for the notification of High forensic Commission is in our opinion an act of mutual trust, in the scientific and evidential value of forensic documents emanating from Romanian forensic authorities.

Naturally, this request will be made by judicial authorities of the two involved states, being excluded the possibility of sending a direct request between the two forensic institutions.

However, we believe, normally, considering the European legislative acts, which rise to the level of principle the recognition and enforcement of judgments in another Member State, other than the convicting one, the correct solution that is to be adopted by the executing court of that Member State, is the rejection of the convict's request, the reason being that with the recognition of the judgment there were recognized all the existing evidence on case file, evidence based on which the legal decision on convicting was passed. Even if the report of the forensic psychiatric evidence is in some circumstances crucial evidence that determined the decision to prosecute an individual, note that this document is part of the evidence which led to the measure of conviction, and therefore is recognized in the initial phase with the judgment of conviction as a whole. In this context, we note that under the depositions of the European legislative act, the authority of the executing State shall not proceed in examining and acknowledging each sample given to the case file, but only the judgment become final as a whole. In fact, the examination of the existing evidence cannot be achieved because the court of the execution state has at its disposal only the judgment and the certificate, the case file being kept by the sentencing court in Romania.

4. Conclusions

The complexity and importance of forensic psychiatric expertise in Member States (i.e. in Romania), at the request of judicial authorities or other natural or legal entities, result in the implications arising from the special report forensic psychiatric expertise, regarded as evidence in the act of criminal justice.

We here consider also the more visible tendencies of persons who have committed crimes, some of extreme gravity, trying to escape the criminal liability, claiming the occurrence of psychiatric disorders during the execution of the action or inaction which represents the material element of objective side of the offense of which he is guilty, and thus the lack of criminal liabilities.

The drawn conclusion from the present examination is that the report of the forensic psychiatric expertise effects after being conducted a survey of this kind has a great evidential value in criminal proceedings, contributing decisively, in certain circumstances to the achievement of justice in any EU member state. In this context, the arguments are likely to lead to the recognition idea of the report of forensic psychiatric expertise in criminal cases, as forensic scientific act, with important implications in determining the criminal liability of persons convicted in Romania of various offenses.

5. Bibliography

Rusu, Ion; Rusu, Minodora-Ioana (2010). Observaţii critice referitoare la aplicarea principiului recunoaşterii reciproce în cazul hotărârilor judecăroreşti care impugn pedepse sau măsuri privative de libertate, în scopul executării lor într-un stat membru al Uniunii Europene/Critical remarks on the principle of mutual recognition to judgments imposing sentences or custodial measures involving deprivation of liberty, to execute them in a EU Member State. *Revista Dreptul/ Law Review*, no. 2/2010, pp. 223-250. Bucharest: Universul Juridic.

Boroi, Alexandru; Rusu Ion (2008). *Cooperarea judiciară internaţională în materie penală/ International judicial cooperation in criminal matters*. Bucharest: C.H. Beck.

***Framework Decision 2008/909/JHA of the Council of 27 February 2008on the principle of mutual recognition to judgments in criminal matters imposing sentences or custodial measures for their enforcement in the European Union, published in the Official Journal of European Union no. L 327/27 of 12.05.2008.

***Framework Decision 2008/947/JHA of the Council of 27 November 2008 on the appliance of mutual recognition principle in case of judgments and probation decisions for surveillance measures of probation and alternative sanctions, published in the Official Journal of European Union no. L 337/102 of 16.12.2008

*** Framework Decision 2009/299 / JHA of the Council of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, on strengthen the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person at the trial, published in the European Union no. L 81/24 of 27.03.2009.

***Government Ordinance no. 1/2000 on the organization of activities and functioning of institution of legal medicine (republished in the Official Monitor no. 996 of November 10, 2005).

***Common Order no. 255 of April 4, 2000 of the Ministry of Health and 1. 134 / C of 25 May 2000 of the Ministry of Justice, for approving the procedural expertise norms on conducting expertise, findings and other forensic activities (Official Monitor, no. 459 of September 19, 2000).

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EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Respecting Human Rights during the Execution of the European Arrest Warrant

Ion Rusu[1]

Abstract: In this paper we examine a topic in the field of European law, which is of particular interest, being always a novel subject, that is the protection and human rights within the complex activity of executing the European arrest warrant by the judicial authorities of each Member State. The paper continues previous research materialized in some in studies and articles published in national or international specialized journals or proceedings. The examination of the European arrest warrant institution has led to some conclusions, which ultimately need to certify the completion of some provisions, notably the ones regarding the mutual recognition and increase of efficiency. The work can be useful both for practitioners and theorists in the field, the essential contribution consisting of the examination and the expressed critical opinions, which may lead to the amendment and completion of the European legislative act.

Keywords: protection; modification; addition; European legislative act

1. Introduction

The establishment of the European Union, besides the indisputable advantages created to Member States at all levels of cooperation in the most diverse areas has determined a disadvantage as well, caused by the proliferation of crime, the difficulties involved in achieving an effective control of the competent bodies, that would lead to the reduction of crime, and especially the cross-border one.

In fact, a potential lack of reaction of the Member States can jeopardize the attainment of one of the important goals of the European Union, that is an area of freedom, security and justice.

The problem of judicial cooperation in criminal matters between Member States, notably simplifying the surrender procedure- receiving procedures of persons wanted for the execution of a sentence or to be subject to legal proceedings has represented a constant concern for the European institutions, that is the reason why the existing legislation was modified and adapted to the new requirements imposed by the successive developments in crime.

In this context, the Framework Decision 2002/584/JHA adopted a new institution designed to replace extradition, which is the European arrest warrant.

As a relatively new form of cooperation in criminal matters between Member States, the European arrest warrant was a permanent research object for many authors in the European Union, including in Romania (I. Rusu, Al. Boroi, F.R. Radu, G. Stroe etc.), the institution itself being investigated and by us as well in other papers published in journals, proceedings of conferences and university courses.

After entering into force of the European legislative act in question, the research conducted and the legal practice revealed some flaws mostly related to some complicated procedures and the right of the persons that are subject to such proceedings.

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As regards insuring the protection of rights of persons subject to a European arrest warrant, during the identification procedures and subsequently after trial and surrender procedure, the legal practice, sometimes supplemented by Romanian or European doctrine, particularly by the decisions of European Court of Human Rights, revealed some shortcomings, which finally have led to the violations of fundamental human rights.

The importance of respecting the fundamental rights is mentioned in the provisions of article 67 paragraph (1) of the Treaty on functioning the European Union, as amended and supplemented by the Lisbon Treaty, which states that "*The Union shall represent an area of freedom, security and justice with by complying the fundamental rights and the various systems and legal traditions of Member States*".

In this study we examine the institution of the European arrest warrant in terms of execution, in the context of the need to respect the right of the accused to be present at the trial where there was taken a court decision against the person, a deprivation of liberty measure. Also, the conducted research is geared towards identifying other provisions that hinder the surrender of a person under a European arrest warrant, in order to improve the European legislation in the field by the amendment of some existing laws.

2. The European Arrest Warrant in the Current Context - Concept and Characterization

The establishment of a European arrest warrant has been a necessity in crime proliferation and simplifications of procedures between Member States of persons convicted or against whom there were applied criminal proceedings.

In the doctrine there has been argued that "the practice of EU Member States has shown that the simple reconsideration of traditional principles in extradition matters is a cumbersome approach, which faces the opposition of states, and it is unable to provide effective and rapid solutions in the international judicial cooperation in criminal matters. Under these conditions it is taken advantage of the new cooperation instruments introduced by the Treaty of Amsterdam in Pillar III, by a framework decision where it was completely reformed the delivery mechanism of a person within the territory of a Member State at the request of the judicial authorities of a State Member". (Streteanu, 2008, p. 2)

In another opinion it is stated that "on *the arrest warrant mentioned the EU strategy by the 28 Recommendation in the prevention and control of organized crime, which provided possibilities of creating, on the long term, a European legal area of extradition and to examine in this context the issue of extradition under the procedures by contumacy (lack) in full respect of fundamental rights guaranteed by the European Convention on Human Rights."* (Stroe, 2007, p. 281)

In our opinion the major event that caused arguably the adoption of the European arrest warrant is the terrorist attacks of September 11, 2001 in United States of America. In this context, the institution of the European arrest warrant was introduced by the Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States.

The European legislative act provides in article 1 line (1) that "*the European arrest warrant is a judicial decision issued by a Member State in order to arrest and surrender by another Member State of a wanted person, for prosecution or executing a sentence or security measure involving deprivation of liberty* ".

After adopting these regulations, all Member States, including Romania, have promoted their own internal laws, designed to transpose the European legislation internally.

What characterizes the institution of the European arrest warrant, and also differentiates it from extradition, is the wide range of established novelties in order to simplify concretely and directly all administrative and judicial procedures. Among the innovations introduced by the European legislative

act, compared to the extradition institution, note: the obligation of Member States to apply the depositions of the European legislative act, widening the scope by including new types of offenses, most of the increased gravity; giving up to the verification procedure of double incrimination for certain categories of crimes, usually considered as being more serious; simplifying the procedures and shortening deadlines; simplifying the administrative phase; the possibility to surrender their citizens, subject to certain conditions; the possibility and recommendation of direct collaboration between the institutions of law enforcement. We appreciate that the level of European Union, Framework Decision 2002/584/JHA of 13 June 2002, represents one of the most important European legislative acts, by its execution there will be achieved important steps in the complex work of preventing and combating crime of all kinds.

2. Mandatory and Optional Reasons for the Refusal of Enforcing the European Arrest Warrant

The EU Member States, within the activity of international criminal judicial cooperation activity can invoke some reasons for not executing the European arrest warrant. These reasons, according to their importance, may be mandatory or optional.

Thus, the judicial authority of the executing Member State may refuse to execute a European arrest warrant, in one of the following cases:

- the offense underlying the European arrest warrant is covered by amnesty in the executing Member State, when that State would have jurisdiction to prosecute the offense under its criminal law;
- when from the information available to the executing judicial authority it results that the wanted person has been finally judged by a Member State for the same acts, under the condition that in case of conviction, the sentence is executed or at that time it was executed or may no longer be executed under the law of the convicting Member State;
- when the person who is the subject of European arrest warrant cannot, because of the age, be held criminally responsible for the acts on which the warrant was released, under the law of the executing Member State.

In addition to mandatory reasons mentioned above, the European legislative act provides some optional grounds for refusal of executing the warrant, which can be invoked by the executing Member State, namely:

- act which lays at the basis of European arrest warrant which is not an offense under the law of the executing Member State;
- when the person subject to the warrant is being prosecuted in the executing Member State for the same act underlying the European Arrest Warrant;
- when the judicial authorities of the executing Member State have decided not to prosecute for the offense on which the European arrest warrant was released or to terminate it, or when the wanted person has been the subject to a final judgment in a Member State for the same facts which prevents further proceedings;
- When the prosecution or punishment was established under the law enforcement of the Member State and the facts are within the competence of that State, under its criminal law;
- When from the information available to the executing judicial authority it results that the requested person was finally judged for the same acts of a third country, under the condition that in case of conviction, the sentence was executed or was under execution at that time or may no longer be executed under the law of the sentencing country;
- When the European arrest warrant was issued for a penalty or a deprivation of liberty measure, when the wanted person is staying in the executing Member State, as a national or resident thereof, and that State undertakes to execute the sentence or security measure in accordance with the national law;
- When the European arrest warrant relates to offenses which:

- in accordance with the executing Member State's law, there have been committed wholly or partly within the executing Member State or in a place considered as such;
- were committed outside the territory of the issuing Member State, and executing Member State's law does not allow the prosecution for the same crimes committed outside its territory.

3. Refusal to Execute the European Arrest Warrant on Grounds of Violating the Rights of the Person in Question

So, the general rule established by the European legislative act is that, any person against whom there are initiated court activities it may be surrendered to another Member State upon the request of its judicial authorities. However, some exceptions have been provided, which after being invoked, can lead to the refusal of executing the European arrest warrant by the judicial authorities of the executing Member State. Among these mandatory or optional reasons for non-compliance, provided by the European legislative act, note the following: the offense underlying the mandate is covered by amnesty in the executing Member State; the wanted person has been finally judged in another Member State for the same acts under the condition that, in case of sentencing, the sanction would be executed or under execution or it can no longer be enforced under the law of the convicting state; the person in question cannot, because of its age, be held criminally responsible for the facts in this warrant, under the convicting Member State's law, the person subject to the warrant is being prosecuted in the executing Member State for the same act underlying the warrant etc.

After the examination of the mandatory or optional reasons that can be invoked by the executing Member State to refuse the execution of a European arrest warrant, we find that they relate to the rights of the person subject to the warrant; in other words, when the judicial authorities of the Member State enforcement finds that those rights were not respected, it will refuse to execute the European arrest warrant.

After the entry into force of the European legislative act, the research undertaken in this area, both internally (to which we have made our contribution as well) and at European Union level, revealed the existence of some flaws related to insuring the protection rights of people covered by the European legal proceedings. Moreover, these imperfections have been found also by the European Court of Human Rights, adopting some decisions in favor of the people who have been submitted to a European arrest warrant.

Under these circumstances, it was necessary to complete and modify the European legislative act, in the sense of providing in its content the accused person's right to be present in person at trial including the right to a fair trial according to article 6 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights. At the same time, we consider the fact that on this issue, the Court held that the accused person's right to be present in person at the trial is not absolute and that, under certain conditions, it can give up, the free and willing by anyone expressly or impliedly, but clearly, this right.

By adopting the framework decision 2009/299/JAI of the Council of 26 February 2009, there were included other reasons for refusal of including the execution of European arrest warrant, reasons that regard, this time directly respecting the right of individuals to a fair trial according to article 6 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights. Thus, according to article 4a of Framework Decision 2002/584/JHA, as supplemented by the mentioned above legislative act, "*executing judicial authority may also refuse, to execute the European arrest warrant issued for the execution of a sentence or a measure involving deprivation of freedom, where the person was not present in person at the trial where the decision was passed...*"

So the general rule imposed legally this time is that when executing a European arrest warrant issued for a penalty or other deprivation of liberty measure, the person in question must be present at its trial.

When the person calls for retrial or appeal to an appeal, the executing Member State must ensure these rights.

Also, the European legislator has provided for some exceptions, on the possibility that the person concerned is not present at its trial, exceptions relating to specific situations that are seen frequently in the legal practice. These include the following situations: the person has been summoned in person on the date and place of the trial which led to the decision, or by other means where it actually received the data, issues that clearly establish that the person was aware of the trial, and was informed that a decision may be issued, if not for the trial, or when determined to have knowledge of the issue hiring a lawyer to defend at the trial, the defendant has exercised the powers specifically so.

The research leads to the conclusion that these changes and additions to the European legislative act, have corrected some previous provisions, which finally led to better ensure the protection of surrender personal rights, the current regulations is certainly improvable.

4. Conclusions

The analysis highlights that the European institution of the European arrest warrant is currently the most important form of judicial cooperation in criminal matters within the European Union. In this context, the execution of a European arrest warrant must be carried out only in full accordance with article 6 of the European Convention on Human Rights. Research and critical remarks doctrine promoted both by us and by other authors in the country and other EU countries, supplemented by the judgments of the European Court of Human Rights, determined the European legislator to adopt a series of changes and additions that have meant to strengthen the rights of persons subject to such proceedings.

However, the conducted research demonstrates that there are still many provisions to be amended and supplemented, which will be subject to further research. Thus, the further research that we will undertake will cover the following aspects: strengthening the rights of persons subject to the execution of European arrest warrant, further simplification of procedures for surrender of persons under the European arrest warrant, obligation of retrial processes where there have been decided the conviction in absentia of the person convicted and broadening the applicability of the European arrest warrant and other offenses including, without the verification of double incrimination and recognition and enforcement of judicial decisions that impose criminal penalties in the context of freedom to protect the individuals concerned.

5. References

Streteanu, F. (2008). Câteva consideraţii privind mandatul european de arestare/Some considerations on the European arrest warrant. *Caiete de Drept Penal/Notes on Criminal Law,* no. 1/2008.

Stroe, G. (2007). *Mandatul de arestare european în Dreptul românesc în condiţiile post-aderării în Uniunea Europeană/The European arrest warrant Romanian law under the conditions of post-accession to European Union*. Volume V. Institutul de Cercetări Juridice. Bucharest: Dacoromână TDC, p. 281.

***Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and surrender procedures between Member States, published in the Official Journal L 190/2002.

***2009/299/JAI Council Framework Decision of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, to strengthen the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person at the trial, published in the Official Journal of the European Union L81/24 of 27.03.2009.

****Lisbon Treaty came into force on December 1, 2009.*

****Treaty on functioning the European Union.*

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The Applicable Surrender Procedure between Romania, Norway and Iceland

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Abstract: The paper aims at examining procedures for persons' surrender that have committed crimes in one of the territory of the three states in terms of internal and European legislation in this area, its importance resulting in the need for strengthening specific activities of judicial cooperation in criminal matters. The previous research conducted in this area has resulted in studies and articles published in professional journals or proceedings of international conferences. The work is useful to judicial bodies with powers of judicial cooperation in criminal matters and to those interested in researching this form of judicial cooperation in criminal matters between Romania and the two mentioned European countries, which are not EU members. The results of the essential contribution of the work, its originality, are focused on the general examination, in critical observations and proposals for supplementing and amending the European legislative act governing the act of surrender.

Keywords: crime; judicial cooperation; surrender procedure

1. Introduction

Preventing and combating crime of all kinds, especially the cross-border one, was a constant concern of all countries of the world since ancient times. As intensifying the cooperation in all fields between the countries of the world, especially at economic level, appeared various possibilities of movement of individuals on all continents.

Thus, the global crime has seen new forms of expression, some of extraordinary violence, the perpetrators of these types of actions succeed in many cases to avoid criminal liability, disappearing from the country where they committed the acts and hiding in the other states. (Rusu, 2010, p. 54)

Under these conditions, over time, the crime manifested in various violence forms, with threats to individual security of citizens or to the internal security of states. The creation of some real opportunities for citizens traveling in Europe (starting from the second half of last century) has caused new mutations in the structure of cross-border crime, mutations that are generally determined by the possibility of moving criminal elements, of ensuring efficient organization and logistics. (Rusu, 2009, pp. 18-19)

We may say that amid all these changes, especially in the recent decades, in Europe, as in the whole world, crime has known an unprecedented evolution manifested in various forms, some of extreme gravity, thereby threatening the safety of individual and collective safety, or even the existence of some states. (Rusu, 2009, p. 186)

This imminent danger, stemming from the growing organized crime, as the possibility of avoiding the prosecution or trial of perpetrators, hiding in other countries, has led governments to intensify the activity of international judicial cooperation in criminal matters, being the only way to prevent and combat the phenomenon as a whole.

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The research on judicial cooperation developments in criminal matters highlights that the oldest and still well-known form of international judicial cooperation in criminal matters is considered, on good reasons, the extradition.

The European states have dealt with this very complex problem on two levels, i.e. internally, through the adoption of legislation to support the extradition of persons, including their own citizens and externally by the continuing tendency of simplifying the procedures for surrender, based on bilateral or regional agreements.

Realizing the imminent danger for the entire European community, the Council of Europe adopted on 13 December 1957, European Convention on Extradition, the first major legislative act in the area, which over time it has been ratified by all European states. (Blan-Rusu & Rusu, 2011, p. 191)

The establishment of the European Union and later to Schengen Area, lead to facilitating the free movement of people and goods in an extended space, thus triggering some major changes in terms of crime, meaning that it determined the easy movement and, in general, without high risk of the offenders in any EU member state or the Schengen area and hence the possibility of avoiding criminal liability. (Bălan-Rusu & Rusu, 2011, p. 192).

In this very complex context, the EU has established two categories of measures, namely the adoption of a coherent regulatory framework that contributes to increasing specific activities the Cooperation in Criminal Matters within or between Member States and the adoption of international instruments of cooperation between Member States and other European or world's countries.

Currently, the Agreement between the European Union on one hand and Iceland and Norway on the other, on the surrender procedure between Member States of the European Union, Iceland and Norway, is the international instrument under which Romania can proceede either for extradition of certain categories of persons or to request extradition.

Given the subject of this paper, we proceed in examining this international instrument, with some critical opinions aimed at improving the legislation in this area.

The importance of this international instrument for judicial cooperation in criminal matters arises from the fact that it must be applied by all EU Member States, thus including Romania, its application contributing in helping to prevent and combat crime in all areas.

2. General Considerations

As a member of the European Union, Romania will apply the provisions of the European legislative act, having the power in its relations with the two European countries, to improve the surrender proceedings. Surrender one person will be achieved in all the circumstances based on the arrest warrants issued by the judicial authorities in Romania and the two mentioned states.

In agreement, the arrest warrant is defined as a judicial decision issued by a State for the arrest and surrender by another Member State of a wanted person, for the prosecution or under the purpose of executing a sentence or security measure involving deprivation of freedom.

The arrest warrant stated above, may be issued by a court in Romania or a competent judicial authority from one of two states, only if the following conditions are met:

- the facts that require the warrant are punishable in the issuing state with a penalty or a safety measure involving deprivation of liberty for a maximum period of at least twelve months;

- when it is ordered a sentence of a punishment or a safety measure, their duration being of at least four months.

Please note that in both cases, it must be performed also the condition of double incrimination, regardless of the legal elements or legal framework in the executing State.

After investigating in the legal standards contained in the Agreement, it results that in the application of the international of the legal instrument it may occur two exceptions as well, those related to political offenses or nationality.

The first exception to the general rules executing an arrest warrant (mentioned above) is in the compulsoriness of executing such warrant in relation to the acts of any person who contributed to the commission, by a group of persons acting in common purpose, of one or more offenses on terrorism, provided by article 1 and 2 of the Convention for the suppression of terrorism, and article 1, 2, 3 and 4 of the Framework Decision of 13 June 2002 on combating terrorism, illicit trafficking in narcotic drugs and psychotropic substances and crimes of homicide, serious injury, kidnapping, hostage taking and rape, punishable by a penalty or a security measure involving deprivation of liberty, with a maximum duration of at least twelve months, even if this person does not participate in the actual execution of the offense in question; such contribution should be intentional and achieved with knowledge that such participation will contribute to the criminal activity of this organization.

The second exception covers the case of certain types of offenses for which double incrimination is not a required condition, but these facts should be punished in the issuing State with a penalty or a security measure involving deprivation of measure for a maximum duration of at least three years. Not mentioning that these types and crime are expected to be executed in the same way in most European legal instruments on judicial cooperation domain in criminal matters.

3. The Procedure of Surrender a Person under the Arrest Warrant

1. Sending an arrest warrant, the rights of the wanted person, the decision of competent authority

In the case of judicial authority of the Romanian state or of one of two states, knowing the location of the person concerned, the issuing judicial authority may transmit directly to the executing judicial authority warrant, without requiring the execution of other formalities. Also, in all cases, the issuing authority may decide to report the wanted person in the Schengen Information System (SIS). This SIS alert has an arrest warrant value, indicating that signaling must be accompanied by the information provided in the warrant.

When the issuing judicial authority does not know the competent executing judicial authority, it shall make the necessary inquiries to establish the authority, including with the help of the information obtained from the executing State. If it is not possible the requiring to SIS's services, the issuing authority will require the notification of the arrest warrant by the International Criminal Police Organization (INTERPOL). Also, the issuing judicial authority may transmit the arresting warrant by any secure means able to produce written records under the conditions which allow the authentication of the executing State. When the authority receives an arrest warrant and it is found that it is not competent to execute this warrant, it will send to the competent authority and inform the authority which issued the warrant. Any difficulties arising in the transmission or the authenticity of the arrest warrant will be solved through direct contact between the involved judicial authorities, or by direct contact between the deciding central authorities of the two involved countries.

Regarding the rights of the arrested person, we first mention that it will be first informed, in accordance with the state law enforcement about the existence and content of the arrest warrant and the possibility given to consent its surrender to the issuing judicial authority. It will also be informed that it has the right to be assisted by a lawyer and an interpreter in accordance with the state law enforcement. The decision to keep the wanted person in custody belongs to the competent judicial authority of the executing State in accordance with law. It can be released at any time in accordance with the national law of the executing State, under the condition that the competent authority of that State takes any measures that it considers necessary to prevent the person's absconding.

When the arrested person indicates that he or she consents to surrender, the granted consent and, where appropriate, the express renunciation of the specialty principle, it will be granted before the executing judicial authority under the State law enforcement. These statements by the wanted person

should be given under the conditions which show that the person has expressed freely and in full awareness of the consequences to which it is exposed. However, the sought person is entitled to a legal counsel. The consent and waiver shall be recorded in the official report, according to the procedure under national law of the executing State. In principle, the consent to surrender is irrevocable. However, each State may provide in its legislation that the revocation and renunciation may be revoked. In these situations, the period between the date of consent and revocation shall not be taken into account in determining the terms set out by the international instruments. Norway and Iceland, on one hand and the European Union, in the name of any of its member States, and on the other hand, it can be made a statement indicating that they wish to use this option and specify the ways in which it is possible the revocation of consent, and any amendments thereto.

If after his arrest, the person does not consent to surrender, it is entitled to be heard by the executing judicial authority, in accordance with state law enforcement.

When two or more states have issued a European arrest warrant or an arrest warrant for the same person the choice for the arrest warrant that is to be executed by the executing judicial authority, taking into account all circumstances accordingly, in special the relative seriousness and location of the offenses, the respective dates of arrest warrants and that the warrant was issued for the prosecution or serving a security measure involving deprivation of liberty. In special cases, the executing judicial authority of a Member State may request the advice of Eurojust in order to establish the execution of the arrest warrants. When there is a conflict between an arrest warrant and extradition request presented by a third state, the decision to give priority to enforcement will be adopted by the competent authority of the executing State, which will take into account all the circumstances, particularly those mentioned above, and the applied deposition of the Convention.

2. Postponed and conditioned surrender and transit. After deciding to execute the arrest warrant, the executing judicial authority may postpone the surrender of the person sought, so that it can be prosecuted, or if already convicted, to execute the sentence. However, instead of postponement of surrender, the executing judicial authority may temporarily surrender the requested person issuing State under the conditions to be determined by written agreement.

In the transit, the general rule established by legislative act is that every state will allow the transit on its territory of a person subject to execution of an arrest warrant, provided that the transit state to be received prior information about:

- identity and citizenship of the person under the arrest warrant;
- the existence of an arrest warrant;
- the nature and legal classification of crime;
- description of the circumstances of the offense, including date and place.

The state executing an arrest warrant for nationals under certain conditions may also, under the same conditions, refuse transit of nationals on its territory or submit the transit to the same conditions. Contracting Parties shall notify each other which is the designated authority in each State to receive transit applications and required documents and any other official correspondence relating to transit requests.

4. Critical Remarks

Given the importance of this international instrument of international judicial cooperation in criminal for Romani in its relation to Iceland Norway and the need to respect its provisions, we will formulate some critical opinions which would contribute to improving the cooperation as a whole.

We appreciate that the first and perhaps the most important observation concerns the absence of a procedure for recognition of the arrest warrant issued by a judicial authority of a Member State or a competent judicial authority in Norway or Iceland.

We believe that the examined international instrument would have provided a special recognition of the arrest warrant, seen as a concrete result which embodied a judgment. In other words, it must be recognized first that judgment that led to the issuance of that arrest warrant.

Another criticism concerns the definition of the arrest warrant, where it is not considered a person arrested and surrendered for trial. According to the provisions of article 2, line (5) of the examined international instrument, the warrant is a judicial decision issued by a State to arrest and surrender by another Member State of a wanted person, for prosecution or serving a sentence or security measure involving deprivation of liberty. We deem it absolutely necessary to supplement those provisions by which it is considered the option of the person sought for the arrest and surrender of its judgment, but only when the court considers that the presence of such persons is required.

Although, as mentioned, the international instrument does not mention this possibility, we consider that the relations between the judicial bodies of the Romanian state and the two countries can highlight the principle of reciprocity, where a person can be surrendered also for its judgment.

Another criticism is about ensuring the right of defense of the sought person, in case of consent to surrender. The current provisions require only that the person is entitled to a lawyer, but not the judicial authorities to execute the arrest warrant in order to ensure mandatorily its assistance by a lawyer (article 16). We believe that these provisions violate article 6 paragraph 3, letter. b) and c), the European Convention on Human Rights and Fundamental Freedoms. In this context, we consider that those provisions should be supplemented by a new paragraph that would provide the compulsoriness of the judicial bodies of the executing State to secure the right to defense through an elected attorney or appointed ex-officio. Adoption of such amendments would avoid any possible abuse of the court involved and therefore would entrench the fairness of taking the consent to surrender.

A special case concerns the surrender of a person enjoying certain privileges and immunities established under the State law enforcement or international agreements or treaties. According to article 23, that the executing State or, where appropriate, issuing state, will address to the relevant institutions by which it will require raising these privileges or immunities, after the lifting process, to follow the surrendering. The provisions of international instrument stop here, making no reference to where a privilege or immunity is lifted, where the person will not be surrendered, and the consequence being that it will not be held criminally liable for the offense. We believe that in this situation, the international instrument should stipulate the possibility of surrender after the wanted person will not benefit from the privilege or immunity.

Finally, one last critical opinion regards the absence of previous legal proceedings on issuing the arrest warrant, different procedures, depending on the issuing State. Thus, for Romania, the competent court will first issue an arrest warrant, which is valid on the national territory. If after the police investigation, the Romanian state institution empowered with concrete tasks of caching and imprisonment of the person under arrest warrant, it results that the person has fled or is hiding in the territory of a EU Member State, the same court will issue the European arrest warrant. If after checking it appears that the same person hides within Norway or Iceland, the same court will issue an arrest warrant under the examined international instrument. In Romania, we think it is possible to issue simultaneously both warrants, given the possibility of moving the person sought throughout the EU area or Norway and Iceland. If the issuing State is Norway or Iceland, and according to the checks that are carried out by competent bodies the requested person is in Romania, the judicial bodies of the two states will issue the arrest warrant that they will send for execution to that State.

5. Conclusions

As Norway and Iceland are not part of the European Union, the European arrest warrant could not be applied, therefore, in order to surrender suspected elements or prisoners, it was found a new way, that is surrender according to a warrant arrest.

The arrest warrant is set out through examined international instruments and it should not be confused with the European arrest warrant or the arrest warrant issued by a court in any case.

Arrest warrant issued under the examined international instrument is considered a judicial decision, which may be taken by the judicial authorities of any EU member state or by the judicial authorities of Norway or Iceland, for prosecution or executing a sentence against an individual who evades criminal prosecution or execute a sentence and it is hiding in a Member State, including Romania, Iceland or Norway.

Although the international instrument does not provide, we consider that issuing an arrest warrant procedure is specific domain, meaning that until issuing, there should be other executed judicial activities, which may vary, depending on the issuing State (if a member of the European Union or whether it is Norway and Iceland).

As a general conclusion we consider that the establishment of the arrest warrant (with all the critical remarks) is an important step in the activity of preventing and combating crime in Europe.

As a member of the European Union, Romania must apply precisely the provisions of the Agreement, under its national legislation.

6. Bibliography

Rusu, Ion; Rusu, Minodora-Ioana (2010). Extrădarea activă/The active Extradition. *Revista de Drept Penal Criminal Law Review*, no. 3/2010. Bucharest: Universul Juridic.

Rusu, Ion (2009). Mandatul European de arestare în urma modificărilor aduse de Legea nr. 222/2008/The European arrest warrant following the changes to the Law no. 222/2008. *Caiete de Drept Penal/ Notes of Criminal Law no. 1/2009*. Bucharest: C.H. Beck.

Rusu, Ion (2009). Transferul de procedure în materie penală/Transfer of criminal proceedings. *Revista Dreptul /Law Journal*, no. 6/2009. Bucharest: Universul Juridic.

Balan-Rusu, Minodora-Ioana; Rusu Ion (2011). *Particularităţile executării mandatului European de arestare în cazul infracţiunilor transfrontaliere/ P*eculiarities of the European arrest warrant execution for cross-border crime. *Revista Dreptul /Law Journal*, no. 9/2011. Bucharest: Universul Juridic.

***Agreement on mutual legal assistance between the EU and USA, Agreement on extradition between the EU and USA, Agreement between the European Union and Japan on Mutual Assistance in Criminal Matters.

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Some Considerations Regarding the Trial of Admitting Guilt

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Abstract: The research regarding the trial in case of admitting guilt was to attract attention to the limitation of the courts to rule other decisions than condemnation in such cases. It is mainly about people who admit their guilt, but cannot benefit from art. 18[1] Criminal Code. The procedure is relatively new (it was introduced in the Code of Criminal Procedure Law no 202/2010) there have not conducted research in this area. In addressing the problem there were used the methods of examination and observation, the results leading to the conclusion that the legal text should be improved. The implications of the work concern the practitioners' activity. It reveals a loophole which is reflected on the quality of justice.

Keywords: new institutions of the criminal trial; Code of Criminal Procedure; guilt

By the article XVII, section 43 of law no. 202/2010 regarding some measurements taken to accelerate the settlement of processes was introduced in the Criminal Procedure Code, article 3201, entitled "Judgment in the case of admitting guilt". The main objective of the new institution is, of course, the prompt settlement of criminal cases to be decided. Indeed, under this regulation, if the application of the defendant, personally or by declaring that it recognized the authentic act retained the perpetration of summons, the trial should be made based on the evidence brought in the prosecution phase, and so the judicial investigation is waived. The judgment can take place at the first hearing only based on the evidence brought in the prosecution phase and if the conditions laid down by the law are fulfilled, namely: the defendant fully admits to all the facts established in the document instituting the proceedings, he will not ask for further evidences except for documents in criminal proceedings and that the criminal action is not justified and aimed at an offense punishable by life imprisonment.

In such cases, the court gives the word to the prosecutor and to the other parties, convicting the defendant but reducing his sentence by one third in case of imprisonment or by reducing his sentence by a quarter in case of a fine.

Therefore, the advantages are on both sides: the act of justice is rendered with maximum celerity, thus giving efficiency to the fundamental principle of promptness, and the defendant benefits of a reduction of the sentence that will be applied to him.

Since the law expressly provides that in the trial of admitting guilt, the court is sentencing the conviction, therefore the defendant that fully admitted committing an act that lacks importance and that doesn't represent any degree of social danger of a crime, can't be judged by the procedure provided by article number 320 of the Criminal Procedure Code if he requests payment under the provisions of article number 11, point 2 a) the reference to article 10 paragraph (1), b) Criminal Procedure Code and to article 18 of the Penal Code. An argument in support of the reason of these provisions would be that in case we refer to a payment, the court must carefully examine all real and personal circumstances of the criminal case, which would not be achieved by passing over the judicial inquiry. The explanation seems superfluous, whereas the sentencing of a person implies, for instance, a thorough examination of the case, in all its aspects. However, the provision of article number 3201 of the Criminal Procedure Code, gives the judge the opportunity to pronounce a sentence, for the ones

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that have the right of a sentence reduction, even at first hearing. From this perspective, we consider that the exclusion from the trial procedure for admitting guilt on the basis of the lack of being a social threat is unjustified.

Most of the times, in case of acquitting the accused under article 11 section 2 letters a) in reference to art.10 par. 1). b) Criminal Procedure Code and art. 18 Penal Code, it acknowledges the facts established in the act of initiating the court and does not request any further evidence than those administered during the prosecution, presenting only situational pleadings (characterizations, relations with different institutions, certifications.). Therefore, the conditions provided by the art. 3201of the Criminal Procedure Code are fulfilled and the defendant wouldn't have, apparently, no reason to disagree that the trial would take place in abbreviated form according to this legal text. In fact, the defendant found in such a situation has a reason not to require the trial to be held in accordance with art. 3201of the Criminal Procedure Code, namely that, he has recognized the deed like it was established by the indictment and not wanting the administration of other evidence, tend to acquittal, which is impossible under the new regulations.

To be able to reach such a solution (acquitting on the basis of lack of the penalty threat), although the defendant fully recognizes the offense which was detained in charge and declares it doesn't require other evidence, the court will have to follow the usual procedure, that is after preparatory measures, clarifications, exceptions and other applications to go to judiciary research, to hear the parties, the witnesses etc., solving the case in a time, sometimes quite long. In this way the defendant who admitted committing the facts found in the act of complaint, but seeks a solution other than condemnation, is not able to claim that the trial should be made only upon evidence taken during the criminal investigation and can't benefit a shorter process.

Given the purpose of the institution recently introduced in the Code of Criminal Procedure, that of accelerate the solving process, we see no reason why the trials where the defendants, fully recognizing the charges withheld through the act of instituting the court, requires payment of the basis of social danger, may not be able to be resolved in accordance with the procedure referred in article 3201 of the Criminal Procedure Code. Therefore, the ferenda law, we consider that paragraph (7) of this article should be amended in order to provide the court to issue a decision under the law, and in case of conviction of the defendant to reduce the penalty under provisions in force. In this way it would be shortened the period of solving the criminal cases and in the situation where the defendant seeks acquittal on the basis of lack of danger of the penalty. If the conviction of a person who pleads guilty is sufficiently short and fast procedure, nothing precludes such a procedure to apply in a situation of acquitting a person on the basis of lack of danger of the deed, when he recognized and does not require evidences other than those administrated during follow-up.

2. The provisions of art. 3201 of the Criminal Procedure Code represents a preview of those covered in art.374 of the New Code of Criminal Procedure, with the same title, namely "Judgment in the case of admitting guilt," between them being an obvious resemblance. Since the Law. 202/2010 has been subsequent to the adoption of the new code, we have every reason to believe that art. 3201 of the current Criminal Procedure Code is a copy of the article 374 of the new code, which is a foretaste of what we wanted to achieve in the future, while testing the viability of an innovative rule for our legal system.

Also this text establishes the exemption of the abbreviated procedure that tends to other solutions than convicting the accused. Therefore, paragraph (7), article 374 of the new Criminal Procedure Code, features that in case of short procedure application "the court will sentence the defendant", excluding, for example, solving the case by removing the penalty. According to article 80 of the Penal Code, the court may decide to waive the penalty if the following conditions are met:

a) the crime committed shows a reduced gravity, given the nature and extent of the consequences produced, the means employed, the manner and circumstances in which has been committed, the motive and aim pursued;

b) in relation to an individual offender, the behavior intended previously of the offense, it's efforts to eliminate or mitigate the consequences of the crime and its means of correcting, the court agrees that a penalty would be inappropriate because of the consequences that would have on its person.

In order to give such an assessment to the offense and offender, certainly the court will also consider the fact that it fully acknowledged the deed. But, according to the law, it will not be able to resolve criminal proceedings pronouncing the solution to waive penalty than following the normal procedure and not the short one, applied to those who admit their guilt. Again, we need to put the problem of identifying the reason, or the reasons, for which the legislature wished that, with regard of defendants who admit their guilt and requests to have it applied the operative procedure under Art.374 the New Criminal Procedure Code, the court to adjudicate exclusively the sentence. For now we can only assume what we have already demonstrated: the concern for careful examination of all circumstances when it decides to waive the penalty, this is accomplished only in a complete procedure, without sacrificing any stage of proceedings, such as inquiry. But, as I pointed out, it will not be accepted that in case of convicting the defendant, the court could allow a rapid transition (in our case, dropping the judicial investigation) over the circumstances of the case to reach the solution of conviction. We believe that, both the case of giving up the conviction but also the punishment, the court examines with the same responsibility the cause, in all matters of fact and law. Under these conditions, the assumption that the legislator has been concerned with ensuring a deeper examination of criminal cases by the court in a situation or another do not stand up to any analysis. Our opinion is that it has manifested easily in the drafting of this text (art. 374 of the New Criminal Procedure Code) and the one from article 3201 of the current Criminal Procedure Code.

There is no justification that after the trial in case of admitting guilt, the defendant who asks that the judgment be made based on evidence taken during the prosecution may not benefit from the solution to the penalty waiver. In this regard there are to make a few practical observations. Firstly we are talking about crimes with a reduced gravity and criminals with chances of correction (art.80 the new Penal Code), but they can't follow the simplified procedure, even if they admit guilt, while for serious crimes, the mere recognition of the defendant shall provide access to this procedure. Secondly, with no possibility of obtaining the solution to the penalty waiver, defendants who meet all the conditions prescribed by the law in order to avoid the procedure established by article 374 of the New Criminal Procedure Code, which, "removes the burdensome and often unnecessary procedures for establishing legal truth", (Explanatory statement, 2010, p. 31.) just by opting for these procedures, burdensome and unnecessary, but which can reach the path to the waiving of penalty.

3. In the same line with the judgment in the case of guilt recognition, lies the special procedure of plea bargain agreement, provided by article 478-488 of the new Criminal Procedure Code. Conceived as "an innovative legislative solution" designed to ensure solving of criminal cases "within a period optimal and predictable," this special procedure in the minds of the editors of the new code represents" a remedy for the elimination of major deficiencies of the Romanian judicial system, respectively long duration of conduct of judicial proceedings." (Explanatory statement, 2010, p. 36)

As in the trial of the case of admitting guilt, carried out on the basis of evidences administrated during the prosecution, the trial on a plea bargain agreement is "an abbreviated from of trial for certain offenses", in order to relieve the courts.

Plea bargain agreement ends the prosecution, after the criminal action, between prosecutor and defendant, as a result of admitting guilt by the latter. He is to recognize and accept the legal classification of committing the crime for which it the criminal proceedings were put into motion, also the type, amount of punishment and execution of its form. Plea bargain agreement may be terminated only with the offenses for which the law provides for penalty a fine or imprisonment that doesn't exceed severs years. After concluding the agreement, the prosecutor shall notify the competent court that decides through sentence, following non-contradictory proceedings in open court, after hearing the prosecutor, the defendant and his lawyer and the civil party, if present. Analyzing the cause, the

court may accept a plea bargain agreement and also sentence the defendant, or may reject the agreement and send the file to the prosecutor for further criminal prosecution.

When the court accepts the agreement and sentences the defendant, the court applies a penalty prescribed by law whose limits are reduced by one third in case of imprisonment and with quarter in case of a fine. Thus the special procedure of plea bargaining agreement does not only simplify and reduces the trial stage, as in admitting guilt trial situation, but also the prosecution phase. The legislator was guided in this process by the economic benefit, looking to encourage all parties, and in this way he saves important material and human resources. But, exclusively concerned about this purpose, he excluded the possibility that at the end of the plea bargain agreement procedure to find a different solution other than condemnation, and to waive the penalty. In other words, if the offense and the offender are placed under art. 80 of the Penal Code, the defendant admitting that he committed the offence and accepting the legal status that set into motion the criminal action, if concluding a plea bargain, the court cannot rule other than conviction. In such a situation, it is understood that the defendant will avoid a plea bargain agreement, preferring the common procedure, with a longer duration but at the end of which it can lead to the abandoning of the penalty solution, a solution more favorable than the reduced sentence. We don't insist on identifying the reason or reasons considered by the legislature for this statutory framework, because in our opinion, they have not existed, the situation is due to the ease and haste in drafting these very important legislation papers.

4. The exclusion from the abbreviated trial procedure for admitting guilt, or from the special procedure of plea bargain agreement of people who recognize the facts, but tend toward the solution of acquittal on the basis of lack of social danger or penalty is waived without doubt, an error that will be eliminated by changing the texts to which we referred. But such an operation will occur only after confronting with reality, after the "side of controversial issues of doctrine and practice "will acquire "a consistent shape", so after a certain period of time (Cioclei, 2009, p. 2.). Till then, the practioners and the theorist will deepen the "letter and spirit" of the new regulations, and the legal practice will accumulate a number of solution that will definitely reflect the shortcomings indicated in these lines.

Bibliography

Cioclei, Valerian (2009). *Preface to the Criminal Code (Law no. 286/2009)*. Bucharest: C.H. Beck.

Neagu, Ion (2008). *Criminal Procedure Treaty, General Part*. Bucharest: Universul Juridic.

Udroiu, Mihail (2011). Little reform in the criminal trial. *The Law Journal*, no. 1/2011, p. 94.

*** (2010). *Reason to the new Criminal Procedure Code (Law no. 135/2010)*. Bucharest: Hamangiu.

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Comparative Law. Europe Union Law

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Abstract: The analysis of the European law, jurisprudence created wants to have that purpose, the idea of justice unique at European Union level, based on the comparison of the two main systems that act as current EU members, namely: the Roman-Germanic legal system and common law system (common-law). Observing the link between the European legal order and its Member States to ascertain the relationship based on the principle of direct integration of European law into national law of Member States and the principle of primacy of European law over domestic law, principles which were stated by the Court of Justice. Increasingly we can see that, besides the current territorial globalization, and globalization of justice is based on general principles of law and would, establish common ground for all other existing legal systems, aiming to equilibrium coexistence of all citizens, in order to respect fundamental rights and freedoms.

Keywords: European legal order; jurisprudence; common law; globalization of justice

Since the oldest times, comparative law has an important object of research but also the practice. Through the adopting different the legal rules, the peoples had discounted most of the times the way they were regulated some problems in the countries which neighbored. For example we have the *Law of the XII tables*, which, according to Roman jurisconsults, was in a great measure made by the Athenian laws of Solon. So after comparing various foreign legal systems, the Romans, a people of lawyers as Plato said, have developed jus gentium (law of nations - was intended to regulate relations between citizens and pilgrims).

Later, in *Novel 89*[2], the Byzantine law regularize the situation of natural children, consecrating a softer regime in their favor, the result of comparing the existing laws in Syria and Phoenicia (Otetelisano, pp.17,140,141.).

Then, Victor Dan Zlatescu concludes that as a country or region is essentially a provincial phenomenon" (Călinoiu et al., 2007, p. 44 and next). This justified Pascal could say: *truth is an error on this side of the Pyrenees beyond themselves*. Indeed, "the legal rules - eventually the subjective phenomenon - is the result of some social needs, the political and psychological pressure, and finally a certain mentality. A border can be drawn arbitrarily certain mandatory rules on a territory and others, can opposite one neighboring. There is no criteria, sometimes there is no possibility of reconciliation. This creates conflicts of laws, with or without conflict of sovereignty and thus becomes necessary private international law (Zlătescu, 1997, p. 11).

Continued on this idea, Zlatescu notes that „The history of shows that law has all times yearned for the universal law, manifested in other words an aspiration to overcome the national condition, to become a universal phenomenon. What else but that right was Roman law, which applied to large numbers of people not just than *rationae imperii* but and *imperii rationis*, because its valence logic and fairness" (Zlătescu, 1997, p. 11).

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[2] Novel 89 - (novela = new law) system was part of the Byzantine law given by Emperor Leon VI (+912)

The modern era is characterized by the fact that despite the diversity of legal systems, it still managed some *uniformity* in some domains, or even a legislative unification through a series of international treaties. Of comparative law studies and research have had a healthy dynamic, one of the most important role in this regard back conferences specialty associations have promoted the need for more consistent comparison of systems law (Călinoiu et al., 2007, p. 44 and next).

In this way exemplify this the events of the last decades of the nineteenth century saw a revival of the legal comparison had as a top the first International Congress of comparative law which took place in 1900 in Paris. Used as a methodological perspective favorite to the social sciences, especially by schools the juridical ethnology (Constantinesco, 1997, p. 121 and next) and comparative history of law, comparative law has acquired gradually the institutional expression that has legitimized and strengthened its position in science of law (Zweigert & Kotz, 1998, pp. 57-58). Therefore in France was born in 1869, the *Society of Comparative Legislation* (*Societe de legislation comparee*) who edited the international journal *Revue internationale de droit compare* periodically occurring today. In Germany is similar to the French society also appear in 1984 bearing the name und *Internationale Vereinigung fur vergleichende Rechitswissenchaft und Volkswirtschaftehre*[1]. French model with the same appear in England in 1984, *The Society of Comparative Legislation* which, in turn, edit own periodical called today *International and Comparative Law Quarterly*. The consequence codification that encompassed all over the world, was reduction in comparison approach, and actually found of the names of various societies and journals, with a simple translated form or juxtaposition of codes and foreign law. (Constantinesco, 1997, pp. 93-94).

As regards concept Of comparative law, many authors specialty have enumerated numerous views and opinions (Constantinesco, 1997, pp. 93-94; Otetelisano, p. 200).

Thus, Raymond Salleiles (Salleiles, 1900, p. 167) consider, for example, comparative law as a „common law of civilized humanity" and each country to compete in the formation of this type of law. Edward Lambert considered that the comparative law (Lambert, 1921, p. 159) is a social science that establishes general laws, as well as a higher form of *juridical art* and the very idea of *civilized nation* would be sufficient to provide the basis for a *common law*. Leontin-Jean Constantinesco, stressed that „As in the natural sciences, and the comparative law is subordinated to any particular problem big problem, which is to comprehend the universe as a whole. In the science of compared the knowledge of comparative law the legal isolated institutions is not just a step to knowledge and understanding of the whole: legal order first, then the legal system concerned" (Constantinesco, 1997, p. 93-94). Also the purposes of a comparison as universal laws and have been pronounced and the Italians doctrinaires, Giorgio del Vecchio and Francesco Cosentini. (Călinoiu et al., 2007, p. 47)

Three trends of the comparative law in Germany (Călinoiu et al., 2007, p. 47) is distinguished by Bernhoeft: an *ethnological* tendency, related to race that explains why the peoples with the same level of civilization have similar institutions, a *historical* tendency that discloses as possible, even to the same level of civilization, as the evolutions of some peoples to be different and the *dogmatic* tendency that would consider juridical institutions reporting to the social environment in which every people lives.

So the comparative law has an object and its purpose, representing a scientific discipline which uses of course elements related to foreign law, but only insofar as they serve the purpose of comparative. With great force this idea is revealed by Professor Pierre Legrand at the University Panthéon-Sorbonne, which criticized (Legrand, 2001, p. 7) the practice of the present as simple comparative studies of foreign law synthesis attempts.

In the opinion of the famous scholar of philosophy of law, the Italian professor Giorgio del Vecchio, the comparative law should become a universal law compared to real science, by which would be identified legal elements of general value, applicable to all humanity. But even Giorgio del Vecchio admits that such a right would be a universal science of compared different from the actual philosophy

[1] International Association of Comparative Law and Economics.

of law, finding him in the latter only the fundamental principles on which would and should produce some findings.

So we can say that the comparative law (Constantinesco, 1971, p. 206 and next) (Schnitzler, 1961, p. 106 and next) is, first of all, a way to gain knowledge in the extent to which exposes this characteristic, it is capable to offer a variety of solutions for problems more and more diverse than those offered by a science juridical the national preoccupation. Purpose of comparative law is to enrich and expand the variety of solutions and provide the person who uses this critical opportunity to find a *better solution* to a specific problem. (Cappelletti et al., 1986, p.l and next, p5 and next.)

Furthermore, the comparative law also aims, the specific goals relevant to the practice. Thus, comparative studies are often useful to preparing the legislative process and this method of comparative law facilitates so as to create a new law but and the way and supranational rights of a union, finally, the comparative law can be a solution for judges in the interpretation of law and creative in their role of *creators* of law (Otetelesanu, 1936, p. 55 and next).

When it comes to drafting national law, legislators have used frequently in many domains and many countries from materials developed by lawyers who use the method of comparative law.

In the law of international organizations, the use of *comparative law* is on the basis the legal policy, a necessary precondition for any creation of law, so used, of the one part, to the creation of the organization itself (founding treaty formulation) and on the other hand, for the autonomous rules of internal field (a right secondary).

The reason is that, knowledge gathered from the various national laws of Member States in an international organization is not only a "reservoir" of ideas welcome for legislation formation of this organization. On the contrary, a more detailed analysis of the national legislation will demonstrate what values are suitable for an implementation of inside a positive community member and which the trials are most appropriate to ensure to a maximum realization of the common principles. With the other words, the *comparative law* can bring a decisive contribution to the development and effective functioning of an international organizations and to national legal the framework of its approval.

Such linked to aspects of regional unification and harmonization of law, must be being stressed the importance that it should have to study comparative law in Romania, in its quality as a member of the European Union. Unification of Europe, compared with as law instrument, required lawyers know all of member countries the legal systems belonging to the Member States.

Dual comparative law based on French civil codes and geman comparison, will take note of the features and common law juridical family otherness.

Considering the specific objectives of the construction of political, economic and juridical in the European Union, the comparative law has concentrated on the European continent, highlighting the similarity in law and, consequently, the building of a *unified European law*. In the the same context of European juridical construction, an evaluation of the right postmodernist postulation highlights the need to maintain diversity in law and *the juridical pluralism*.

Starting from the past, from the idea of unity of Europe[1] the comparatists could distinguish a European legal configuration which favored the rise of the two juridical structures cognitive or of two forms of knowledge in law, each having its own principles of storage, reproduction and of extension: of the one part, tradition roman law, the the invoice nomotetica, and on the other part, the common law tradition, the ideographic nature. Legrand also stated in his book *Comparative Law* as "As goes without saying as we ought to reserve the name of research priority chip" comparative „of confrontation the

[1] European idea, by using the phrase,, United States of Europe is quite old (1849). The idea of European unity was expressed in sec.al eighteenth century by JJ Rousseau, I. Kant, in sec.al nineteenth century by Saint-Simon, Proudon or Victor Hugo (1849), at 7. 09.1929. Aristide Briand proposed the League of Nations League of Nations General Assembly to create a federal link between European states which do not affect, but the sovereignty of these states. Over the years this idea was taken and used in different circumstances. Thus, on September 19, 1946, Winston Churchill in his speech at the University of Zurich, said the need for establishment of the United States of Europe, and as its first stage, a partnership France-Germany.

phenomena that occur on both sides of the demarcation lines that appear between the two embodiments of the language of reality that is the juridical tradition (legal tradition is altuf any) is not excessive and apply to Europe, of European Community has used a formula that Nietzsche, in his time, to figure out what will be *the age of comparison*. So for the first time, the two European juridical traditions - a roman-born and one English source - are required to interact effectively within the parameters defined by the *Treaty of Rome*".

A factor of comparison of of European law and the birth was considered to be the development level of a system of law or another. After Roscoe Pound, the comparison must take into consideration, therefore, only mature legal systems or those belonging to civilized nations. From there went and the idea as "like must be compared with these, concepts, rules and institutions under comparison must be linked *the same level of development of legal, political and economic*" (Gutteridge, 1938, p. 73.). Risk analysis of the this kind of things was that drove the comparatists for comparisons all occidental the legal systems, namely those belonging to civil law and common law, and to ignore others. „... Comparing the law of the old races of the East with European law would not be productive, maintains, therefore, Gutteridge" (Gutteridge, 1938, p. 73.).

The challenge of unification of European law by the appearance of EU law, having as a instrument comparative law, required lawyers of member countries know all the legal systems belonging to the Member States.

The two main systems of law apply to EU Member States had compared and found common points in the birth and development of a new law, European Union law, juridical traditions: roman and common law must be understood as two manifestations of European discourse on unification of the law.

Essential characteristics of Roman-Germanic law:

- The public law is separate from the the private law. Ulpian considers that the public law regulates the organization of the state and the private law refers to citizens, it is, therefore, consists of principles of civil law, the law of nations and the natural law.
- The unity of private law, is another feature of the Roman-Germanic law, meaning the existence of fundamental common principles underlying the civil law, the commercial law, the private international law, even though many states have separate codes that regulate their commercial relations, separate of civil codes.
- Not all rules of civil law, existing laws states are roman-born so in the civil or commercial codes there are rules which have their source in the local customs, for example, the union of family assets in French law is rooted in traditions French, many states have taken the canonical rules about marriage, affiliation and even succession, which the differs from Roman law. These differences do not affect the family features of law in countries that use the Roman-Germanic law, as is common conception of law, legal vocabulary and method followed is common to find a solution in the process also common.
- Although almost all modern legal systems have abandoned collective responsibility for violating legal obligations, specifically Roman-Germanic law is how to design material obligations.
- Common form of regulatory, the legislative technique is another common feature Roman-Germanic family in that almost all countries within this family have codes, which the establish rules for of civil relationships, of family and property.
- The Roman-Germanic law has preserved formalism few characters from Roman law. Thus, the human will create legal documents without ever actually be expressed in a form that is solemn or the magistrates participation. However, marriage is a solemn act, the real estate transfer is made with authentic, contracts with a certain amount must be made in writing, etc.
- The principle of regulation subjective rights is characteristic Roman-Germanic law. In English law, the judge creates the right applicant from the obligation of the defendant, to be proved. In the Roman-Germanic law, rights are the subjective the owner may claim restitution of property or subjective right on the basis of their son has the right to the legacy parent.

The principal feature of English law has developed along two lines: to live honorably, which has found expression in the rules of *Equity*, and not harm another and gives that which is, or the precepts that formed the *Common Law* rules.

- English law was formed as a judicial law, which has led to the priority of procedure, which means that we must first determine the outcome of established procedure.
- English Sovereign could not only use a particular law, which actually was a law of the case. He exercised the supreme jurisdiction, giving in each case an individual solution. From here, they developed two principles: English parliament, which is the sovereign power, can only give individual laws, establishing specific rights, so-called status, which refers to how to resolve disputes, on the other hand, courts decide on behalf of the sovereign, so only their decision, the concrete application of the will it can be a rule of law. Presently, English judge can refuse to apply a law emitted by Parliament, if it does not conform with the judiciary practice or violate *Equity*.
- English law was established as a customary law and judiciary. Unlike the continental European law, which is a set of rules that the judge examine them to choose the solution, English law do not the norm becomes obligatory only when an application acquires precedents. English law was created by judges, not by lawyers.
- Another a feature of English law is the absence of divide, known in continental European law, in public law and the private law, in turn, but the private law is not subdivided into commercial law, civil law,etc..
- Finally, another specific feature of English law is that it only applies in England and Wales.

Always there was very large differences between the traditions of a region than customs of another, even more so between existing customs of territories of different states. However, is the history of Europe law in reality a unity and is a creation old while histories of national laws is the late scientific creations and forced the idea of sovereignty of states. Roman law taken by most European states exercised with different intensities in different periods, in various forms, directly or indirectly, a profound influence on European legal systems. In parallel with upgrading and updating law of each state to develop a European legal science taken as a method and systematic corps of rules ordered and systematic organized, the Roman rule in their substance but European in scope. (Constantinesco, 1997, p. 31). With the advent of legal codes, these differences have widened, leading in the second half of the nineteenth century to a total ignorance of foreign law systems. The motivation of appearance codes resides in rationalism and in the principle of legal certainty, than claimed and exploited by political power. Assuming the diversity the states will strengthen laws autonomous individuality, distinct from each other, but limited in time and space in application. Each national legal systems will become the center of their interests, the national legislations develop in parallel, independent, so that the comparative law in this period was justified by the simple curiosity of jurists, on the fragmented and abstract fields.

As a result of comparing the two major systems of law but also with other systems of law the Court of Justice gave the definition of EU law, according to which this order is a legal entity, autonomous and integrated into the legal system of Member States which stem of the following characteristics its:

- European Union law represents a legal order, an „organized and structured set of legal rules with their own sources, equipped with organs and procedures able to issue them, to interpret them and to find and sanction if necessary, violations”[1].

In this sense, the Court of Justice stated that the treaties are not limited to creating the mutual obligations between the various topics which apply, but establishes a new legal order that regulates the

[1] ECJ established the principle of primacy of EU law in its judgment against Costa Enel dated July 15, 1964. In this decision, the Court finds that the legislation issued by the European institutions are integrated into the legal systems of Member States which are bound to respect. European law has supremacy over national law then. Thus, if a national rule is contrary to European provisions, Member States authorities to apply European mood. National law is neither canceled nor repealed, but its character is obligatory suspended.

powers, the rights and obligations of these topics, and the procedures necessary for a finding any the possible infringement.

- EU legal order is an order independent legal entity both in relation to international legal order, and the internal law of the Member States. EU law is distinguished from the public international law of the following points of view a) - while international law regulates the relations between states, so their the external relations, the European Union law regulating relations within the European Community is not a national law, no the external law, but also their right of each member, as their national law, EU law is placed in a position much closer to national law, not to identify with it yet, b) - subjects of EU law and can be natural or legal persons, while the area of international law is strictly limited to subjects to states (primary subjects) international organizations nation to fight for national liberation, insurgency and warring (subtopics), c) - while norms of international law originated in cooperation of States in their agreement will, and involves maintaining full sovereignty of States, European Union law is based on a skills transfer, on the transfer of sovereignty from Member States by EU institutions European elections, they the latter having the right to adopt legislation autonomously, within the limits set by European Union treaties, d) - while international law lacks sanctionatorie side, EU law establishes a mechanism of enforcement of its rules and sanctions and providing in case of non-compliance.

Autonomy of EU law is manifest in relation to the national law of Member States, but this autonomy is not complete, absolute, for European elections EU the legal rules constitutes an important component of of the national legal systems of Member States, which are applied in a obligatory of the national courts. Substitution the national law with EU law is not completely, European Union law regulating those intervening only the in social relations where occurred a transfer of power from the State Community and the European Court of Justice has no jurisdiction to verify the legality of legal norms of the Member States.

- The European Union law is a straight-in the national law of the Member States, this feature is the essence of The European Union law. The European Union law has a special power of penetration in the domestic legal order of Member States and it is expressed in the fact that the rule of national law automatically acquires status positive law in the internal order of the Member States (it is immediately applicable), creates by itself rights and obligations for private persons (it is directly applicable) and has priority over the national norm (is the priority application).

The dialogue between the legal traditions of Roman law and of common law - between the speech of commentary on the text sacred and the speech rhetoric - is undoubtedly to subscribe in the forefront of every project of European integration: „Mutual knowledge of the two different systems, knowledge to that must be inclined the investigator spirit of jurist of this century, is necessary and sufficient elements to form the comparatists modern mentality" (Sarfatti, 1938, p. 63 and next). Thus the tradition of Roman law, and especially his the civil rights, to avoid assuming the appearance of a civilizing mission in the imperialism and colonialism to the cultural and political, to name just the idea of civilization, they wanted to eliminate the peoples, ethnic groups and cultures for simply because they were different and replace world view born of lived history, with the world view imposed by a dominant culture. Rather it is for the Roman rights to operate in an environment characterized by civic attitude and civilian, as manifestations of civilians tends to recognize of individual differences of sensitivity, that is a generalized form of respect to the other, considered not as an opposite outside , but as constitutive of self.

Current remains famous formulation of Andre-Jean Arnaud, such as „Europe juridical will not exist unless will itself the pluralism and the complexity that even at origin, have been included in history."

Bibliography

Călinoiu, Constanta; Duculescu, Victor & Duculescu, Georgeta (2007). *Comparative Constitutional Law - treated - Volume I*, Fourth Edition, revised and added. Bucharest: Lumina Lex.

Cappelletti, M. et al. (1998). *Integration through law, European and American federal experience. A general introduction, Integration through law*. Vol. l. Berlin.

Constantinesco, L.J. (1971). *Rechstvergleichung/Law.* Vol. l, Berlin.

Constantinesco, J.-L. (1997). *Comparative Law Treaty/ Introduction to comparative law*. Vol.1. Bucharest: All.

Gutteridge, H.-C. (1938). La valeur du droit compare/The value of comparative law. *Recueil d'etudes Edouard Lambert, Introduction a l'etude du Droit compare/ Collection of studies Eduard Lambert, Introduction to the study of comparative law*. Vol I. Paris: Librairie generale de droit et de jurisprudence.

Lambert, Eduard (1921). *L'institut de droit compare. Son programme. Ses metodes d'enseignement/The Institute of Comparative Law. Its program. Its teaching methods*. Lyon.

Legrand, Pierre (2001). *Comparative law*. Bucharest: Lumina Lex.

Otetelesanu, Al. (1936). *Compared Civil Law Course*. Bucharest: Culture of the People.

Otetelisano, Alexandre (1940). *Esquisse d'une théorie générale de la science du droit comparé/Outline of a general theory of comparative law science*. Paris: Sirey.

Sarfatti, Mario (1938), *Le droit compare dans son essence et dans son application /The comparative law in his essence and in his application*, in Collection of studies Edouard Lambert, Introduction to the study of comparative law, Volume I, General Library of Law and Jurisprudence, Paris.

Salleiles, Raymond (1905). Conception et object de la science juridique du droit compare/ Design and object of legal science of comparative law. *Procès verbaux/Official Reports*, Vol. I, Congress in Paris.

Schnitzler, A.F. (1961). *Vergleichende Rechtslehre/Comparative jurisprudence*. 2nd edition. Basel.

Zlatescu, Victor Dan (1997). *Comparative private law*. Bucharest: Oscar Print.

Zweigert, K. & Kotz, H. (1998). *Introduction to Comparative Law.* Oxford: Clarendon Press.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

Civil Liability for Environmental Damages

Daniela Ciochină[1]

Abstract: We debated in this article the civil liability for environmental damages as stipulated in our legislation with reference to Community law. The theory of legal liability in environmental law is based on the duty of all citizens to respect and protect the environment. Considering the importance of environment in which we live, the liability for environmental damages is treated by the Constitution as a principle and a fundamental obligation. Many human activities cause environmental damages and, in line with the principle of sustainable development, they should be avoided. However, when this is not possible, they must be regulated (by criminal or administrative law) in order to limit their adverse effects and, according to the *polluter pays* principle, to internalize in advance their externalities (through taxes, insurances or other forms of financial security products). Communication aims to analyze these issues and legal regulations dealing with the issue of liability for environmental damage.

Keywords: ecological damage; environmental protection; environmental damage; act of guilt; liability for environmental prejudice

Civil liability for environmental damages is a way to apply the "polluter pays" principle from the Treaty establishing the European Community. Its application is defined by Directive no.35 of 2004.[2] The directive states that the environmental damages can be covered by the remedy, which in case of damage to water, protected species or natural habitats, consists in reintegration measures aimed at restoring the damaged natural resources, ecological and human public services to initial state (primary remediation) or compensation measures if primary reabilitation does not lead to a complete restoration (complementary remediation[3]) and compensation measures for interim losses of natural resoaurces and ecological and human services provided (remedial compensation[4]). In case of damage to soil, the remediation consists in soil decontamination until there is no significant risk of affecting human health.

The environmental degradation is today one of the major problems of mankind. Environmental protection is a matter of national interest, being an obligation of authorities, central and local government, and all the individuals and business organisations.

The operational need to protect the natural environment has lead components of a complex of specific legal rules. Civil liability for ecological damages apply to environmental damages and for risk of damage due to commercial activities, since can be linked between the damage and activity.

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[2] EC Directive 35/2004 does not propose any material compensation for environmental damage. Can compensate the costs to restore impaired natural resources and public services provided.

[3] The goal of complementary remediation is to provide additional repair a global natural resources and / or services, also to an alternative site, similar to those that would have been provided if the site was damaged, aiming to return to state original. Where possible and appropriate alternative site should be geographically linked to the damaged site, taking into account the interests of the affected population. First, will be considered measures providing resources and / or services of the same type, quality and quantity of the damaged and secondly, other resources / services at least equivalent to those damaged.

[4] Purpose of remedial compensation is to improve natural habitats and species of damaged site.

Environmental damages include direct and indirect damages caused to aquatic environment, species and natural habitats protected by Natura 20001, and direct or indirect contamination of soil, which could pose a risk to humann health.

There are created two systems of accountability. The first system, without the proof of fault, applies to harmful or potentially harmful commercial activities, listed in the community legislation. In this case, the carrying out the business can be held responsible even if he did not commit a mistake. The second system requires proof of a fault or negligence applying to all commercialactivities, if there are damages or an imminent risk to species and habitats protected by EU legislation. In this case, the activity performer is held responsible only if he commited a fault or negligence.

In the international legalspecialized literature, the legal liability is considered as another way to achieve an understanding of environmental protection and development, especially in the harsher legal sanctions applicable in this field.

Legal sanctioning of harmful acts for the environment monitors the polluter education and all the citizens generally to form an ecological consciousness[1] for environment generally, without you can not perform complex tasks of preventing pollution and improve environmental conditions.

According the theory of liability, the legal constraint contains a plurality of rights and obligations, the substantive and procedural law and appears as a result of having committed illegal acts, leading to legal sanctions.

Any violation of legal norms of environmental law may give rise to a legal constraint established between the state and the author of illegal act.

Governmental Emergency Ordinance no. 68/2007[2] on environmental liability regarding the prevention and remedying of environmental damages established legal framework on polluter liability for damages caused.

Outlining the legal frame, GEO no. 68/2007 provides that the state recognizes for any person the right to a healthy and ecologically balanced environment, ensouring by art 5: a) access to environmental informations, according to confidentiality requirements provided by the applicable law, b) the right of association for environmental organizations, c) right to be consulted in marking decisions on policy development and environmental legislationregulating issuance of documents, plans and programs, d) the right to adress, directly or through environmental organizations, to administrative authorities or courts regarding environmental issues, whether injury occurred or not, e) the right to compensation for suffered damage.

In the tort liability in environmental law is sanctioned (Marinescu, 2010, p. 438) a reprehensible conduct, antisocial for the subject of law (individuals or organizations) who by their illegal acts (commissionn or omission) cause damages to both environmental factors and the environment as a whole

Defining the concept of pollution, art 2 pct 51 of GEO 195/2005[3] on environmental protection, as amended, shows that pollution is a direct or indirect introduction of polluants (substance, prepared as a solid, liquid, gas or vapor, or energy, electromagnetic radiation, ionizing, thermal, sound or vibrations introduced into the environment change the balance of its components and harm living organism and material goods) that can harm human health and/or environmental quality, materials or cause damage, prevent the use of environment for recreation and other legitimate purposes.

[1] Ecological consciousness involves developing a responsible attitude on the environment, advocating for respect for nature, a protective attitude towards the environment of the people. Preservation of natural heritage protection is present, biodiversity conservation and development of public commitment to environmental protection and conservation.

[2] Emergency Ordinance no. 68/2007 of 28.06.2007 on environmental liability with regard to the prevention and remedying of environmental damage was published in Official Monitor no. 446 / 06.29.2007 and was approved by Law no. 19/2008 of 29.2.2008 published in Official Monitor no. 170 - 05/03/2008.

[3] GEO no. 195/2005 was published in Official Monitor no. 1196 / 30th of December 2005.

The damage is defined in mentioned GEO in the same art.52, pct 52, in sesnse that the injury suffered is "a measurable change of a natural resource or a measurable impairment of function of a resource for the benefit of other natural resources", quantificable effect on cost of damage to human health, property or environment caused by polluants, harmful activities or disasters.

The constitution provides explicitly the duty for all individuals and organizations to protect and improve the environment. The constitution creates general legal framework for protection of victims of actions that caused environmental damage[1].

The term "recovery environment" used in the constitutional text can be interpreted in terms of contribution to tackling sectors ecological degradated, also for the interventions of civil institutions inresolving civil tort which have caused damages to the environment.

The Constitution regulates the right to a healthy environment in art 35[2] in Chapter II on fundamental rights and freedoms. In the Title IV of fundamental law concerning "Economy and public finances", provided in art 135 paragraph 2 letter e) that the state must ensure "environmental protection and restoration and mentaining ecological balance".

The Constitution imposed specific obligation to owners for environmental protection in art 44 paragraph (7): "The right of property compels the the observance of duties relating to environmental protection and ensure good neighborliness and other duties which the law or custom charged to the owner.

In the absence of special regulations, will recall the classic principles of civil liability (in cases where damages occur to failure to comply with laws relating to conservation, proetction and development environment) as follows:

- rules on neighborly relations (essence of rules concerning balancing the interests of the victim of pollution to polluter, establishing the acceptable limits of pollution, and the requirement that damages be paid by the pollutant);
- Rules governing the civil liability remedy. Who is responsible? (Liability subjects). By definition, the natural environment is not subject to claim repair, but a fundamental value that is protected by law, domestically and internationally.

Under national law, the subject may be State, a territorial administrative unit or person or entity, public or private who suffered an injury produced by an unlawful act, failure to comply with environmental rules.

Subject in international law is in principle entitled to repair environmental holder, that State.

How can tort liability in environmental law? (Elements of attracting liability).

For civil liability must be met the following conditions:

- to have committed an unlawful act;
- to have an injury;
- to be a causal link between the illegal act and injury;
- to be guilty of illicit offender;
- at the time of the offense, authorities have been able tort.

The right of responsible environmental events includes:

- fault which produces environmental damage - acts which entail subjective (on the basis of fault);

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[2] According to Article 35 of the Constitution:
"(1) The State recognizes the right of everyone to a healthy and ecologically balanced environment.
(2) The State shall provide the legal framework for exercising that right.
(3) Individuals and legal duty to protect and improve the environment.

- ordinary activities, normal, legitimate, but sometimes can be causes of injuries to the environment - entail objective facts (on the basis of risk), without any fault.

In environmental law covers injury suffered damage to the natural environment through pollution and damages incurred by the person or property.

Damage will be assessed by estimating the costs necessary for recovery. Regarding the extent of damage caused, it is hard to do there is a large number of unknowns. Some elements of the environmental components cannot have economic value. Some damage to the environment or its components may not be caused by wrongful act of one person, but to be a causal link between injury and wrongful conduct of several persons. It is necessary to constitute infringements of the people as a whole, an indivisible whole, because of injury. To consider a joint appeared to be caused not need people to act through simultaneous actions, the same intensity or that the facts are linked by a common purpose or that the person who caused the result, together with others, others to know the facts.

In connection with the causal link between the illegal act and injury, must take into account the fact that any action takes place in an infinite number of relationships with other action or a series of external factors.

Tort liability forms, particularly in the area of environment.

• subjective liability for environmental damage is rarely applied, the plaintiff (victim) must prove that actual injury was caused directly and personally, and the offender's guilt, the amount of damage and the causal link between facts and injury. The proof is difficult for damage caused by pollution (due to different nature of pollutants). Subjective element of liability is negligence. Wrongful and unlawful nature of the tort is distinct conditions without which there is no liability. For illegal act become guilty must have produced some echo the psychological (especially in intellect and volitional aspect), that is to get a subjective contour.

• Responsibility objectives apply to the regulation of liability for damage caused to the environment. Objective liability is based on the idea of risk in the sense that the activity that creates a risk for another, without fault, is the author or responsible for the damage it can cause

A feature of civil liability for environmental damage is that it no longer guided by the Civil Code relating to tort, under which victims can obtain compensation for environmental damages unless the defendant proves guilt.

Government Emergency Ordinance no 195/2005 establishes in article 95 paragraph 1, two principles governing civil liability for environmental offenses objective liability independent of fault and several liability in cases of multiple offenders.

Civil liability for environmental damage is a special, different from the tort liability regulated in civil codes, environmental law aiming repressive social values attached to nature protection and environmental responsibility that aims to balance economic and social needs and preserving the environment need protection. So far, we can say that for the protection and conservation of environment operate civil, contravention or criminal liability, which add a number of specific environmental law sanctions.

Social responsibility involves social sanctioning of individual attitudes inconsistent with established social norms. Because this attitude a person can be held in the various social relations and social responsibility take different forms, being able to speak of political responsibility, moral, ethical, civil, and of course, legal.

Legal liability can arise if the non-observance of the rules of right conduct, i.e. for violating the law. In Chapters XIV-XV of Ordinance nr.195/2005 are three forms of liability established in the following formula: "violation of this law involve civil or criminal, as appropriate". Since disputes arising from the issuance, revision or suspension agreement/ environmental authorization shall be settled on Administrative law, according to GEO no. 190/21.11.2005, where justified and to prevent an imminent

damage, the applicant may ask the court to order the administrative act be suspended pending the outcome of applications.

Liability offenses consist in applying sanctions to persons guilty of violating the laws which provide for offenses and sanctions. This form of liability has advantages in the sense that the procedure of finding and sanctions offenses more quickly than other legal proceedings and enforcement measures are required, allowing for emergency intervention.

The contravention designates the offense committed by guilt, which presents a lower danger to society than the criminal offense and is provided for and sanctioned as such by laws.

It's about violating legal regulations to protect the environment with guilt, being excluded liability without fault. By applying sanctions to environmental offenses pursue certain goals: determine the pollutants to promote technologies and techniques that protect the natural and human environment, creating an economic balance factor, so that those who pollute do not obtain higher returns than units comply with legal requirements on, getting funds to be used to finance investments pollution, etc.

Contravention liability system plays important liability regulations with an economic role and is also a means of preventing serious. Individuals and organizations operating rules hostile for environment, or which do not meet the legal obligations arising from the mutual relations of the legal liability environment are likely contravention whose surface is proportional to the pollution caused, consequences and social danger of that fact. Offences and individuals that meet legal reason is that it is for them a series of specific obligations, to ensure normal development of social relations on the environment.

Contraventional penalty shall apply to persons authorized on behalf of administrative power bodies, without research polluter's guilt. Government Emergency Ordinance no. 195/2005 establishes a series of cotraventions punishable by fine amounts established by law.

Liability for pollution is an objective, it can occur whenever the environment was polluted.

Bibliography

Marinescu, D. (2010). *Environmental law treaty.* Bucharest: Legal Publishing House.

***EC Directive 35/2004 does not propose any material compensation for environmental damage. Can compensate the costs to restore impaired natural resources and public services provided.

***Emergency Ordinance no. 68/2007 of 28.06.2007 on environmental liability with regard to the prevention and remedying of environmental damage was published in Official Monitor no. 446 / 06.29.2007 and was approved by Law no. 19/2008 of 29.2.2008 published in Official Monitor no. 170 - 05/03/2008.

***GEO no. 195/2005 was published in Official Monitor no. 1196 / 30th of December 2005.

***The Constitution of Romania.

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Aspects of National and Community Trademarks

Constantin Anechitoae[1], Calin Marinescu[2]

Abstract: When Romania joined the EU on January 1, 2007, all Community trademarks (CTM), with the filing date before that date, were automatically extended and have effects in Romania. National brands do not extend across the EU. In order to obtain a Community trade mark, a single application is filled in at OHIM. It can convert a Community trade mark application into national trade mark. The registered community trade mark has effect in all EU Member States, including Romania. The national trademarks registered nationally - at the State Office for Inventions and Trademarks (OSIM) - are effective only in Romania and have no effect in the European Community.

Keywords: national trade mark; trademarks; designs; OHIM; EU

1. Introduction

By registering a community trade mark we can obtain a single document providing uniform protection throughout the European Community. Community trademarks shall not replace any of the national and international trademarks, but they represent, in themselves, an independent system of protection. The seniority of a national mark may be invoked, i.e. a Romanian holder is entitled to the seniority of the trade mark previously registered in Romania. CTM protection is not binding, nor exclusive, and trade companies interested in the protection of trademarks in the European Union can protect their trademarks nationally and internationally (under the Paris Convention).

2. Ways to Protect a Trademark in the European Union

When Romania joined the EU on January 1, 2007, the Community trade mark extended its validity on the Romanian territory, becoming enforceable against those national and international trademarks designated for Romania.

Nowadays, there are several ways to protect a trade mark in the 27 countries of the European Union, namely:

1. Filing an application for registration in each European Union Member State;
2. Naming the European countries through the Madrid System;
3. Filing an application for a Community trade mark (CTM registration);
4. Naming the European Union through the Madrid system (for countries that are members of the Madrid Protocol).

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2.1 Filing an Application for Registration in each European Union Member State

This straightforward and simple way is among the most used. The applicant may choose the European countries he/she is interested in, in order to protect his/her trade mark and, obviously, he/she will apply for these countries. Procedures such as trademark renewal, changes in the legal status of the trade mark, licensing should be made for each country. The same happens with the rejections or limitations on classes of products and services, which create legal effects only for that country. The requests for trade mark registration and the registered trade mark are independent and there is no risk of refusal of registration of the trade mark because of possible problems with the registration in the country of origin.

2.1.1 Disadvantages

There should be considered a major disadvantage, which may offset these advantages. Compared to other options, costs can be high, not only those relating to taxes, but also on the workload. Registration and renewal procedures for each of trade mark are costly and time consuming.

2.2 Naming the European Countries through the Madrid System

Taking into account only the cost criterion, naming the European countries through the Madrid System (Agreement and Protocol) is an obvious advantage. In addition to the reduced costs, one should mention the need for a single registration application. Also, it is enough to fill in a single application for renewal, leading to an effective economy of time and money.

2.2.1 Disadvantages

There are several disadvantages. The registration of a trade mark through the Madrid system remains dependent on the registration in the country of origin, for the first five years. If the country of origin is not a member of the Madrid Protocol, the international registration will be canceled if the registration in the country of origin is canceled; in this case the applicant will have the option of filing an application for national registration, if he/she is interested in further protecting his/her trade mark in one or more EU countries. If, however, the country of origin is a member of the Madrid Protocol, there is the possibility to convert the international application in a national one and to continue the registration of the trade mark separately, in those European countries. Both options involve significant additional costs.

It is necessary to consider another important restriction imposed by the Madrid system. The list of goods and services in classes provided in the registration application of the trade mark through the Madrid system should be the same or reduced compared with the list provided in the registration application of the trade mark in the country of origin. Also, another important condition concerns the assignment of the trade mark, which can be made only by the trade mark holder (assignor) to a natural or legal person or entity (transferee); the latter must belong to a member State of the Madrid System or have a real and effective industrial or commercial company in one of the countries belonging to the Madrid System.

2.3 Filing a CTM registration

If the applicant wishes to obtain registration in all European Union countries, a CTM registration application will be, in terms of costs, the most efficient way. As the Community Trademark Regulations considers the EU a single territory, there is not the possibility to choose individual countries. An immediate consequence is that if the mark is refused or if the opposition is lost, the entire registration application is affected. Possibilities of solving this problem have been developed,

but the resulting costs are relatively high. In addition, there is not the possibility to partially transfer the trade mark, as in the case of the Madrid System.

2.3.1 Advantages

The Community Trade Mark system has many advantages, such as a single registration procedure instead of 27 separate procedures, a uniform legislation instead of 27 legislations, special courts and the enforcement of court decisions throughout the European Union.

Since October 1, 2004, there has been created the possibility (for the Member States of the Madrid Protocol) to name the European Union in the application for trade mark registration, in order to obtain the protection throughout this union.

For natural and legal persons from outside the EU, this way is most convenient one for trade mark protection in the European Union.

Normally, all the advantages and disadvantages of the CTM system are applicable in this case. The only difference is that an applicant is faced with several additional disadvantages. Firstly, there are maintained several of the disadvantages of the Madrid System.

If the applicant chooses this path, he/she must bear in mind that the period of 5 years (of dependence on the registration application or the registered trademark in the country of origin) and the restrictions on the list of products and services are applied.

2.3.2 Disadvantages

It should be noted that the trade mark may be transferred only to a natural or legal person (assignee) belonging to a member of the Madrid System or having a real and effective industrial or commercial company in one of the countries of the Madrid System.

Another disadvantage is represented by the time which passes between the CTM registration application and the designation of the European Union through the Madrid system. It is the opposition period, which lasts nine months, because the 3 months opposition period begins at 6 months after the publication of the registration by OHIM.

This is a very long period for third parties, which must decide whether to make an objection, extending the registration procedure.

3. Conflicts between Community Trademarks and National Marks

Romania's new status of EU member has caused a greater complexity of trademark rights. Since 01.01.2007, an estimated number of 500,000 CTM became valid in Romania, so that their holders have the exclusive right to their use in Romania. (Ţurcanu, Rădulescu, Bucşă, & Ţurcanu, 2011, p. 143)This massive volume of CTM rights determines a profound change in the marketing strategy, which the holders of national trademarks in Romania have to consider.

The following aspects should be retained by the holders of national trademarks:

• Community trademarks with the filing date prior to Romania’s accession to the European Union, which were automatically extended after 01.01.2007, and identical or similar national trademarks (directly registered to OSIM) coexist after the accession.

• Community trademarks brought for registration to OHIM after 01.01.2007 can be subject to cancellation in Romania, if they violate or infringe the rights acquired by the holders of the national trademarks brought to OSIM after 01.01.2007.

• If a national trade mark identical or similar to a previous Community trademark is registered in Romania after 01.01.2007, this trade mark may be canceled by the CTM holder by action at the Bucharest Tribunal. In fact, this possibility should not exist, because, during the substantive examination of a trademark, OSIM examines the anteriority of identical or similar Community trademarks.

• If a national trade mark is registered before 01.01.2007, the holder may oppose to the use in Romania of an automatically extended CTM if the latter is identical. The prohibition of CTM use, in this case, is done through an action before the courts of Romania.

• If the holder of a national mark, after 01.01.2007, will tolerate for 5 consecutive years the use of an identical or similar trade mark, in Romania, having knowledge of this use, can not oppose its use thereafter.

• The holder of the national trade mark may legally cancel a Community trade mark registered before 01.01.2007 and automatically extended to Romania.

4. Conclusions

Choosing a way to protect a trademark in the European Union depends on several criteria, and on what the applicant for registration wants to obtain. The first issue: the countries where the applicant has an interest. Is he/she interested in obtaining protection throughout the European Union or is he/she interested in a limited number of countries? Also, the results of documentary research conducted prior to the application for registration and the assessment of obstacles to registration under applicable law (absolute criteria: significance of the trade mark in the EU languages, distinctiveness; relative criteria: previous trademarks, which can be opposed in the examination process, oppositions and other previous industrial property rights) are essential. The criterion of costs and time allocated for obtaining trade mark protection is very important, causing the applicant to choose the path that reduces these parameters.

If the applicant is interested in a larger number of European countries, or if the trade mark is "strong" and the documentary research has not revealed previous identical or similar trademarks which can be in conflict with the trade mark subject to the registration process, the adequate path for protection is:

1) Designation of the European countries through the Madrid system;

2) Designation of the European Union through the Madrid system (for countries that are members of the Madrid Protocol).

If the applicant is interested in a few countries (2-3), if the trade mark is "weak" or if the documentary research revealed the existence of previous trademarks which may constitute serious obstacles in the registration process, the option will turn to the following ways:

1) Filing an application for registration in each European Union member state;

2) Filing an application for a Community trade mark (CTM registration);

3) Designation of the European Union through the Madrid system (for countries which are members of the Madrid Protocol).

Of course, the final say in decision making belongs to the applicant who, guided by the agent and given the above criteria, may choose the best way to obtain protection of his/her trade mark.

5. References

Anechitoae, C. (2011). *Introducere în dreptul proprietăţii intelectuale/*Introduction to intellectual property law. 6th Edition. Bucharest: Publisher BREN.

Grigoruţ, C. (2001). *Piaţa de capital. Mică Enciclopedie / Capital market. Small Encyclopedia*. Bucharest: Expert.

Grigoruţ, C. (2002). *Marketing / Marketing.* Bucharest: ERA 2000.

Ionica, Ş. (2007). Căi de protecţie a unei mărci în Uniunea Europeană / Ways to protect a trademark in European Union. *Romanian Industrial Property Review*, No. 2/2007, pp. 33-37.

Macovei, I. (2010). *Tratat de drept al proprietăţii intelectuale/*Intellectual property law treaty. Bucharest: C.H. Beck.

Romiţan, C. R. (2010). *Dreptul proprietăţii intelectuale* / *Intellectual property law*. Bucharest: Universul Juridic.

Roş, V. & Spineanu M. O. & Dragoş, B. (2003*). Dreptul proprietăţii intelectuale / Intellectual property law*. Bucharest: ALL Beck.

Ştrenc, A. C. (2010). *Tehnologia informaţiei. Protejarea şi respectarea dreptului proprietăţii intelectuale / Information Technology. Protecting and respecting intellectual property rights*. Bucharest: Universul Juridic.

Ţurcanu, C., Rădulescu, M., Bucşă, G., & Ţurcanu, C. (2011). *Manualul consilierului în proprietate industrială/Manual of the counselor in industrial property. Second Edition.* Bucharest: OSIM.

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REALITIES AND PERSPECTIVES

Exceptions to the Principle of Free Movement of Workers in the European Community: the Case of Persons Infected with HIV/AIDS

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Abstract: The movement of workers in the years after the foundation of the European Community (EC) was as a result of the labor market needs, essentially in most developed countries in which there was a lack of specific profiles of occupation and skilled workers. Due to the fact that, every member state of EC discretionary regulates the issues relating to free movement of workers, working conditions and organization of working hours, it was inalienable the harmonization of rules at the EC level. Even today there are a large number of legal measures regarding the harmonization of legislation on free movement in the EC member states; however, they are sometimes interpreted differently by its member states, particularly those related to movement restrictions. Specifically, in the framework of realization of the right to free movement will also analyze the rules that exclude this right and states conduct against persons who violate the rules on free movement. As states, under the protection of public health of their citizens, they have the right to restrict the free movement of workers coming from other states, in this context this paper will analyze the behavior of states towards persons infected with the virus HIV. This paper will analyze the right to free circulation of workers in the EC, and the limitations that exist in several member states, whereas suggests eliminating the obstacles which are not based on the positive acts of the EC.

Keywords: Public Health; EC Member-States; Free Movement of Persons with HIV

1 Introduction

Movement of workers as a legitimate opportunity was provided by Art. 48 of the Treaty on European Economic Community(1957), which among others, confirms the right of workers to accept the offer for employment in another member state, and employed by the same criteria as domestic workers, excluding the public sector employment. Whereas, Art. 49 of the same Treaty include the necessary measures to ensure free movement of workers, then the close cooperation of employment services and elimination of administrative barriers and practices. Relief of this nature also enabled the balance of needs in the labor market.

A practical realization of the free movement of workers requires the simplification the administrative procedures and elimination of the legal barriers on mobility (work permit, visas and residence permits). In this respect, important contributions have given the provisions of secondary legislation of EC as follows:

- Council Directive 68/360/EEC (OJ L 257) of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families;

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- Regulation 1612/68 EEC (OJ L 257) of the Council of 15 October 1968 on freedom of movement for workers within the Community; and
- Regulation 1251/70 EEC (OJ L 142) of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State.

Also, The European Union Treaty-EUT (1991) marked the significant stage in the development of European policy on freedom of movement. Art. 8 of the EUT established the principle of the citizenship of the European Union, by which employees were given the right to vote or run in local elections, as well as in the European Parliament elections under the same conditions as for local citizens (Gormley, 1998).

Usually, the free movement is been limited for the certain cases by secondary EC legislation, such limitations which are based on consistent reasons.

2. Exceptions to the principle of free movement of workers in the EC

The EC is composed of 27 states with widely varying in histories, economies, cultures, legal systems, health-care systems and approaches to the balance between public good and private right (Martin, 2009).

The right to free movement is a fundamental and personal right, but this right might be restricted by Member-States. The EC legislation provides a safeguard and guarantees in order to limit the discretionary power of Member-States in this respect and to ensure that the fundamental right to free movement is protected.

'Public policy, public security or public health' form a effective formula for exceptions concerning the fundamental principles of free movement, citizenship rights, freedom to provide services and freedom of establishment within the EC. This means that a citizen might be refused entry or residence in another Member-State, or even be expelled from the Member-State where he/she is established on these grounds. Though this may appear to be a broad and general proviso, EC legislation and the Court of Justice case-law have zoomed in on the essentials. The Court of Justice of EC has stated that restrictions may only be imposed in individual cases where there is sufficient justification. In other words, Member-States must specify on a case-by-case basis the exact reasons for imposing restrictions. Furthermore, measures taken on the grounds of public order or public security will be based exclusively on the personal conduct of the person and need to be motivated by a present and serious threat affecting one of the fundamental interests of society. The Member-State cannot impose restrictions to serve economic grounds.

These exceptions should be interpreted in a right way in order not to have abuses by the authorities of member-states. However, member-states have the discretionary right to determine what they include in public policy in the light of national needs.

What includes public policy and public security is defined in Directive 2004/38/EEC, which contains the minimal procedural measures to protect migrant workers, discrimination in the areas of public policy, public security and public health. They have the right to official information to limit certain rights in these areas in precise and understandable manner.

This Directive 2004/38/EEC relates to all measures for entry into the territory, granting or renewal of residence permits, or expulsion from their territory, these measures undertaken by the member-states based on public policy, public security or public health (Section 2).

In addition, the right of institutions, respectively the European Parliament and the Council, given that the regular legislative procedure to approve directives for coordination of the law's provisions concerning the special treatment of foreign on the basis of public policy, public security and public health, is also known at the Treaty of Lisbon in Chapter 2 (Article 52) "The right of establishment"

(Azizi, 2009).

2.1. Public Policy and Public Safety

The Directive 2004/38/EEC provides the exceptions, where the employee of another member-state can be deported for violating security as a measure of preventive nature. These measures are conditioned by the existence of the serious threat that could risk the social interests of member-state. In the case Calfa , the Court of Justice of EC on the request of the person's decision for permanent removal from the Greek authorities, because the person was accused of using drugs, stressed that the expulsion of citizens of the Community action is justified only if it presents serious threats violating the fundamental interests of society. In this case, the Court concluded that the conditions of expulsion had not been met, so it cannot justify such restriction is inconsistent with democratic interests.

Endangering public policy and public security, as usually considered in terms of people's personal behavior, and measures taken on the basis of public policy and public security will be based solely on personal behavior in question. It is worth mentioning the case Bo signore, who was an Italian citizen who had gone to Germany for work. Three years later he injured his brother in an accident, using gun which possession was illegal. He was imprisoned because of negligence causing the stabbing and was then ordered to be deported. German court asked the Court of Justice of EU to answer the question whether Community law allows member-states to deport persons for preventive reasons or reasons must be specific to individual cases. To that question for preliminary issues the Court answered that: these measures should be based only on the personal conduct in question and previous accusation not present basis to undertake such measures. In fact, it should avoid the belief that the deportation of foreign workers, particularly those of the common market, represents the result of the expression of hostility, and xenophobia against foreigners.

Also, in the case Van Dyne the Court of Justice of EC was interpreting the exclusion from the freedom of movement of workers due to the protection of public policy, as a discretionary right of member-state. Indeed, the United Kingdom authorities refused to permit entry into its territory to a German lady, that wanted to work at a Scientology Church, organization which activities was considered by the state as harmful. Longtime states undertake administrative measures to eliminate the organization's activities, but because of fact that UK could not deport its citizens who worked in scientology church, the Court of Justice of EC accepts the deportation of foreigners for the same activities on the grounds of protecting public policy. The case drew a critical comment to the recognition of inequality in the treatment of local citizens and foreign nationals. If such activities are indeed oppose to the public policy that results in undertaking measures to deport foreign citizens or their refusal to enter in the territory of the State, without a doubt that action must be taken against own citizens engaged in such activities. The court stated that there is an inevitable discrimination between the local citizens and nationals of other countries and must be taken restrictive measures against activities that endanger public policy.

The Community law doesn't specify what measures should be taken against member-state citizens, when they should protect the public interest. More logical measure that can be taken is the deportation, but it is calculated as the last, when other options have been expended to discipline the person and to harmonize the actions of current regulations.

2.2. Public Health

The individual nation states are signatories to Europe within the International Health regulations, but the capacity of states to undertake measures to control transmissible disease is constrained by their obligations to comply with EC law. Some, but not all states are signatories to the Schengen Agreement that provides further constraints on disease control measures. The porous nature of borders between EC member-states, and of their borders with other non-EC member-states, limits the extent to which it protects states are odious to their populations in a pandemic disease.

According to Directive 2004/38/ EC (Art.29):

"1. The only diseases justifying measures restricting freedom of movement diseases with the scarf done Epidemic Potential as defined by the relevant Instruments of the World Health Organization and Other infectious diseases or contagious parasitic diseases are the subject IF broke Protection of provisions applying to nationals of the host Member State.

2. Diseases occurring after a three-month period from date of the Arrival scarf not constitute grounds for expulsion from the territory.

3. Where there are indications Serious That it is necessary, Member States may, Within three months of the date of Arrival, require Persons entitled to the right of residence to undergo, free of charge, a medical examination to certify That broke are not suffering from Any of the Conditions referred to in paragraph 1. Such medical examinations required may not even do a Matter of routine."

The exception on the right of free movement of persons is also provided because of the protection of public health. Disease and disability that justify a refusal of entry into member-state reject the granting of residence permits are only those diseases that are listed in the Annex of this Directive and are listed in 1951 in World Health Organization (WHO):

a) Diseases that may endanger the public health:

- Diseases that subservient to quarantine, listed in Section 2 of the International Health Regulation of 25 May 1951,
- Tuberculosis of reparative system in an active state or trend of development,
- Syphilis, and
- Other infectious diseases or infectious verminous disease, if are subject to the provisions for the protection of citizens of member-state.
- b) Diseases and invalidities that may present threats to public policy or public security:
- Drug dependants,
- Hard mental disturbance Anxiety, state of psychotic disturbance with agitation, Delirium, hallucinations or confusion.

Illness and disability to be presented after the residence permit doesn't provide a legal basis for refusing renewal of residence permit or expulsion from the territory.

The decision to grant or refusal of residence permits should be taken up within six months from the date of application for obtaining the permit.

Member-State may require from the other countries of origin of person who has submitted the request to provide information to police for the person in question and the answer must be given within period of two months. The person concerned will be informed officially for the decision regarding the permit application or his expulsion from the territory. At the same time, will set the exit deadline from the territory, which except in an emergency should not be shorter than 15 days (Sections 5-7). A person has the right to use the legal means regarding of decision to refuse the application for stay, or expulsion from the territory (Article 8).

2.2.1 Case of persons with HIV/AIDS

However, into practice such situations also arise when the limitations for the movement of citizens has no basis in EC law that especially limitations for the people infected with the HIV virus.

Over 50 000 people a year are diagnosed with HIV in the EU and its neighboring countries, while around two million people are already living with the virus.[1] Immigrants who are HIV positive or are infected with the AIDS virus are in unfavorable position. In the practice of states, such persons are not

[1] Joining together to tackle HIV/AIDS in Europe, European Public Health Programme, European Union, 2011, p.3 *For more see at*: http://ec.europa.eu/eahc/documents/health/leaflet/hiv_aids.pdf

allowed to enter in the country, although there are no specific prohibitions which justify such actions. Only four EC member-states which participate in this group (Cyprus, Lithuania, Poland and Slovakia), while the other 23 member states doesn't have any particular form of restrictions on entry and stay of persons with HIV in the territory of their state. These countries that maintain restrictions are sending the message to their own citizens and the rest of the world that HIV-positive people are persona non grata and should not be able to enjoy the same freedoms and opportunities as everybody.

By institutionalizing one type of HIV-specific discrimination, governments are implying that is acceptable the discrimination in other areas such as employment, housing, education and healthcare.

Over the years, many of the United Nations Agencies and Programmes, including the WHO, the Joint United Nations Programme on HIV/AIDS (UNAIDS), and the UN Office of the High Commissioner for Human Rights (UNHCHR), have strongly opposed the using of restrictions on traveling for peoples with HIV/AIDS. They have recognized them as being ineffective, costly and discriminatory and cannot be justified by public health concerns. This advice has been strongly reiterated and confirmed in various UN system documents. Such restrictions are complex and differ widely in their form, content and application from country to country.

There are broad types of restrictions on entry, stay and residence for people living with HIV.

Table 1 Types of restrictions on entry, stay and residence for people living with HIV

Types of restrictions	Countries, territories and areas
Some form of HIV-related restriction on entry, stay or residence	It appears that 4 member-states of EU (Cyprus, Lithuania, Poland and Slovakia) and other 55 countries, territories and areas of the World have some form of HIV-specific restriction on entry, stay and residence that is based on positive HIV status. These include those that completely ban entry of HIV-positive people for any reason or length of stay and/or are applied to visa applications for very short stays (e.g. tourist visas) and/or are applied to visa applications for longer stays (visas for residency, immigration, labour migration, asylum or resettlement, study, international employment, and consular service).
Deny employment visas and/or work permits based on HIV status	It appears that there are 39 counties, territories and areas in the World that have HIV-specific restrictions that are applicable to employment or labour. In some countries, HIV-related restrictions on entry, stay and residence are applied to certain professions or forms of employment. For example, in *Slovakia* an application for a work permit includes tests for HIV, hepatitis, syphilis and other sexual transmitted infections. In *Cyprus,* HIV tests are enforced for construction workers, bar staff, household help and people working in the tourism industry. Exceptions are made for employees of international enterprises and the United Nations.
Deny applications by HIV-positive students to study abroad	Health checks are required by the Ministry of Health for those who want to study or work in *Cyprus*
There is no information on HIV-related restrictions on entry, work or residence	In *Germany*, HIV tests are required in certain states for the entry of immigrants (including Bavaria, Saxony and New Brandenburg). Mandatory testing related to HIV travel restrictions may also include testing of refugees, pregnant women and their babies—as is the case in *Poland.*
Require declaration of HIV status for entry or stay for HIV-positive people	It appears that the following 7 countries (Brunei, China, Oman, Sudan, United Arab Emirates, USA and Yemen), require declaration of HIV status for entry or for any length of stay.
Deny applications for entry and for short stay	It appears that the following countries deny HIV-positive people their applications for visas for stays beginning as short as 10 days, up to 90 days (and subsequently for longer-term stays and residence): Egypt, Iraq, Qatar, Singapore, Tunisia, Turks and Caicos Islands.
Deport foreigners based on HIV status alone	It appears that 26 countries in the World which deport people once their HIV-positive status becomes known: Armenia, Bahrain, Bangladesh, Brunei, China, Democratic People's Republic of Korea, Egypt, Iraq, Jordan, Kuwait, Malaysia, Moldova, Mongolia, Oman, Qatar, Republic of Korea, Russian Federation, Saudi Arabia, Singapore, Sudan, Syria, Taiwan, China, United Arab Emirates, USA,

	Uzbekistan, Yemen.
Hasn't HIV-related restrictions on entry, work or residence	Some 108 countries, territories and areas don't have HIV specific restrictions on entry, residence and stay based on positive HIV status.

Source: Mapping of restrictions on the entry, stay and residence of people living with HIV UNAIDS-Geneva, May 2009

These restrictions in above mentioned cases aren't necessary or effective in protecting public health. It is hoped that the countries that have HIV-specific restrictions on entry, stay and residence based on positive HIV status will move quickly to rescind them as part of their fulfillment of the commitments they made in the Declaration of Commitment on HIV/AIDS (2001) and Political Declaration (2006) to end discrimination against people living with HIV.

The travel restrictions to protect the public health are relevant only in the instance of an outbreak of a highly contagious disease, such as cholera, plague or yellow fever, with a short incubation period and clinical course (Decosas, 1997), a recent example being severe acute respiratory syndrome or SARS. The entry restrictions relating to such conditions can help to prevent their increase by excluding travelers that may transmit these diseases by their mere presence in a country through casual contact. However, HIV is not transmitted casually but rather through specific behaviors. Sexual intercourse and use of contaminated injection equipment to inject drugs are the main routes of transmission. Furthermore, the means of protection against transmission are not only in the hands of the infected, but also in those of the non-infected. Thus, travel and migration of infected people doesn't in themselves entail a risk to public health. Excluding non-national travelers with HIV in order to prevent HIV transmission is based on the assumption that the infected will engage in unsafe sex or injecting behavior, and that the national will also fail to protect him or herself. Such assumptions are not founded in fact.

The world today is a much different than that at the beginning of the HIV epidemic over many years ago (Brian, 2000). Restrictive measures to achieve public health goals have largely been replaced by an emphasis on health education and support, and voluntary compliance, to achieve the same goals.

2.2.2 UNAIDS Recommendations Regarding HIV Related Travel Restrictions (June 2004)

- HIV/AIDS should not be considered as a condition that poses a threat to public health in relation to travel because, although it is infectious, the human immunodeficiency virus cannot be transmitted by the mere presence of a person with HIV in a country or by casual contact (through the air, or from common vehicles such as food or water). HIV is transmitted through specific behaviors, which are almost always private. Prevention thus requires voluntary acts and cannot be imposed. Moreover, restrictions against non-nationals living with HIV may create the misleading public impression that HIV/AIDS is a "foreign" problem that can be controlled through measures such as border controls, rather than through sound public health education and other prevention methods.
- Any HIV testing related to entry and stay should be done voluntarily, on the basis of informed consent. Adequate pre-and post-test counseling should be carried out, and confidentiality strictly protected.
- Restrictions against entry or stay that are based on health conditions, including HIV/AIDS, should be implemented in such a way that human rights obligations are met, including the principle of non-discrimination, the right to privacy, protection of the family, protection of the rights of migrants, and protection of the best interests of the child.
- Any health-related travel restriction should only be imposed on the basis of an individual interview. In case of exclusion, persons should be informed orally and in writing of the reasons for the exclusion.
- Exclusion on the basis of possible costs to health care and social assistance related to a health condition should only be considered where it is shown, through individual assessment, that the person requires such health and social assistance.

- If a person living with HIV/AIDS is subject to deportation, such deportation should be consistent with international legal obligations including entitlement to due process of law and access to the appropriate means to challenge the expulsion.
- Any policy regarding HIV/AIDS-related travel restrictions should be clear, explicit, and publicly available. Implementation of the policy should be consistent and fair, with discretion guided by clear, written instructions.

3. Resume

All measures concerning the restriction of free movement of EC citizens are meaningful if they are closely related to the protection of public policy, public safety and public health. Legislative measures at EC level, would not have achieved its efficiency if member states did not implement in practice their full spirit. Thus, administrative and legal limitations of the Member States concerning the free movement of citizens within the EC should aim to implement EC rules rather than their degeneration. Any different interpretation of the right of the EC on the free movement of citizens, excluding the aforementioned limitations will cause discontent. In fact, persons infected with HIV according to EC law that are not exempted from the right of free movement, while the legislation of some Member States, unjustly put them in the group of persons to whom it denies the right of free movement because of public health protection of society.

Travel, mobility and migration have exploded and have become an ordinary and essential part of the lives of millions people. In this swiftly world of changes, governments of member-states in EC must implement the rational and ethical means possible to protect their citizens and their national interests, while at the same time opening themselves and others up to the benefits of ever-increasing travel and trade. HIV-related travel restrictions are an ineffective and discriminatory. People living with HIV should have an equal opportunity as the other EC citizen's to participate in economic, social, educational and other activities. Everyone at some point his lives, is affected by security and health conditions, but the nature and severity of these conditions should not be contrary to the principles of free movements in EC.

4. References

Azizi, A. (2009). *Puna dhe politika sociale ne BE: Evoluimi, standardet dhe sfidat / Social policy and social work in the EU: Evolution, standards and challenges*. Tetovo: Arberia Design.

Brian et al. (2000). *Population Mobility and Infectious Diseases: The Diminishing Impact of Classical Infectious Diseases and New Approaches for the 21st Century*. 31:776-80.

Decosas et al (1997). *Migration and HIV/AIDS*. 11 (suppl A): S77-S84.

Gormley (1998). *Introduction to the Law of the European Communities: from Mastricht to Amsterdam*. London / Boston.

Martin, R. (2009). *The role of law in pandemic influenza preparedness in Europe, Public Health*, Volume 123, Issue 3, pp. 247-254.

***HIV/AIDS and Human Rights, International Guidelines, United Nations-Geneva. 1998, HR/PUB/98/1, p. 50.

***Mapping of restrictions on the entry, stay and residence of people living with HIV UNAIDS-Geneva, May 2009 p. 12.

***Report of the Consultation on International Travel and HIV Infection, WHO-Geneva, April, 1987; WHO/SPA/GLO/787.1

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
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European Dimension of Legal Education. A comparative study of the Romanian Law Curricula and EU Law Syllabus

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Abstract: Our purpose is to provide a detailed view on the European legal education system in Romania. There are few papers on EU legal education policy in Romania. We try to fill this gap in some extend, as a part of a larger research we conducted in the past 3 years. Our sources of evidence were: the Romanian legislation; a representative number of law curricula and EU law syllabus and a research survey of Romanian students, EU law professors and legal practitioners. We found out that the "traditional" Law specialization is more desired by the potential students than the European Law specialization. Nevertheless, Romanian law schools have enough discretion to introduce more EU law disciplines. By targeting the weak parts of the EU legal education system, our study may reveal its benefits to law professors, legal researchers, responsible factors within the Romanian law departments and even to the Romanian legislator. This paper provides a short explanation of the ascension and development of EU legal studies in Romania, an overview of the key issues in the law curricula and the EU law syllabus and recommendations on the reforming the EU legal education in Romania.

Keywords: EU legal studies; legal education policy; curricular choices

1. Introduction

On January 1st 2007, Romania joined the European Union, along with Bulgaria. It was the latest expansion of the EU, considered by the European Commission as part of the same wave (the fifth) i.e. enlargement of the European Union in 2004.

The Romanian Constitution (§ 32 (6) – "Right to education") warranties the autonomy of any university. Nevertheless, EU legal education – like any other form of public education – is, to some extent, under state's control and command. The academic autonomy and discretion is not unconditional; universities have to follow the national policy of public education. Likewise, the academic teaching staff is following state decision and has to comply with state regulations. On the other hand, the teachers are subordinated to the universities in a lower extent being just their employees; regarding the way of teaching, they enjoy almost full discretion.

Although Romanian higher education institutions are independent, autonomous entities, the Romanian state imposes the minimum standards to provide a certain quality of academic studies.

First of all, the general frame of the educational system is set by the Romanian Constitution and the organic law on education, No 1 / 2011. Nevertheless, the kind of normative information needed for this study is to be found not in such general laws, but in lower-ranking provisions like governmental and ministerial acts, emphasizing and interpreting the normative acts (Tomuleţiu et al. 2010).

Moreover, in view of the academic education, in 2005 was established The Romanian Agency for Quality Assurance in Higher Education (RAQAHE), an autonomous public institution of national

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interest, mainly focusing on the external assessment of the Romanian higher education's quality, at both levels of study programs and institutional point of view.

However, the political commitment of a Government is not enough for the full integration of any country. A stable and socially accepted EU policy has to be consented and sustained by each and all key factors of national jurisdictions, including law professors and law students.

In other words, legal education is essential to achieve the goal of a fully unified Europe. The role of academic studies is not just an informative one, but also a formative one. This paper aims to present a part of a wider three years research effort, which considers the EU Integration through legal education (Gorea *et al*., 2010)

2. Purpose of Study and Methodology of Research

The objectives of our present study are: (1) to offer a short but accurate review of the ascension and development of EU legal studies in Romania, since 2006 to present days; (2) to track the key issues in the EU law curricular chosen by the Romanian main Academic Law Schools and the syllabus defined by EU law professors; (3) to draw some conclusions and provide some recommendations on the reforming the EU legal education in Romania.

In order to reach these goals we used three main sources of evidence: (a) the Romanian instructional legislation; (b) a representative number of law curricula and EU law syllabus; (c) a research survey of Romanian students, EU law professors and legal practitioners.

(a) In order to clear up the legislative and institutional background of EU legal studies in Romania, we analyzed several relevant laws starting from the Romanian Constitution and the Law on education to governmental regulations on legal specializations and law curriculum.

(b) We also conducted a comparison study of law curricula defined by six main Romanian Universities and extracted the most frequent issues from the EU Law syllabus of those law faculties. To be more precise, we studied six Law departments functioning within the following six Romanian Universities: "Dimitrie Cantemir" University of Târgu-Mureş, University of Bucharest, University of Craiova, "Al. I. Cuza" University of Iaşi, West University of Timişoara and "Lucian Blaga" University of Sibiu.

In this comparison study, we used public information, published on the official websites of each relevant institution or provided by assigned academics. We considered only "Law" specialty and full-time mode of study, and excluded disciplines not inherent to EU law branch (International public law, International relationships and organizations, European Human Rights Convenient, EHRC Case Law etc.).

(c) In order to find out how the phenomenon of EU legal education is seen by the Romanian law students, EU law professors and legal practitioners, we also conducted a research survey. This sociological method of investigation consists in asking subjects to reply to several statements or questions from a questionnaire or interview.

Our methodology of work is following the rules of a social research. After defining the population subject of our research such as students, legal practitioners and EU law teachers, we got the consent of 216 willingly subjects forming our sampling group: 115 law students, 85 lawyers and 16 EU law teachers from all over the country and ask them to answer some questions, in a face to face or self-administrated survey. All the subjects were over 19 years old, 49 % males and 51 % females.

We prepared three different sets of questions for the three selected subjects. For students, we choose 5 questions, asking them to evaluate the significance of EU law and CJEU case-law for their future legal career and to describe how they use now or intend to use EU documentation sources. For legal practitioners (judges, prosecutors, lawyers and legal advisers) we choose a set of 6 open questions, intended to reveal their main areas of practical interest in EU law, the non-academic context in which

they studied EU law and their documentation sources in EU law matters. Finally, for EU law teachers we prepared interview guidelines, as an interview has the advantage of a more refined and toned survey technique and allows the respondents to give deep and free answers. We asked EU law teachers to identify the most important topics of courses and applications (including their arguments of such choices), to explain how they encourage the students to focus more on EU legal studies, what documentation sources they recommend to their students and what documentation sources they use etc. In order to conclude our researching survey, we also interviewed openly 5 of the most prestigious legal scholars and EU law specialists from Romania.

3 Findings and Results

3.1 The Structure of Legal Education System in Romania

Once we have outlined the legislative and institutional background of academic studies in Romania, we can take a closer look on how the Romanian legal education system is structured and what are the meaningful consequences to be drawn up for our study.

In 2006, the Romanian Government adopted a provision (no. 1175) defining a new structure of the bachelor's level, concordant with the principles of the Bologna process. Later on, this provision was subsequently improved by several normative acts as the Government's Decision no. 749/2009 or Government's Decision no. 631/2010, both referring on universities study domains and specialization.

Currently, the Romanian legal education at bachelor's level has three specializations: "Law", "Community Law" and "Public Order and Safety" (last one only as of 2009).

Although the Treaty of Lisbon gives to the EU a legal personality (Article 48) and the European Communities are no longer public law subjects (Article 1 par. 3), the Romanian legislator has not yet adjusted the way of speaking and continues to talk about a "community law" instead of the "EU law", at least in the regulations concerning legal education.

Talking about Community law it's not the real problem (as before 2007 we couldn't refer otherwise to the European law), but now, it is in our opinion the time for the Government to assume first of all the current terminology encouraging in this way other factors to update their language.

Disregarding these terminological issues, a Romanian Faculty of Law can provide three kinds of legal learning paths, all of them considered by law as general studies: "classical" Law, EU law and, recently, Public Order and Safety. Of course, it is not *compulsory* for any Faculty of Law to offer all these three specializations. We wanted to know how the Romanian Legal Departments are using this opportunity so we analyzed the list of approved legal specializations. We found out that most of the Legal Departments are choosing the "Law" specialization, only.

3.2 Community Law Specialization at Bachelor Degree Level

There are, according to the Nomenclature of accredited specializations or temporarily authorized to operate at the first stage of university-level studies, only two universities in Romania having as specialization the Community Law: "Babes Bolyai" University in Cluj Napoca and „Nicolae Titulescu" University in Bucharest.

For the first one, this specialization is no longer part of the educational provision for 2010-2011 or for 2011-2012. In fact, this specialization is no longer found also in the above cited Government Decision no. 749/2009 subsequently modified by the Government Decision no. 631/2010.

For the second one, the University "Nicolae Titulescu" of Bucharest, the only one in Romania still offering the specialization of Community Law within the Faculty of Law, in the academic year 2010 – 2011, only 23 students joined the specialty of Community Law compared to 678 enrolled at the specialty Law, i.e. less than 3.4%. In the academic year 2011-2012, the situation is even worse, as no

more than 13 persons are enlisted as European and International Law (the specialization's name have changed since the previous year) students. In comparison, the Law specialization offered by the same Faculty of Law attracted a total of 600 students (450 on attendance type of courses and 150 on non-attendance type of courses).

Nationwide, this percentage drops dramatically because this is the only operational specialty of such kind. However, it is to emphasize that several universities in Romania have as specialty the „Community law" at the level of master degree, which means that prospective students consider studying the European Law not as a general legal training, but as a professional specialization.

3.3. EU Law Courses Required by Specific Standards

As aforementioned, even if universities enjoy academic autonomy, the state imposes a set of requirements designed to ensure the quality of higher education. Such requirements are related, as well, to the content of legal education (see: Baias, F. A., Dănişor D. C., Vasilescu, P., 2007).

Based on the Government decision no. 1175 / 2006, the Romanian Agency for Quality Assurance in Higher Education (RAQAHE) above stated, adopted a provision for Law specialization and Community Law specialization: «Specific standards in legal education». This regulation imposes to a student of «classical» Law to follow the courses of the European Community and Competition Law. Nevertheless, the courses of the European Competition Law we found in none of the examined curricula.

Since we talk about accredited faculties (by a procedure involving the control exercised by RAQAHE itself), we can deduce that it is an implicit amendment of the Standards, which are in fact quite old and aren't updated. Since (based on the above mentioned) we do not have the specialty of Community Law at the Bachelor degree level, we can't analyze this situation and will proceed to analyze the EU studies within the Law specialty.

We'll emphasize only that a hypothetical Community Law student shall follow twelve more specific courses: General Theory of European Community Law, Institutional Community Law, European Relations and Organizations, The European Development History, Community Business Law, Community Social Law, Community Financial and Tax Law, EU Insurance Law, Intellectual Property Law, Community Environmental Law, Community Transport Law and Community Politics.

3.4. Comparative Study of the Romanian Law Curricula

Based on the comparative study we conducted on the curricula published by the website of 6 legal departments, we found out that:

1. All of the analyzed law departments include in their curriculum at least one general EU law discipline: one of them – 1 discipline as such, two departments have 2 EU law disciplines, two departments – 4 disciplines and one of the six has no less than 5 EU law disciplines. Please keep in mind that two of the six universities have the "European community law" studied in two semesters, which apparently doubles this discipline ("European community law I" *and* "European community law II"); the total number of EU law disciplines studied in the 6 law departments is, consequently, 18.

2. Most of the 18 courses are imposed (11), 6 are optional (the students can opt between 2 or 3 disciplines, but must choose one) and 1 is facultative (the students can follow it if they want but they don't have to).

3. Regarding the name of the courses, we found out they are far from being uniform. First of all, some are in the process of adopting the new correct terminology and have in their curricula both "European community law" and "EU law". The remaining 4 law departments still have the old discipline's name ("European community law" or "Institutional community law"). Second of all, some choose to include in their curricula an additional number of EU law disciplines, not imposed by the "Law specific

standards in legal education": Business communitarian law, History of European construction, Substantive law of the European Union, European construction, Social communitarian law, History of legal European thinking or Current issues of European integration.

4. The 18 disciplines are divided in all eight semesters, but mostly in the third, fourth or the fifth semester, i.e. the second or third year of study.

5. The evaluation form is mostly an exam, colloquies held only when the discipline is not imposed but optional or facultative. The ECTS credits number varies between 2 and 6, with an average of 5 ECTS credits.

Table 1. Comparative study of the Romanian law curricula.

Institution	Discipline's title	Semester of study	Evaluation: Exam (E) / Colloquy (C)	Discipline's regime Imposed (I) / Optional (O) / Facultative(F)	ETCS credits	Courses (C) and Applications (S) Hours / semester
Law Faculty, "Dimitrie Cantemir" University of Targu-Mures	1. European community law	3	E	I	3	28C+28S
Law Faculty, University of Bucharest	1. European community law I / EU Law I	4	E	I	5	28C+28S
	2. European community law II / EU Law II	5	E	I	5	28C+28S
Law and Administrative Sciences Faculty, University of Craiova	1. Institutional communitarian law	3	E	I	4	28C+14S
	2. Business communitarian law	5	E	I	3	28C+14S
Law Faculty, "Al. I. Cuza" University of Iasi	1. Institutional communitarian law	2	E	I	5	28C+28S
	2. European community law. General part	3	C	O	5	28C+28S
	3. History of European Construction	3	C	O	5	28C+28S
	4. Substantive Law of the European Union	5	C	O	5	28C+14S
Law and Administrative Sciences Faculty, West University of Timisoara	1. Institutional communitarian law	2	E	I	6	42C+14S
	2. European Construction	3	C	O	3	28C+ 0A
	3. Social communitarian law	7	C	O	3	28C+ 0A
	4. Business communitarian law	8	E	I	5	28C+14S
"Simion Barnutiu" Law Faculty, "Lucian Blaga" University of Sibiu	1. History of European legal thinking	1	C	O	4	14C+14S
	2. European community law I	3	E	I	3	28C+14S
	3. European community law II	4	E	I	3	28C+28S
	4. Current issues of European integration	5	C	F	2	14C+14S
	5. Business communitarian law	7	E	I	4	28C+28S

3.5. EU Law Syllabus Analysis

As aforementioned, the state authorities force binds law departments to include some disciplines in their curricula. Likewise, the curriculum binds the professors in aspects like discipline's name, the semester of study or the total number of course / application hours.

3.5.1. EU law professor's discretion and responsibility

However, law professors have much more discretion in defining their syllabus for the disciplines subject of the "EU law" concept. According to the RAQAHE Standards, the disciplines of study included in the curricula are consisting of syllabuses specifying the objectives of the discipline, the

basic thematic content, the distribution of the number of lessons, seminar, and practice hours, by topics, student evaluation and a minimum bibliography.

In other words, EU law professors may choose freely the subjects of their courses and applications, they can decide how many hours to assign for each subject and they can select the compulsory bibliography for their students. Such discretion ought to be doubled by a great sense of responsibility.

From the interviews taken, we can state that EU law professors feel indeed responsible for their choices. We also asked a Romanian EU law official (the Second Secretary for the Permanent Representation of Romania to the European Union) for an interview and he told us that, in his opinion, the main problem is the quality of the professors: the standards imposed by the legislator cannot be followed if the professors are poorly trained.

We can conclude that the responsibility is shared between the EU law professors, the ministerial homologation body and the university which employs the professor and approves his EU law syllabus.

3.5.2 EU law syllabus analysis

From the comparative analysis of the six curricula we found out that the most frequent EU law courses` subjects are: EU history and communitarian development's principles; EU institutions` structure and activity; Sources of law and the European legal order; Judicial relations in the European Union; The single market and EU politics. The above subjects are included, under one name or another, in each of the 6 studied curricula and were indicated by all 16 interview respondents.

We've noticed as uncommon the following courses: *The national judge as communitarian judge* and *The Romanian lawyer's role in EU law enforcement* – at the University of Bucharest's Law School; *Intercommunications between Romania and EU* – at the University of Craiova's Law and Public Administration School; *Documentation sources on European matters* – at the Law Department of Iasi University; *Law's general principles and unwritten law as EU law sources* – at the University of Timisoara's Law Department.

«EU development and its perspectives» seems to be the main course subject in the 16 interviewed EU law professors` opinion. They think the only mean to avoid confusions is to understand the EU mechanisms, its procedures and its consequences. On the other hand, «EU politics and EU funding», as well as «EU competition law», although considered useful, were indicated in a less than 3% percentage.

According to the interview respondents, the 5 most important subjects to be included in EU law syllabus are: EU development and its perspectives (16.43%); EU law and its relationship with internal law (12.86%); EU institutional law (12.86%); EU law sources (11.43%); EU decision making process (9.29%).

Regarding the practical application, EU law professors are convinced that most useful topics for their students should be: European Parliament and its work procedures (15.71%); CJEU case-law (15%); CJEU procedures (13.57%); European Commission's role in EU (12.14%); EU institutions` place, role and activity (12.14%).

3.6. Motivations for EU Legal Studies

Professor's responsibility lies not only in selecting the topics of courses and applications, but also in the way of making their students aware about the importance of EU law, and motivating them to study it. Of course, the European legislation takes its hold also on other courses, e.g. the Romanian new Civil Code (October 2011) which provided "a significant liberalization of marriage dissolution by divorce" (Bodoaşcă, T., Saharov, N., Drăghici, T.-A., 2011).

How important is in the opinion of students to master EU law for their future legal career? According to their answers, it is: extremely important for 26.76%, very important for 54.93%, of medium importance for 16.9%, relatively unimportant for 0.1% and of minor importance for 1.4%.

Most of the professors agree that both «Understanding new perspectives» (35.71%) and «Practical significance: EU law became internal Law» (35.71%) are the main arguments they use to convince their students. As an interesting subject, the possibility of being elected or to become an employee in EU institutions or bodies is considered as an important argument to the students for 14.29% of professors.

4. Conclusions and Recommendations

From the perspective of EU law, legal education in Romania gains new valences, approaches and new gateways. The quantitative and qualitative survey we made on primary sources (legislation, legal curricula, EU law syllabus, interviews and questionnaires) allowed us to draw some conclusions, summarized here bellow:

(1) Despite the constant interest of the Romanian Government into the European legal education, Romania still confronts with conceptual issues and unsystematic approach of EU law courses. In the regulations relevant to legal education, Romanian legislator has not yet adjusted the way of expression and continues to speak about "community law" instead of "EU law".

(2) Disregarding this semantic oversight, the Romanian government issued "specific standards" for *EU law* specialization in law schools, indicating a constant interest and support in this educational branch, at least as a level of declaration.

(3) Even if the law schools are allowed by instructional provisions to offer distinct *EU law* specialization, most of them choose the "traditional" *Law* as specialty as more desired by the potential students.

(4) *EU law* is more often requested by the Romanian law graduates as a master degree specialization, what makes us believe that EU legal studies are thought more as a form of professional specialization than a general form of legal training.

(5) Apart from a number of courses imposed by the Government, Romanian law schools have enough discretion to make the most of the curricular choices, so it's up to them to define how many and what kind of EU law disciplines they include in the curricula, in which semester of study, how many hours they assign for courses and applications, the number of ECTS and so on.

(6) As the curriculum binds the EU law teacher in aspects like discipline's name, the semester of study or the total number of course / application hours, he/she enjoys discretion in issuing the syllabus and may choose freely the topics of courses and applications, the number of hours assigned for each topic and the compulsory bibliography.

As a general conclusion, the responsibility for a proper, competitive EU legal education in Romania is shared-between duty of EU law teachers, the commitment of every law school and the political will of the Government. Each of these three key factors must concur to help law students in the effort to understand *what*, *how* and *why* to learn EU law. Finally, we can make some recommendations for the above three actors on the EU legal education scene, hoping that of such actions can benefit not only to law students, lawyers and other legal practitioners, but the whole Romanian society, serving to a healthy, harmonious and strong EU policy.

Therefore, our recommendations to the Romanian authorities are:

(1) To update the official terminology of all instructional provisions by the term of "EU law" instead of "community law"

(2) To grant several governmental scholarships in order to encourage potential law students to choose EU legal studies for bachelor's degree;

(3) To encourage the EU legal education in the widest sense by books and magazines written in an easy language, accessible even for lay in law areas in order to understand the significance of European law as internal law.

(4) To be more receptive to the EU law and the opinion of legal education experts and to consult such professionals before taking important decisions.

Our recommendations to the Romanian faculties of Law are:

(1) To assign in their curricula more hours of practical exercises for EU law courses, following the example of non-academic training programs for judges, prosecutors or lawyers.

(2) To try to organize regular practical trainings for students within the EU institutions, bodies and agencies, or at least yearly visits to bodies like the European Parliament, the EU Court of Justice.

(3) To join international networks for EU legal studies and encourage students to enroll in visiting or exchanging programs for university studies.

Finally, our suggestions to any Romanian professor of EU law are:

(1) To find creative and interactive methods to make law students aware how important is EU law as internal law, mainly of the practical benefits for any lawyer's career;

(2) To encourage more the students to work independently with EU law provisions: access, understand the way of expression, interpret the meaning and figure out how to use it in actions and pleas;

(3) To help students to understand clearly and directly the practical aspects of the EU law, like the complex institutional architecture of EU as well as decision making process, by practical exercises and study of case;

(4) To encourage and expect active participation in class, e.g. by moot exercises – hypothetical problems, moot courts and decision-making games.

(5) To inoculate to students the idea of law in the widest sense and EU law in particular, is a social construction demanding critical thinking, contextual approach and sensitivity to other cultures and experiences.

5. References

Baias, F. A., Dănişor D. C., Vasilescu, P. (2007). Standardele de conţinut şi programul cadru pentru domeniul Drept / Standards of content and program framework for education in Law. *Analele Universităţii* "*Titu Maiorescu*" *din Bucureşti, seria Drept / Annals of "Titu Maiorescu" University of Bucharest, Law series*, No. 4 (2007) pp. 138-156.

Bodoaşcă, T., Saharov, N., Drăghici, T.-A. (2011). Judicial Separation by Mutual Agreement*, Conference Proceedings 2 of the 17th International Conference The Knowledge-Based Organization*, pp. 594, Sibiu, 2011 November. Sibiu: "Nicolae Bălcescu" Land Forces Academy Publishing House.

Gorea, B., Tomuleţiu, E. A., Costin, M. D *et al*. (2010). Educating law students as good citizens. Is the Romanian legal education system ready to fulfill its social mission?, *Proceedia - Social and Behavioral Sciences*, Volume II, No. 2 (January 2010), pp. 2927-2931.

Gorea, B., Tomuleţiu, E. A., Puha, E. *et al.* (2010). Romanian Legal education at the Crossroads: Designing Responsible Law Curricula. *Proceedings of the 6th International Seminar on the Quality Management in Higher Education– QMHE 2010*, Book I, pp.431-434, Tulcea, Romania, 2010 July. Iasi: UT Press.

Tomuleţiu, E. A., Pop-Lupu, A. M., Oroian, M. *et al.* (2010). Methodological Implications of the Diversity of Learning Styles in Higher Education Practice**,** *Proceedings of the 6th International Seminar on the Quality Management in Higher Education– QMHE 2010,* Book II, pp. 291-294, Tulcea, Romania, 2010 July, Iasi: UT Press.

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Human Dignity in International Law: Issues and Challenges

Izabela Bratiloveanu[1]

Abstract: We intend to present in this synthesis study the concept of human dignity, reviewing the main legal instruments on the protection of human rights that defines it, concisely analysing the jurisprudence of the European Court of Justice and of the European Court of Human Rights, focusing on the key moments of its jurisprudential definition. Human dignity, through its continuously expending presence in international law and through the controversies related to it, is an exciting and challenging topic of debate for Romanian and foreign literature, being one of the issues and challenges of the new millennium.

Keywords: jurisprudence of the European Court of Justice; Charter of Fundamental Rights of the European Union; jurisprudence of the European Court of Human Rights; international law

1. The Contribution of the Philosophical Currents to the Evolution of the Concept of Human Dignity

The term, before appearing in international law, after the year 1945, as a reaction to the dramatic events of the Second World War, was the object of philosophical and theological reflections. Thus, the Greeks and the Romans didn`t know other dignities than those which resulted from the social class or from the positions occupied. (Pettiti, 1999, p. 53)

The notion of dignity, of laic origin in Antiquity, would acquire a religious connotation through the Christian theologians. According to Ph. I. André-Vincent "The human dignity is, from an historical point of view, a Christian concept. It is the result of reflections which were originated in the doctrine of Calcedonia." The first major reference to dignity is assigned either to Lactance, or to Gregory of Nyssa (Ranson, 1995, p. 24). In Christianity, the human dignity is founded on the creation of man in the image of God and His redeeming work on man; therefore, according to the religious concept, the individual that is protected is not man himself but the divine power which is expressed in man through the dignity of the individual. Dignity becomes an attribute by excellence of the person, an expression of his/her intrinsic humanity.

Throughout the centuries, Plato, Aristotle, Cicero, St. Augustine, St. Thomas Aquinas, Giovanni Pico della Mirandola, Leibniz, Locke, Schopenhauer, Schiller, Hegel, Stuart Mill, Feuerbach, Compte, Kant, B. F. Skinner, Jürgen Habermas have reflected on this concept, this being only an attempt to review them, without the claim of completeness of the numerous philosophers and theologians who have tried to decipher the mystery of human dignity.

2. The Main International Documents wich Define the Concept of Human Dignity

As France Quéré rightfully states: "Before Auschwitz, man presented himself through the sculptural beauty of the body, through his power to work, by his conflicts of honour and interests, by his natural

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but conscious limits, by the nobility of the "I think", by the struggle of the soul, torn between misery and grandeur. Dignity always made him appear above nature and stated his automatic supremacy. After Auschwitz, we know that man is also something that we can trample on until he is entirely disbanded, that we can reduce man to a matter, to a consumable good by volatizing him or we can reduce him to nothing: that we can deny until refusing him the honour of an individual death, treating him like magma, as a whole, mostly with one shot in order to burn him like pieces of wood" (Quéré, 1991, p.178).

The concept of human dignity appeared in the international law of human rights and in the constitutional right very late; it was not mentioned in the text of the first founding declarations on human rights; the declarations on rights were mostly founded on the notions of liberty and equality, therefore not on the notion of human dignity. The notion appears neither in the Declaration of Independence of the USA nor in the French Declaration of 1789. However, in the foreign literature, there are authors which state that Article 1 of the Declaration of 1789 contains an implicit reference to dignity; therefore the concept would be absent just as a legal norm which would not exclude it for this reason from the category of moral rules on which the text is based (Gimeno-Cabrera, 2004, p.27).

The first explicit mention of the notion in the international legal order was related to the social rights. Therefore, the Declaration of Philadelphia of 17 May 1944, the founding declaration of the International Labour Organization, states that: "All human beings (…) have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity."

The first Convention on Slavery, that took place on the 26th of September 1926 in Geneva, made no reference to dignity; after the Second World War, the New York Convention of the 2nd of December 1949, the Supplementary Convention of the 7th of September 1956 and the Convention of the 25th of July 1951, all three of them on the issue of slavery, state this notion only in the Preamble.

The U.N. Charter of the 26th of June 1945 states in the Preamble the decision of the members of the United Nations to restate their faith in the fundamental human rights, in the dignity and value of the human being.

In 1948, the notion appears in the American Declaration of Human Rights according to which "All humans are born free and equal, in dignity and in rights" and "while rights exalt individual liberty, duties express the dignity of that liberty".

The Universal Declaration of Human Rights passed on the 10th of December 1948 states in the Preamble that: "the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and "the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human being and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom." (Năstase et al., 2007, p. 124) In the same text, Article 1 states that all human beings are born free and equal in dignity and rights.

Starting with the Universal Declaration of Human Rights, the number of international instruments which refer to this concept greatly multiplies, dignity becoming the "solid idea of the human rights system", the expression of an universal, fundamental consensus and the justification of the human rights, "the common basis acceptable to all, the basis so general that can serve as a common denominator for the general aspirations of all the peoples and of all the human beings, a solid base for an universal code of conduct of a modern humanism. " (Toth, 1976, p. 76 and 79).

For example, at Article 11 of the American Convention on Human Rights (1969) it is stated that: "Everyone has the right to have his honour respected and his dignity recognized. No one may be the object of arbitrary or abusive interference with his private life, his family, his home or his correspondence, or of unlawful attacks on his honour or reputation. Everyone has the right to the protection of the law against such interference or attacks." The African Charter on Human and

Peoples` Rights states that "freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples" (Dănişor, 2004, p.6).

We also have to mention the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on the 9th of December 1975 (Resolution 3452, where it is stated that: "Considering that… the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world") (Muraru & Vlădoiu, p. 3).

Human dignity was also stated by the international instruments which belong to the humanitarian law; for example, Article 3, common to the four Geneva Conventions, stated for the first time in 1949, at paragraph 1 forbids "outrages upon personal dignity, in particular, humiliating and degrading treatment".

Three of the grounds of the Preambles of the International Convention on the Elimination of All Forms of Racial Discrimination adopted on the 21st of December 1965 and of the Convention on the Elimination of All Forms of Discrimination against Women adopted on the 18th of December 1979 refer to human dignity. In parallel, the Preamble of the International Convention on the Suppression and Punishment of the Crime of Apartheid of the 30th of November 1973 and of the International Convention against Apartheid in Sports of the 10th of December 1985 come back to the issue of human dignity.

In terms of bioethics, we mention the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine of the 21st of November 1996, which states from the first Article: "the parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine."

The Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity of the 26th of November 1969 adopted by the General Assembly of the United Nations and which came into force on the 11th of November 1970 or the European Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity signed at Strasbourg on the 25th of January 1974 remind that the requirement to respect and protect the dignity of the individual would be infringed by the acknowledgment of the applicability of statutory limitations of crimes against humanity (Gimeno-Cabrera, 2004, p. 67).

The International Covenant on the Civil and Political Rights and The International Covenant on Economic, Social and Cultural Rights recognize in the Preamble that "the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and that "these rights derive from the inherent dignity of the human being". Article 10 of the ICCPR invokes the respect of dignity in a restrictive manner, namely not for all human beings, just for "all persons deprived of their liberty".

The Convention on the Rights of the Child of the 20th of November 1989 refers in the Preamble to the inherent dignity of all members of the human family and Article 39 specifically aims the dignity of the child. The concept of human dignity is also present in other international legal instruments like the Standard Minimum Rules for the Treatment of Prisoners adopted within the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Geneva in 1955. The Basic Principles for the Treatment of Prisoners adopted by Resolution no. 45/111 on the 14th of December 1990 state that "all prisoners shall be treated with the respect due to their inherent dignity and value as human beings", phrases that tend to indicate that prisoners are indeed one of the categories which are exposed to infringements of their dignity (Benchikh, 1999, p. 43).

3. Perception on the Concept of Human Dignity in the Jurisprudence of the European Court of Human Rights and of the European Court of Justice

The reference to the concept of human dignity was not resumed when drafting the text of the European Convention on Human Rights but "the examination of the preparatory works proves the fact that the expression in the Preamble «a common heritage of ideals» mainly contains the expression of «respect of human dignity»" (Maurer, 1999, p. 66).

However, we cannot talk an absolute absence of the notion of dignity from the text of the Convention because it was later introduced in the Protocol on the abolition of the death penalty of 13th of May 2002, which states in the Preamble: "every person`s right to life is a basic value in a democratic society and the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings."

In the jurisprudence of the Strasbourg Court, the concept of human dignity was especially used regarding the inhuman and degrading treatment, torture, corporal punishment, police violence, detention conditions, death penalty, the right to have control of your own body, freedom of expression, discriminations.

The first mention of human dignity by the Commission was made in *the case of the East African Asians* where the requests of the United Kingdom citizens of foreign origin, residents in East Africa, were trailed, citizens which, even though they were in the possession of British passports, they were denied entrance in the United Kingdom due to the application of the immigration law. In its report, the Commission estimated, when analysing this case, that the racial discrimination which was the object of the case due to the application of the legislation on immigration, represents a prejudice of their human dignity which, in the special circumstances stated constitutes an inhuman treatment in the sense of Article 3 of ECHR. The Commission considered the infringement of Article 3 of the Convention because the discrimination to which the plaintiffs were subjected reached "a certain level of severity". Moreover, the Commission underlined the fact that the treatment applied to the plaintiffs by the legislator reduced them to "second hand citizens".

The first mention of dignity in the jurisprudence of ECHR was made in the *case of Tyrer v. U.K.* of the 25th of April 1978. In this case, the plaintiff, a British citizen, resident in the Isle of Man, was convicted at the age of 15 by a local juvenile court at three strokes of the birch in accordance with the legislation in force on the isle for the unlawful assault which led to actual bodily harm (Berger, 1998, p.41 and 43). In the complaint formulated in front of the Commission on the 21st September 1972, Antony Tyrer argued that the corporal punishment to which he was sentenced was contrary to Article 3 of the Convention. The judicial corporal punishment was inflicted for certain offences provided by law in the Isle of Man for males between 10 and 21 years old. Examining all the circumstances of the case, the Court assessed that the beat which the applicant was subjected to represents a degrading punishment. In this sense, the Court states the following elements: "The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human being; furthermore, it is about institutionalized violence, the nature of which is composed by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender. Although the applicant did not suffer any severe or long-lasting physical effects, his punishment, whereby he was treated as an object in the power of the authorities, constituted an assault on precisely that which it is one of the main purposes of Article 3: a person`s dignity and physical integrity."

The first exam of the Strasbourg Court regarding dignity was in the *case of Abdulaziz, Cabales and Balkandali v. The United Kingdom* of the 28th of May 1985. In this case, the Court concluded that the provisions of Articles 14 and 8 of the Convention were infringed due to sexual discrimination and, for one of the plaintiffs, due to discrimination on the ground of birth. Examining the infringement of Article 3, because the plaintiffs invoked "an affront to human dignity", the Court considered that "the difference of treatment complained of did not denote any contempt or lack of respect for the

personality of the plaintiffs; it was not designed to, and did not, humiliate or debase; therefore it cannot be regarded as "degrading".”

A major challenge is determining the legal nature of human dignity within the European Convention on Human Rights. In a well-documented study, the author B. Maurer concludes that the principle of respecting human dignity is used by the control bodies of the Strasbourg Court as a main interpretation material and that the latter has its formal source in the theory of the general principles of law. Regarding the recognition of the principle of respecting human dignity as a general law principle, the author considers that, since the European judges didn`t explicitly insert it in this category, things are in progress, the hypothesis must be confirmed.

Absent from the text of the Convention, used with caution by the Strasbourg judge, the concept of human dignity plays with excellence the role of interpretative concept in the jurisprudence of the Court, helping the widening of the protection domain of rights in a progressive manner, especially on the basis of Article 3 of the Convention and determining the creation of a new law, absent from the text of the Convention, namely the right to detention conditions compatible with the respect for human dignity and also determining the restriction of the protection domain of the rights. For F. Tulkens, the jurisprudence of the Court passes “from the state of ignorance of the general detention conditions to that of recognition of the right of any prisoner to respectful conditions for human dignity.” The Pretoria law emergence to the detention conditions in compliance to human dignity is the result of a permanent and long action of the Luxembourg Court, which has passed through successive phases starting with 1962 when the Commission stated in the *case of Isle Kock v. the Federal Republic of Germany* that: “Even if a plaintiff is serving a sentence for the crimes committed against the most basic rights of a person, this circumstance does not prevent him from guaranteeing the rights and liberties defined by the European Court of Human Rights”. In a subsequent phase, the Committee of Ministers within the European Council, being inspired by a similar text from 1957 of the Economic and Social Council of the United Nations, adopted in 1973, “Set of Minimum Rules for the Treatment of Prisoners”, revised and modernized in 1987 through the “European Prison Rules”, updated on the 11th of January 2006. Finally, in 2000, in the *case of Kudla v. Poland*, the Court concluded that Article 3 entailed the state to ensure that any prisoner enjoys detention conditions which are compatible to the respect of human dignity, that the manners in which the measure is enforced do not entail that the person in question be subjected to a suffering or to a task of an intensity which exceeds the level of suffering inherent to the detention and that, taking into account the practical requirements of the imprisonment, the health and comfort of the prisoner are properly ensured.

In the community law, the concept of human dignity is used in relation to the free movement of workers, the abolition of discrimination, the promotion of women`s rights, the right to sufficient resources in order to lead a life and to social assistance, etc. The reference to this concept was rather marginal, the Luxembourg judge being moderated concerning its use.

The Charter of Fundamental Rights of the European Union, which was proclaimed within the Intergovernmental Conference on the Nyssa Treaty and adopted on the 12th of December 2007, became legally binding after the entry into force of the Lisbon Treaty on the 1st of December 2009 which states in Article 6(1) that “The Union recognises the rights, liberties and principles provided in the Charter of Fundamental Rights of the European Union of the 7th of December 2000” and that it has the same legal value as the Treaty has.

In the Preamble, this document provides that human dignity is, along freedom, equality and solidarity, one of the “indivisible and universal values” on which the E.U. is founded and contributes to the preservation and to the development of these common values while respecting the diversity of the cultures and traditions of the member states as well as the national identity and the organization of their public authorities at national, regional and local levels and it places the individual at the heart of its activity.

The concept is restated in Title I “Dignity”, firstly in an autonomous manner in Article 1 according to which human dignity is inviolable, it must be respected and protected, then in Articles 2-5 where it is

connected to the right to life, to the right to the integrity of the person, to the prohibition of torture and inhuman or degrading treatment and to the prohibition of slavery and forced labour. In the Explanations regarding the Charter of Fundamental Rights of the European Union it is shown that dignity is a fundamental right but also the basis of the fundamental rights; therefore, none of the rights stated in the Charter can be used in order to prejudice human dignity, which is part of the core of the rights stated in this document.

Relating to the respect of the provisions of Title I of the Charter, at the E.U. level, the Commission, which took a particular interest in the impact of the security scanners in the airports on human dignity and on other fundamental rights, proposed new standards on the interception of sailors at sea regarding the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) and it also proposed new standards on human trafficking for labour or sexual exploitation in order to ensure a more efficient prosecution by the national authorities of human traffickers at a trans frontier level and it adopted a report on the application in the member states of the UE standards on the issuance of residence permits to the citizens of third countries which are the victims of trafficking (The 2010 Report on the applicability of the Charter of Fundamental Rights of the European Union).

The emergence of the Charter on Fundamental Rights of the European Union in 2000 and subsequently the acquirement of the legally binding value marked a revival from a jurisprudence point of view regarding the use and concept of human dignity in the jurisprudence of the Luxembourg Court, which culminated with its fundamental right status, part of the set of general principles which it projects in the community legal framework in the case of the Kingdom of the Netherlands v. the European Parliament and the Council of the European Union of 2001, where the annulment of Directive 98/44/EC on the Legal Protection of Biotechnological Inventions of the 6th of July 1998 was requested and also in the case of Omega Spielhallen-und Automatenaufstellungs-GmbH of 2004 (The case of the Kingdom of the Netherlands v. the European Parliament and the Council of the European Union, C. 377/98, &70, jugement of 9 october 2001, The Collection of Case Law of the European Court of Justice, page I-07079 and The case of Omega Spielhallen- und AutomatenaufstellungsGmbH, C 36/02, The Collection of Case Law of the European Court of Justice, page I-09609).

The European Court of Justice makes, for the fiers time, in the resolution issued in the *case of Netherlands v. the European Parliament and Council* a reference to dignity, not as a principle or as a value but explicitly as a fundamental right, part of the assembly of general principles which it protects within the community legal framework, stating that: "It is for the Court of Justice in its reviews of the compatibility of acts of the institutions with the general principles of Community law, to ensure that the fundamental right to human dignity and integrity is respected" (Case of Netherlands v. the European Parliament and Council, Case C-3 77/78, &70, C.J.C.E., resolution of the 9-th of October 2001).

4. Prospectus Outlook

Taking into account those mentioned above, we can only agree with the expressed and well-grounded opinion of Judge L. E. Pettiti who states that, taking into account the term in international law, it is predominantly a jurisprudential creation, human dignity developing in a few years from a philosophical reference to a compliance criteria of the protection of human right texts (Pettiti, 1999, p.53). It is worthy to note that its presence in the legal texts is today in a permanent expansion. Its polysemantic fundamental nature, the difficulty in defining it and limiting its protection domain, the controversies regarding its legal status, its presence in the jurisprudence of the European Court of Human Rights and of the European Court of Justice, the prominent status given by the Charter of Fundamental Rights of the European Union, its role in the conventional space as an interpretative concept, make human dignity a captivating and difficult topic of debate for Romanian and foreign literature, being one of the issues and challenges of the new millennium.

Taking into account the previously outlined practice solutions of the European Court of Justice and of the European Court of Human Rights regarding the concept of human dignity, in the perspective of EU accession to the ECHR which is an obligation under Article 6 of the Treaty on the European Union, it remains to be seen what the evolution of the jurisprudence of the European and national courts will be in this matter.

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6. References

Benchikh, M. (1999). La dignité de la personne humaine en droit international/The dignity of the human person in international law, In Th. Revet, M.L. Pavia, *La dignité de la personne humaine/The dignity of the human person,* Economica, 1999.

Berger, V. (1998). *Jurisprudenţa Curţii Europene a Drepturilor Omului/ Jurisprudence of the European Court of human rights. I.R.D.O.,* pp. 41-43.

Dănişor, D.C, (2004). Demnitatea omului: valoarea supremă a statului român/Human dignity: the supreme value of the romanian state. *R.S.J., 29/2004.*

Gimeno-Cabrera, V. (2004). "Le traitement jurisprudentiel du principe de dignité de la personne humaine dans la jurisprudence du Conseil constitutionnel français et du Tribunal constitutionnel espagnol"/Treatment jurisprudential from the principle of dignity of the human person in the jurisprudence of the Constitutional Council French and the Spanish Constitutional Court. *L.G.D.J.*

Quéré, F, (1991). "Frères humains"/Fellow human beings, *"Le défi bioéthique"/The bioethics challenge*, Autrement, Mars, p. 178.

Maurer, B. (1999). *Le principe du respect de la dignité humaine et la Convention européenne des droits de l'homme/The principle of respect for the human dignity and the European Convention on human rights,* La documentation française, 1999.

Muraru, I., Vlădoiu M.N, (2007). "Protecţia demnităţii omului ca valoare constituţională"/ Protection of human dignity as a constitutional value, *R.R.D.P.,* 3/2007.

Năstase, A., Aurescu B. & Gâlea B. (2007). *Drept internaţional contemporan. Texte esenţiale/Contemporary international law. Essential texts.*

Pettiti, L.E. (1999). *La dignité de la personne humaine dans le droit européen/The dignity of the human person in European law,* in Th. Revet, M.L. Pavia, "*La dignité de la personne humaine"/The dignity of the human person,* Economica.

Ranson, P. *Humanisme ou théandrisme*, in P. Magnard (1995), *La dignité de l'homme/The dignity of the human*, Honore Champion, Paris

Toth J. (1976). *Les droits de l'homme et la theorie du droit/Human rights and the theory of law,* René Cssin amicorum discipulorumque liber, IV, pedone.

***The case of the Kingdom of the Netherlands v. the European Parliament and the Council of the European Union, C 377/98, &70, judgement of 9 October, 2001, The Collection of Case Law of the European Court of Justice, page I-07079.

***The case of Omega Spielhallen-und Automatenaufstellungs-GmbH, C 36/02, The Collection of Case Law of the European Court of Justice, page I-09609.

***The 2010 Report on the applicability of the Charter of Fundamental Rights of the European Union.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

The Reservation to Treaty

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Abstract: In this paper we aimed at analyzing the reservation to the treaty, a theme involving issues related to one of the most important areas of public international law, namely the Law of Treaties. The reservation to the treaty is regarded as one of the most controversial issues in the international law, which has generated intense discussions and debates and it has been analyzed both by the doctrine and by the international states and organizations. We aim at interpreting and explaining the content of the articles of the 1969 Vienna Convention on the Law of Treaties on the reservation to the Treaty in order to establish the meaning and scope thereof, and at identifying the relationship between the reservation to the treaty and the states' sovereignty. We do not believe that our analysis is exhaustive regarding the reservation to the Treaty, but we have highlighted the importance of this institution relative to the conduct of relations between states respecting the principles of international law.

Keywords: multilateral treaties; states; treaty law; Vienna Convention 1969

1. Introduction

The Treaty represents today the main tool that confirms the cooperation of States within international relations, "the major route" (Anghel, 2000, p. 72) of occurrence and development of law, it makes all the other branches to be influenced, as the Law of Treaties "*is intended to regulate absolutely all relations that take place between entities that have international capacity*." (Ploeşteanu et al., 2005, p. 32)

Schwartzenberger believed that the treaty allowed the parties to solve final, actual and potential disputes, which allowed the parties to amend or supplement the customary international rules on the path of principles and standards that may lead to the transformation of international society into one that can be organized at the level of social integration. (Schwartzenberger, 1967, pp. 151-152)

Article 2, paragraph 1 of the 1969 Vienna Convention[4] on the Law of Treaties defines international treaty as "*an agreement concluded between States in written form and governed by international law, whether recorded in a single instrument document or twice in more related instruments, whichever their particular denomination*."

The International treaty is concluded under the essential purpose of producing legal effects, namely to create, modify or extinguish the rights and obligations towards international law involved subjects, as a result of the consent they gave to the conclusion of the Treaty. Consensual nature of the Treaty requires the existence of mutual consent of all states for the birth of conventional relationships, as an indispensable condition for its validity. In terms of number of states participating in the treaty, we

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[4] Vienna Convention on the Law of Treaties was opened for signature in 1969 and entered into force on January 27, 1980

distinguish bilateral and multilateral treaties. In the case of multilateral treaty, the highest the number of participating states, the more difficult is to achieve the unanimous consent of the states. As a resolution to this situation, in the practice of states, it has emerged and developed the institution of the reservation to the Treaty, considered an "*important innovation in the Law of Treaties*" (Ploeşteanu et al., 2005, p. 193) which is designed to "*allow the participation of a larger number of countries in multilateral treaties of general interest, promoting the international cooperation of states, even in situations when they disagree on the developed detailed solutions.*" (Anghel, 2000, p. 587)

2. Definition

In the Romanian doctrine the reservation was defined as "*a unilateral declaration - part of the legal act by which a State, which is intended to become a party to a multilateral treaty, falls among the Contracting Parties - Declaration recorded outside the treaty text, having as purpose to reduce, as far as the state in question is concerned, the scope of obligations being developed in principle from that treaty,*" (Glaser, 1971, p. 31) "*a declaration of will by which the state makes when signing or ratifying a treaty, or on the occasion of accession, thus creating with other parties, in certain aspects, other relations than those that would have been established in the absence of the reservations*." (Geamănu, 1965, p. 510)

In the specialized foreign literature the reservation to the treaty was seen as a surgical procedure by which certain provisions of the Treaty are being removed, (Droz, 1969, p. 383) a unilateral way of limiting the effects of the treaty, made by the Contracting States before its entering into force, a statement made by a State party to a treaty on which it intends to exclude a provision thereof, to alter or to ascribe a determined meaning, a provision derogation from the general rules. (Rousseau, 1944, pp. 290-291)

The purpose of formulating such statements is to reduce, for the State in question, the extent of the obligations under that treaty, (Glaser, 1971, p. 13 and the next) and the formulation of a reservation expressing the will of a state of "excluding, in its part, certain provisions of the Treaty, not accepting certain obligations under that treaty, clarifying the meaning that it intends to give to the provisions of that Treaty". (Anghel, 2000, p. 602)

The reservation to a treaty represents, according to the 1969 Convention, Article 2 paragraph 1 letter d) a unilateral statement, whatever its content or its name, made by a State when signing or approving a treaty or accede to it, by which it expresses the intention to exclude or modify the legal effect of certain provisions of the Treaty on their application to that State.

Similarly, Law no. 590/2003 on Treaties[1] defines the reservation in article 1 (j) as being the unilateral declaration, whatever the content or its name, when signing, ratifying, approving, acceding or accepting a multilateral treaty, by which it expresses the intention to exclude or modify the legal effects of certain provisions of the treaty for the Romanian part, unless the treaty prohibits such reservations and they also are according to the international law; in order to produce legal effects, the reservations must be ratified or approved.

3. Effects Legal, Substantial and Formal *Requirements*

Reservations process has been the subject to "*severe criticism*" (Dinh, Dailler, & Pellet, 1999, p. 178); the criticisms regarded the fact that the reservations change, undermine the integrity and balance of the treaty, they fragment the regime. Even if these objections are not without truth, they are not able to tip the balance against reservations, because under the appliance of such special mechanism, it facilitates the acceptance of the Treaty by a larger number of states.

[1] Published in the Official Monitor, Part I, no. 23 of 12/01/2004.

The reservation to the treaty is made by the reservation state to exclude, as far as the state is concerned, certain provisions of a treaty, or to specify the sense that it intends to assign to certain provisions of the Treaty, or to refuse certain obligations established by that treaty, essentially to restrict the extent of its obligations under the Treaty.

For example, when joining the Convention on the recognition and enforcement of foreign arbitral sentences, adopted at New York on June 10, 1958, Romania has made the following reservations:[1]

- it will apply the Convention at the recognition and enforcement of judgments passed on the territory of another Contracting State.
- as for judgments passed on a territory of a non-contracting state, the Romanian People's Republic will apply the Convention only on the basis of reciprocity established by the agreement between the parties.

When depositing the instrument of ratification by the Romania of the European Convention on Nationality (adopted in Strasbourg on 6 November 1997 and entered into force on March 1st, 2000), the Law no. 396 of June 14, 2002,[2] Romania has made the following reservations:

1. On the application of article 6, paragraph 4, letter. e), f) and g) of the Convention: "*Romania reserves the right to grant citizenship to persons born on its territory of parents with foreign nationality and to persons residing, legally and ordinarily in its territory, including stateless persons and recognized refugees, upon request, under the conditions specified in the internal law."*

2. On the application of article 8, paragraph 1 of the Convention: "*Romania reserves the right to allow the renunciation of its nationality, if the requesting person meets the conditions of internal law*."

3. On the application of article 17, paragraph 1 of the Convention: "*Romanian citizens residing in Romania, who have another nationality in Romania, enjoy the same rights and same obligations as any other Romanian citizen under the Romanian Constitution.*"

This way of defining the scope of international obligations that a State wishes to take is only possible for multilateral treaties, as in the case of bilateral treaties, the agreement requires both parties to agree upon all discussed issues.

The legal status of the reservation to the Treaty has been codified in article 19-23 of the 1969 Vienna Convention. According to these regulations, the reservation to the Treaty must fulfill certain substantial and formal *requirements*.

The article 19 (a) of the Vienna Convention on the Law of Treaties provides that the reservation formulation may be possible in different phases: the moment when a Member State is signing, ratifying, accepting or approving a treaty or acceding to it. If the reservation at the moment of signing intervenes when the participants to the negotiation are in the stage of concluding the treaty, the situation is complicated for the reservation at ratification, when the negotiations' stage is completed, and it becomes extremely sensitive in terms of the reservation to ascension, as it regards a treaty which is final born between the initial contractors.

The same article 19 states that the reservation should not be prohibited by the treaty, the treaty should not provide that there may be accepted only certain reservations, among which it is not specified the reservation in question, or that the reservation is incompatible with the object and purpose of the treaty. Article 120 of the Rome State of the International Criminal Court in 1998 which states, for example, that: "*The current Statute does not allow any reservation*".

The interpretation of situations listed in article 19 we notice that if at point a) it is emphasized the unity of the legal regime applicable to reservations, at point b) it represents "*the other side of the coin*" (Pellet, 2005, p. 10 and the next) and it requires the fulfillment of the following conditions:

[1] Decree no. 186 of 24 July 1961 Published in Official Monitor, no. 19 of 24 July 1961.
[2] Published in the Official Monitor, Part I, no. 490 of July 9, 2002.

- the treaty should allow the formulation of the reservations;
- the authorized reservations must be determined;
- it should be noted that only certain reservations may be made.

In this respect, the Geneva Convention of 1958, for example, enrolls in article 12, paragraph 1 the following provision:

„At the time of signature, ratification or accession, any State may make reservations to articles of the Convention other than to articles 1 to 3 inclusive."

The European Human Rights Convention governs the formulation scope of reservations in article 57:

„1. Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

2. Any reservation made under this Article shall contain a brief statement of the law concerned."

The reservations to the Treaty must be expressed in written form and communicated to the Contracting States and other countries entitled to be parties to the treaty. In this sense, article 23 of the Vienna Convention of 1969 provides in paragraph 1 that:

"The reservation, an express acceptance of a reservation and the objection to a reservation must be expressed in written form and communicated to the contracting parties and other countries that have the capacity to become parties to the Treaty."

The other parties to the Treaty have the right to raise objections or to accept the communicated reservations, and the acceptance of the reservations can be made expressly or implied. Article 20 of the Vienna Convention of 1969 states that a reservation expressly authorized by a treaty *does no longer require any subsequent acceptance* by the other contracting States, unless the treaty provides it; but when from the small number of States that participated in the negotiations, and the object and purpose of the treaty it results that the appliance of the treaty in its whole between all parties is an essential requirement of the consent of each of them to be bound by the treaty, the reservation must be *accepted by all parties*.

The Convention also establishes that a reservation is considered to have been accepted by a State if it has not been raised any objection to the reservation until the expiration of twelve months from the date on which it was notified or after the expressed consent of being bound by the treaty, if it is a subsequent date.

Unless the treaty otherwise provides, a reservation may be withdrawn. Regarding the moment when a reservation may be withdrawn, article 22 of the 1969 Vienna Convention states that "*a reservation may be withdrawn at any time without requiring the consent of the State which has accepted the reservation*" and article 23 requires that the withdrawal of reservations to be made in writing. Romania became a party to the 1949 Geneva Conventions on international humanitarian law by Decree no. 183/1954.[1] When ratifying the four conventions, Romania has made reservations on:

- article 10 of the Convention on improving the fate of the wounded, sick and shipwrecked from the armed forces at sea, adopted in Geneva on August 12, 1949;
- article 10 of the Convention for improving the fate of the wounded and sick in armed forces in the field, adopted at Geneva on 12 August 1949;
- article 10, 12 & 85 of the relative Convention on the treatment of prisoners of war, adopted at Geneva on 12 August 1949;
- article 11 & 45 of the Convention on the protection of civilian people in time of war, adopted at Geneva on 12 August 1949.

[1] Published in Official Monitor no. 25 of 21 May 1954.

Thus, in article 12, for example, it was formulated the following reservation: "*Romania will not consider as valid the release of power holders, who transferred to other powers the prisoners of war, of the responsibility for implementing the Convention to these prisoners of war, while they are under the protection of the power that has agreed to receive them*" and article 85: "*Romania does not consider itself bound by the obligation under article 85, to extend the appliance of the Convention of prisoners of war, condemned, under the law of the entitled power in accordance with the principles of the Nuremberg trial, for war crimes committed against humanity, given that the persons convicted of these crimes must be subject to the regime established in the country in question, for those serving their sentence*. "

After 1989, when the political reasons that laid on the very foundation of these reservations have disappeared, Romania withdrew its reservations to the four conventions by Law no. 277 of May 15, 2002.[1]

4. Conclusion

The current moment of development of international relations reflects the problems of great complexity which are to be solved by the states through treaties. The content of these issues determines the achievement of the unanimous agreement of the States concerned in their regulation difficult to fulfill. The institution of the reservation contributes in encouraging the member participation in multilateral treaties, by applying to the fundamental principles of international law on state sovereignty, equality in rights of all states and the noninterference in internal affairs of a State, even if it reduces the scope of the treaty on countries that have made reservations. It is referable this solution, the opposite case leading to the unthinkable violation of states free consent on the assumed obligations. Our great diplomat, Nicolae Titulescu, in a speech in 1936 excluded the situation in a speech in 1936: "*We will never give up at the sovereign right of never accepting a decision that concerns us, to which we have not consented."*

5. Bibliography

Anghel, I. M. (2000). *Dreptul tratatelor/Law of Treaties, Vol.I.* Bucharest: Lumina Lex.

Dinh, N. Q., Dailler, P., & Pellet, A. (1999). *Droit international public/Public international law.* Paris: L.G.D.J.

Droz, M. G. (1969). Les réserves et les facultés dans les Conventions de La Haye de droit international privé/The reservations and faculties in the Hague Conventions on Private International Law. *Revue critique de droit international privé/Critical review of private international law*.

Geamănu, G. (1965). *Dreptul internaţional contemporan/Contemporary international law.* Bucharest: Editura Didactică şi Pedagogică.

Glaser, E. (1971). *Rezervele la tratatele internaţionale/Reservations to international treaties.* Bucharest: Editura Academiei Republicii Socialiste România.

Pellet, A. (2005). *Dixième rapport sur les reserves aux traites/Tenth report on reservations to treaties.* Geneve: A/CN.4/558.

Ploeşteanu, N., Duculescu, V., Pătraşcu, A., Zaharia, F., & Boantă, A. (2005). *Dreptul tratatelor. Noţiuni de teorie şi practică/Law of Treaties. Notions of theory and practice.* Bucharest: Lumina Lex.

Rousseau, C. (1944). *Principes generaux du droit international public/General principles of public international law, Vol. I.* Paris.

Schwartzenberger, G. (1967). *A Manual of International Law, vol. I.*

[1] Published in the Official Monitor, Part I, no 368 of 31 May 2002.

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REALITIES AND PERSPECTIVES

The Right to Family Reunification in Relation to Third Country Nationals within the European Union

Mihaela Mazilu-Babel[1]

Abstract: The paper aims to establish the character of the right to family reunification and to bring together all the situations in which a Member State of the European Union is "forced" to asses the application for the family reunification with a third-country national, in accordance with the EU law, both primary and secondary, incident in the case at hand. The family reunification, as the most important form of migration in the European Union, was subject to previous research, research that was conducted only at a sectored level. Therefore, the "puzzle pieces" must be put together and a "whole picture" conclusion is necessary. It will be submitted that family reunification right, although derives from a fundamental human right – the right for respect of family life, its effects depend majorly on the specific factual and legal situation of the 'beneficiary' of such a fundamental right.

Keywords: Directive 2003/86/EC; Directive 2004/38/EC; EU Charter; European Convention on Human Rights

1. Introduction

Family reunification is the most important form of migration as family migration makes up 40-60% of all migrants and because of these numbers, family reunification is a major political issue (Lawson, 2007). It has also become a major legal one when the Council of Ministers (from now on referred as 'the Council') adopted Directive 2003/86/EC ('the Family Reunification Directive') that partially harmonized this policy field, offering to third country nationals Community residing rights in their own capacity for the first time in history. In addition, as it concerns the rights for family reunification of third country nationals which are also family members of an EU citizen, their situation was covered by the specific provisions of Directive 2004/38/EC ('the Citizens' Directive'). Therefore, already two instruments were put in place to takle the issue of family reunification in cases involving third-country nationals.

In fact, due to the fact that immigration goes to the heart of sovereignty, the rules that govern such a sensible field are split not in two but in three major categories given by the status of the person applying for family reunification with a third-country national (i.e. the sponsor of the third-country national). There are situations when the sponsor is a EU citizen, a national of a country that has concluded an Association or Sectoral Agreement with the European Union – the so-called privileged third-country national (i.e. Turkish or Swiss national) or a legaly residing third-country national (i.e. American).

As the purpose of this paper is two faced: on one side, to analyse and underline the right to family reunification of a third-country national sponsor and on the other side, to compare it with the right to family reunification of an EU sponsor, the first stop is the analysis in substance of such a reunification right.

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2. The Family Reunification Right

2.1. Proposals and Principles

It all began at the European Council in Vienna in December 1998 where it was established as a priority the need to legislate common provisions on family reunification. A second beginning was on the cards when the Tampere Council was met (on 15 and 16 October 1999). There, it was decided to assimilate the status of third-country nationals as far as possible with those of EU citizens.

This is why, in order to answer to this political will, the Commission has drafted the first proposal of Family Reunification Directive in December 1999 while it has presented its third proposal in May 2002. This three-years time gap was due to, on one hand, the changes proposed by the European Parliament meant at enhancing the Directive's provisions while on the other hand, there were also the proposals of the Council which obliged the Commission to opt for a slower harmonization of this sensitive national immigration topic (Weber & Walter, 2003).

Above all, two principles underpinned its drafting. Firstly, the principle of immigration of Family Members which means that family members have the right to immigrate because of their personal relationship with the migrant worker. This right to immigrate derives from the right to preserve family unit as an answer to the right to protection of family life, a fundamental human right respected also by the Community law (now EU law). Secondly, the integration principle based on the demand of the Tampere Council for "a common approach to ensure the integration into our societies of those third-country nationals who are lawfully residents in the Union" and those should receive "rights and obligations comparable to those of EU citizens"(as also stated at the Tampere European Council, 15-16 October 1999, see conclusion no. 18, Presidency Conclusions). The reference to the rights of EU citizens establishes the upper limit on how family reunification right can be regulated while the minimum list is established by international law standards, namely article 8 ECHR (Weber & Walter, 2003).

Although one might be tempted to affirm that due to the recent transfer of power (since the 1997/1999 Amsterdam amendments to the EC Treaty) to regulate family reunification to the Community we are in the presence of a blank canvas, this was not the case as numerous international obligations of the Member State concerning the respect for family life had to be taken into account (Oosterom-Staple, 2007)**.** The most obvious one is article 8 ECHR in relation to the right to family life and Article 12 ECHR in relation to the right to marry. Both ECHR provisions apply in Member States and have to be respected by the Community (see ex-Article 6(2) EU Treaty). This reflects the Court's previous decisions that the right to respect for family life (within the meaning of Art.8 ECHR) is a general principle of Community law (see Case C-60/00, Carpenter [2002] E.C.R I-6279, paragraph 41). Furthermore, the expression of Article 8 ECHR is to be found in article 7 of the EU Charter, part of the EU primary law. Such rights had therefore to be respected by the Family Reunification Directive, as a secondary EU legislation that must always be in accordance with EU primary law.

However, the Parliament was of the opinion that this was not the case as the provisions of the Directive were not in accordance with the case law of the ECrtHR and other international conventions in relation to the rights of the child (see Case C□540/03 Parliament v Council [2006] ECR I-5769). Basically, three provisions were at stake: a) the possibility open to Member States of imposing integration measures on children over 12 years of age; b) the option of admitting for reunification only children below the age of 15 - as opposed to to 21 in the case of EU citizens' children; and c) the power of making immigrants wait for up to three years before being allowed to claim reunification for members of their family. The ECJ's answer came after it examined the scope of the right to family reunification by citing the relevant case-law of the Strasbourg Court (see case C□540/03 Parliament v Council [2006] ECR I-5769 paragraphs 55 et seq).

The Sen v the Netherlands and the Rodrigues da Silva and Hoogkamer v the Netherlands were the two cases from which the ECJ chose to construct its understanding of the right to family reunification. In Sen, the European Court of Human Rights ('ECrtHR' or 'Strasbourg Court') recognized for a 9 years

old third-country national, the right to reunify with her family in Netherlands. Nonetheless, by deciding to do so, a major role was played by the specific circumstances of the case (see case Sen v the Netherlands, no. 31465/96, paragraph 40). In Rodrigues da Silva and Hoogkamers, the Strasbourg Court enumerated the factors that are to be taken into account when the right to family is at stake. Factors such as: the extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles to the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion or whether the applicant knew that the persistence of that family life within the host State would from the outset be precarious (see ECrtHR judgement of 31 January 2006, Rodrigues da Silva and Hoogkamer v. The Netherlands, no. 50435/99 and ECrtHR judgment of 5 September 2000, Solomon v. the Netherlands, no. 44328/98)**.** In both of these cases, one child was left in the State of origin – a third-country, while other children were born in the host Member State, namely Netherlands.

Although all this lenghty reference was made, the European Court of Justice ('ECJ' or 'the Luxembourg Court') concluded by passing the obligation to the national court to ensure the protection of the right to family reunification of legally residing third-country national in accordance with the ECHR('Convention'). This is precisely why the Luxembourg Court, when the subject of "waiting periods" was brought, established that there was no breach as it was also not held unlawful by the competent courts, including ECrtHR, and because it is to be considered a classical element of an immigration policy.

Such a rulling entitled legal scholars to question the added value of a Directive which, while containing ambivalent rules that leave a great amount of discretion to Member States, merely put into black-letter-law obligations which are already binding on Member States by virtue of the ECHR and to also conclude that the protection is not as absolute as it is in the internal market field and is, in a way, more decentralised, as it relies, to a large extent, on Member States' authorities (Hatzopoulos, 2008).

2.2. The Family Reunification as an Autonomous Fundamental EU Right for Third-country Nationals?

Although the Parliament did not win the case in front of the ECJ (after the Treaty of Lisbon, Court of Justice or 'CJ'), the Family Reunification case was important at least for one reason: it offered the European Court in Luxembourg the possibility to clarify some important aspects in relation to the family reunification right contained therein. The Court of Justice confirmed that the Directive grants a subjective right to family reunification to individuals and sets clear limits on the margin of appreciation of the Member States when making individual decisions concerning family reunification (Groenendijk et al., 2007*).*

The question that aroses was if this subjective right to family reunification can it be considered a fundamental right as well? As an answer, under article 8 ECHR, it can be argued that the right to family contained therein does not imply also a right to family reunification. This is so in the light of Abdulaziz and Others v the United Kingdom where it was maintained that there is no general imposition on a State to respect the choice of married couples of the country of their matrimonial residence and to authorize family reunion in its territory (see EcrtHR, judgment of 28 of May 1985, Abdulaziz and Others v the United Kingdom, no. 9214/80; 9473/81 ; 9474/81, paragraph 68). Thus, the right to family does not guarantee a right to choose the most suitable place to develop family life and consequently no right to reunify with the family in the host Member State for third-country nationals.

On the other hand, whenever there is a rule, there is also an exception. In this case, the exception is to be found in Gül v Switzerland (judgment of 19 February 1996, Reports of Judgments and Decisions 1996-I], p. 174) and Sen v the Netherlands (ECrtHR, judgement of 21 December 2001, no. 31465/96)

where there is a strong autonomous right of the child that is also envolved in the residence rights equation. In such cases, the Strasbourg Court took a more balanced decision by taking into account the position of the family members who had already settled in the host country. Usually, in this exceptional cases, there was the danger of expulsion of one of the family members at the detriment of the family members that were still children. Another situation is the one existing in Tuquabo –Tekle v the Netherlands case (ECrtHR, judgement of 1 December 2005, no. 60665/00). It seems that an important factor in persuading the Strasbourg Court to give a ruling in favour of Mrs Tuquabo-Tekle was the fact that the family members, those living in a Member State, had already other children who were born in that Member State and thus, the return to the country of origin would have meant the need of their other children to adapt and integrate in a different cultural and linguistic environment. Thus, the ECrtHR concluded that there was a major impediment against them returning back to their country of origin and the only way to enjoy family life would have been for the other children to be allowed to reunite with their family.

One difference between the Sen v the Netherlands and the Tuquabo-Tekle v the Netherlands case is that the child that needed to be reunited was, in the first case, 9 years old while in the latter case, 15. This is highly relevant when we are to look at the provision of the Family Reunification Directive which stipulates that a Member State may derogate from the general principles set out in the Directive where the child is 15 or older (see Article 4(6) of Directive 2003/86/EC, OJ 2003 L 251, p. 12)**.**

It must also be underlined that even if such right was to have an autonomous existence, an individual right cannot exist if there is to be a case-by-case approach when assessing the core characteristics of such a right. This seems to be also the problem when looking at the Strasbourg Court's case law. There, the ECrtHR uses the case-by-case approach in order to ensure that a national authority has ensured a fair balance between the interest of the family reunification applicants and the need to control immigration (see Tuquabo-Tekle v the Netherlands, no. 60665/00, paragraph 44). This is the consequence of Article 8(2) and of the fact that this right is not to be absolute. In many of the cases 'this proves to be a lottery for national authorities and a source of embarrassment for the Court.'(see ECrtHR, judgment of 24 April 1996 Boughanemi v France, no 22070/93).

This case-by-case approach cannot be transferred also at the EU level, as the Court of Justice in Luxembourg still does not have the competence to directly apply Article 8 ECHR. However, the Court of Justice (referred further on as 'CJ') has the competence to interpret article 7 of the EU Charter, which is a reflection of Article 8 ECHR. This would allow the CJ to construct its own meaning of family reunification while taking inspiration from the common traditions existing in the Member States and basing its judgment on the provisions contained in the EU Charter. It can have the power to transform the exception in the rule and vice-versa. On the other hand, the CJ is not competent to rule on the basis of detailed facts. Thus, it would not have the possibility, like the ECrtHR to always make sure that there is a fair balance between the interests at stake. This would be the duty of the national courts. Nevertheless, what the CJ can do is to ensure a broad interpretation of the Article 7 of the Charter and then request the national courts to respect that broad interpretation which favors the right to family reunification. The power of interpretation hold by the CJ is the subject of our next section. We plan to have a look at the case law on matters concerning the rights to family reunification which affects the same third country national but when having as a sponsor a different category of lawfully residing citizens within a EU Member State.

3. Same Third-country National – Different Sponsor – Different Outcome

3.1. Third-country National ('TCN') with a EU Sponsor that has Exercised its Right to Free Movement within the EU - the Metock and Others Case

When the sponsor is an EU citizen living in a host EU Member State, the need to protect the family life on such a sponsor seems to be higher than the need to protect the family life of a third country national's sponsor as it can be concluded from the CJ rulling in Metock and Others v Minister for Justice, Equality and Law Reform case (Cambien, 2011). Here, the Luxembourg court also overruled

the Akrich legal precedent by creating a right to family reunification argued to be absolute. This is mainly for two reasons. Firstly, the fact that a TCN was unlawful resident before applying for a residence is of no importance, leaving a Member State without any possibility to deny their entrance on its territory. Secondly, the date of the marriage is of no importance as well. The ruling in Metock and Others was underpinned by the need to ensure that no obstacle is to be created to the exercise of the free movement rights because of a potential disruption to family life of the European Union sponsor.

The CJ, using the prohibition of reverse discrimination of an EU citizen compared to a legally residing third-country national, decided that any other conclusion than the one reached would amount to third-country nationals being better treated in EU more favourably than EU citizens as far as the right to family reunification is concerned. Family members of TCNs residing lawfully in a Member State could gain entry on the basis of the Family Reunification Directive but TCN spouses of Union citizens might still be refused entry based on the Citizens' Directive (see C-127/08, Metock and Others [2008] ECR I□6241, paragraph 69).

Of most interest in this regard is the Court's confirmation that the proposition of disruption to family life applies, in the first instance, just as strongly, even if the family was not in existence at the time of the Union citizen's move to the Member State (the consequence of Case C□291/05 Eind [2007] ECR I□0000) and, secondly, regardless of how the TCN entered the Member State, namely lawfully or unlawfully.

This can be compared with the situation of a third-country national which has as sponsor a lawfully residing third-country national. In this situation, the Family Reunification Directive precisely allows for family reunification irrespective of the time in which the family was formed. Such a view was also supported in Chakroun v Minister van Buitenlandse Zaken where it was established that a Member State cannot impose further legislation which draws a distinction according to whether the family relationship arose before or after the sponsor entered the territory of the host Member State (See Case C-578/08 Chakroun [2010] ECR I-1839 paragraph 64).

3.2. EU sponsor and Purely Internal Situation Case – Ruis Zambrano v. McCarthy case – the Side-effect of Children

The limit to the Metock rulling was that it did not apply to purely internal situations, namely when the EU citizen sponsor did not exercise his right to free movement (see Metock and Others, paras. 77-9). This limit was nuanced in the Ruiz Zambrano v Office national de l'emploi (ONEM) case. Here, the children – but not the parents – are the EU sponsor, a sponsor that did not exercise his free movement right but nevertheless, the third country nationals, parents of an EU citizen-child enjoy a right for residence in order to render the children's citizenship status effective on the basis of primary EU law and not secondary legislation such as the Citizens Directive (Hailbronner&Thym, 2011). In addition, in the case of an EU child, the right to family enshrined in Article 7 of the Charter must be read in a way which respects the obligation to take into consideration the child's best interests, recognised in Article 24(2) of that Charter, and taking into account the fundamental right of a child to maintain on a regular basis personal relationships and direct contact with both of his or her parents, stated in Article 24(3) of the Charter (see, to that effect, Case C□540/03 Parliament v Council [2006] ECR I□5769, paragraph 58).

The reverse can be found in McCarthy v Secretary of State for the Home Department judgement (see case C□434/09 McCarthy [2011] ECR I□0000), where the Luxembourg Court's third chamber denied the right to residence of family members applying for family reunification in which the sponsor was an EU citizen-adult without having any intra-EU movement. The situation was purely internal and therefore had to be reglemented by the national immigation rules of that Member State.

3.3. A Third-country National Sponsor

Based on the Family Reunification Directive, third-country nationals, who are family members of another but lawfully residing TCN, can enter the European Union territory and reside together with him/her. Nevertheless, this right is not absolute (as in the case of third-country nationals, family members of an EU citizen sponsor) and certain conditions, sometimes not so clear spelled out, have to be satisfied before being capable to actually enjoy the exercise of a residence right. This was because, Member States have been very determined to negotiate a Family Reunification Directive where the personal scope was limited only to those who have a "reasonable prospect" of obtaining a permanent right of residence (Baldaccini & Toner, 2007).

In relation to this, two categories of requirements have to be fulfilled: personal and economic requirements.

Firstly, the sponsor is the applicant for family reunification who has to satisfy certain conditions such as the need to hold a residence permit which is to be valid for at least one year and also to have reasonable prospects of obtaining a permanent right of residence. Concepts like "reasonable prospect" and "permanent residence" are not further on explained and thus, their meaning is vague. Nevertheless, Member States should not define such concepts unilaterally. There should be a uniform Community interpretation in order to resist to the "willingness" of the Member State to amend their national legislation on the right to permanent residence and thus restricting the personal scope of the Directive.

Secondly, although you might think that the Family Reunification Directive should apply to all third-country nationals, you should think again. There is an explicit exclusion of the third-country nationals who are applicants for refugee, also of the ones who are residing on a temporary basis (i.e. the TCN-student) and also of those who are to enjoy subsidiary protection. In relation to this, we share the opinion of H. Oosterom-Staple that the above-mentioned class of third-country nationals was to be already excluded "by virtue of the fact that they cannot provide evidence that they have reasonable prospects of a permanent residence status" (Oosterom-Staple, 2007*)***.** Secondly, the economic resources of the sponsor must be "stable and regular" in order to ensure that there will be no recourse to the social assistance system of the host Member State. This can be contrasted with the requirement for EU citizens, namely "sufficient resources". It seems that the level asked for the resources is higher than the one that must be satisfied by a EU sponsor. This can suggest that in such a situation, the resources must be generated by a stable economic activity (i.e. an employment contract) while in the case of a EU sponsor, the person can satisfy the condition of having resources without having to prove that those are regular.

4. Future Approaches

In a post-national polity which views its citizens as "citizens" and no longer merely as factors of production, divisions as to the protection of human rights should no longer be maintained, since all human beings, regardless of status, are entitled to the respect of their human rights and in the case at hand, of their family life. The CJ has made one step towards this direction by extending the availability of family reunification rights to almost all categories of Union citizens. It remains to be seen whether the Court will follow further down this road in the future by abolishing other unjustifiable distinctions that remain in the grant of family reunifications rights (Tryfonidou, 2007*)***.**

As it concerns the equality principle, this appears to be applied only in cases involving Community nationals (since Treaty of Lisbon, EU nationals). In the end, the Community plays "the identity politics game" as regards third country nationals and their family life, by requiring integration tests and permitting derogations from the two-year waiting period before family reunification is requested on the basis of "a country's receptive capacity". Consequently, the family reunification of third country nationals is still subject to the Member States' discretionary control. Despite official assurances that the aim of the Directive was to ensure that third country nationals were being treated in the same way

as Community nationals, the definition of family members is fraught with limitations and must be substantiated with many official documents; the conditions for enjoying family reunification are riddled with discretionary elements to be assessed by Member States' authorities and in principle permit high financial barriers to family reunification to be created or maintained; and the rights granted to family members are restricted (Guild, 2007).

Unfortunately, it also looks that even for the future and as a last resort, the only way in which third-country nationals can become equal with EU citizens as the right to family reunification is concerned would be for them to become full-EU citizens.

5. Conclusions

Starting with the Family Reunification Directive case it looks that the European immigration law has moved from the stage of abstract legislation into the stage of practical interpretation and application.

The Directive on the right to family reunification and the Directive on the status of long-term resident third-country nationals are both examples of the long tradition of Community law furthering the integration of migrants and they are to form the centerpieces of any EU integration policy (Groenendijk, 2004*)*. However, the way in which they are going to be implemented by the Member States in their national law provides, at the end of the day, a good indication of the extent to which Member States seriously want to increase integration of immigrations into their society. In fact, the Family Reunification Directive, adopted at a 3rd try, is in fact a selection, a "best of" all limitations and restrictive practices in force (or even forthcoming) in the Member States. It is a typical case in which the requirement of unanimity in the Council has led to the adoption of the lowest common denominator as the common rule (Hatzopoulos, 2008).

Because of the many qualifications that the Family Reunification Directive contains, it is even questionable if the family reunification is a "right" in the proper sense of the word. The Commissioner of Human Rights of the Council of Europe in his 4th Report: 'Age requirements for the reunion of spouses and children, strict economic conditions concerning employment, accommodation, the absence of security claims, all touch the very limits and often infringe the rights to family life and the principle of equality before the law. All of these measures greatly undermine the integration of immigrants' (Alvaro, 2004*)*. While the free movement of EU citizens and their family members is an important rationale of the EU project and is promoted and celebrated, the movement of third-country nationals is often viewed in a considerably more negative light, whether it is in the context of their admission or non-admission to the EU, their presence on the territory of EU Member States, including their capacity to integrate, and their return or expulsion (Cholewinski, 2007).

Lastly, although is trite law that the ECHR applies to everyone within the jurisdiction of states parties (Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 Nov 1950, ETS No.5, Article 1), the ECJ does not have the mechanism to ensure the minimum level of protection for the family reunification, which remains in the end the prerogative of the national courts.

6. References

Baldaccini, A. & Toner, H.(2007). From Amsterdam and Tampere to the Hague in: Baldacinni, A. & Guild, E. &Toner, H. (2007). *Whose Freedom, Security and Justice*. Oxford: Hart Publishing.

Cambien, N. (2009). Case C-127/08, Blaise Baheten Metock and Ohters v. Minister for Justice, Equality and Law Reform, *The Columbia Journal of European Law*, Vol. 15, No.2, (Spring 2009) pp. 321-342.

Cholewinski, R.(2007). The Criminalisation of Migration in EU Law and Policy in: Baldacinni, A. & Guild, E. &Toner, H.(2007).*Whose Freedom, Security and Justice*. Oxford: Hart Publishing.

Currie, S. (2009). Accelerated justice or a step too far? Residence rights of non-EU family members and the court's ruling in Metock, *European Law Review*, Vol. 32, No. 2, (April, 2009) pp. 310 – 326.

GIL-Robles Alvaro, The commissioner for Human Rights of the Council of Europe, 4th Annual Report, January to December 2003 to the Committee of Ministers and the Parliamentary Assembly, CommDH (2004) 10, *http://www.statewatch.org/news/2005/apr/coe-2004-rep.pdf* date: 29.02.2012.

Groenendijk, K. & Fernhout, R. & van Dam, D. & van Oers, R. & Strik, T. (2007*). The Family Reunification Directive in EU Member States*. Wolf Legal Publishers.

Groenendijk, K. (2004). Legal Concepts of integration in EU migration law. *European Journal of Migration Law*, Vol.6, No. 2 (April, 2004) pp. 111-126.

Groenendijk, K. (2006). Family Reunification as a Right under Community Law. *European Journal of Migration and Law* Vol.8 No.2 (April, 2006) pp. 215-230.

Guild, E. (2007). EU free movement of persons in: Baldacinni, A. & Guild, E. &Toner, H. (2007). *Whose Freedom, Security and Justice*. Oxford:Hart Publishing.

Hailbronner, K. & Thym, D. (2011). Case C-34/09 Gerardo Ruis Zambrano v. Office national de l'emploi (ONEm), Judgement of the Court of Justice(Grand Chamber) of 8 March 2011, not yet reported. *Common Market Law Review* Vol.48 No.4 (August, 2011) pp. 1253-1270.

Hatzopoulos, V. (2008). With or without you ... judging politically in the field of Area of Freedom, Security and Justice, *European Law Review*, Vol. 33 No. 1, (February, 2008) pp. 44-65.

Lawson, R. (2007). Family Reunification Directive. *European Constitutional Law Review*, Vol. 3, Issue 2, (August 2007) pp. 324-342.

Oosterom-Staple, S.(2007). The Family Reunification Directive in: Baldacinni, A. & Guild, E. &Toner, H. (2007). *Whose Freedom, Security and Justice*. Oxford: Hart Publishing.

Schneider, H. & Wiesbrock, A. (2005). The Council Directive on Family Reunification : Establishing Proper Rights for Third Country Nationals? in: Schneider, H. E. G. S. (2005). *Migration, integration and citizenship (A Challenge for Europe's future)* Vol. II. Maastricht: Forum.

Tryfonidou, A. (2007). Jia or "Carpenter II": the edge of reason. *European Law Review*, Vol. 32, No.6, (December, 2007) pp. 908-991.

Weber, A. & Walter, A. (2003). The Right of Protection of Family for Migrants in Europe: Access and Integration of Family Reunion, in: von Hoffmann, B. (2003). *Towards a Common European Immigration Policy* Frankfurt-Berlin-Bern: Peter Lang.

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REALITIES AND PERSPECTIVES

European Perspectives Approach to Asylum and Migration

Georgeta Modiga[1]

Abstract: Migration is a complex process, with a multinational character that can not be managed only unilaterally or bilaterally, but through effective management to take into account the benefit of all involved and changing characteristics of the migration process. Regarding the European Union, framed in the general context, it aims to promote a comprehensive migration policy, to provide a coherent and efficient manner to meet the challenges and opportunities that migration presents. Multilateral approach under consideration covers all phases of migration, aiming to seize them and present it at the same time, to implement effective policies and measures concerning illegal migration and human trafficking. It is based on generally accepted principles relating to subsidiary, proportionality, solidarity and respect for law and the economic and social. From this perspective, the present study examines the quantitative aspects of migration as well as qualitative aspects, with emphasis on the challenges that they face Romania, from the status of EU member country.

Keywords: control of migration; asylum procedures; integration of immigrants

Population decline associated with the decline of qualifications at European level will cause a decrease in the future working population in Europe. Appears the need of finding solutions to eliminate the negative effects of population decline. In this context the EU has opened to migrant workers from third countries. Thus, legal immigration is now seen as a way to balance the working age population decline in Europe. It is considered however that a controlled migration to the EU space policy is more beneficial than leaving it up to each Member State Migration. Consequently there was a common immigration policy at EU level, which shows openness to labour from third countries. Changing migration policy at EU level is marked by the Communication on Immigration, Integration and Work Commission in June 2003.

Simultaneously, EU migration policies have focused on four issues to effectively manage the migration process:

- policies for the regulation and control of migration flows;
- policies to combat illegal migration and employment of foreign workers;
- policies for integrating immigrants;
- policy on international cooperation in migration.

These policies are reflected in EU directives, as well as strategies and programs adopted in the field of migration. They are based on a coordinated approach to the problem of migration, both as to the legal and illegal, for the benefit of EU countries, but also of the supplying countries.

Policies and legislation on asylum is a distinct field of European regulations on migration. This should be first noted the distinction between asylum seeker and other categories of migrants. Thus, while migrant choose to leave their home country due to economic, social, cultural, family, etc., Asylum seeker / not received a form of protection (refugee status, subsidiary or temporary protection) is forced to leave their home country because his life or freedom are threatened.

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International agreements set the obligation of signatory states to ensure free access to the asylum and the principle of non-refoulement (prohibition of measures of return, expulsion, extradition of the asylum seeker or the person is during the procedure to apply for asylum, accompanied by providing necessary assistance during the development of the asylum and then, when people receive some form of protection. (Constantin et al., 2004, p. 19)

The main programs of the European Union, that consider migration include:

- The Tampere (1999) introducing common policy on asylum;

- The Hague (2005) for strengthening freedom, security and justice in the European Union, followed by Solidarity Programmed and Management of Migration Flows for the period 2007-2013 (2006).

- The Hague (2005) has established ten priorities of the European Union to strengthen the area of freedom, security and justice in the next five years. Among them, more direct reference to the issue of migration:

1. strengthening citizens' fundamental rights and
2. fight against terrorism;
3. defining a migration approach equilibrate;
4. establishment of procedures for asylum communes;
5. maximize the positive impact of migration;
6. developing an integrated management of external borders of the union;
7. achieving a balance in the exchange of information;
8. develop a strategy for tackling organized crime;
9. establishing a European area of justice original;
10. shared responsibility.

Regarding legal migration, there are four main areas that are envisaged in the Plan on legal migration and integration of migrants:
- Legislative measures in the field of labour migration;
- Access and information exchange;
- Integration of migrants;
- Cooperation with countries of origin.

Legislative measures for labour migration in the European Union are considering proposals for directives, including a general direction and three specific directives (for highly skilled workers for seasonal workers, for employers who contract the illegal labour force):

1. Proposal for a Council Directive on application of a single procedure for a single permit to citizens of third countries to live and work within a Member State and on a common set of rights for workers from third countries legally resident in a Member State is a general directive proposal which was submitted to the Council in October 2007.

This suggests two important rules:

a) existence of a single procedure for requesting the right of residence and the right to work, the only procedure to be followed by followed by the release of a single administrative document encompassing both a residence permit, as well as on the work. Single permit is issued by Member States in a unique format as a model provided by Regulation (EC) no. 1030/2002.

b) that a number of workers rights in third countries by providing them equal treatment with national workers in relation to: working conditions, freedom of association, education and training, recognition of diplomas, certificates and professional qualifications, social security systems the payment of pensions, tax benefits and access to goods and services for individuals (including to obtain a home or to fill a job).

2. Proposal for a Council Directive on the conditions of entry and residence of citizens of third countries to high employment grade (Blue Card), is a proposal for a Council Directive specifies sent in

October 2007. The proposal regulates the admission of highly skilled workers (university degree) in the employment of highly qualified job in an EU member. A highly qualified applicant from a third country who asks to be allowed for work in an EU country must prove the existence of a valid work contract or binding job offer and the conditions under national law. Those who have the European Blue Card accepts the application received for a period of two years (or duration of employment plus three months) based on which have the right to perform work for which they sought admission to the first state in the EU.

After two years they receive the same rights as nationals of third countries the right to stay and work in the long run, being able to move in a second Member State for family. Member States shall:

a) the volumes of admission of nationals based on his own labour markets. They can preference to EU citizens in relation to nationals of third countries;

b) who may apply for a European Blue Card, national or employer.

3. Proposal for a Directive of the European Parliament and the Council on conditions of entry and residence of seasonal workers was sent to Council in March 2002. The proposal establishes the general principle of non-discrimination as temporary workers about working conditions and employment, to those who held the same job, but are permanent employees.

4. Proposal for a directive providing for sanctions against employers of third country nationals illegally staying was sent to Council in May 2007. This proposal concerns the participation of employers to reduce illegal immigration and requires employers to check whether a third country national holds a residence permit valid for the employment and notify the competent authorities on hiring a new national of a third country (so they can check the veracity of documents). Employers that do not comply will be fined, will contribute to the costs of repatriation of illegal immigrants will pay all their arrears of wages, as well as taxes and contributions related to the state. Also, these sanctions are proposed and other employers, such as exclusion from the opportunity to benefit from aids and public subsidies, to participate in public procurement, etc..

In regard to access and exchange of information, is considering the creation, development and improvement of the media in migration: a portal of the European Union which will access the EU policies and acquis relevant EURES network etc. Integration of legal immigrants is another priority of the European Union's migration. Social and cultural integration of legal immigrants is considering their access to education and training through information with packet information, the language and civic orientation courses, etc..

Cooperation with countries of origin is a fourth direction of EU action in the field of migration. It aims to identify countries of origin of immigrants in various skills and increase awareness in these countries about the possibilities for legal immigration into the European Union. It also will be considered as meeting the needs of EU Member States, as well as the countries of origin. Enhancing labour mobility within the European Union as one of the main goals of the Lisbon strategy is pursued in the European action plan on job mobility for 2007-2010.

It sets out the main directions for future action followed by concrete objectives, as well as four priority areas for action:

- improving existing legislation and administrative practices;
- providing policy support for mobility from authorities at all levels;
- strengthening EURES
- increase awareness about the benefits of mobility.

Improving existing legislation and administrative practice is a first priority area in order to increase labour mobility within the European Union. It starts from the fact that one of the main aspects that influence labour mobility at Community level is to ensure that migrant workers do not lose their social protection. Currently, this is covered by Regulation (EEC) no. 1408/1971 on social security schemes

to employed persons and their families moving within the Community and subsequent amending regulations.

Given that appeared new types of mobility (for example by hiring temporary seasonal periodic oscillation between home and destination country) are not protected by existing social regulations, the question whether legislation is necessary to change one part and adaptation of administrative practices in the field, on the other.

Regarding improvement of administrative practices, they have already taken steps to better administrative cooperation between institutions and national authorities. This follows the end of 2009 the administrative exchange of information between national institutions in European Union countries, to be fully electronically, the introduction of a European health insurance card electronically, providing consultations and exchanges of information online. (Lazaroiu, 2002, p. 32)

Providing policy support for mobility from authorities at all levels is a second field prioritar plan. It aims to encourage geographical and occupational mobility within the Community to achieve the national strategy for employment and lifelong learning. It will consider removing obstacles and promoting current practice "fair mobility"(by against social dumping and undeclared). To support mobility, Member States are encouraged to implement the European Qualifications Framework.

Another area for strengthening the EURES (European Employment Services Labour Force) as the main instrument of information about the availability of jobs in EU countries. EURES has created a unique portal in 2006 includes all offers of jobs in the national public service employment, available in 25 European languages. The EURES wants to improve their work by: providing more information, expanding services to new categories of workers (long-term unemployed, young workers, researchers, seasonal workers), increasing the amount of information collected about mobility flows; possible extension of services to nationals of third countries (in a first phase from the country of origin information related to procedures to be followed to access the labour market in the EU). Increasing awareness of the benefits of mobility is the fourth priority area of the plan. It overlooks carrying out activities to raise awareness about workers rights and benefits of mobility by enhancing information sharing and disseminating good practice.

For this purpose will be organized every year activities such as "European Job Days" will create networks of cooperation between stakeholders, will disseminate the latest achievements in the field and lead to new innovative programs.

In terms of illegal migration, the Hague Programmer has made a balanced approach to its insights in the fight against illegal migration, which itself is associated explicitly fight against trafficking in persons, especially women and children. Subsequently, the European Commission has set political priorities, solutions and measures to combat illegal migration priority components (COM/2006/402/final).
Basically, they refer to:

- Continue dialogue and cooperation with third countries on migration, especially those in sub-Saharan region and the Mediterranean to participate in the EU neighbourhoods policy Will be considered to address the causes of migration in countries of origin (poverty, conflict, environmental degradation, etc. n.) And capacity building assistance to these countries to carry out management of migration flows and fight against human trafficking.

- Securing the borders, including "e-borders". To analyze the potential risks and the hazards will be extended system under which some carriers are obliged to report data in travel documents of passengers by authorities performing external border controls.

- Creating an integrated border management model, by identifying best practices.

- Ensuring the security of travel documents and identity by developing common guidelines intended to establish minimum standards on procedures for the granting / issuing travel documents or identity.

-Combating human trafficking by developing mechanisms for coordination and cooperation, promoting best practice identification and victim support, development of guidelines for data collection, involving international organizations and NGOs.

- Combating illegal employment by adopting and implementing measures that would require employers to verify the status of status in terms of entry and residence rights of third states before being hired. Will be established for this purpose and responsibility of the employer, including financially, for employment of nationals of third countries who are in situations of illegality in the Member States. Other measures aimed at ensuring health and safety at work.

- Completion of negotiations on readmission agreements for removal of the EU of illegal immigrants, focusing on countries in the Western Balkans. A particular importance will be given to training staff involved in implementing the return.

- Enhance cooperation between liaison officers on immigration issues (ILO), to maximum use of available information. Priority will be networking ILO African countries and the Western Balkans area.

- Establish clear and transparent rules for returning citizens of third countries which do not meet the conditions of stay in EU countries.

Controlled immigration aims to promote free movement of persons within the European Union, but also facilitate admission of third country workers. Measures proposed by the national strategy in Romania, are in accordance with the Hague Programmer and the EU common policy on legal immigration.

- a.1. Providing administrative framework required to exercise the right to free movement and residence of citizens of European Union Member States by providing appropriate legal and institutional framework
  a.2. Fostering the admission of third country nationals for work will be done according to labour market needs in Romania through: establishing admission quotas for work, facilitating access for limited periods of certain socio-professional categories that are deficient domestic bilateral agreements between Romania and other countries for admission Romania workers for work.
  a.3. Encouraging admission of third country nationals for carrying out commercial activities and business that have major potential in making investments and creating jobs in Romania.
  a.4. Promoting an efficient selection of citizens from third countries to study in Romania, so that their level of training to help them stay any further after completion of studies to conduct the benefit of Romanian society.
- a.5. Development and efficient management information systems in managing immigration on national territory. It aims to create high performance systems to be interconnected nationwide in their central system is National Visas, Migration and Asylum.

The main actions to be undertaken in accordance with European legislation refer to:

- b1. Ensuring access to the asylum and the principle of non-refoulement, special attention being given to cases of persons residing in Romania, but the real need of international protection, the necessary regulation of their status.
- b2. Prevent, deter and punish abuse of asylum procedure, by applying the criteria of efficiency and quality of procedures, policies and practices.
- b3. Providing and maintaining Romania's capacity to assume the responsibilities and obligations of EU membership Asylum, which involves, inter alias, an active contribution to the mechanisms of division of labour between countries receiving asylum seekers and refugees.

- b4. Providing an active role in developing legal and institutional framework and building functional asylum systems in eastern and south-eastern Europe, to countries such as the opening of the ex-Yugoslavia or the Republic of Moldova. In this respect will strengthen cooperation with the authorities of EU Member States as well as with international organizations - O.I.M. and U.N.H.C.R.
- b5. Improving the reception of asylum seekers and research information from their home countries by solutions to the opportunities offered by the European Refugee Fund and Integration Fund Social integration of foreigners is to:
- c1. Support active participation of foreigners who reside or have resided legally in Romania the social, economic and cultural country, which will contribute to their integration into the host country society, while preserving their cultural identity.
- c2. Protecting vulnerable groups and victims of persecution based on gender/sex, unaccompanied minors, victims of torture, people with disabilities, people age
- c3. Providing access to all foreigners who live or reside on territory of Romania the procedure for obtaining Romanian citizenship.
- c4. Adequate training of personnel involved - civil servants, contractual personnel, people with leadership, staff in health services, education, welfare, to respect cultural differences, religious, physical and psychological needs of people undergoing integration. It will focus on the development of programs of education and training of these staff.

If by 2007 the priority concerns were focused on legislative and institutional harmonization in order to fulfil the acquis after accession to the EU. Romania has new obligations that derive from the status of EU member country. From this perspective, we fully share the view expressed by the National Strategy on Immigration in the period 2007-2010 that "migration is a process to be managed and not a problem to be solved". It relates to the migration target from early this century, decisively marked the implications of globalization.

Romania currently has well developed strategies, policies, action plans to manage migration, but the biggest challenge, real, occurs when they have translated into practice. In this direction there must be a modern management, performance, to ensure the best use of human and material resources allocated to this process. Therefore we present below a series of recommendations and proposals aiming at improving policy and practice of migration in Romania, from the state of existence. From a legal perspective, Romania has transposed the acquis communitarian in the field of migration. But bear in mind that the changes currently taking place migration policies at European level with the trend toward greater openness to attract labour from third countries. These policy changes attract new directives whose requirements must be implemented nationwide. Romania will have to continue to align policies and permanent migration in EU legislation, which currently experience a stronger dynamic.

In Romania there is a very complex institutional framework, but also very fragmented, leading to deficiencies in communication between the institutions responsible for migration, and even between departments within the same institution, which have different competent in the field of migration. Appears the need for better cooperation, coordination and information between the management and inter-institutional migration process. Of great utility as an integrated information system with the participation of each institution and information that is accessible all institutions and departments.

Frequent institutional changes through reorganization, establishing and ending the institutions and within institutions directions led to a high turnover of staff so that continuity is lost in many cases occupying certain positions with consequences that going concern. Many people are newly engaged or have little experience in a newly created or reorganized institutions, and in conditions of strong dynamic operating systems and institutional frameworks, resumes activity almost from scratch in new directions with new people, losing many or previous experience very helpful in this area. It is therefore

necessary to attempt to stabilize the personnel involved in activities related to the migration process once it has specialized in this activity.[1]

Staff turnover, with insufficient coordination and information between departments and institutions may be another explanation for the weakness, that lack of vision and an overview of the employees of various institutions, involved in various activities in the field. Each knows his own work to be performed today, but has less knowledge about the activities of colleagues from other departments and institutions dealing with other aspects of migration. Therefore, we had a much better coordination between departments and institutions better information and mutual knowledge "about each other" in respect of the activities, tasks, objectives follow employees from different departments / institutions and how they can be linked and coordinated between them.

There are a large number of NGOs that are involved in migration issues (especially regarding asylum). Better cooperation with state institutions such organizations would contribute to better management of migration. Unlike state institutions, these organizations have a greater continuity of their activities, organizational structures, many of them benefiting from support and international experience.

If not otherwise, at least in terms of turning the experience of these institutions can be more cooperation between governmental and non-governmental organizations. An example of good practice for the purposes mentioned is the collaboration between the Romanian Government (ROI) and the ILO for a program of voluntary repatriation of foreigners residing addressed.

From financial perspective, it is necessary to administer effective, rational management of funds allocated for migration - internal and external sources, primarily from European funds. In some cases requires, besides increasing the absorption of funds allocated for solidarity and management of migration flows, rethinking allocations, specifically for asylum seekers, refugees, return, border security.

These must be accompanied by concerns administratively for staff training, ability to identify real needs, to develop viable projects. In the current European context of migration and the problems facing workers Romanian, Romania should make their position known as vigorous campaign for change and vision for mobility and labour migration: they are two interrelated concepts, which should describe different realities, namely the mobility of citizens of the old Member States versus migration of citizens of new Member States, which would lead to the equal treatment of all European citizens.

About asylum seekers and refugees, basic requirement, rational basis for management is to recognize the difference between the two groups and their treatment correlated: the numerical, asylum seekers are far less numerous than refugees, in fact, request for asylum is a transient state to refugee status or other forms of protection, which requires dealing with requests in terms and procedures established by law, finding the most appropriate response particular claim, followed by implementation, the policies and differentiated management, appropriate measures chosen solution: acceptance / integration - rejection - repatriation.

Although in the past Romania among countries was not flooded with requests for asylum is considered a transit country on the route to other European countries after EU accession is expected that soon become a target country, although deriving implications in terms of strategies, policies and management in the field.

In the illegal migration should be given special attention trafficking, a phenomenon increasingly worrying, multi-dimensional: it is a serious violation of human rights, economic and social phenomenon with negative consequences for society, an aspect of public health and one criminal order, the traffickers are criminals (and victims).

A change whose implications should be treated with all the attention is overcome, recently, the share of persons exploited sexually exploited share the work. It is accompanied by decrease in comparison with previous periods, the share of women victims of trafficking victims in total. In our opinion efforts

[1] MIRA (2008). Immigration and Asylum in Romania - 2007, Ministry of Interior and Administrative Reform, Bucharest.

in institutional, technical and operational plan to combat trafficking must still combine with the Romanian society's awareness about this issue. Continuation and expansion of information campaigns should contribute to the awareness of public on the difference between human trafficking and various antisocial acts such as prostitution, theft etc. It also requires inter-institutional capacity building especially after the return of persons who were victims of trafficking for their reintegration and treatment of traumatic shock consequences.

References

ANITP (2007). Report on trafficking situation in Romania, January-June 2007, National Agency Against Trafficking in Persons, Bucharest, September 2007.

Constantin, Vasile; Preda V. & Niculescu, L. (2004). *Migration from the perspective of Romania's accession to the EU* (bilingual edition - Romanian and English) p. 33.

Delcea. M. (2002). *Legal Protection of Refugees in International Law*. Timisoara: University Press Publishing, p. 15.

Kozak, D. (2007). Romania: labour migration trends and Reasons. European Conference on Mobility on Workers Labour Market, Gdansk, April, 2007.

Lazaroiu, S. (2002). *Circular migration of labour from Romania. Consequences of European integration*, p. 42.

MIRA (2007). *Immigration and Asylum in Romania - 2006, Ministry of Interior and Administrative Reform*, Bucharest.

MIRA (2008). *Immigration and Asylum in Romania - 2007, Ministry of Interior and Administrative Reform*, Bucharest.

Nicolescu, L. & Constantin, D.L. (2005). Romania's External Migration in the Context of Accession to the EU: Mechanisms, Institutions and Social-Cultural Issues. *The Romanian Journal of European Studies*, No. 4/2005, p. 28.

*** www.arca.org.ro

*** www.e-migration.ro/

*** www.muncainstrainatate.anofm.ro/

*** www.oim.ro

*** http://anitp.mira.gov.ro

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REALITIES AND PERSPECTIVES

Strategies of Environmental Policy in the European Union

Georgeta Modiga[1]

Abstract: Strategies for achieving environmental policy reinforce the principle of subsidiary (delegation of responsibilities of Member States, while European Union outlines only the general objectives to be taken into account) and try replacing the traditional vertical approach, command and control type, by promoting an alternative model for achieving the EU average. One can say that these strategies are a kind of "aids", which complement standard tools and acting as incentives for the adoption of measures for environmental protection that emphasizes the trend towards an approach based on the principle of volunteering. In the early '70s, was recognized the need and legitimacy of a common environment. In time, will develop a progressive environmental Community law, which includes over 200 directives and regulations. They concern mainly water protection, air quality, protection of flora and fauna, noise, waste disposal. Environmental legislation has a particular characteristic; it takes into account economic aspects.

Keywords: environmental protection; European strategy;environmental agreements

Treaties establishing the European Communities did not provide explicit competent environmental community. Dealing with pollution, the rapid growth, Member States have adopted measures at national level. As a transboundary phenomenon, pollution could be controlled effectively only within national borders. In addition, some of the measures adopted by Member States prevented the free movement of goods within the common market. As a result, calls for joint action and pressure for environment have multiplied. In 1972, shortly after the first UN Conference on Environment, European Commission proposed a program of action in this field.

But previous legislation of 1986 had no legal basis in a treaty. Single European Act explicitly gives competent European Community environmental policy. Thus, it will provide a formal legal basis that overall increasing environmental regulation. European Single Act has set three priority objectives of Community policy: an environmental, human health 2, 3 prudent and rational utilization of natural resources (Article 130 R).

Treaty on European Union (1992) formally established the concept of sustainable development in EU legislation. Four years later, the Treaty of Amsterdam has made sustainability a primary goal of the European Union. European Union's future development must be based on the principle of sustainable development and a high level of environmental protection. Environment must be integrated into the definition and implementation of all economic and social policies of the EU, including trade, industry, energy, agriculture, transport and tourism.

First Environmental Action Programmer (EAP) developed by the Heads of State and Government of the Community based on this application is in the very beginning to the Community environmental policy. Although first steps have focused more on repairing damage already occurred, the very first principles of prevention set EAP. These principles were partially reversed, enlarged and completed the three ESP's (1977, 1983 and 1987).

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By its very nature, sustainable development is the need for accountability and environmental education, and this is reflected by changes in Community policy in recent years, politics marked the transition from an approach based on coercion and punishment, more flexible one, based on incentives.

Thus, to act on a voluntary approach, in order to promote the accountability towards the environment and to encourage the use of environmental management systems.

Environmental policy does not act independently, but reflects the interests of civil society in the direction shown by the creation of numerous environmental movements and organizations. Moreover, in some countries led to the creation and development of political parties "green", with a success in the political arena. Resistance should not be forgotten either - or, better retention and inertia that occurs when environmental objectives appear to limit industrial competitiveness and economic growth, but this only serves to highlight once again the need for a concerted approach to Europe and the need for an active and integrated environmental policies, able to meet the challenges that arise in economic terms. (Sava, 2005, p. 41)

EU environmental legislation may be subject of several articles of the EU Treaty, depending on its major goals. Directives aimed at environmental qualities of products are usually based on Article 100 or (after 1987) on Article 100a, which aims to harmonize Member States' legislation establishing the common market.

EU environmental policy, as was established by the Treaty, aims to ensure environmental sustainability activities through its inclusion in EU sectoral policies, the development of preventive measures, through the principle of "polluter charged "by fighting the source of pollution, and by assuming joint responsibility.

The acquis comprises approximately 200 legal instruments covering a wide range of sectors, such as air and water pollution, waste management and chemicals, biotechnology, radiation protection and nature conservation. Member States must ensure that an environmental impact assessment was carried out before approving certain development projects in public or private sector. Despite the significant improvements that have occurred, especially in reducing air and water pollution, the acquis needs to develop further. In the new environment action program identifies four priority areas: climate change, nature and biodiversity, environment and health, and natural resources and waste.

A strategy should include several elements:

- to express a major;
- to establish a means by which to meet that objective;
- produce measurable results.

On 12 December 2003 European Council approved the European Security Strategy 'A secure Europe in a Better World ". The EU has managed to produce a document that provides a coherent picture of security threats and European political reactions. What is new is the new European strategy analysis broadened and enhanced security environment at the same time:

- more attention to the effects of globalization;
- awards for "old" and "new" forms of terrorism;
- proliferation of weapons of mass destruction has been redefined as the largest potential, but not the only threat;

A. Sustainable development

In addition to promoting economic and social progress and a high level of labor employment, the European Union has set itself the objective of achieving balanced and sustainable development. This objective was enshrined in the Treaty of Amsterdam by the 15 member states and was seen as a key aspect of Community law to be adopted in negotiations with the 10 new members, the candidate.

Environmental policy is therefore of great importance not only in the EU 15 but will continue to be so and in an enlarged Union of 25, then 27 Member States.

The common goal of sustainable development is defined in detail in the chapter on environmental policy of the EC Treaty (art. 174): "The Community shall preserve, protect and improve the environment, protect human health, will use natural resources prudently and rationally and promote international measures to deal with regional or international environmental problems. European Union Sustainable Development Strategy was adopted in 2001, the international working meeting in Gothenburg (Sweden), the long-term strategy that focuses on sustainable development policies in the fields of economic, social and environmental protection and had a significant appreciation in the coming years. But the concept of sustainable development is now in EU environmental policy since May and just PAM separates the independent strategy in 2001. This development framework identified four priorities:

1) climate change and energy use "clean" (is energy sources that do not harm the environment);
2) public health;
3) the responsible management of natural resources;
4) transport systems and land use.

To treat these priorities have been established three lines of action, the structure and efficient strategy for sustainable development and at the same time, complement each other. These include:

- A proposal that affects several sectors
- B. measures to achieve long-term goals
- C. revisions progressive degree of implementation of the strategy.

European Union Sustainable Development Strategy was adopted in 2001, the international working meeting in Gothenburg (Sweden), the long-term strategy that focuses on sustainable development policies in the fields of economic, social and environmental protection and had a significant appreciation in the coming years. But the concept of sustainable development is now in EU environmental policy since May and just PAM separates the independent strategy in 2001. Currently there are two lines of development of this strategy: first, the process corresponds exactly Cardiff and is considering integrating environmental policies into other Community policies, the second, represented by the Declaration of Gothenburg - called "A Sustainable Europe for a world better: a European Union strategy for sustainable development "18 - has the role of EU in global sustainable development issues. Through the development started in 2001 identified four priorities:

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2) Public health;
3) The responsible management of natural resources;
4) Transport systems and land use.

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These include:

a. proposal that affects several sectors,
b. measures to achieve long term objectives,
c. revisions progressive degree of implementation of the strategy, each of which is developed by a set of measures to create the proper action and result in operational and practical application of sustainable development.

B. The promotion of NGOs active in environmental protection

This program is based on Decision 466/2002/EC of March 2002, works as a financial instrument and is re-renewal of an earlier program, lasted three years (1998-2000). The new program covers the period 2002 -2006, has a budget of 32 million Euro and encourages systematic participation of NGOs

in the development of Community environmental policy and supporting small local and regional associations that contribute to the implementation of the acquis communitarian. Its role is accomplished by providing incentive grants (grants) to NGOs active in environmental protection, based on proposals submitted by them.

Criteria for grants and follow priorities 6th EAP promotes environmental education and supporting the implementation of EU environmental legislation, and amounts paid covers 70% of the organization over the last two years for NGOs in MS and 80% for candidate countries. This program works as a financial instrument and encourages systematic participation of NGOs in the development of Community environmental policy and supporting small local and regional associations that contribute to the implementation of the acquis communitarian. Its role is accomplished by providing incentives for financial support to NGOs active in environmental protection, based on proposals submitted by them.

C. Integrated Product Policy (IPP)

It is based on a Green Paper on Integrated Product Policy (February 2001) and is the strategy since June 2003, when the Commission adopts communication related. IPP seeks to minimize the damage they're causing some environmental products throughout their life cycle and proposes a voluntary approach to "green products" and close cooperation with stakeholders. PIP is based on a Green Paper on Integrated Product Policy (February 2001) and exists as a strategy since June 2003, when the Commission adopts communication related. IPP seeks to minimize the damage they're causing some environmental products throughout their life cycle and proposes a voluntary approach to "green products" and close cooperation with stakeholders. Basic principles of this strategy are:

1) Thinking the product life cycle perspective;
2) Market involvement by creating incentives to encourage demand and supply of "green products";
3) Stakeholder involvement;
4) Updating and further development;
5) Creation of various instruments.

Regarding implementation, have identified two directions:

- Establishment of "framework conditions" - promoting those types of measures and instruments applicable to several different products;
- Create an "product-specific approach" - identifying products most harmful to the environment and developing pilot projects to demonstrate the practical application of PIP benefits. Currently, this strategy is still in development phase and how to promote the objectives of its principles into practice.

Although this strategy is not yet functional, it has great potential to promote an attitude centered on concern for the environment, both by producers and consumers - which, in the long run, can generate the formation of a self-regulating mechanism for selecting the types products on the market, depending on their potential harm to the environment. To ensure the effectiveness of this strategy, the Commission envisages reviewing every three years.

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1) thinking the product life cycle perspective;
2) market involvement by creating incentives to encourage the supply and demand "green products";
3) stakeholder involvement;
4) updating and further development;
5) creation of various instruments.

To ensure the effectiveness of this strategy, the Commission envisages reviewing every three years.

D. voluntary environmental agreements

Environmental agreements are a form of co-regulatory role to support the active involvement and accountability to environmental businesses. They are voluntary and are currently used in all Member States at national, regional or local. Among their advantages are:

- pro-active approach from industry
- effective and tailored solutions to problems identified
- the rapid environmental objectives.

Environmental agreements is that strategy in the aftermath of a Commission Communication of July 200224 and is a form of co-regulatory role to support the active involvement and accountability to environmental businesses.

Environmental agreements are voluntary and are currently used in all Member States at national, regional or local level, but appear as a new EU - the agreement between the European Commission and European industry federations (Dragos & Velişcu, 2004, p. 24). The novelty is the establishment of a legal framework for the use of voluntary environmental agreements; otherwise we speak of environmental agreements since 1996, when they first outlined their advantages:

- pro-active approach from industry;
- effective and tailored solutions to problems identified;
- rapid achievement of environmental objectives.

Regulating their operation, made the communication of July 2002, sets out three possible types of agreements:

1) agreements on its own initiative - refers to industry initiatives in areas where the Commission does not intend to propose regulations and they can support a formal recognition;
2) self-regulation - is where the industry choose to regulate a controversial issue to prevent a legislative regulation of the Commission;
3) co-regulation: is a type of stricter regulations, the EU established objectives and monitoring requirements and industry decide what measures be taken for this purpose.

Areas where these agreements at Community level may have an important role are: the impact of environmental PVC, integrated product policy, climate change and waste management. Areas where these agreements at Community level may have an important role are: the impact of environmental PVC, integrated product policy, climate change and waste management.

E. Environmental taxes and fees within the Single Market Environmental taxes were adopted in 1997 as a way to promote the use of fiscal instruments to increase the effectiveness of environmental policy. These are taxes imposed and the SM (and not at EU level), a strategy that has always been encouraged by the European Commission and involving the use of two categories of environmental taxes:

- the applicable emissions (pollution taxes on emissions aviation noise);
- the applicable products (pesticides tax, excise duties on oil etc.)

Revenues from these taxes are added to the budgets MS and can be used to finance environmental protection activities, but also to reduce other taxes (such as employment taxes). Environmental taxes were adopted in 1997 as a way to promote the use of fiscal instruments to increase the effectiveness of environmental policy. These are taxes imposed and the SM (and not at EU level), a strategy that has always been encouraged by the European Commission and involving the use of two categories of environmental taxes:

- the applicable emissions (pollution tax on aviation noise emissions);
- the applicable products (pesticides tax, excise duties on oil, etc..)

- income from these taxes is added to MS and budgets can be used to finance environmental protection activities, but also to reduce other taxes (such as employment taxes). In this context, the EU strategy is to:
- collection of MS experiences on environmental taxes,
- analyze economic and environmental effects of existing taxes,
- monitoring their effects on the Single Market and Competitiveness
- European industry in order to assess the effectiveness of fiscal instruments and any possibility of their translation to the Community.

F. European environment and health strategy (SCALE)

Envisages direct causal relationship between the complex and pollution, environmental change and human health characteristics. SCALE is the result of constant concern to the European Commission in this direction and initiated in June 2003, being developed in collaboration with DG Research and DG Environment and DG Research. The novelty of this strategy is centered on children's health - which are the most vulnerable social group most affected by pollution effects - unlike the rest of environmental legislation, which is based on norms and standards for adults (Petrescu-Mag, 2008, p. 15).

G. Thematic Strategy on waste management

To implement this strategy, the waste has been classified as domestic or industrial. In Romania, only 22% of all waste products are recovered, the majority being eliminated by storage and only 1% is incinerated.

The objective of this strategy is to eliminate the causal relationship between growth rate / resource use and waste production. Identified the following main aspects:

- To formulate a good policy for the prevention of waste is necessary for scientific analysis, the present there are no reliable statistics
- On recycling should focus on materials instead focus on products which have completed their life
- A new debate on the definition of waste
- Need to establish a recycling level common to all Member States.

EU aims to reduce the period 2000-2010 by 20% the amount of waste generated and 50% by 2050. Union policy on waste management involves three complementary strategies:

1. elimination of waste at source by improving manufacturing
2. encouraging recycling and reuse of waste through their recovery points collection facilities
3. reduce pollution caused by waste incineration. This position requires close monitoring because of environmental damage that can be made.

Managing risk and environmental emergencies Extreme manifestations of natural phenomena such as storms, floods, droughts, landslides, earthquakes and more powerful, plus technological accidents (serious pollution, for example) and the conflicts can have direct influence on the life of each person and the society as a whole.

Vulnerability highlights how much the man and his assets are exposed to the various hazards, indicating the damage they can cause a phenomenon. Environmental destruction increases the vulnerability. This varies depending on how the equipment and training of the population.

Classification of disasters in terms of NATO is as follows:

- natural disasters: earthquakes, tsunamis, volcanic eruptions, landslides, floods, drought

- technological accidents: nuclear accident at nuclear power plants, chemical and industrial accidents, plane crash, rail, water, and acts of terrorism.

Thematic Strategy on the Urban Environment

Following the Environment Council meeting in June 2006, was adopted "Thematic Strategy on Urban Environment," which suggests actions in four priority areas: urban management, sustainable transport, construction and urban design. The measures outlined in this strategy aim to contribute to better implementation of EU environmental policies and legislation at local level by supporting and encouraging local authorities to adopt a more integrated approach to urban management and inviting Member States to support this process.

The evolution of environmental policy and changes made during this time are reflected not only the objectives and priorities, but the number - growing - it's implementing instruments. Thus, one can speak of the development of three types of tools: legal, technical and economic and financial tools, plus a set of "aids" rather responding to new trends and strategies for environmental protection.

Successive waves of enlargement of the European Union has problems not only political, institutional, economic and social, but also from an environmental perspective, and environmental policy issues addressed by the Union widened considerably. As environmental security issues worsen, can lead to conflicts between states for the following reasons:

- access and control of natural resources;
- decline in living standards and mass migration due to environmental degradation;
- altering power effectively states that environmental degradation due to their geographical;
- pollution across national boundaries;
- global environmental degradation (air, water).

Current threats to environmental security are related to exceeding the carrying capacity of natural conditions by increasing population and proliferation activity. Environmentalists say that people should be able to reverse this trend of undermining their living conditions if they understand this. The fact is, now, that environmental security is a security sector that tends to gain prominence on other sectors.

References

Dragos, D.C. & Velişcu, R., (2004). *Introduction to European Union environmental policy*. Cluj-Napoca: Accent European Institute of Romania, Environmental Policy, Bucharest, 2004.

Petrescu-Mag, Ruxandra (2008). *Policies institutions and environmental legislation.* Cluj: Academic Press.

Popovici, Eveline (1998). *Study environment. European dimension*. Iasi: University "Al. I. Cuza".

Rizea Marian, (2005). *Ensuring environmental security-risk assessment*. Bucharest: ANI Publishing.

Sava, Ionel Nicu (2005). *Security Studies*. Bucharest: Romanian Center for Regional Studies Publishing House.

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REALITIES AND PERSPECTIVES

The Global Dimension of Education

Vasilica Negruţ[1], Jana Maftei[2], Varvara Licuţa Coman[3]

Abstract: The general objective of the paper was founded on a very current topic of great interest as globalization is no longer a simple theoretical debate. It is a major process that clearly shapes the evolution of the contemporary world, opening new opportunities for development. In the information age it increases the technology importance of education, institutional performance, mass media. Not only the economy, but also the education is covered by profound changes caused by the information revolution and there have been significant, dramatic changes. Using content analysis, through a descriptive study research, this paper aims at showing a new dimension of education, the global dimension, starting from the development of new technologies and their role in the global economic growth. We thus appreciate that ensuring quality education for all citizens it will enable the EU to face the challenges, namely the globalization and competitiveness of newly industrialized countries, the demographic structure, the rapidly evolving labor market and the revolution of information and communication technologies.

Keywords: globalization; education; economics; development; skills

1. Conceptual Clarifications

In the most general terms, "globalization is the process by which the geographic distance becomes a less important factor in establishing and developing the economic, political, and socio–cultural cross-border relations". (Brad, 2001, p. 6)

The paradigms of globalization differ from one school of thought to another. Thus, the realistic point of view argues that globalization is equivalent to the militarization of the international system and the establishment of political control model over borders. However, realists consider that, although there are affected all industries and public life domains, it is not affected the real competition between states.

Instead, the followers of liberalism identify globalization with multilateralism and with the global phenomenon of increasing world interdependence. In turn, globalists argue that it is a normal result of the development of the world capitalist system.

In the most general terms, globalization represents the almost natural consequence of its growing rate printed in the history on the meaning of human development. (Popescu, 2009, p. 3)

Globalization is a highly dynamic process of increasing interdependence between national states, which included all areas of economic, social and cultural life, being one of the most significant problems and also challenges of the contemporary world. (Ciolan, 2008, p. 8)

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2. Manifestation of Globalization in the Economy

Economics is considered by specialists as the most legitimate domain to analyze globalization, because it was the main "artisan" of the global state, transforming the whole world into one market. (Ciolan, 2008, p. 55)

It is becoming increasingly clear that a new economy, dynamic, innovative, knowledge-based and computer networks, led by changes cannot be achieved only in a globalized and globalizing society.

Internally, there is an increase of the states' competencies at economic level. They occur more often in shaping the savings, investments, consumptions, and also financing industries in order to cope with the internationalization process of the market and banking systems.

The economic globalization, a feature and at the same time, a vehicle of the new society, has many implications. (Niculescu, 2006, pp. 48-55)

Globalization is certainly a reality whose "central, strategic activities, including innovation, finance and corporate management, operate on a worldwide scale in real time." (Ciolan, 2008, p. 56)

Therefore, knowledge, along with information, represent the main forces of the modern economy, the knowledge-based economy is the only mechanism for rapid economic growth. (Haralambie, 2009, pp. 245-252)

At the same time, it shows that as the economies open, more and more people are involved in the integration process of knowledge and in developing the links that are not commercial, including information, cultural, ideological and technological flows. (Bran & Ioan, 2009, p. 75)

However, the knowledge society requires a radical transformation of institutions in all fields: political, economic, and educational. Knowledge society institutions must become flexible structures, managed and serviced by professionals of high moral character that puts the public good before personal welfare. But the most felt need for transformation is in education. (Sabău, 2001)

3. Globalization and Geopolitics

Geopolitics is, above all, a method of analysis and explanation of political events of modern history in terms of geographical realities - dimensions, borders, layout and structure of the territory, landforms, natural resources or climatic factors - from which interaction it derives theoretical conclusions and there are developed the guidelines and directions for real policy. (Serebrian, 2009, p. 6)

Geopolitics is, in its essence, geoeconomics; it is part of the geopolitics of major geoeconomic and messianic spaces. This leads to the birth of a single market system which together with information technologies, will give "a unique and homogeneous world" and one *liberal-democratic ideology* (Bădescu, 2003, p. 37).

As Mircea Maliţa stated, the geopolitics of the contemporary world proposes ten thousand cultures, but only one civilization, border processes being manifested by permeability and even dissolution of the national state borders. (Ciolan, 2008, p. 57)

In the field of social reality the geopolitical phenomenon is part of the international relations that is structured in a geographical area or another.

Nowadays information revolution leads us to meditate more upon some essential components of geopolitics, namely the geographical location of the state. (Dobrescu, 2003, p. 386)

In other words, physical neighborhood does not matter as much as today, the borders that delimit territories are crossed by "continuous waves of information on which the state can carry out only a minimum or no control at all" (Dobrescu, 2003, p. 386). And this information does not remain without consequences; it has a key role in shaping values, and resetting equilibrium.

In information age it increases the importance technology, education, institutional performance, mass media, as for geography, people no longer play such a prominent a role. Not only the economy, but also the education is covered by the profound changes caused by information revolution and these changes are significant, creating huge advantages.

Globalization is no longer a simple theoretical debate. It is a major process that clearly shapes the evolution of the contemporary world, opening new opportunities for development. Although it induced a series of negative tendencies, as shown in the specialized literature, globalization "has an assertion potential still little explored", but it will have the grades of a "fundamental geopolitical process of nowadays."

4. Globalization and Education

Economic globalization, following the transnational corporations spreading worldwide has opened opportunities to what education globalization means, whereas education and specially curriculum can not remain indifferent to these developments. Therefore, the general tendency is to bring learning from the classical discipline framework and focus it towards a globalization of learning.

As mentioned in the specialized literature, the learning globalization is not achieved just by border processes with "epistemological and social feature," but also by extending this process throughout the entire life.[1]

Lifelong learning has been defined as "all learning activities completed throughout life in order to improve knowledge, skills and competences within a personal, civic, social or occupational perspective".[2]

The undertaken research in the recent years on the implications of globalization in education tries to emphasize that its very foundation is deeply affected. There are theories, as the one of J. Delors, who claims that economic globalization and information revolution have radically changed the nature of teaching – learning process, leading to its deinstitutionalization. At the same time he shows that diversification and fragmentation, specific to global companies, would lead to the cancellation of the national educational ideals, whereas it would have to meet the economic requirements under the conditions of global competition.

An obvious effect of globalization was the internationalization tendency of education, transposed in the mobility of pupils, students and teachers and also the tendency of authorities to borrow models of educational reform.

The internationalization of education has been systematically supported by the international organizations such as OECD (Organization for Economic Cooperation and Development), CEDEFOP OECD (Organisation for Economic Cooperation and Development), CEDEFOP (European Centre for

[1] Memorandum on Lifelong Learning, Brussels, 30.10.2000, SEC (2000) 1832. According to the memorandum, lifelong learning is seen "as a purposeful learning activity undertaken on as an ongoing activity, with the aim of improving knowledge, skills and competencies. Section IV outlines six key messages, each including a set of questions that need to clarify the priority areas for action. Key messages suggest that a coherent and comprehensive lifelong learning for Europe should aim at:
- guaranteeing the universal and continuing access to learning for gaining and renewing the skills needed for a sustained participation in a cognitive society;
- visibly raising levels of investment in human resources to prioritize the most important values of Europe - its people;
- developing effective teaching and learning methods and situations which encourage the continuity of lifelong learning;
- significantly improving the ways in which participation and outcomes of learning are understood and appreciated, particularly non-formal and informal learning;
- ensuring that everyone can easily access good quality information and advice about learning opportunities throughout Europe and throughout life;
- providing lifelong learning opportunities as close to those who want to learn in their own communities, supported through ICT-based facilities, wherever appropriate.

[2] The European Commission, The paper *Making a European Area of Lifelong Learning a Reality*.

the Development of Vocational Training), UNESCO (United Nations Educational, Scientific and Cultural Organisation), WB (World Bank).

The educational reforms around the world are assisted by foreign experts, putting into question the national experiences in education. The educational standards are generalized as an effect of exchange of views between specialists. The International organizations promote the transnational education policies, including on the agendas their concerns of international/ global dimensions of education. However, their policies depend on their financial resources available to officials and practitioners in education domain. There are organizations like UNICEF which survive through government funding and private donations, launching campaigns for protecting the rights of children (annual report The State of World's Children); UNESCO, an organization that promotes democratic values, contributing to peace and world security, advocating for collaboration between nation in education, science, culture, justice and human rights, supporting the free men's right, regardless of race, gender, language or religion (The Report on XXI century education, developed under the leadership of Jacques Delors, 1996); the World Bank - intergovernmental organization and specialized agency of UN, with special status among those who finance educational reforms and promote the internationalization of education (first report in 1995 called *Policies and Strategies for Education: A World Bank Review*).

Also, there are developed new tools for education, there are educational products, there are developed in school programs of (natural) and social environment, leadership training, development of entrepreneurial qualities.

Young people are taught to find the necessary information, to use modern means of investigating the information, to plan a career route during their early school. The teacher will not be prepared in the sense of an encyclopedic mind, for the volume of information is no longer important to convey knowledge, but how the teacher directs its students to understanding the investigation methodologies, which corresponds to individual needs and aspirations. Thus the teacher presents a very important role on the line of training critical, lateral, complex, analytical thinking, which the youngsters will use throughout their life. Moreover, the methods of learning, teaching and assessment for learning throughout life suggest a model different from the traditional one, where the roles of teachers and students are redesigned.

4.1. The Need to Modernize Education

The rapid implementation of scientific discoveries and technical inventions make science a productive force, resulting in rapid changes in all fields of activity to which man must adapt through education. Modernizing education includes the education system and also the learning process. The system provides the necessary institutional framework of carrying out the educational process, and in turn it provides the conditions necessary to materialize the objectives of educational action. Modernization is a logical process, consisting of a series of actions, aiming at achieving a fundamental consistency, actions that take place in the social life, economy, science, technology and culture in particular.

Modernization aims at reducing the gap between education and society. This is a prerequisite for advancing the education as a whole, becoming a fundamental aspect of state policy in education domain, a fundamental concern of the central body decision, a problem that focuses the efforts of many groups of professionals: teachers, economists, psychologists, sociologists etc. Modernization and education merge into a whole, so that only a modernized education can become an important factor for accelerating the social progress.

The purpose of modernizing, adapting education to the demands of society does not exhaust and it cannot explain its internal mechanisms, hinges and pedagogical springs that, ultimately, are at the basis of this purpose.

On the content of modernization, we can mention the fact that it consists of establishing optimal relations between the structural elements of education, viewed as a whole, so that it would ensure an appropriate and stimulating framework and at the same time the implementation of educational ideal.

Modernization of education means finding and implementing solutions that would balance the negative effects of the phenomenon of "accelerated abrasion of knowledge".

Between the two categories of factors there is a close inter-independence. "Optimizing the relationship between social logic and education is the driving force of development and improvement" (Nicola, 2003, p. 554).

4.2. The Changes on the Labor Market – A Determinant Factor of Education Globalization

In a reference work in the domain of educational system reform (Neacşu, Ştefan, Stanciu & Mirilă, 1997, p. 27) it is stated that the educational system and in particular, that of training, integrated market economy mechanisms, involving flexibility and, progressively, the liberalization of demand, supply, training costs, salary and motivation forms for quality standards. It further points out that this means: the human resources begin to react positively to new signals of labor market; the state responds to the demand for new skills, making flexible the offer of education forms; the institutions of higher education in particular, perceive and react more quickly to the needs of labor market.

However, as a result of the internationalization it has appeared a labor global market. Business agents already use the "teleworking" in order to achieve in useful time the required activities, by involving specialists from countries with low income.

In order to achieve these results, the education must draw the new world transformations in constant motion and also to provide to youngsters new orienting tools with which they find their affirming way and their permanent development.

Raising the skills' level is a priority of educational policy, at both national and international level. Finally it should be a tendency to rebalance between the actual professional skills and the transversal ones. The latter are particularly important in terms of exercising the profession, as they take into consideration: the achievement of professional tasks effectively and responsibly, respecting the rules of conduct in the field; applying the techniques work effectively in a team (with elements of interdisciplinarity), within the hierarchical levels; the efficient use of communication resources and sources of professional assisted information, both in Romanian and a foreign language of international circulation.

It is therefore expected on a medium and long term, to significantly increase the level of education and training, recording at the same time, the increase of the functional side of education (Ciolan, 2008, p. 63), centered on key skills training[1], which have transversal and transferable feature, which is formed beyond the traditional disciplines.

The globalization is a global reality, and the changes produced due to globalization regard the increase of educational exchanges and curriculum internationalization. The international dimension of the curriculum was encouraged in many countries; the European Union boosts the cooperation in research education domain and bilingualism, in response to the demands of the contemporary world.

4.3. The Role of Information and Communication Technologies in Education Globalization

New information and communication technologies have an obvious influence on the global training approaches and on educational policies.

With the increase of the demand for training it is diversified and it complicates the concrete offers of meeting the new requirements. More and more pathways to achieve education move from classical

[1] In 2006 the European Parliament and EU Council adopted a Recommendation on the establishment of key competencies for lifelong learning throughout life. These competences: are skills and linguistic skills (in mother tongue), skills and linguistic skills (foreign language) skills and mathematical skills, scientific and technological skills; learning skills (learning to learn) skills and civic, interpersonal, intercultural and social competences; skills and entrepreneurial skills; abilities and skills of cultural expression.

institutions towards the formula sustained by the new media and information technologies. Driven by the conjugate impulse of new information technologies, the education and training domain is under the sign of fundamental structural and procedural transformations.

The practice of computerizing the education involves valuing the computer in a broader meaning, in order to achieve the educational goals. The technological perspective overcomes the didactic vision that highlights the technical advantages of computer-assisted instruction.

One of the fundamental objectives of Europe 2020 Strategy is the use of new ICT tools and teacher training, an essential condition for promoting creativity and innovation.

In the Report on Key Data on learning and innovation through ICT in schools from Europe in 2011, it shows that information and communication technology (ICT) offers a variety of tools that can open new possibilities in the classroom. They can help, in particular, to adapt the process of learning to the needs of each student and also it can offer them the much-needed digital skills in the economy based on knowledge.

Information and communication technology is evolving extremely rapid, and the problems associated with their use in education are becoming more complex, according to the report.

At the same time the report also presents a set of indicators that can help policymakers in their efforts to increase the impact of ICT use on learning. (Vassiliou, 2011)

ICT is essential to support teachers in providing opportunities for innovative teaching and learning, but they have an important role in achieving an effective school management.

In this respect there are also the European Commission statements according to which "the integration of ICT systems in education and training systems require additional changes in the environments of technology, organization, teaching, learning classes, employment and informal educational settings." (European Commission, 2008)

Developing a framework of qualifications and assessment based on skills is closely related to the current requirements of globalization, modernization within the society based on knowledge.

These changes have led also to changes in the organizational landscape of the school, focusing on: structural and functional directions.

From the structural point of view, one can speak of a new type of management, characterized by a more flexible internal organization, able to respond to economic and social requirements. From the functional perspective, school is, as stated in the specialized literature (Ciolan, 2008, p. 68), a human resource center, a provider of training (mentoring programs for juniors, training sessions at the request of companies), a center of production and distribution of knowledge, a social and education center for democratic citizenship.

5. Conclusions

Ensuring a quality education for all citizens will enable the EU to meet the challenges that they face namely globalization and competitiveness of newly industrialized countries, demographic structure, labor market and the rapid development of information and communication technologies revolution. Therefore, globalization of education can be achieved by increasing the supply of education by sustainable educational programs, that would allow the formation of appropriate skills to new national and international labor market requirements, developing new and e-learning technologies, raising the information and communication level, international recognition of university diplomas, developing new models on economic support from public and private environment and partnerships with economic, social and cultural environment.

6. Bibliography

Bădescu, Ilie (2003). *Tratat de geopolitică*/*Treaty of Geopolitics.* Bucharest: „Mica Valahie".

Brad, I. (2001). *Globalizarea şi probleme globale/Globalization and global issues*. Bucharest: Economică.

Bran, Florina & Ioan, Ildiko (2009). *Globalizarea şi mediul/ Globalization and Environment*. Bucharest: Universitară.

Ciolan, Lucian (2008). *Învăţarea integrată. Fundamente pentru un curriculum transdisciplinar/Integrated Learning. Foundations for a transdisciplinary curriculum*. Iasi: Polirom.

Dobrescu, Paul (2003). *Geopolitica/Geopolitics*. Bucharest: Comunicare.ro.

Haralambie, George Alin (2009). *Analele Universităţii „Constantin Brâncuşi" din Târgu Jiu, Seria Economie/ Annals of the "Constantin Brancusi" University of Targu Jiu.* Economics Series. No. 1 /2009, pp. 245-252.

Istrate, Olimpus (2011). Rezultate ale introducerii instrumentelor TIC în educaţie/ Results of the introduction of ICT tools in education. *Revista „iTeach:Experienţe didactice"/iTeach: Teaching Experiences Journal*, no. 2. www.iteach.ro/experientedidactice.

Neacşu, Ioan, Ştefan, Rodica, Stanciu, Filip & Mirilă, Oana (1997). *Şcoala românească în pragul mileniului III (o „provocare" statistică)/ Romanian school on the threshold of the third millennium (a statistical "challenge")*. Bucharest: Paideia.

Nicola, Ioan (2003). *Tratat de pedagogie şcolară, Modernizarea învăţământului/Treaty of school teaching, education modernization*. Bucharest: Aramis.

Niculescu, Niculae. (2006). Economia bazată pe cunoaştere - NOUA ECONOMIE?/ Economy based on Knowledge - New Economy? *Revista Economie theoretică şi aplicată/ Journal of theoretically and applied economics*, pp. 48-55.

Popescu, Eugen (2009). *Teorii ale integrării europene/Theories of European integration*. Bucharest: C.H. Beck.

Sabău, Gabriela Lucia (2001). Premise ale procesului tranziţiei de la societatea industrială la societatea cunoaşterii/The premises of the transition process from the industrial society to knowledge society. *Studii tematice. Societatea Informaţională, Societatea cunoaşterii - concepte, soluţii şi strategii pentru România/The thematic studies. Information society, knowledge society - concepts, solutions and strategies for Romania*. Coordinator Acad. Florin Gh. Filip. Bucharest: Expert Publishing House.

Serebrian, Oleg (2009). *Despre geopolitică/About geopolitics*. Chisinau: Cartier.

Stănescu, Vasile (2005). Cuvânt înainte la *Ştiinţa globalizării*/Foreword to *Science globalization*. Bucharest: ALL Beck.

Tudorică, Roxana (2004). Dimensiunea europeană a învăţământului românesc/European dimension of the Romanian education. Bucharest: Institutul European. *Seria Ştiinţele educaţiei/ Science Education Series*.

Vassiliou, Androulla (2011). Comisar reponsabil pentru Educație, cultură, multilingvism și tineret/ Commissioner responsible for the Education, Culture, Multilingualism and Youth. *Raport cu privire la Datele cheie referitoare la învăţare şi inovare prin intermediul TIC în şcolile din Europa 2011/ Report on Key Data on learning and innovation through ICT in schools from Europe 2011*.

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How do we define „WORKER" in the European Union

Pop Mihaela[1]

Abstract: The citizens who exercise their right of free movement are protected by the dispositions of European Union regarding coordination of social security. A person can travel between countries from European Union in order to search for a job, according his qualification and his studies. Free movement is a means of creating a European employment market and of establishing a more flexible and more efficient labor market, to the benefit of workers, employers and Member States. It is common ground that labor mobility allows individuals to improve their job prospects and allows employers to recruit the people they need. It is an important element in achieving efficient labor markets and a high level of employment. We can say that Romania is a country of migrants. According to official government estimates are about 3 million Romanian workers in EU countries. I followed that this article to ensure an efficient and accurate information on the term "worker" and the possibilities for labor migration in EU countries in accordance with the principle of freedom of movement. A novelty of this article is represented by comment on various approaches, nuances and connotations that were associated with the concept of "worker" by different authors.

Keywords: worker; labor market; work relationship; free circulation; social security

Introduction

The European Union is based on principles such as: liberty, democracy, civil rights and basic freedom, as well as obeying the principal of the state governed by law.

Having a job and a complete workforce are basic elements with a view to guaranteeing equal chances for all people and also contributes to fully participating of the citizens in the cultural, social and economic life.

Any citizen of a UE state has the right to look for a working place in other state witch is member of EU and benefits from same services as the citizens of the host member state from behalf of the national agencies of workforce. The UE legislation regarding the workforce guarantees the minimum level of protection which applies to all persons who live and work in the European Union.

1. Consideration Regarding the Concept of "Worker"

According to the art. 39 (2) from the European Community Treaty, related to the free circulation it is stipulated that any citizenship discrimination is forbidden, among the workers of the member states, regarding the employment, salary and other working conditions.

The European law norms do not define the term "worker"; however, the European Community Treaty consists of some elements which can lead to the clarifying of the nations such as: employment, workplace, salary/income and working conditions.

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In essence the worker is in an employment relationship that involves subordination to the employer (Ținca, 2005, p. 63). Consequently, the worker is the person who goes from one EU member state, other than his native one, in order to find a working place, to hire and to develop an activity, having proper working, without any discrimination.

The EU Court of Justice had an important role in order to clarify the term "worker", considering that this notion can be interpreted on basis of community law, in an extensive way (CJE, 1982, p. 1035). In return, the norms that consist of exceptions and derogations from the free circulation have to be restrictively interpreted (CJE, 1986, p. 433-434).

On defining the concept of "worker", the European Court of Justice used criteria which concentrate on the existence of a work report and an income for it (Ștefan & Andreșan-Grigoriu, 2007, p. 385). Therefore, the worker was defined as the person who, for a certain period of time, develop a paid activity for or being controlled by other person.

The term "worker" is much wider in the sense of working community law, in comparison with the meaning used in the national labor law. Thus, we consider that the right to free circulation can be extended also to the persons who are looking for work in other EU state, and the EU states have to permit them the entrance on their territories in order to study the workforce market and to make the necessary forms in order to be employed (Popa Nistorescu, 2008, p. 62). To the one that is looking for work can be asked by the EU state to leave their territory 6 month from their entrance if he cannot prove that he is still looking for a workplace and has the chance to be hired.

If the definition had been left at the hands of EU states, according to their interests to protect the workforce market, a part of the persons which rights are acknowledged, wouldn't have had the possibility to perform (Gornig & Rusu, 2007, p.158).

The European Court of Justice refers to the relation to work not to the work contract when they want to define the work "worker". This term, with an extensive sphere, has to be conforming to the objective criteria which characterize this type of relation, while considering the rights and obligations of the people involved. The essential characteristic of the work relationship is the circumstance that a certain person develops, in a certain period of time, in favor of other person and under its heading, some activities as a response to which they earn a certain sum of money. It has also to be involved the carrying out of a real and effective activity because neither the more or less increased productivity, neither the origin of remuneration resources or the nature of the judicial link which connect the worker to the employer, can have consequences regarding the recognition of a person as worker (CJE, 1989, p. 1621).

By worker, one should understand as all the persons that in this quality and named in whichever other way find them caught in varied national systems of social security. This term refers to any person that carrying out or not a professional activity has the status of an insured person, according to the legislation regarding social security of one or several state members (Țiclea & Gîlcă, 2008, p. 15).

According to the Regulation no. 1408/71, a person has the quality of worker if his or her situation is characterized on the one hand by the fact that he or she contributed to the financing of that particular regime as a wage earner worker and, on the other hand, he or she is entitled to earnings in case of disease and especially to complete earnings according to the importance of due.

According to the Court of Justice, the wage earner worker or the assimilated worker is the worker that named in whichever other way is insured in varied national systems of social security. The term of wage earner worker or assimilated worker as shown in the Regulation of CEE Council entails the persons who, at first mandatory affiliated to social security as workers, were afterwards admitted to benefit from an optional insurance governed by the regulations of internal law, similar to the principles of mandatory insurance.

According to the same Regulation, the wage earner worker and the worker that carries out an independent activity can have the following traits:

a) Any person that is insured on grounds of permanent mandatory or voluntary insurance against one or more unpredicted events, in compliance with the branches of a social security regime that applies to wage earner workers and to workers that develop an independent activity or in compliance with a special regime for office workers.
b) Any person that is insured on grounds of mandatory insurance for one or more risks covered by the branches of social security that are entailed in the current Regulation, within a social security regime that applies to all residents or to the entire active population.
c) Any person that is insured on grounds of mandatory insurance for one or more risks covered by the domains of the current Regulation, within a standard social security regime that applies to the entire rural population.
d) Any person that is insured on grounds of voluntary insurance for one or more risks covered by the domains entailed in the current Regulation, within a member state's social security regime organized for salaried workers, for workers that develop independent activities or for all residents or for certain categories of residents.
Also, according to article 7, paragraph 3 from Directive 2004/38, a European Union citizen who is no longer a worker or the person that develops an independent activity maintains the status of worker or person that develops an independent activity under the following conditions:
a) He or she is in temporary incapacity of working, as a result of a disease or accident;
b) He or she is registered properly as being in involuntary unemployment, after being employed for a period of over a year and registered at the relevant office for work force placement as a person in search of a workplace;
c) He or she is registered as being in involuntary unemployment, after completing a work contract on a determined period, with the duration of under a year or after becoming unemployed involuntarily during the first 12 months and registered at the relevant office for work force placement as a person in search of a workplace, in this case the status of worker being maintained for a period of at least 6 months;
d) He or she is starting a stage of professional training, excepting the case when the person is in involuntary unemployment, the status of worker being maintained only if the training is related to the former professional activity.
The term of independent worker does not have a European meaning, for the interpretation of the term of independent activity, one is sent to consult the legislation of the member state. Thus, the Court settled that „by independent activity, one should understand the activities appreciated in this way by the applicable legislation in social security of the member state where these activities are developed." (CJCE, 1997, p. 1-609, pct. 20)
According to European regulations, the insured worker is not exclusively the one that is currently employed. The Lisbon Treaty and the Regulation do not have as a purpose solely the protection of the current employee, but their purpose is also insuring the one that giving up a job is given the possibility to occupy a new workplace. When internal law gives unemployed persons the right of voluntarily affiliating to social security of salaried persons and when the affiliation has been confirmed and accepted, this measure can be considered, under certain conditions, as a means of insuring those persons as workers. This happens if the so-called benefit is granted to interested persons as a consequence of the fact that, on the one hand they formerly had the status of workers and, on the other hand, they are qualified of acquiring this status again (CJCE, 1964, p. 371).

- The border worker is any wage earner worker or any worker that develops an independent activity on the territory of o member state and who has residency on the territory of another member state where he or she comes back usually every day or at least once a week.

A border worker who is detached in another place, on the territory of the same member state or of another member state by the enterprise to which he is normally attained, or who carries out services on the territory of the same or another member state, maintains the status of border worker for a period that is not longer than 4 months, even though during these four months he cannot come back every day or at least once a week at his residency place.

The status of border worker is granted solely to the workers that, on one hand have the residency in another state than the state where they work and who, on the other hand, come back to the residency state every day or at least once a week.
It has to be stated that a worker who, after moving to a state different than the one in which he works and does not come back in the latter state, does not have the status of a border worker.
- The detached worker is the worker that, for a limited period of time, works on the territory of a member state, a different member state that the one where he normally works. The length of being detached cannot be more than 12 months (it can be prolonged with another 12 months). During this entire period, must exist a direct connection of employment between the employer and the detached worker. The term of worker is the one that applies in the legislation of the member state where the worker is detached.

Community jurisprudence and usual practice settled certain criteria in order to determine the existence of a direct relationship between the employing enterprise and the detached worker, as follows:

- The work contract is still applicable between the two parties;

- The decision to cease the working contract by dismissal has to be made exclusively by the enterprise which makes the detachment;

- The enterprise that detached the worker has to keep its competence of determining the „nature" of the work developed by the detached worker, not in terms of defining the details of the type of work that has to be done and the way it should be done, but in general terms of determining the final product of the work or the basic service that has to be offered;

- The worker's payment obligation belongs to the employing enterprise, the one that makes the detachment, no matter who is the one that actually makes the payment;

Besides being temporary and impossible to use in order to replace a worker, the traits of regular detachment are:

- Continuity, during the detachment, of the worker's subordination in relation with the employing enterprise;

- Development of working activity in favor of the employing enterprise;

In Europe, the legal regulations are represented by the Directive of the European Parliament on of the Council 96/71/CE of 16th of December 1996 regarding the detachment of workers carrying put services, published in the Official Journal of European Communities (OJEC) no L 018 of 21st of January 1997. This Directive does not regard neither the treaties between the Community and other states, nor the legislation of member states in the field of foreign persons that carry out services on their territory, as this directive does not regard the national legislation about admission conditions, settling and occupying a workplace for national workers of third party countries.

The member states have transposed the Directive 96/71/CE regarding the detachment of workers in their own national legislation or adapted the existing legislation to it. Every country settled a linking office whose main purpose is to offer information regarding terms and conditions of work placement applicable to detached workers in a specific member state. In Romania, the Directive 96/71/CE was transposed by the Law no. 344 of 19th of July 2006 regarding the detachment of salaried workers.

There are four situations when the existing regulations exclude a priori the application of detachment provisions, especially when:

- The enterprise where the worker was detached makes him/her available for another enterprise in the same member state;

- The enterprise in which the worker is detached makes him/her available for another enterprise in a different member state, according to the provision of the European Parliament's and Council's Directive 96/71/CE of 16th of December 1996 regarding the detachment of workers, published in the Official Journal of the European Communities (OJEC), no. L 018 of 21st of January 1997;

- The worker is recruited in a member state in order to be sent by an enterprise situated in a second member state to an enterprise situated in a third member state;

- The worker is recruited in a member state by an enterprise situated in a second member state, so that he/she could work in the first member state;

In these cases, the reasons why detachment cannot be applied are clear: the complexity of the relationships forced by these situations, as well as the lack of any guarantee of the existence of a working relationship between the enterprise that makes the detachment and the detached worker are in obvious contrast with the purpose of avoiding both administrative complications and fragmentation of the existent history of insurance, which after all is the whole meaning of the provisions governing detachment.

- Temporary worker

Community law refers to the term of temporary worker (Directive no. 91/383/CEE of completing the measures meant to encourage the improvement of workers' security at the workplace for workers that have a working contract on a determined or temporary duration (OJEC, 1991), as well as the one of part-time workers (Framework Agreement of 6th of June 1997 regarding work with partial duration signed by the Union of Industrial and Patronal Confederations in Europe, The European Centre of Public Enterprise and the European Confederation of Syndicates and applied by the Directive 97/81/CE.) (OJEC, 1998)

The number of persons that work part-time has grown considerably in the last years. One of the reasons is the more flexible attitude of the employers towards the family life of the employees. According to the legislation regarding the protection of employees at the workplace, the part-time employees benefit from the same rights as the full-time employees, although in some cases part-time employees will have to work a minimal number of hours for a determined period of time in order to acquire some rights from the work legislation.

The number of persons that have chosen to work based on contracts of temporary work (or on contracts with determined object) has grown in the latest period. Employees that work successively based on temporary work contracts benefit from protection in case of dismissal. However, to file a complaint based on the provisions of the Act regarding dismissals, it is necessary that the employees should have worked for at least one year. According to the law regarding the protection of employees that work based on temporary contracts, the employers cannot prolong continuously the temporary work contracts. Employees can work for a period of maximum four years based on temporary contracts. After this term, it is considered that employees have a contract on undetermined period (for example, a permanent contract).

2. The Doctrine and the Romanian Legislation regarding the Concept of the Worker

The Romanian doctrine uses the term of worker for: salaried workers regardless of the nature or the type of their work contract, unemployed persons and persons incapable of work because of an accident or professional disease (Ştefănescu, 2010, p. 56). On the contrary, there are excluded from the notion of workers persons that carry out liberal professions, including handicraftsmen and individual entrepreneurs and any other person that carries out independent, unsubordinated activities. Office workers are also excluded from the notion of „workers".

The Romanian legislator took the term of worker from the European regulations used in the normative documents that regulate security and health in work. The law 319/2006 defines the worker as „any person hired by an employer, including the apprentice interns, excluding the stay-at-home personnel", but this definition is applicable solely in the field of security and health in work.

3. Conclusions

Ensuring the fully application of the principle of free movement for Romanian workers in the European Union's space is a priority. The mobility of the work force is an accentuation of the person's free movement in the union's space, a fundamental principle of the European's Union. According to the provisions of the Adhesion Act of Romania and Bulgaria to the European Union, maintaining the restrictions on the work force market for the citizens of the two countries in the last transitory period (2012-2013) is justified just in the case of appearance or the risk of appearance of severe perturbations on the work force market of the states that apply the restrictions.

By the Resolution of 15th December 2011, the European Parliament requested the member states to ensure an equal treatment for Romanian and Bulgarian citizens, according to the provisions of the Union's treaties. Also, a recent report of the European Commission, elaborated at the request of Romania and Bulgaria, shows the fact that the free movement of workers does not create turbulences on the work force markets, but, on the contrary, it contributes to the economic growth of member states that have opened their work market.

On the 31st of December 2011, the second transitory period expired, in which, according to the Proceedings to the Adhesion Act of Romania and Bulgaria to the EU, the member states of EU can restrict the access on the work market for the citizens of the two countries. If risks of perturbations should appear, the limitations imposed on the work market for Bulgarian and Romanian workers may be maintained until the 1st of January 2014, after this date the circulation of these workers being unconditionally liberalized.

Nine member states of the European Union will argue on Friday their decisions of restricting the access of Romanian and Bulgarian workers on the work market until the end of 2013, within the European Council of Work and Social Politics Ministers. The economic situation and the lack of social security, fueled by the financial crisis, will be presented as main arguments by the majority of these states. The EU states were able to impose restrictions for Romanian and Bulgarian workers only if there were some serious problems on the local work market or if there was a peril that these problems should appear. The European Commission can decide to impose penalties if it establishes that the situation was not like that, but this possibility is very unlikely. The last nine states of EU that restrict the access of Romanian and Bulgarian workers are Austria, Belgium, Germany, Holland, Luxembourg, Malta, France, Great Britain and Ireland.

European Commission's priority is improving employment conditions of workers in Europe. One of its objectives is to develop a modern labor market, flexible and inclusive. Romanian's purpose continues to be the opening, as soon as possible, of the work market for Romanian citizens in the European Union's states.

4. References

Ţinca, O. (2005). *Drept social comunitar - Drept comparat. Legislaţie Română /Social Community Law – Comparative Law. Romanian Law*. Bucharest: Lumina Lex.

Stefan, T., Andresan-Grigoriu, B. (2007). *Drept comunitar/Community law.* Bucharest: C. H. Beck.

Popa Nistorescu, C. (2008). Libera circulaţie a lucrătorilor în spaţiul comunitar /Free circulation of workers in European space. *Revista de Ştiinţe Juridice/Juridical Science Magazine*, No. 4.

Gornig, G. & Rusu, I.E. (2007). *Dreptul Uniunii Europene/European Union Law*, second edition. Bucharest: C. H. Beck.

Ţiclea, A. & Gîlcă, C. (2008). Libera circulaţie a lucrătorilor în Uniunea Europeană/Free movement of workers in the European Union. *Revista Dreptul Muncii/Labor law Magazine* No. 5.

Ştefănescu, I.T. (2010). *Tratat teoretic şi practic de dreptul muncii/ Theoretical and practical treaty of labor law*. Bucharest: Universul Juridic.

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REALITIES AND PERSPECTIVES

Globalization and Money Laundering

George Dorel Popa[1]

Abstract: Twentieth century has been characterized by many structural changes on the planetary level. The changes were caused by social revolutions, the communist bloc collapse, huge technological advances, not least the significant increase of the international trade volume. The second part of the century brought the globalization as a major feature of our world. Globalization has manifested first in the Economical field and then gradually in other areas of the social life. This phenomenon brought undeniable benefits and a number of risks and negative effects for the countries of the world. The biggest threat in this respect is the extent of transnational organized crime. The originality of this paper is consisting in understanding of money laundering using the factors that define the formation and development of this crime, as well the favor factors. The added value of the paper comes from interdisciplinary presentation of this crime. This paper highlights the conditions and factors that cause serious consequences in this respect. Studying this crime and its features could be a key for solving many problems in the area of Economical crimes. This paper could contribute to the work of police officers, prosecutors or judges on daily bases fight against crime and its social consequences.

Keywords: globalization; money laundering; criminality; organized crime

We all have noted the proliferation of organized crime activity and accelerated growth of organized crime. These phenomena occur as a result of the "erasing" of the borders between the states of the world. Organized crime groups operate both on the nationally and internationally level. Among the most common offenses, today we meet the weapon traffic, drugs traffic, human trafficking, trafficking in luxury cars and not least the money laundering offenses. After December 1989, crime in Romania has grown and increased significantly the proceeds of these illegal activities.

There were massive embezzlement of state property assets and funds by embezzlement, theft and deception. Privatization of state assets after 1989 was marked by acts of corruption and deliberate undervaluation of privatized assets. All these funds from illegal activities required recycling operations, 'the laundering process' was necessary to give an apparent legality for the money. Fight against this scourge was a permanent priority for Romania authorities. In this respect, the Romanian authorities have adopted a successive series of laws and regulations and have created several institutions. Romania joined several international agreements in an effort to prevent and combat organized crime is ready to continue the fight against the money laundering phenomenon.

Globalization from the perspective of economical integration and financial crisis might be the general terms used to describe the worldwide situation. The actual globalization brought a plenty of benefits, has increased international trade and cultural exchanges, removing political and economic obstacles. Increasing interdependence in international relations, besides positive aspects undoubtedly brought some negative aspects related to economy and security and public order.

Globalization has led to a border removal, which favored the cross-border organized crime. Today, organized crime, in various forms (trafficking of weapons, human beings, drugs, illegal immigration, money laundering) and terrorism are global threats and the actual economic and financial crisis tends

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to increase those phenomena having new forms and engaging new players on the world stage. Organized crime and money laundering in particular are not new phenomena. The novelty is the way of expansion, the magnitude of these phenomena and the way more people are involved in this system of organized crime.

Organized criminal group means a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

On the other hand, an economic and financial crisis that occurs in a country directly affects not only this country but the entire geographic region and even the world economy as a whole. Globalization in the current economic crisis will always lead to economic recession, lower loan rates, low budget world countries, the general economic downturn, which favors the growth of the underground economy and crime especially the phenomena of money laundering. Money laundering offense is without any doubt part of trans-border international crime.

Legislation in Romania in this area has been adopted based on UN Convention to combat organized crime, ratified by Romania by Act 565/2002. Also, Act no. 39/2003 on preventing and combating organized crime is compatible with international law; any crime that is committed will be incriminated both in Romania and abroad. The countries of the world permanently prepared jointly series of protocols and international agreements that establish ways to fight against trans-border criminals and operators engaged in money laundering.

The starting point in terms of money laundering is the United Nations Convention against Illicit Traffic of the Narcotics and Psychotropic Substances which has been adopted by member states on December 19, 1988 in Vienna. All these acts and international conventions and agreements included Romania and have been transformed in domestic acts and emergency ordinances that allow prevention and countering the Romanian banking system to be used for money laundering and financing cross-border organized crime.

Romanian Code of Criminal Procedure lays down rules and principles regarding the rogatory letters, the recognition of criminal judgments issued by other states and the possibility of trial in absence of criminals in the penal cases involving extradition. There are a significant number of other acts, adopted according to EU legislation, “in the area of protection of economy, society and environment adopted in order to fight against trans-border criminality.” (Brasoveanu & Alexandru, 2010)

In the world of finance and banking, money laundering can be approached and understood only by analyzing it in close correlation with increased global financial transactions and with huge capital investments taking place today in the world economy. Daily world market transactions involve hundreds of billions of Euros, of which, paradoxically, only a small fraction (10%) are directly related to world trade. Most of the transactions taking place on the world market today are the result of financial speculation and short-term investments often under cover of anonymity.

Rapid growth of this kind of speculative capital has been particularly favored in recent years by the process of internationalization of banks and banking consortiums, the unprecedented development of stock markets and commodity markets, removal of restrictions and controls on foreign investment and the giant impact had on the world banking system, modern technology of transmitting of information.

All these processes have led to dramatic changes in the organization and functioning of international financial markets, banks and the relationships between banks both domestically and internationally. These changes occurred in global banking system had of course a lot of positive consequences in the structure and value of contemporary global market, but unfortunately had some undesired consequences.

This "internationalization" emphasized national banking and financial systems led to the emergence of phenomena such as tax evasion, illegal export of capital, the emergence of illicit goods and capital markets, underground economies, financial and bank fraud, etc. Strong evidence of the fact that

economic transactions show the world circuit of abnormalities is that the global balance of payments is not zero as theoretically should be. On the other hand, the total amount of goods and services exported worldwide is equal to the total amount of goods and services imported. But studies carried out by specialized institutions reveals that since 1970, appeared and then continuously increased discrepancy between the value of global imports and exports overall value.

Thus, in 1997 the gap between imports and exports reached about 250 billion dollars and has remained relatively constant at this value until present days. Of course, the idea is plausible that the methods of analysis and registration of international trade are far from perfect, but more certain is that much of the global transactions take place outside the legal framework, which "determine their possibility to avoid registration and evaluation, including in Romania" – (Brasoveanu & Lisievici Brezeanu, 20110). The I.M.F. has repeatedly drawn attention to the fact that worldwide there are phenomena that have an upward trend: the movement of illegal capital flows, double invoicing of exports and payments (and the partner), tax evasion etc.

The same international institutions said that according to recent studies, the net benefits obtained from the various illegal economic and financial activities of banks are about 600 billion dollars (approximately 2% of gross domestic product of countries of the world). According to these studies, the total stock of the "black" capital "washed" is permanently increasing, which demonstrates that this phenomenon is directly proportional to increasing of criminal activity in these countries. In today's world, globalization of financial markets led to an extraordinary mobility of the money, which has facilitated the free flow of funds from organized crime activities. Following this process of globalization and development and integration of world markets today, there is a spectacular mass of speculative capital.

Also, this development and integration of national markets has favored the development of illicit markets. The development of illegal markets, especially in the last two decades, has also led to an unprecedented increase of transnational delinquency and determined the establishment of the links with financial and banking institutions dealing with "homeless" capital.

For this reason, the organized crime activities and the "laundered" money resulting from these activities are likely to significantly influence the economies of some countries, especially the economically weak countries.

Another phenomenon that contributes directly to intensifying of the money laundering is the specific activities of "underground" economy. Clandestine economy should not be confused with organized crime, is relatively different, because, clandestine economy includes all production and financial transactions and banking and commercial laws, which are not highlighted in any way in official documents.

In majority of the cases there are hidden financial and accounting institutions, used "in order to avoid taxes and tax records" (Turcu & Stan, 2008). Recent studies reveal that, global "underground" represent approximately 10-15% of production of developed countries. In these conditions it is obviously that the "underground" economy of the world has an important role in forming the total volume of speculative capital. The "underground" economy affected all economical, social and educational national systems of the countries affecting "especially the financial rules and regulation, including the copyright law" (Grigoruţ & Anechitoae, 2011)

These funds from "underground" activities should be recycled using different methods of money laundering phenomenon. Finally, another source of speculative capital is the capital exodus from third world countries.

Capital exodus began in the early 70's when there was a time when lack of raw materials and the prices "explosion" has led to very large inflow of funds from developing countries to developed countries.

Then, in the '80s, in the world, there was a tendency when major financial and banking institutions had as priority, not the maximization of the profits, but providing a larger volume of loans, in their effort to conquer the international banking market. Amid these trends an important part of the third world started not to invest and to spend locally, but to return these capitals by the ruling political class of these countries, as capital illegally exported to the banking systems of developed countries, in order to obtain personal profit.

Bibliography

Popa, George Dorel (2011). *Preventing and fighting money laundering and economical and financial criminality*. BREN Publishing House.

Grigoruţ, Cornel Constantin Anechitoae (2011). Combating bio-counterfeiting. Published in: *Romanian Biological Sciences*, RBS, vol. IX, no. 1-4, 2011, ISSN 1584-0158.

Turcu, Ion & Stan, Mădălina (2008). Current issues in banking law, *Present-day problems of banking law*, Bucharest: Wolters Kluwer.

Brasoveanu, Florica; Lisievici Brezeanu, Alexandru Petru (2010). EIRP 2011, *The Role of Romania in Building the New Security Architecture,* Galati, The 6–th edition of the International Conference European integration Realities and Perspectives.

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A Comparative View on Regulating the Transaction Agreement. French, German and British Law

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Abstract: Over the few decades there has been a steady growth in the conclusion of the transaction contracts, given the multiple needs it responds to-it avoids long delays and high costs associated with the legal proceeding and it ensures the removal of doubt as regards the legal proceeding result. It is the purpose of this article to provide a comparative analysis over the legal regulation of the transaction contract in several European member states and to examine the legal changes brought by the New Romanian Civil Code. In order to achieve these objectives, we have examined the national and foreign legislation and doctrine, confirmed by the case law. Therefore, this study contributes to knowledge of the defining aspects of the transaction contract at European level, following the crystallization of the legal concept and its normative evolution.

Keywords: settlement, compromise, mutual concessions, judgment by consent, alternative dispute resolution

1. Introduction. Practical Importance of the Transaction Agreement as an Alternative Way of Dispute Settlement

Seen as a remedy to the state justice imperfections, the conclusion of the transaction contract is today one of the increasingly spreading phenomenon, being used by the parties seeking to extinguish the litigiousness right disputed by them, based on mutual concessions.

There have been identified (Jeammaud, 2006) a number of philosophical and especially civic virtues of this type of agreement: the parties do their own justice, in the sense that the protagonists get back to being partners and agree somehow to do each other's justice, without resorting to court proceedings.

The French doctrine (Malaurie, Aynes & Gautier, 2007) defines the utility and complexity of this legal instrument in a suggestive way by the formula "a poor arrangement is worth more than a good lawsuit" („*un mauvais arrangement vaut mieux qu'un bon procès*"), this because "a legal agreement is more acceptable and less dramatic". This is natural, as long as a free and mutual consent requires a higher degree of acceptance than in the case of imposing a legal order. Settlement of disputes by courts should be regarded as a last resort, for as long as the subjective law protection can be made by agreement of the parties.

Thus, the interest in the transaction agreement is not surprising at all, given the multiple practical needs it responds to, as this is a solution required in nowadays practice especially to avoid long delays and high costs associated with legal proceedings, i.e. removal of doubt as regards the legal proceeding result.

In UK, in the "Review of Civil Litigation Costs" carried out by Lord Justice Jackson, the Final Report issued in December 2009, included as recommendation the view that in general the *alternative dispute resolution (ADR)* has a vital role to play (Blake, Browne & Sime, 2011).

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The family of contracts related to the dispute resolution is substantiated by the following fact: "the contract/agreement and the trial should not exclude each other, but should be combined" (Clay, 2006).

The transaction agreement is often the result of a conciliation. Usually it is the result of the direct agreement of the parties, but it doesn't exclude, also, the presence, the activity of a mediator, that is a person specialized in conducting the mediation process.

2. Historical View on the Transaction Agreement. Roman Law

In relation to the terminology of the word "transaction", it comes from the Latin *transactio,onis*, namely derives from the verb *transigo, ere* which means "to carry to the end", "to settle a business", "to put an end to", hence the current meaning - the transaction puts an end of a misunderstanding, a dispute between the parties (Malaurie et al., 2007).

In the Roman law, the transaction was an unnamed contract of the type *"do ut des"* (Deleanu&Deleanu, 2000), that according to its form, it might lead to the creation or extinction of obligations, i.e. the transmission of property rights. Hence the translative nature of the transaction recognized in the Roman law -"*transigere est alienare*", seen as a fair title (Prescurea, 1934).

So, in this matter, as in many others, we have to go back to the Roman law, where we find the title "*De transactionibus*", in Digeste (book II, title XV) (Tabary, 1863).

In the Roman law, two conditions had to be met for a transaction (Tabary, 1863): the parties to have made mutual sacrifices (*"sacrifices mutuels")* and the existence of *dubius eventus litis*, as the Roman legal experts called it. Thus, if one of the conditions was not met, there was no transaction.

The first condition, to require contractors to make mutual concessions, was indisputable in the Roman law, revealed by Law 38, Book II, Title IV, which provided:*"transactio nullo dato, vel retento, seu promisso minime procedit"* (Tabary, 1863). Therefore, one had to have something to give, retain or promise.

Also, for a transaction there must be a *dubius eventus litis*. The transaction of *res judicata* was null and void, because they talked about a completed, settled trial (Law 23, Book XII, Title VI). So the general rule was that *res judicata* could not be subject to a transaction (Tabary, 1863).

However, it does not mean that each time a legal court decision found a solution to a case, any transaction was impossible. If the validity, legality of the court order was challenged, they spoke about an obvious *res dubia* and thus the transaction could be concluded.

Next, to study the normative evolution of this type of contract, we consider necessary to make a historical and comparative foray, which reveals the fact that this legal instrument is and it was, at a large extent, favoured by different European countries legislation.

In this respect, we decided to follow three main areas of research in our approach: we shall firstly refer to the French regulatory model, we will next turn our attention to the British law, given the tradition of amicably dispute settlement concluded and then we'll make reference to the German law justified by the Roman – German closeness to France.

We must state from the beginning that the transaction is examined both in the special contracts doctrine and in the civil procedure specific doctrine, since when the transaction is judicial, this is set both in a contractual mechanism and a procedural incident.

«*Transaction*» in French law, « *compromise », « settlement », « agreement* » in British law, « *Vergleich* » or « *Prozessvergleich* » (compromise settlement) in German, the institution is widely known and its usefulness is increasingly more highlighted.

3. The French Regulatory Model

In the French law, the transaction is the subject of regulation of Title XV (*Titre XV : «Des transactionis»*) of the Third Book of the Civil Code (*Livre III : Des différentes manières dont on acquiert la propriété*), the bases of materials being Art. 2044-2058[1].

In this context of analysis it is appropriate to refer to the circumstances that led to the regulation of this special agreement in the French law (Jeammaud, 2006). Thus, these provisions (Art. 2044-2058) were not included in the initial draft of the Civil Code, but to respond to the comments coming from legal courts, the editors had written these articles *in extremis*, getting inspired from the treaty « *The Civil Laws in their natural order »* written by Jean Domat.

It was noted that Jean Domat got away from the position inherited from the Roman law on the transaction, as it was regulated in the Justinian law. The conception mirrored in the paper *The Civil Laws in their natural order*, regarded the transaction as valid without being given or promised anything before. This is the explanation (Jeammaud, 2006) for which the legal definition of the transaction in the French law does not refer to how to achieve the transaction, namely to the mutual concessions. But mutual concessions, as part of the transaction results from Art.2048 which stipulates that the transaction contains a waiver of rights, actions and claims.

The transaction represents, therefore, the subject of provisions that the doctrine authors (Malaurie et al., 2007) qualified as "incomplete" and "empirical" since the main condition of the transaction qualification is missing from the definition. According to Art.2044 in the French Civil Code, a settlement is a contract whereby the parties end a *dispute* which has arisen or is about to arise („*La transaction est un contrat par lequel les parties terminent une contestation née, ou préviennent une contestation à naître*").

However, since the first decades of the nineteenth century, thanks to a decision of 1818 of the Court of Appeal of Toulouse – the courts have endorsed this transaction condition, namely that of mutual concessions, that we find in the Roman law, but was neglected and even removed by Domat. The first decision of the Court of Cassation adopting the same position dates back to 1883 (Jeammaud, 2006).

According to Art. 2056 of the French Civil Code, the transaction is only possible as long as no final decree was ruled. Actually, it is possible to conclude the transaction even with regard to the enforcement of a decree. Although we might think that once the parties agreed to the terms of the settlement in a non-adjudicative process, there won't be difficulties as regard the enforcement of such an agreement, there are many cases that demonstrate the opposite.

Later, the French legislator interest for this type of agreement is reflected by adopting special laws favouring the transaction in various areas. For example, we mention here, the Law of July 5, 1985 relating to the compensation for damages suffered by victims of traffic accidents that stipulated in the insurer's charge the obligation to make an offer for compensation, which was qualified as a transaction offer, if the victim accepted it, the transaction became effective (Malaurie et al., 2007).

4. The Transaction in the British Law - Historical Aspects

The British law - whether it's the English or the American law - is traditionally favourable to alternative dispute resolutions (Blake at al., 2011) and particularly to the transaction between parties.

In 1996 was drafted the *Woolf's Report: Access to Justice.* This report criticized the excessive duration of trials, their high cost and the procedural terminology incomprehensible for the citizen[2].

[1] French Civil Code retrieved from http:// www.legifrance.gouv.fr/, *Le service public de l'acces du droit.*

[2] Report retrieved from http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/reportfr.html, Date: 12.12.2011.

In this Report, Lord Woolf wrote: "*My approach to civil justice is that disputes should, wherever possible, be resolved without litigation*".

In order to achieve this goal, there were designed the so-called "Pre-action Protocols", to facilitate the compromise/settlement between the parties. The glossary defines these as "statements of understanding between legal practitioners and others about pre-action practice and which are approved by a relevant practice direction". So, it was noted (Grainger, Fealy&Spencer, 2000) that "their provisions are designed to encourage a sensible exchange of views and a pooling of information between the parties even before a dispute develops into litigation-all with the view to the promotion of early settlements or at least the minimization of expense through greater "focusing" on the real issues".

The draft of the reform proposed for the British civil procedure, known as « *Woolf Reforms »* became a law: *« Civil procedure act* » was adopted in 1997; new rules of this procedure have been drafted and entered into force on April 26, 1999, along with the new « *Practice Directions and forms* ».

The civil procedure rules (CPR) cover a special part - *Part 36*: *"Offers to settle and payments into Court"*. These provisions allow both the applicant and the defendant to make transaction offers *(offer to settle)*.

In its initial form, Part 36 of the CPR replaced the Order 22 of the Supreme Court Rules and the Order 11 of the District Court on payments made in court for prosecution of claims. The obligation to make payment in court for prosecution of claims was repealed during revisions that entered into force on April 6, 2007 (Foskett, 2010).

Regardless of these specific provisions of Part 36 of the Civil Procedure Rules, an amicable resolution of the dispute could be reached as follows: a simple transaction (*pure agreement)*, by the expedient decision acknowledging the parties' settlement, rendered by the court record office (*judgment by consent)*, by a certain decision called *Tomlin order* and, last but not least, by the two parties' waiving (divestment) the trial (Ferrand, 2006).

We find the transaction in the British legislation of the agreement/contract (referred to as « *compromise »)* as a legal instrument of general undeniable utility to avoid court proceedings. Moreover, in the British law, the legal basis for a "compromise" (transaction), legally established, is the common law of contracts.

In the British literature (Foskett, 2010), confirmed by the case law[1], the compromise or the settlement is regarded as representing the dispute settlement by mutual concessions, namely reaching an agreement and settling a dispute by mutual concessions.

Referring to the disputed rights, the British theorists (Foskett, 2010) make a clear separation between the *actual dispute*, the *potential dispute* and the *unarticulated dispute*. One example to illustrate the "implied settlement by transaction (*settlement implied*)" is represented by payment made by an insurer to an insured person who claimed payment under the insurance contract. The payment made by the insurer is generally regarded as a solution to the problem, even if there are possible debates on payment liability.

5. The Transaction in the German Law. General Issues

The judicial concept of "transaction" is defined also in the German Civil Code. The German Civil Procedure Code makes additional statements on the transaction signed or ascertained by a German court of law.

[1] Gurney v. Grimmer (1932) 38 Com. Cas. 12 at 18: "*when a matter has been compromised it assumes that a mutual concession has been made by both parties and that each party has got something less than he claimed*".

Referred to as « *Prozessvergleich* », the legal transaction occupies a place of honor in the German law. The legal transaction is seen by the German doctrine and case law as a special type of transaction. The same applies to the settlement made by a lawyer on behalf of its client - (*Anwaltsvergleich*) (Ferrand, 2006).

The doctrine and the case law meet at a certain point, acknowledging the double nature of the legal transaction, both contractual and procedural: it is about a private contract (*privatrechtlicher Vertrag*) and a step in the proceeding (*Prozesshandlung*). The legal transaction *(gerichtlicher Vergleich*, *Prozessvergleich)* has the same effects of substantive law as the extrajudicial transaction (Ferrand, 2006).

The conclusion of a legal transaction is enabled by the civil procedure reform of July 27, 2001. Regardless the independent judge's initiative to attempt to reach an amiable settlement of the dispute, it is possible that the two parties submit a written transaction proposal.

The court ascertains by a legal order the existence and the content of the parties' settlement. Before, the judge was supposed to hold a hearing to prepare the minutes of the transaction between the parties, while, along with the reform of 2001, the parties may also complete a transaction by simply submitting conclusions in this regard (Ferrand, 2006).

With regard to the legal definition of the transaction in the German law, it says that it is a contract by which the dispute between the parties and their uncertainty as to their legal relationship is removed by mutual concessions *(gegenseitigen Nachgeben = mutual concessions).*

6. The Legal Notion of the Transaction Contract in the Romanian New Civil Code

The specialized literature (Deak, 2001; Dogaru, Olteanu & Săuleanu, 2009; Toader, 2008) has made some observations on the Article 1704 of the former Civil Code; thus the definition of the transaction contract was seen as incomplete, since the definition of the transaction omitted highlighting the specific difference (the actual way of achieving the transaction by mutual concessions) which individualizes this type of contract in relation to other legal documents concluded in relation to a dispute or to put an end to the parties' dispute.

Although the legal definition of the transaction has not provided mutual concessions, the fact that they were legal means by which transactions were made could be inferred from the interpretation of Art. 1709 of the Civil Code that reminded about «waiving all claims and actions», without specifying the mutual nature of such « waiving ».

This requirement of «mutual concessions» was imposed by the case law[1] that ruled in the sense that in the limits of civil procedure, the transaction is the agreement or the legal agreement of the parties, in order to put an end to an existing process by which the parties make mutual concessions, waiving certain rights or stipulating new claims.

The Romanian legislator endorsed all the critical comments we referred to above and in an attempt to overcome the shortcomings of the legal definition of the transaction, adopted in Art. 2267 of the New Civil Code the following definition: *"The transaction is the contract by which the parties prevent or settle a litigation, including during forced execution, by mutual concessions or waiving rights or by the transfer of rights from one to the other"*.

This agreement involves (Moţiu, 2010):

1) the pre-existence of a dispute (triggered or imminent);
2) the parties' intention to put an end to the existing dispute or to prevent a dispute to arise;

[1] Recently Î.C.C.J. (Romanian Superior Court of Justice), civil section, Decision no. 3256/22.05.2008, retrieved from http://www.scj.ro/ , Date: 15.12.2011

3) the existence of mutual concessions, mutual waiving rights or transfer of rights.

In Romanian doctrine (Pop, 2006), after examining the jurisprudence/case law, there have been given examples when disputes of rights can arise-cases in which the defendant adopts at least one of the following three attitudes:

- he challenges the legal basis of the right invoked by the claimant;
- he challenges the content of the right or its existence;
- he claims that the right doesn't exist anymore as it was extinguished by one of the means of extinguishing the obligations.

The cause/scope of concluding the transaction contract is the parties' intention to prevent or to extinguish the dispute between them, and is generally presented as one of the defining elements of this kind of agreement.

Referring to the significance of the third element characteristic of a transaction-the mutual concessions-the case law held that it means mutual waivers of claims or new benefits promised by one of the parties in exchange of the other's part waiver to the disputed right[1] .

There can be encountered a variety of mutual concessions given the contractual freedom of the parties. We should be satisfied, therefore, to let open the question to know exactly in which consist these mutual concessions, in order not to limit it in theory, as the transactional freedom shouldn't be restricted too much, at least by the private law.

Our option will be to maintain the flexibility of the mutual concessions concept, as it was decided by the French doctrine (Fages, 2006).

7. Conclusions

The Alternative Dispute Resolution, whose pattern is the transaction contract, is an instrument, worth to be considered in order to capitalize the rights in optimal conditions.The practical importance of the transaction was explained through the function performed by this legal instrument. On the one hand, a transaction operates as a practical, economic measure by which the parties may be exempt from expenditure and loss of time inherent to trials, and on the other hand, no less important is the social contribution brought by it, given that it helps to restore the relations between the parties.

This study contributes to knowledge of the defining aspects of the transaction agreement, from a comparative view, following its normative evolution, crystallization of the legal concept.

The comparative analysis of the legal regulation of the transaction concludes that this is an instrument recognized even by the Roman law, which is favoured currently by the legislation of many European countries.

On the legal definition action, the conclusion is that the legal definition must highlight the specific difference, the one individualizing the transaction agreement in relation to the family of legal contracts concluded in relation to the dispute, which was made by the New Civil Code legislator; also we have highlighted the transaction agreement specific issues.

[1] Craiova Appeal Court, civil section, Decision no. 8683/1999, in *Coduri adnotate. Codul civil,*vol. III (art.1405-1914)/*Annotated Codes. The Civil Code* (Terzea V.), Bucharest: C.H. Beck.

8. References

Blake, S.; Browne, J. & Sime, S. (2011). *A practical approach to alternative dispute resolution*. Oxford University Press.

Clay, T. (2006). Transaction et autres contrats relatives aux litiges/The transaction contract and other contracts relating to dispute resolution.In Mallet-Bricout B., Nourissat, C. (Eds.). *La transaction dans toutes ses dimensions/The transaction contract in all its dimensions,* pp. 13-23. France: Dalloz.

Deak, F. (2001). *Tratat de drept civil. Contracte speciale/Civil Law Treaty. Specific contracts*. Bucharest: Universul Juridic.

Deleanu, I. & Deleanu S. (2000). *Mica enciclopedie a dreptului/The small encyclopedia of law*. Romania: Dacia, Cluj-Napoca.

Dogaru, I.; Olteanu, E. G. & Săuleanu, S.B. (2009). *Bazele dreptului civil. Vol. IV. Contracte special/The Civil Law basis. Specific contracts*. Bucharest: C.H. Beck.

Fages, B. (2006). Equilibre et transaction: l'exigence de concessions reciproques/Balance in transaction: the requirement of mutual concessions.In Mallet-Bricout B., Nourissat, C. (Eds.). *La transaction dans toutes ses dimensions/The transaction contract in all its dimensions,*(pp. 53-61). France: Dalloz.

Ferrand, F. (2006). La transaction. Regard comparatif/The transaction contract. A comparative outlook. In Mallet-Bricout B., Nourissat, C. (Eds.), *La transaction dans toutes ses dimensions/The transaction contract in all its dimensions,*(pp.187-202). France: Dalloz.

Foskett, D. (2010). *The law and practice of compromise. With precedents.* London: Thomson Reuters (Legal) Limited.

Grainger,I.; Fealy, M. & Spencer, M. (2000). *The Civil Procedure. Rules in Action,* second edition. Cavendish Publishing Limited.

Jeammaud, A. (2006). Genèse et postérité de la transaction/The genesis and evolution of the transaction contract In Mallet-Bricout B., Nourissat, C. (Eds.), *La transaction dans toutes ses dimensions/The transaction contract in all its dimensions,*(pp.5-11). France: Dalloz.

Malaurie, Ph.; Aynes, L. & Gautier, P.Y. (2007). *Contractele speciale/Specific contracts,* coordinator of the Romanian edition Şcheaua, M. Translation by Dănişor D. Bucharest: Wolters Kluwer.

Moţiu, F. (2010). *Contractele speciale în Noul Cod Civil/Specific contracts in the New Civil Code.* Bucharest: Wolters Kluwer.

Prescurea, E. (1934). *Efectul translativ al tranzacţiei/The translative nature of the transaction*. Romania: Institutul de Arte Grafice "Gorjanul".

Pop, L. (2006). *Tratat de drept civil. Obligaţiile/Civil Law Treaty. The obligations*. vol. I, Publisher: C.H. Beck.

Tabary, E. (1863). *Droit romain: de transactionibus. Droit français: des transactions/Roman law: de transactionibus. French Law: the transaction contract*, these pour le doctorat, Paris, retrieved from http://www.gallica.bnf.fr, Date: 24.01.2012.

Toader, C. (2008). *Drept civil. Contracte special/Civil Law. Specific contracts*, Publisher: C.H. Beck.

*** Craiova Appeal Court, civil section, Decision no. 8683/1999. In *Coduri adnotate. Codul civil,* vol. III (art.1405-1914)/*Annotated Codes. The Civil Code* (Terzea V.), Bucharest: C.H. Beck.

*** French Civil Code retrieved from http:// www.legifrance.gouv.fr/, *Le service public de l'acces du droit.*

*** Î.C.C.J., civil section, Decision no. 3256/22.05.2008, retrieved from http://www.scj.ro/, Date: 15.12.2011.

*** Woolf's Report: Access to justice, Report retrieved from http://webarchive.nationalarchives.gov.uk/+http://www.dca.gov.uk/civil/reportfr.html, Date: 12.12.2011.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

The Legality and Morality in the Political life in Romania from the Perspective of the Right to a Fair Administration and Good Government

Verginia Vedinaș[1]

Abstract: The Romans, our ancestors, defined law as the art of goodness and justice (*jus est art boni et aequi*). The bright minds of the time were always concerned about how human society is governed and, in this context, the extent to which, in the manner of governing, there may be found on the one hand the compliance with the written laws, that is respecting the rule of law and, secondly, respect for the unwritten laws, namely morality. Any imbalance between the two is blameworthy and harmful to the rulers. A great lawyer and a illuminated, diplomat and teacher scholar, Nicolae Titulescu, defined the law as the totality of rules, precepts, laws that govern the activity of the man in society and that may be enforce, at some point, by the public force. Unlike the law, morality always includes a set of rules governing the relations between humans from the perspective of some values such as: honesty, self respect, respect for others, the dignity of personal behavior and private that by which we relate with others.

Keywords: law; morality; imbalance; good administration; good governance

1. La juridisation des normes morales

Plus d'une de ces valeurs a cessé d'appartenir simplement à la morale. Elles n'ont pas été incluses dans des instruments juridiques, internes ou internationaux, dans les Constitutions des Etats du monde, dans les déclarations et les documents à statut de carte dans la catégorie des droits et des libertés fondamentales. La Constitution de la& Roumanie non plus ne fait exception de cette réalité. L'exemple le plus éloquent est que, dans son premier article, intitulé l'Etat roumain, la première valeur déclarée suprême et garantie, dans l'esprit des traditions démocratiques de notre peuple et des idéaux de la Révolution de décembre 1989, est **la dignité de l'homme**[2].

Par rapport au rôle des principes généraux, qui précèdent toutes les règlementations constitutionnelles, les valeurs suprêmes déterminent **le contenu et les finalités des fonctions de l'Etat**. Elles constituent un point de référence, tant pour les règlementations concernant les droits et les libertés fondamentales, que pour celles concernant les autorités publiques. (Muraru & Tanasescu, 2008, p. 17)

L'on constate que sur ces valeurs suprêmes, la première est la dignité de l'homme, ce qui a ainsi acquis une double nature : morale et juridique, en outre, l'on peut affirmer que l'on assiste à un processus de constitutionnalisation de la dignité humaine.

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[2] Art. I alinéa (3) : «*La Roumanie est un Etat de droit, démocratique et social, où la dignité de l'homme, les droits et les libertés des citoyens, le libre épanouissement de la personnalité humaine, la justice et le pluralisme politique représentent des valeurs suprêmes, dans l'esprit des traditions démocratiques du peuple roumain et des idéaux de la Révolution de décembre 1989, et sont garantis* ».

Une autre valeur morale qui a été soumise à un processus de juridisation, est celle des bonnes mœurs. L'article 26 (2) de la Constitution, d'une part admet le droit de la personne de disposer d'elle-même, d'autre part, conditionne l'exercice de ce droit de l'interdiction de ne pas enfreindre les droits et les libertés des autres, l'ordre publique et les bonnes mœurs.

La Constitution ne se résumé pas à consacrer simplement des concepts relevant de la morale, éléments composants de celle-ci, mais le terme même de « **morale publique** », sa défense représentant l'une des situations justifiant de la restriction de l'exercice de certains droits ou libertés[1].

Le législateur a en vue **la protection de la morale publique**, en tant que situation légitimant la restriction de l'exercice d'un droit fondamental ou d'une liberté.

Il ne s'agit pas de la protection de la morale, en général, incluant la morale publique et privée, mais juste de la morale publique, entendant que le législateur constituant fait la différence entre elles[2], la seule morale publique justifiant de la restriction d'un droit ou de libertés fondamentales.

Non pas en dernier lieu, la bonne foi représente elle aussi une valeur formée tant d'une composante relevant de la morale, que d'une autre, très importante – la juridique, l'article 57 lui consacrant le rôle de principe d'exercice des droits et libertés fondamentales[3].

En ce qui concerne l'état de constitutionnalité et légalité – composante également de la vie publique et de la vie privée, elle est instituée, principalement, par l'article 1 (5) conformément auquel « *En Roumanie, le respect de la Constitution, de sa suprématie et des lois est obligatoire* ».

Il est de notoriété publique que, jusqu'à la révision de 2003 de la Loi fondamentale, la disposition incluse dans l'&actuel article 1 alinéa (5) représentait le contenu d'une norme constitutionnelle distincte, incluse dans le Titre II consacré aux droits, libertés et devoirs fondamentaux, au titre des obligations.

Le changement de la règlementation n'est pas dû au hasard. Il a entraîné la modification du régime juridique, de devoir fondamental, comme antérieurement, en élément constitutif de l'Etat roumain, comme à présent, voire, en véritable principe général de toute la règlementation constitutionnelle. (Muraru & Tanasescu, 2008, p. 17)

La suprématie de la Constitution ne représente pas une simple affirmation, mais une norme opposable à tous les sujets de droit public ou de droit privé, également. Le garant du respect de la Constitution est la Cour Constitutionnelle, réglementée par le Titre V de la loi fondamentale. Et le garant du respect de la loi dans l'activité exécutive est le pouvoir judiciaire, par des instances de contentieux administratif, qui exercent le contrôle de légalité des actes administratifs des autorités publiques.

En conclusion, l'on peut affirmer que l'actuel édifice constitutionnel en Roumanie, crée les prémisses nécessaires d'une vie publique, de l'Etat par ses autorités, qui se déroulent sous des conditions de constitutionnalité, légalité er moralité, également.

[1] Conformément à l'art. 53 (1), *l'exercice de certains droits ou libertés peut être restreint par la seule loi et seulement si cela s'impose, le cas échéant, pour : la défense de la sécurité nationale, de l'ordre, de la santé ou de la morale publique, des droits et libertés des citoyens ; le déroulement de l'instruction pénale, la prévention des conséquences d'une calamité naturelle, d'un désastre ou d'un sinistre extrêmement grave*.

[2] Concernant la signification de ces deux syntagmes et la corrélation entre droit et morale, voir (Djuvara, 1997, pp. 59-66)

[3] Voilà la teneur du texte : « *Les citoyens roumains, les citoyens étrangers et les apatrides doivent exercer leurs droits et libertés constitutionnels de bonne foi et sans violer les droits et libertés des autres* ».

2. Le droit à une bonne administration et à un bon gouvernement dans l'Union Européenne et dans les Etats membres

La principale source de droit européen auquel on se rapporte, est la Carte des droits fondamentaux de l'Union Européenne, proclamée comme telle par le Parlement Européen, le Conseil et la Commission Européenne, qui règlemente à son premier titre : la dignité. parmi les droits conférant du contenu à la dignité humaine, est aussi le droit à une bonne administration, réglementé par l'article 41 de la Carte[1].

De l'analyse du contenu de cet article, il résulte que ses dimensions composantes, sont:

a) le droit à un traitement impartial, équitable et la solution de ses besoins dans un délai raisonnable par les institutions, offices, organes et agences de l'Union. En extrapolant, au niveau des Etats membres un tel traitement s'impose de leur être accordé par les autorités publiques et par les agents qui constituent leur personnel;

b) le droit à la réparation, par l'Union, des préjudices provoqués par ses institutions et agences dans l'exercice de leurs fonctions, conformément aux principes généraux communs aux législations des Etats membres, droit qui s'impose d'être respecté par les Etats membres eux-mêmes;

c) le droit des personnes de s'adresser par écrit aux institutions de l'Union, dans l'une des langues officielles de l'Union et de recevoir une réponse dans la même langue. Au niveau des Etats membres, le droit reconnaît à tous les citoyens l'aptitude d'employer leur propre langue dans leurs rapports avec les autorités publiques, reconnu par la Constitution de la Roumanie aussi dans l'article 120 (2) concernant les rapports avec l'administration publique locale et l'article 128 concernant les rapports avec la Justice.

Le droit à une bonne administration se trouve en un rapport nécessaire avec **le droit à un bon gouvernement**. Nous considérons que la bonne administration représente le moyen par l'intermédiaire duquel se réalise le bon gouvernement.

Le bon gouvernement est défini par la Commission Européenne comme représentant la direction et l'administration des affaires publiques d'une manière transparente, responsable, participative et équitable, en direction des droits de l'homme et dans le respect de lettre de la loi. (Catană, 2009, p. 69)

Le bon gouvernement, comme la bonne administration, vise tant les Etats membres de l'Union Européenne, que tout son système institutionnel.

Les deux imposent et supposent également, le respect de l'état de légalité, que de l'état de moralité dans l'activité des autorités et des institutions publiques.

Dans la pratique gouvernementale, comme dans l'exécutive, on retrouve nombre de dérapages de l'esprit et de la lettre de la loi fondamentale et des règlementations adoptées en vertu d'elle. De la multitude de telles manifestations, nous nous proposons de nous arrêter, dans cette contribution, sur les aspects suivants:

a) la violation des limites de compétence que la loi confère aux autorités publiques, tant de la sphère des trois pouvoirs classiques dans l'Etat, comme de ceux excédant la classique trinité des pouvoirs.

Exempli gratia, nous invoquons la transformation du Gouvernement d'exécutif en législatif, par la manière dont il exerce les prérogatives législatives qui lui sont déléguées par l'article 115 de la

[1] Voilà la teneur de l'art. 41 de la Carte : « *(1) Toute personne a le droit de bénéficier, concernant ses problèmes, d'un traitement impartial, équitable et dans un délai raisonnable de la part des institutions, organes, offices et agents de l'Union. (2) Ce droit inclut, principalement : a) le droit de toute personne d'être entendue avant qu'on ne prenne n'importe quelle mesure individuelle à même de lui porter atteinte ; b) le droit de toute personne d'avoir accès à son propre dossier, dans le respect des intérêts légitimes relatifs à la confidentialité, et au secret professionnel et commercial ; c) l'obligation de l'administration de motiver ses décisions. («) Toute personne a le droit de voir réparer par l'Union les préjudices causés par les institutions iy leurs agents dans l'exercice de leurs fonctions, conformément aux principes généraux communs aux législations des Etats membres. (') Toute personne peut s'adresser par écrit aux institutions de l'Union dans une des langues des Traités et doit recevoir une réponse dans la même langue.* »

Constitution, et l'affectation, de la sorte, du rôle du Parlement comme unique autorité législative du pays ;

b) l'instabilité législative concrétisée par des modifications successives d'actes normatifs, la transformation de l'exception en règle dans le domaine de la légifération et nous avons en vue le recours fréquent à la procédure des ordonnances, simples ou d'urgences, ou à l'engagement de la responsabilité du gouvernement;

c) la déprofessionnalisation et l'instabilité des fonctionnaires publiques par des immixtions répétées du facteur politique, concrétisées par des solutions législatives contraires aux principes qui gouvernent le statut juridique de cette catégorie de personnel, bon nombre d'elles sanctionnées par la Cour Constitutionnelle.

Nous nous arrêtons sur ces aspects, en précisant que nous sommes conscient de ce que chacun des trois aspects pourrait constituer le sujet d'un exposé indépendant, mais qu'on peut leur ajouter bien d'autres, appuyant les dérogations aux significations de l'Etat de droit et d'une démocratie authentique.

Bibliography

Catană, E. L. (2009). *Principiul bunei guvernări, Evoluţii europene şi Studii comparative/Principle of good governance, European developments and comparative studies.* Bucharest: Universul Juridic..

Djuvara, M. (1997). *Eseuri de filozofie a dreptului/Essays of Law Philosophy.* Bucharest: Treo.

Muraru, I., & Tanasescu, E. S. (2008). *Constituţia României, comentariu pe articole/Romanian Constitution, comment on articles.* Bucharest: C. H. Beck.

Titulescu, N. (2004). *Drept civil/Civil Law.* Bucharest: All Beck.

Vedinaş, V. (2009). *Deontologia în viaţa publică/Deontology in public life.* Bucharest: Universul Juridic.

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REALITIES AND PERSPECTIVES

EU and US Data Protection Reforms. A Comparative View

Gabriela Zanfir[1]

Abstract: This research makes a comparative analysis of two significant reform projects in data protection legislation, proposed in early 2012 in the EU and the US, in order to identify the common philosophies and also the main differences between them. Its outcomes are important as transatlantic data transfers are exponentially increasing and their main actors need to know what to expect from both legal regimes. The paper builds on a ground zero, as both reform projects were made public in late January – respectively late February, so such a comparison can only refer to researches made prior to the announcements regarding the general concepts of privacy and data protection in the European and American view. The main method employed is comparative observation. The results show that EU and US legislations start using the same language regarding data protection law – by the legal definitions proposed and main principles implemented, while still keeping significant differences. Academics and researchers will have a starting point for future comparative analyzes in a legal field which enjoys a lot of attention from lawmakers all over the globalized world. The paper focuses on very recent legal developments, which need throughout analysis in order to make them functional in practice.

Keywords: privacy; EU-US data transfers; legal definitions; privacy principles

1. Introduction

Privacy and data protection are a main concern for lawmakers of properly safeguarding human rights and democracies. Living in a Surveillance Society is already a fact of the modern world and not only an Orwellian product of imagination[2]. Thankfully, the democratic mechanisms keep the Surveillance Society in a framework of respect for human rights. Among such mechanisms, the most important is the regulation of the protection of privacy and personal information. A recent study discovered that the total number of new privacy laws globally, viewed by decade, shows that their growth is accelerating, not merely expanding linearly: 8 (1970s), 13 (1980s), 21 (1990s), 35 (2000s) and 12 (2 years of the 2010s), giving the total of 89 (Greenleaf, 2012). The phenomenon began in Europe, Germany being the first country which provided for a data protection law, but only in one of its regions – Hasse, in 1970. Several countries soon followed the model: Sweden, Denmark, France.

The European Union's jurisdiction became the leading global defendant of personal data, imposing a minimum standard of protection to countries that want to engage in data transfers with European entities. And one of the countries that do not provide a minimum degree of compliance is the United States of America. Hence, the two entities agreed upon a procedure called The Safe Harbor principles, which allow processors to make transatlantic data transfers. In early 2012, both countries made official announcements regarding data protection reforms. The European Commission published the proposed regulation for data protection on January 25 and the White House published the Consumer Privacy Bill of Rights a month later.

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[2] See 'A Report on the Surveillance Society' for the UK Information Commissioner, by the Surveillance Study Network (September 2006).

This paper will compare the two legal developments, underlying first the fundamental difference between privacy protection in EU and US which originates in philosophy. The paper continues with a general view on both reform projects, a comparison of the legal language used, focusing on the definition of personal data, followed by conclusions.

2. Different Philosophies of the Protection of Privacy

2.1. Europe: Privacy Protected as Dignity

Privacy and data protection are regulated different in the European Union and the United States. The EU centrally supervises the private sector's use of personal data, whereas the US regulation of the private sector is minimal. These differences emanate from distinct conceptual bases for privacy in each jurisdiction: in the US, privacy protection is essentially liberty protection, *i.e.* protection from government, while for Europeans, privacy protects dignity or their public image. (Levin & Nicholson, 2005). For instance, in Germany, for instance, on the basis of the current case-law from both the Constitutional Court and the Supreme Court, five broad-ranging protected personality interests developed under art. 823(1) BGB[1], with their own specific preconditions and sub-categories: (1) the protection of privacy; (2) the right to one's own image; (3) the sphere of publicity or the right to identity; (4) the right of informational self-determination (right to one's data); and (5) the protection of dignity, honour and reputation (Brüggemeier, Ciacchi, & O'Callaghan, 2010).

They are all rights to control your public image, rights to guarantee that people see you the way you want to be seen. They are, as it were, rights to be shielded against unwanted public exposure – to be spared embarrassment or humiliation, and, as such, the prime enemy of our "privacy", according to this view, is the media, which always threatens to broadcast unsavory information about us in ways that endanger our public dignity (Whitman, 2004). See, for instance, the famous case of Caroline of Monaco (Von Hannover v. Germany, 2004), where the European Court of Human Rights ruled that the publication of photos of the princess while she was engaged in private activities, alone or accompanied, in public spaces, such as parks, is a breach of Article 8 of the European Convention of Human Rights. Previously, the German courts had decided that the private life of the princess was not protected by Article 8, as she was a public figure.

2.2. America: Privacy Protected as Liberty

America, by contrast, is much more oriented toward values of liberty, and especially liberty over against the state. At its conceptual core, the American right to privacy still takes much the form that it took in the eighteenth century: it is the right to freedom from intrusions by the state, especially in one's own home (Whitman, 2004). Moreover, the US Constitution does not provide for a distinct right to privacy. This is why the protection of one's privacy is reconstructed as a puzzle in a quilt of statutes: The Right to Financial Privacy Act, The Identity Theft and Assumption Deterrence Act, The Cable Communications Policy Act, The Telecommunications Act of 1996 and even The Videotape Privacy Protection Act.

Previous research has shown that the absence of a constitutional right to privacy has two main effects. The first one is that the US piecemeal approach will result in various privacy-protecting acts clashing with well-established constitutional rights, and, as a result, their protection of privacy will be watered down (Levin & Nicholson, 2005). The second one is that the US Constitution with its supporting body of jurisprudence does not provide adequate privacy protection, especially in the light of continuing technological development (Levin & Nicholson, 2005).

Therefore, a Bill of Rights containing general guidelines for the protection of personal data is more than welcomed, especially that its content is approaching the European view on data protection. The

[1] The German Civil Code.

next section will analyze the general framework of the two reforms proposed recently by the EU and the US.

3. A General View on the Reform Projects

3.1. Scope and Objectives

Currently, the protection of personal data is regulated in the EU by Directive 95/46 on the protection of the individual with regard to the processing of personal data and on the free movement of such data (the Data Protection Directive or DPD). This directive was adopted in 1995, when internet was living its infancy, less than 1% of the Europeans using the internet at that time (Reding, 2012). The general framework of the reform has as starting point the technological developments and the need to protect the individual in this context. The EC argues that "Rapid technological developments have brought new challenges for the protection of personal data. The scale of data sharing and collecting has increased dramatically. Technology allows both private companies and public authorities to make use of personal data on an unprecedented scale in order to pursue their activities". (European Commission, 2012). As such, we understand that the main purpose of the regulation is to effectively protect the individual from intrusions in his or her private life, highly accentuated by the developments of IT systems.

The regulation itself defines its material scope in Article 2(1) – "the processing of personal data, wholly or partly by automated means, and the processing other than by automated means of personal data which form part of a filing system or are intended to form part of a filing system". Hence, the scope is broad and the main limitation is that the regulation only applies to natural persons, in that it protects their fundamental rights and freedoms, as stated in Article 1(2). The main accomplishment of the proposed regulation is the enhancement of the procedural, specific rights individuals have regarding the fair processing of their personal data: new rights are introduced and the existing ones are consistently developed. For instance, the "Rectification and erasure" section of the Data Protection Regulation (DPR) proposal is a part of Chapter III "Rights of the data subject" and it encompasses Article 16 – *the right to rectification*, Article 17 – *the right to be forgotten and to erasure* and Article 18 – *the right to data portability*. It should be noted that the right to be forgotten and the right to data portability are an innovation. All of these rights are provided in order to enhance control by individuals over their own data.

The US Consumer Privacy Bill of Rights (CPBR), on the other hand, is concentrating on the commercial aspect of the data protection and privacy debate. In the official document published by the White House containing the framework "Consumer Data Privacy in a Networked World" (White House, 2012), the Administration explains that "Privacy protections are critical to maintaining consumer trust in networked technologies. When consumers provide information about themselves - whether it is in the context of an online social network that is open to public view or a transaction involving sensitive personal information - they reasonably expect companies to use this information in ways that are consistent with the surrounding context". The discourse is evidently guided towards the economical, commercial spheres and not clearly towards the broader purpose of human rights protection. At the centre of this framework stands the Consumer Privacy Bill of Rights, "which embraces privacy principles recognized throughout the world and adapts them to the dynamic environment of the commercial Internet" (White House, 2012).

Another important component of the framework is the invitation launched to private stakeholders to adopt codes of conduct, based on the rules contained by the Consumer Privacy Bill of Rights (see, also, section 3.2).

The Administration observed that one of the elements the current piecemeal privacy framework lacks is "a clear statement of basic privacy principles that apply to the commercial world and a sustained commitment of all stakeholders to address consumer data privacy issues as they arise from advances in technologies and business models". This is the reason why the CPBR comprises seven principles

developed around basic rights individuals enjoy in relation to the protection of their personal data (see section 4.2).

3.2. Enforceability

EC chose to implement the data protection reform through a regulation. According to Article 288(2) of the Treaty on the Functioning of the European Union, a regulation is "binding in its entirety and directly applicable in all Member States", in contrast with a directive which is binding only as to the result to be achieved upon each Member State to which it is addressed, but shall leave to the national authorities the choice of forms and methods. Therefore, the rules provided in the DPR will directly apply in the legal orders of the Member States, without being implemented by national laws.

This was not the case with the Data Protection Directive. The different means of implementation chosen by the Member States led to significant differences in the protection of personal data throughout the EU, which caused legal uncertainty and a widespread public perception that there are significant privacy risks associated notably with online activity. Therefore, the choice of a regulation instead of a directive to implement the data protection reform is a premise of a more coherent data protection policy, of strengthened legal certainty and of a more effective protection of personal data inside the EU.

The Consumer Privacy Bill of Rights is not directly enforceable. It is "a guide for the Administration to work collaboratively with Congress on statutory language" (White House, 2012). Technically, the White House Administration is calling the US Congress to pass legislation that applies the principles contained in the CPBR to "commercial sectors that are not subject to existing Federal data privacy laws". Which means they will not unify the very decentralized current legislation, but will provide for concrete guidance to future legislation. The function of the rights provided in CPBR will also be active in the creation of future code of conducts. "The Federal Government will play a role in convening discussions among stakeholders - companies, privacy and consumer advocates, international partners, State Attorneys General, Federal criminal and civil law enforcement representatives, and academics - who will then develop codes of conduct that implement the Consumer Privacy Bill of Rights."

In the next section we will compare briefly critical legal concepts used by the two reform projects, to conclude that European and American privacy at least have started to use the same language.

4. The Legal Language Used

4.1 Definition of personal data

Delimiting the concept of the certain kind of information that legislations such as the ones being analyzed in this paper protect is of vital importance for the implementation of privacy laws. Recently, the results of a research completed in America showed that "information privacy law rests on the currently unstable category of personally identifiable information (PII). Information that falls within this category is protected; information outside of it is not" (Schwartz & Solove, 2011). The CPBR makes the "personally identifiable information" a stable concept, at least as far as consumer law is concerned. Moreover, the notion can easily be adopted by other sectors, now that it is legally defined.

The first statement of the CPBR is that "The Consumer Privacy Bill of Rights applies to personal data, which means any data, including aggregations of data, which is linkable to a specific individual".

The first observation is that the "personally identifiable information" is replaced with "personal data", a term used in the EU data protection law.

The second observation is that the concept of personal data is very similar to the one used in the EU: "any information relating to an identified or identifiable natural person" (Article 2a DPD). The DPR

introduces a renewed definition – "any information relating to a data subject" (Article 4(2)) and a data subject is "an identified natural person or a natural person who can be identified, directly or indirectly, by means reasonably likely to be used by the controller or by any other natural or legal person, in particular by reference to an identification number, location data, online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that person".

The amount of details considered in the EU definition of personal data is explained by the significant role the delimitation of personal data has in the application of the law. Especially when "technologists can take information that appears on its face to be non-identifiable and turn it into identifiable data" (Schwartz & Solove, 2011) in the context of a fallen myth of anonymization (Ohm, 2010).

4.2. Principles

The DPR sets out the principles relating to personal data processing in Article 5, stating that personal data must be: a) processed lawfully, fairly and in a transparent manner in relation to the data subject; b) collected for specified, explicit and legitimate purposes; c) adequate, relevant, and limited to the minimum necessary in relation to the purposes for which they are processed; they shall only be processed if, and as long as, the purposes could not be fulfilled by processing information that does not involve personal data; d) accurate and kept up to date; e) 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; personal data may be stored for longer periods insofar as the data will be processed solely for historical, statistical or scientific research purposes; f) processed under the responsibility and liability of the controller, who shall ensure and demonstrate for each processing operation the compliance with the provisions of the regulation.

Most of these principles correspond to those in Article 6 of Directive 95/46, but they are renewed with the transparency principle, the clarification of the data minimization principle and the establishment of a comprehensive responsibility and liability of the controller. Chapter III of the Regulation is dedicated to the "Rights of the Data Subject" and it comprises 10 detailed articles which technically transpose the principles stated above.

The CPBR enforces seven rights each corresponding to one principle. „Individual control" gives the right to consumers to exercise control over what personal data companies collect from them. „Transparency" presupposes a right to easily understandable and accessible information about privacy and security practices. „Respect for context" means consumers have a right to expect that companies will collect, use, and disclose personal data in ways that are consistent with the context in which consumers provide the data. „Security" is referring to the right to secure and responsible handling of personal data. „Access and accuracy" provides the right to access and correct personal data in usable formats, in a manner that is appropriate to the sensitivity of the data and the risk of adverse consequences to consumers if the data is inaccurate. „Focused collection" means consumers have the right to reasonable limits on the personal data that companies collect and retain. And, last, „Accountability" gives the right to consumers to have personal data handled by companies with appropriate measures in place to assure they adhere to the Consumer Privacy Bill of Rights.

Comparing the two frameworks we can find significant common concepts, which can be summarized in three main ideas: 1) the individual enjoys an enhanced control over the collection and processing of data, which implies consent, intervention and transparency; 2) the purpose and time limitation of data processing; 3) responsibility and accountability of the data processor.

The differences remain in several aspects. One of them concerns the entity which processes data and is accountable under the law. While CPBR is only referring to "companies", DPR is referring to "controller", which can be "a legal person, public authority, agency or any other body". Another difference is the legal certainty implied by the two provisions in general: while the DPR is specific,

maybe even too detailed, the CPBR, faithful to the idea of a bill of rights, is more general, leaving a lot of room for interpretation.

5. Conclusions

Even though their bases are fundamentally different, EU and US legal protection systems of privacy in general and informational privacy in particular found common denominators to start converging from. The EU data protection reform is a natural development of existing law, after two decades of evolution, while the US set of principles is a cornerstone for a coherent, unified legal protection system of privacy.

Both developments have in common the need to provide accountable and effective safeguards for individuals faced with the rapid evolution of technology. Both reforms envisage a more protected individual and a more responsible data controller or data processor. Even though they use completely different mechanisms to achieve these goals, at least they count on similar concepts.

The most significant difference between the reform projects remains the narrow scope of the Consumer Privacy Bill of Rights compared to the broad scope of the proposed data protection regulation. The first one only applies to commercial relations – the one who is being protected is "the consumer" and not "the individual", and the one accountable for breaching the consumer's legal safeguards can only be a "company". Nevertheless, the principles established for this specific domain can easily be taken into account for several other sectors.

6. Future Work

This paper is evidently only an introductory work and it can be continued at least in two directions. First, a study on circumscribing each principle stated in the Consumer Privacy Bill of Rights to certain mechanisms or provisions already implemented or soon to be enforced in the European Union. In this way, a more accurate correspondence can be made between the legal systems protecting personal data. This could also be a support for future US legislation and private codes of conduct. At the same time, the EU stakeholders could learn some lessons from the pragmatic way US Administration views informational privacy. Second, a research on how the CPBR could be implemented in the US legal system would be very interesting and also useful for the lawmakers and the private entities that are strongly encouraged to adopt codes of conduct.

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8. References

Brüggemeier, G., Ciacchi, A. C., & O'Callaghan, P. (2010). *Personality Rights in European Tort Law.* Cambridge University Press.

*** Comission Staff Working Paper. (2012). Impact Assessment on the proposed Regulation, SEC(2012) 72/2.

Greenleaf, G. (2012). Global data privacy laws: 89 countries, and accelerating. *Queen Mary University of London, School of Law Legal Studies Research Paper* .

Levin, A., & Nicholson, M. J. (2005). Private Law in the United States, the EU and Canada: the Allure of the Middle Ground. *University of Ottawa Law and Technology Journal* , 357-395.

Ohm, P. (2010). Broken Promises of Privacy: Responding to the Surprising Failure of Anonymization. *UCLA Law Review* , 1701.

Reding, V. (2012, January 25). Public statement on the occasion of the press-conference organized after publicly launching the content of the data protection reform in 2012. Brussels.

Schwartz, P. M., & Solove, D. J. (2011). The PII Problem: Privacy and a New Concept of Personally Identifiable Information. *New York University Law Review* , 1814.

Von Hannover v. Germany, Application no. 59320/00 (European Court of Human Rights June 24, 2004).

Whitman, J. Q. (2004). The Two Western Cultures of Privacy: Dignity versus Liberty. *The Yale Law Journal* , 1151.

*** European Commission. (2012, January 25). COM(2012)11, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data. European Commission.

*** White House. (2012, February). Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy.

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REALITIES AND PERSPECTIVES

On the Legitimacy of Representation During the Transition towards Democracy

Ioan Alexandru[1]

Abstract: From the very beginning we need to mention the fact that legitimacy as a social fact does not necessary coincide with the legitimacy that grants the legal character, although normally the doubts concerning the legitimacy of an action, of a process, of an authority or of an institution represent the source of mistrust and are questioning their legality. (Rosanvallon, 2010, pp. 21-29) With other words, it is not enough for a process to observe the regal requirements, nor for a qualified and legally authorized or recognized body take a favourable decision. The legitimacy involves trust and total and active acceptance of the majority of citizens towards the result of the actions of institutions and of the relevant public persons.

Keywords: democracy; legitimacy; institution; transition

It is true that the legitimacy of the modern state is based on the legal character of its actions but the legality involves something more than a simple concordance of the action of the state power with a law norm in force. Legality may be considered as legitimate only if the legitimacy of the norm is previously assumed. This means that the notion of legitimacy involves the acknowledgment of that law norm as being valid and that practically it was and is still used by the members of the society to harmonize their actions. (Serrano Gómez, 1994, p. 277)

In the reality of the social practice, given that the homogeneity of the modern state is just a relative presumption; the legitimacy is practically based on several types of criteria and arguments. For example the so called "unwritten rules of the political system" that is the tradition that things were always made in a certain manner. Such an unwritten rule is the acknowledged authority of a person that issues an order, or an opinion; and from the tendency to observe any procedural legality which acting based on the established, public and consensual regulations enjoys trust and credibility (the assumptions of authenticity, of veracity and legality of the actions made by the public authority). In this case, a crucial element is that the actions of the legal authorities, as well as the legal procedures be transparent, credible and clear, especially in a social environment which does not excel by the political-juridical culture.

In order to highlight the importance that legitimacy has in exercising the public power we submit broadly an excellent definition of one of the most famous doctrine makers of the past century: "*Legitimacy represents the bridge between a political regime and its national community; and means also the frame of convictions shared by that community, to which the capacity of governing is transferred of any government from any State.*

Or if preferable, it means the possibility of that government to lead and to be obeyed, being protected by the real game rules which give a meaning to a political system: not only those written as laws, but also the ones that allow the coherent inclusion of numerous recipes of social structures and the

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exercise by authorities with the largest possible certainty. The key to legitimacy does not consist, eventually, of people who believe always blindly in all that its government does, but to have the convictions." (Merino Huerta, 1995, p. 8)

In what concerns us, the previously mentioned have two implications that are underlined through the fact that these represent both requirements, as well as tasks for the democratic transition.

The first of them implies that it accepts that in our country the so called democratic processes and especially the electoral ones, do not enjoy a full legitimacy, neither the trust of its citizens, given the unorthodox antecedents practiced by the political class in the twenty one years of transition towards democracy but also the tendency of a great part of the population to qualify democratically a process, only if the personally preferred one wins the elections. It thus is necessary, in order to re-establish the trust, to obtain the social legitimacy of the democratic processes.

The second one involves the passing from the so called political culture of results, that is to expect what the reform or the government offer directly and individually to citizens (e.g. if personally or somebody close obtains any kind of benefit we do not object to reform), to the culture of participation, in which the citizens develop by themselves the reform and are responsible for its results.

Thus, situations are to be avoided, which have costs on the average and long run which are still not clear such as those from the periods (such is the one we go trough) in which, according to almost all major opinions, the government's legitimacy is debatable both from the point of view of the electoral process as well as of law, being a legitimacy accepted by need which takes place when the government in operation is seen as a lesser evil in order to avoid a major instability and in order to maintain the minimum acceptance from behalf of the population and to allow the continuation of transition with lower political costs.

Finally we underline the already mentioned matter of trust, which is one of the elements that allow the apparition of legitimacy of an authority or of measures in transition. In the modern and democratic society, the trust becomes a central element. This trust is characterized by credibility and anticipated reliability, deposited in social processes crystallized into institutions, which the sociologist Giddens calles *expert systems* (specialized techniques and knowledge, as for example all that is related to the legal system), having certain purposes, such as money. (Giddens, 1993, p. 39) This trust is based on the idea that none of these matters will be subjected to arbitrary changes and that these have a predictable normal functionality based on the regulations that the company established and which will make them valid for all.

In what concerns Romania, the process of reformation and modernization had certain peculiarities, which are related to the specificity of transforming the East-European rural societies into modern societies[1]. Kenneth Jowitt notices three characteristics of the Romanian political and social realities before 1940:

- the gap between the urban Romania and the rural one, according to C. Dobrogeanu Gherea's expression;
- the mechanic transfer of the liberal institutions from the West and the fact that
- Romania is seen by intellectuals and the political leaders as suffering from multiple dependencies towards the West.

He calls this particular situation a „dependency syndrome", (Jowitt, 1978, pp. 2-4) marking the complex of dependency of external factors of the small and undeveloped countries, which entered later on in the modernization process. Broadly analyzing the state of democracy in our country Stelian Tănase (Tănase, 1998, pp. 8-10) quoting Andrew Janos draws the following conclusions: "in the

[1] There has been a long debate on the issue if Romania follows the same stages of development as the Western countries. See (Zeletin, 1925) in which the author claims that Romania is going through the same stages of the Western capitalist development. C. Dobrogeanu Gherea (in „*Neoiobăgia",* 1910 second edition 1977, from which we quote in this paper) and Șerban Voinea (in „*The Oligarquic Marxism*", 1926) it underlines the differences, the specificity of the Romanian way, in a different context.

countries that opened the path to the material civilization, the modernization means the penetration of technology into the society, whilst in Romania ... the technology appears less as a social object but as an object of aspiration and orientation ... in the peripheral areas left behind, "the demiurge of change" (using the Marxist expression) was the desire to imitate. Consequently, certain structures – first of all the bureaucratic state and the public education system – appear not as an answer to the social differentiation and complexity, but as an anticipation of these"; „as opposed to the experience of the Western societies, in Romania ... the development of the market mechanisms was rudimentary and distorted. As a matter of fact, there is in Romania a weak impulse towards the development of the entrepreneurship spirit and towards the production of goods destined to the market ... the market remained very limited"; "... whilst the tastes and expectations were tailored at global scale – mainly according to the example provided by the "nucleus" of the advances nations -, the resources and the means to fulfil these remained in majority outside the diminished borders of the state-nation". (Janos, 1978, pp. 113-114) In continuation it generalizes these observations by concluding that "Once the process commences to develop in the undeveloped countries, they take as reference frame the realities, the type of structure, performances, the level of Western development. We need to underline the fact that their imitation will lead, on one hand, to the acceleration of transformations (in the lack of own searches to delay to finding of a solution and to increase the costs raised by West, by revolutions, civil wars, economic bankruptcies, etc.) and, on the other hand, to the stressing of their dependency towards the West. One needs to remark that the imitation of institutions, methods, Western criteria was made on realities which were different in many aspects. These societies are structurally different, and cover the distinction operated by Max Weber between "class-society" and „status society"[1]. (Weber, 1978, pp. 926-938)

As to these correct observations we need to understand that in the process of reforming the Romanian society, it is necessary to remember permanently that the democracy is not a natural and necessary product of the social evolution, it appears not by itself, but as an invention or human creation. Thus, as the great contemporary scholars have underlined, the democracy is a product of active will and of the creativity of the groups involved. (Norberto, 1995, p. 17) "*Unfortunately, we did not assimilate the necessary political culture to make from the natural political dispute in democracy a means of enhancing the thinking of all and to perfect the management at the society scale*". (Iliescu, 2009, p. 28) Thus, democracy is a mere "artificial" product, that is totally human but this tends to be forgotten in times of "normality", but the crisis situations remind us of the fact that, most of the times, the crisis, needs to be understood positively, constructively, because it uncovers the "natural" world from falsity and exposes again the image of the society as being the one which truly is. Being an "artificial" product, the construction of democracy implies a succession of options with an open result. The crisis demonstrates that democracy does not show out by itself, out of an objective necessity, but it is actually a "subjective" product and creates actors and projects. (Sartori, 1987, p. 175)

Precisely because of this, it may have many concrete forms and in itself supposes a conflict for its continuous definition, either in a more extended manner, either in a more limited manner. "*Democracy in itself does not reflect only the multitude of opinions, but at its turn represents the object of very different construance*". (Norbert, 1990, p. 13)

Anyways, we need, within a society, to have a minimum consensus over the forms of understanding and on this fundament are developed the vectors of deepening or limiting the democracy (Iniesta, 2006, p. 56):

a) what does it mean all that is public and which represents the object of all that is public? and
b) who is the people? who (individuals or groups) belongs to the people, from the crowd, having the right to participate in the democratic processes?

The first question refers actually both to the issues that need to be debated in public and which need to make the object of the attention and of the responsibility of a group as well as to defining the "public space", more exactly to social or theoretical establishment or predefinition of what a "public" space is.

[1] Kenneth Jowitt in (1978, pp. 6-21) makes a pertient analysis of the issue.

Within this meaning, it is necessary to state that in the field of issues that need to be publicly debated as well as in defining the public space, the amendment and reformulation of the type of existing relation are possible, and, moreover, more important, the need to recognize the autonomy of the attending topics is crucial. A classical example of these problematic is given by family, because it is recognized as being a "natural" space, where hierarchies are established "naturally" and there are no lawful subjects or a "social" space, as in past times, the "policy" and the "government" were considered a "divine" space, reserved to certain adored actors, such as the kings.

Today, for example, it is debated if health or the economic survival of the individuals, need to represent or not the responsibility of the States, that is to constitute public issues or issues that concern each individual. This was an issued that seemed solved when the theory of the benefactor state was prevalent, however, it is again a current matter of these times dominated by neoliberalism. In what concerns the "public space", the discussion passes from the ones who want to limit it to certain environments, actions or institutions of the State – e.g. the limitation of discussion on economic policy to certain "solvable" actors (that is the decisions related to economics will not be subject to democratic-elective procedures, these remaining exclusively in the private area) or its extension into a state policy, which implies the need to include this problematic into the public space, in which, though debate and decision, the access is allowed, based on democratic rules for all those that belong to the community in relation to fields such as the one of the mass communication means, with the purpose of the role that they fulfil in the constitution of the real life in the modern society. (Ferry & Walton, 1995)

In the doctrine, different definitions of the public space called also *realm* or *public area* were worded. We reveal some of these:

"By public realm we understand mainly a field of our social life in which something such as public opinion can be formed. All citizens have – fundamentally – free access to it. A part of the public realm is constituted by each discussion on particular issues that are reunited in public. In this case, citizens do not relate as entrepreneurs, nor in the performance of their professions, whose particular matters would motivate them to do so, neither as colleagues with statutory obligations of obedience, according to the legal provisions of the state bureaucracy. On the contrary, these relate voluntarily on the guarantee that they can associate in order to express and publish freely opinions that have to do with topics of general interest. In the context of a tough competence, this communication needs certain means of conveyance and influence; today, these environments from the public realm are: the newspapers, magazines, radio and television. We are referring to the public realm almost without distinction from the literary one, when the public discussions are related to the subjects that depend on the state praxis. The State Power is, so to speak, the opponent of the public realm, but is not a part of it. Consequently, this power is considered a public power because, first of all, it is forced to contribute to the tasks that need to be fulfilled for the public good, which is to the following of the common good of all citizens. First of all, when the performance of the political dominance is subordinated effectively to the mandate from the public realm, it gains an institutionalized influence over the government, by means of the legislative body. The "public opinion" phrase, is related to the critique and control tasks that develop informally the urban competence (at the same time informally throughout the elections), as compared to the organized domination of the State. According to this function of public opinion, dispositions exist as well around the publicity; the compulsory public realm is connected to something like the protocol type. In the public realm, in capacity of field that makes public the relation between the society and the State, in which the competence is formed as bearer of the public opinion, the following principle is important: each publicity, that once needed to be made against the monarchs' enigmatic policy, it allows now a democratic control of the state action." (Jürgen, 1986, p. 53)

According to François Guizot, the European civilization is characterized by a few traits that single it out from all the other – righteousness, legality, public space and liberty. (Guizot, 2000, p. 38) By public space Guizot understands the existence of general interests, of public ideas, shortly, the society itself.

The European public space is under construction considering the aspect of discovering the legitimacies and internal reasons to govern it. The concept of "European public space", yet not completed theoretically in the specific terminology of the European integration, will include and describe in a systemic manner, the mechanisms, processes and the complex phenomena that govern the development of the public sectors and of the European administrations, highlighting the connections and determinations of administrative, economic, social or political nature.

Today it is observed that, at the level of the European Union, it is desired the creation of a transnational public space to allow the legitimacy of the European institutions and the founding of a European collective identity. Surely, the conceptual definition of the public space needs to be discovered in the light of the process of political unification of Europe, the political will having a decisive role. (Ioan, 2008, pp. 874-884)

The requirements for the existence of the European Public Space may be summed up to:

- the existence of the Union founded justly;
- the existence of community institutions which should operate in a democratic manner;
- the existence of an organized frame of debates in the public life based on the existence of the means to allow all citizens from the Union to express publicly [1], and in what concerns the ways regarding the public debate and the obtaining of the European public solidarity these remain yet to be invented because the citizens of the European states, are informed from the press, radio and television on the novelties and the debates that concern their country, and the debate between partisans and opponents of the European construction is not an European debate, but a mosaic of debates in the core of each European country. (Wolton, 1993)
- the existence of the frame to allow the concepts delineated after the debates from the public life to be transformed into laws by means of the public law.

A first issue to be put into discussion regarding the relation of the "public realm" with the democracy of a society is the one that concerns to what extend the ordinary people may play a role regarding the activity of the state by means of the possibility to communicate their opinions and to influence the decisions of the State. With other words, here democracy would tend to identify with the main role that may be fulfilled by the formation and spreading of the "public opinion", in defining institutions and their policies.

A second question that creates controversies regarding the democracy is how to accomplish the people's participation to decisions, and from here the problematic of representation.

A third thing that needs to be clarified is the defining of persons and of categories of decisions to which these need to participate, if not considered as possible or proper for all inhabitants or members of a certain political entity to participate.

It is alleged in the specialty literature that these themes linked to democracy, representativity and its legitimacy, are gather around two basic principles that any democratic approach should follow, true criteria in order to appreciate democracy:

a) the possibility and real capacity of any natural person or legal entity from the civil society to control any decision or public human activity (of a natural person or legal entity with public attributions), to have relation or impact over its life and over the possibilities that it would have in the future.

In other words, there is a collective and individual possibility to decide, under the social conditions of its own life and of its descendants. "The utopia of democracy is the self-determination of a people based on their conditions and life structures." (Norbert, 1990, p. 13)

[1] Définition de notions de la sphère de la Société civile 2002, par Jean Claude BOUAL, Paris / Horst GRÜTZKE, Berlin, *Forum permanent de la Société civile européenne*, www.europa-jetz.org.

b) a second principle would be that the object of democracy be understood as a maximization issue of an individual's self-development, once with the understanding of all elements and social connections that limit or support it.

The first need is determined by the need to establish conditions, structures and social contexts to allow the activity of individuals as citizens. In the second case, it is not enough to establish social possibilities, but is needed to underline the need that the individual act in order to become citizen and the fact that this conditions may be fulfilled only by its practicing.

Starting from these criteria and principles, a discussion appears, on the exigencies that these impose to political regimes and to legal systems.

The bases of the different democracies have been at the same time different, according to the requirements and the historical times. For example, sometimes was enough to agree upon living in a certain space so that, in order to over impose interests, to create a political integration, a public space based on what is common, forming a "city", a "polis". In a justified manner, as I have mentioned before, a basic requirement for democracy is represented by the creation and preservation of the "public space", where all that is of collective or public interest, "public matters", be acknowledged effectively by all those interested and not only by a dictator or by a particular group of persons. That is why, the first constitutions of modern democracy started by stipulating the fact that the government was not a property, neither was instituted for the benefit of "any man, family or any category of men" (North-American Constitution from Massachusetts, 1780). This public space of discussion and decision over the public matters was in Athens a material physical space: the agora (the public square). For the modern theoreticians it is more of an ideal-symbolical or institutional space: the State. This modern State appears in direct opposition to the individual. Nevertheless, in the second half of the 20th century, it was developed very time more powerful the conviction that it needs to exist an intermediary sector, even bigger or more important that the State, which is the one of the collective subjects, that nowadays is called the discussion of identities, which makes reference to the minorities right. Consequently, in what concerns the State scheme as sole answer to the social order, and of the isolated individual as sole possible alternative of liberty, is corrected now when we see that intermediary organizations appear for the exercising the liberties of individuals and of warranty for a non-punitive governability. (Iniesta, 2006, p. 63)

In the modern perspective, it was always been taken into consideration the affiliation, because all citizens become equals by the fact that they are tax payers, their taxes supporting the bureaucratic apparel. Contrary to allegations such as the democracy represents the final political product of the Western civilization, one needs to mention that nowadays, it is debated even the possibility of democracy beyond the horizon of the so called western civilization. We may observe not only that there are "different" democracies, but also that, by its own nature, there is not and neither will exist anything that we can consider as "finite democracy". As I have shown it is not about any fact or natural or necessary result of the human or society's evolution, but about a sought, imagined, voluntary fact. Fist of all, the democracy was, and continues to be, an idea, and the transformation of this utopias into reality, its survival depends on the continuous activity of the members of the society.

So to speak, while the tyranny or the dictatorship has as sole purpose to preserve itself, the scope of democracy is to fulfil the requirements suggested and desired by citizens. The capacity of a society to integrate itself from the democratic point of view and to ensure its survival represents the conditions of the existence and permanence of any nation. With other words, the democracy becomes a requirement in order to avoid the disintegration of nations.

From the previously mentioned a first political conclusion is drawn over democracy: this persists only if there is activity and will from behalf of the ones forming the community or the defined public space. With other words, there is and it survives only where there are active citizens, not only nominal ones, and then these citizens have as explicit and implicit objective to maintain and develop a democratic system.

"The free participative institutions need certain generally accepted self-disciplines. The free citizen has the capacity to offer voluntarily his contribution to which, contrary to this, the despot would force him/her, maybe in another way. Without this, the free institutions cannot exist. There is a great difference between the societies that find cohesion by means of certain common disciplines, rooted in a public identity, and which thus allow and request the participative performance of the equal ones, on one side, and between the multitude of types of society that needs driving chains based on the incontestable authority of the other". (Taylor, 1986, p. 2)

All the above mentioned show the importance of legitimacy, which is the only manner to allow the identity in a democratic system, an identity that we can call "public", an identity with "public questions", with order, with the public organization, an identity that we have to build, by means of an inter-subjective collaboration in the sense of what we feel that we think and build together. This is the meaning that needs to be lived, believed, understood and practiced by those who belong to a democratic society.

We shall have to remove the confusion regarding the conviction that democracy consists only in obtaining a government with good programs, to complete then and which should pay attention to population, and which fundaments its legitimacy upon the fulfilment of the programmed objectives. With other words, the confusion that democracy would mean a sort of agreement between the governed and the governors, in which the first renounce totally or partially to their capacity of citizens in order to be well taken care of or well governed, needs to be removed.

No, the true democracy is when the citizen transforms into a responsible and active entity and assumes the decision and its consequences.

Bibliography

Ferry, J.-M. & Walton, D. (1995). *El nuevo espacio público/The new public space.* Barcelona: Gedisa.

Giddens, A. (1993). *Consecuencia de la modernidad/Consequence of modernity.* Madrid: Alianza Universidad.

Guizot, F. (2000). *Istoria civilizaţiei în Europa. De la căderea Imperiului Roman până la Revoluţia Franceză/History of Civilization in Europe. From the Fall of the Romanian Empire to the French Revolution (1828).* Bucharest: Humanitas.

Iliescu, I. (2009). *România şi lumea – la confluenţa secolelor XX şi XXI/Romania and the world - at the turn of the century XX and XXI.* Bucharest: The Technical Publishing House.

Iniesta, R. U. (2006). *Dimensiones par la Democracia – Espacios y criterios/Dimensions of Democracy - Spaces and criteria.* Cuernavaca: UNAM, Centro Regional de Ivestigaciones Multidisciplinarias.

Ioan, A. (2008). *Tratat de administraţie publică/Public Administration Treaty.* Bucharest: Universul Juridic .

Janos, A. (1978). Modernisation and Decay in Historical Perspective. *Social Change in Romania 1860-1940. A Debate on Development in an European Nation*, 113-114 .

Jowitt, K. (1978). *The Leninist Response to National Dependency. IIS.* Berkeley: University of California.

Jürgen, H. (1986). La esfera de lo público/The public sphere. *Touraine y Habermas : ensayos de teoria social/Touraine and Habermas: social theory tests*.

Merino Huerta, M. (1995). *Tres hipótesis sobre la transición politica/Three hypotheses about the political transition.* México: Nexos.

Mill, J. S. (1966). *Consideraciones sobre el gobierno representativo/Considerations on Representative Government.* México: Herrero Hermanos Sucesores.

Norbert, L. (1990). Los patios interiores de la democracia/The inner courtyards of democracy. *Subjetividad y politica/Subjectivity and politics*, 13.

Norberto, B. (1995). *El futuro de la democracia/The future of democracy.* México: FCE.

Rosanvallon, P. ,. (2010). *Counter-democracy – Politics in the age of mistrust.* Bucharest: Nemira.

Sartori, G. (1987). El debate contemporáneo/The contemporary debate. *Teoria de la Democracia/Theory of Democracy, Volume I*, 175.

Serrano Gómez, E. (1994). *Legitimidad y racionalización/Legitimacy and rationalization.* Barcelona: Anthropos y UAM.

Tănase, S. (1998). *Procesul comunismului. Elite și societate/The Process of Communism. Elites and Society. The Gheorghiu-Dej Government 1948-1965.* Bucharest: Humanitas.

Taylor, C. (1986). *Foucault on Freedom and Truth, Hoy David, comp. Foucault: A Critical Reader.* London: Basil Blackwell.

Weber, M. (1978). *Economy and society, vol. 2.* NY: Bedminster Press.

Wolton, D. (1993). *La dernière utopie. Naissance de l'Europe démocratique/The last utopia. The Birth of a democratic Europe.* Paris: Flammarion.

Zeletin, Ș. (1925). *Burghezia română. Originea și rolul ei istoric/The Romanian Bourgeoisie, The Origin and its Historical Role. Second edition 1991.* Bucharest: Humanitas.

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REALITIES AND PERSPECTIVES

Legal System as a Determinant of Economic Performance: Factual Records in Romania

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Abstract: The role of the legal system in generating economic performance is enjoying increased attention in literature. Our scientific endeavour tries to underline, from an original perspective, the incoherence which characterises the Romanian law and judicial system; at the same time, it also offers a few solutions meant to restore and reconsider the role of public institutions in the legislative and judicial process. Considering the facts presented in our study, the existence of efficient legal institutions, who enforce contracts *ex post* while using the judicial infrastructure (courts and judicial procedures), is more than critical for the formation of an agreement of will between contracting parties, thus generating economic performance for private organisations by reducing transaction costs and by limiting the opportunism of economic agents. Equity, predictability, transparency and reduced costs are advantages deriving from the legal enforcement of contracts, which stimulate competition and trade, while reducing the risks associated with different types of transactions. Thus, it is necessary to implement an anti-corruption policy, to enhance the predictability of the law-making process, to reconsider and restore the attributions of institutions involved in the Romanian legislative and judiciary process, in order to promote proper civil and commercial judicial procedures, together with the analysis of the possibility to acknowledge jurisprudence as a source of law.

Keywords: law and judicial system; economic performance; institutions; transaction costs; contract enforcement

1. Introduction

The theoretical contributions and factual evidence found in literature tend to emphasize the important role that state institutions have in ensuring economic growth and development, thus creating the premises for the consolidation of an economic research nucleus regarding institutional implications. Within this context, the analysis of the way in which the law system influences economic performance becomes an extremely important topic in literature, raising a vivid general debate. Our scientific endeavour subscribes to these efforts and tries to underline, from an original perspective, the incoherence which characterises the Romanian law and judicial system; at the same time, it also offers a few solutions meant to restore and reconsider the role of public institutions in the legislative and judicial process.

Our scientific study commences with a theoretical and empirical approach of the observed phenomenon, and subsequently continues with a brief digression on the general theory of law, in order to show the optimal way in which the Romanian law and judicial system should function and to contrast it with the current state of affairs, while emphasizing the way in which economic performance is affected by the present situation.

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The paper ends with some conclusions and recommendations regarding the increase of efficiency of legal institutions and with some outlines regarding further research.

2. Theoretical and Empirical Perspectives

In what concerns the existent causal relationship between economic performance and the legal system (including the institutional network which ensures its existence – the judicial system) *via* contract enforcement, scientific literature, together with other numerous empirical studies, we can observe an ongoing exchange of views.

The existent concerns in the identification of the way in which the legal system functions and influences economic development are not necessarily new. In his fundamental work, *Leviathan*, written in 1651, philosopher Thomas Hobbes, as a founder of social contract theory, manifests the belief that entrepreneurs will never get involved in trade activities, if they have lost their trust in the coercive power of the state, meant to ensure contract enforcement.

Later, Adam Smith, in his well-known paper *The Wealth of Nations*, argues that the efficiency of the judicial system plays a significant role in determining the development level of a state.

Max Weber, this time from a historical and sociological perspective, believes that economic development derives from a rational and solid legal system. Thereby one of the main exponents of neoinstitutionalism, Williamson associates the level of transaction costs, negotiation costs and contract enforcement with economic development (Williamson, 1985).

Some authors consider that people use the law and judicial system to structure their own economic activities and to solve their disputes. As a consequence, the first step is to know the laws in general and the way they constrain economic transactions, followed by the identification of those mechanisms which sanction the contracting parties who do not fulfil their assumed obligations due to contract enforcement, mechanisms linked to the operation of courts and other legal state institutions (Cooter, 1996).

Other authors consider that the law and judicial system holds the responsibility to ensure property rights protection and to facilitate their transaction between private businesses, to define rules regarding entering and leaving a market, to promote competition and to shape economic behaviour in monopolised sectors (Gray & Associates, 1993).

As we will further show in our study, it is not enough to have laws which support the socio-economic reality, it is also important for them to be efficiently applied within the existent institutional environment, as courts have an important role in providing law enforcement (and, thus, in providing an impartial enforcement of contracts) and dispute resolutions.

Moreover, we believe that the law and judicial system aggregately influences economic performance, because the ability of courts to provide rapid, impartial and predictable resolutions depends on how well written are the laws, within a given economic reality (Sherwood, Shepherd & De Souza, 1994). For example, if a law system is incoherent and flawed, courts cannot reach a resolution in commercial disputes, for two reasons, at least.

Firstly, courts cannot decide if a certain breach of contract really occurred. This happens because in the absence of standard legal regulations, courts cannot impartially decide if a contracting partner breached the contract by misappropriating the other partner's money in a joint-venture.

Secondly, the law does not provide a suitable body of regulations which courts must follow in the case a commercial agreement was actually breached. This is the case of Russian legislation, which does not specify which contract party can be held accountable in the situation in which a property buyer discovers that his property had been illegally purchased by its previous owner (Hay, Shleifer & Vishny, 1996).

Empirical studies suggest that the law and judicial system is able to stimulate economic performance through coherent policy-making and by protecting property rights in general, and intellectual rights in particular, thus ensuring the premises for the promotion and dissemination of technical progress. The protection of intellectual property rights also determines specific related transactions and amplifies national and foreign investments in the research and development sector (Gould & Gruben, 1996).

3. A Brief Incursion into the General Theory of Romanian Law

The doctrine shows us that, being determined by purposes which impose actions, the law, a normative phenomenon, represents an attempt to discipline and coordinate social relationships, in the view of promoting generally accepted social values – property rights, lawful defence and protection of individual freedom, civil society. Consequently, the juridical norm, which is the base-cell of law, refers to a subject's rights and obligations. *Legis virtus haec est : imperare, vetare, permitere, punire – This is the strength of the law: to command, forbid, allow and punish.* The subject of law can be a person, either physical or juridical, both of private and public law (Popa, 2008).

The most important formal sources of law are the normative juridical laws which form *ius scriptum* or the *written law*, which is a complex system created by public authorities with certain normative competencies (the Parliament, the Government, other bodies of the local administration).

We have to underline that laws occupy the central place in the normative system, being issued by the Parliament, as a legislature, and elaborated according to special procedures; social relationships are only governed by these laws, and other rules and regulations are created only to develop and amend them.

However, through legislative delegation, the Government can primarily amend social relationships through ordinances, in the name of certain prerogatives stated in the Constitution. At the same time, the Constitution allows the Government to issue emergency ordinances, but only in extraordinary circumstances which require rapid amendment, and with the obligation of stating the reasons for the urgent amendment within the text of the ordinance.

The legislative activity has to rely on careful planning and on a great sense of responsibility, which means that the elaboration of legal norms requires a substantial scientific foundation capable of eliminating potential contradictions and inconsistencies. Thus, the legislative work has to be the result of a profound and precise knowledge of social and national needs, capable of foreseeing potential social consequences.

Although law enforcement is significantly important, due to its punitive character, we believe that imposing a law by taking advantage of the coercive force of a state, without taking into consideration the needs of a society, does not ensure its efficiency and durability, leading towards a general revolt against legislature; in other words, the efficiency of a legislative act depends on the legislator's capacity to inform the society on its normative activity through several media and to build its regulations in accordance with real social needs (Naschitz, 1969).

We are also mentioning that in the context of Romania's accession to the European Union, our country has adopted the Community *acquis*, embarking on a mission to rise to the Union's juridical standards.

As a result of the direct influence of the Community law over national law, for every project of law elaborated by Romanian legislature, a written motivation is necessary in order to express the compatibility of the project with the Community's policy, its reasons for implementation and future harmonisation actions deriving from it.

From this perspective, currently, Romania is undergoing a process of transition and adaptation of its national law and juridical system to the Community's system, which tends, more and more, towards the unification and homogenisation of the law systems of member states; this transition, as we will show in our study, does not lack disruptions.

We included this brief excursus in order to highlight that the law and judicial system has to enforce a clear, unequivocal normative framework, capable of providing coherent and consequent regulations, meant to honour a set of unanimously accepted social values and to guarantee free access to a politically independent judicial system. Such a system is also able to directly influence economic performance in a positive way, by reducing transaction costs for either public or private economic entities and by ensuring *ex ante* and *ex post* contract enforcement.

4. Incoherence of the Romanian Law and Judicial System

A thorough analysis of the Romanian legislative system, even without being exhaustive, leads to the observation of certain – let us name them – incoherence, regarding the adoption and implementation of laws, as well as the judicial network in itself.

Firstly, our attention is drawn to the large number of normative acts that have been issued during the past few years, by both the Parliament and Government (as an authorised legislative forum by virtue of Article no. 115 in Romanian Constitution), creating the illusion of a legislative effervescence.

The statistics regarding the normative activity of Romanian Parliament and Government for the past 5 years confirm these conclusions. According to the data provided by the Centre of Institutional Analysis and Development, in 2010 there were adopted 223 laws and 122 Government ordinances, in 2009 there were adopted 391 laws and 138 ordinances, in 2008 there were 307 laws and no less than 268 Government ordinances, in 2007, the Parliament adopted 383 laws, while the Government released 200 ordinances and, finally, in 2006, there were adopted 514 laws and 201 ordinances.

Moreover, these statistics underline the profound legislative instability, given the fact that 46% of the laws adopted in 2010 either modified or abrogated previous normative acts, and 20% of them modified or abrogated other recent laws and ordinances, adopted in the last three years.

Additionally, half of the Government ordinances from 2010 were adopted with the purpose of modifying the existent juridical system, while 15% of them modified or abrogated laws adopted in the last three years. For example, Law no. 571/2003 which refers to the Fiscal Code – a significantly important law that establishes the legal framework for taxes (which represent important revenues for the state and local budgets), the way they are calculated and their payment methods, as well the number and identity of taxpayers – has been modified 47 times during the past five years.

The above data also renders the large number of normative acts adopted by the Government, which takes advantage of the stipulations found in the constitutional article no. 115, and becomes a legislature, thus eroding the fundamental principle of separation of powers within a state. This situation is the result of a negligence, as the Constitutional Court did not sanction the breach of the emergency clause regarding government ordinances, which contravenes the constitutional specifications concerning parliamentary legislative power.

We consider that these frequent modifications of laws are caused by the lack of sufficient planning and scientific research during their elaboration process, which makes the legislator incapable of anticipating and counteracting the social and economical consequences resulting from their implementation. Neither anticipative impact studies, nor professional debates were conducted, contrary to the stipulations found in Law 24/2000, Article 7(3) regarding the norms of legislative techniques for the elaboration of normative acts, which underline the necessity of an impact evaluation of project laws before their actual enactment, while examining both the impact of laws in force at the moment of project elaboration, and the impact of public policies entailed by a given law project.

The current state of affairs is also the consequence of a malfunctioning Legislative Council which, according to the stipulations of Article 3 of Law 73/2003 with its subsequent amendments, should analyse and notify law projects, legislative proposals and Government ordinance projects, before they are approved and implemented; the Council should also analyse law projects and legislative proposals arrived after they were adopted by one of the Parliament Chambers, as well as elaborate studies for the

systematisation, unification and coordination of laws, together with examining their compliance with constitutional principles.

It is also necessary to mention a series of other factors which jointly generate vulnerabilities in the law and judicial system. Thus, the flawed and often interpretable legislative framework, together with a heterogeneous and contradictory practice regarding the cases brought to court, generates a slow resolution process, due to the intensive and profound activity of courts, causing the postponement of court decisions and generating moral prejudices caused by excessively lengthy trials.

For example, in the case of insolvencies or commercial litigations, the repeated postponement of court hearings from one year to the other negatively affects the business environment and economic development.

Moreover, long trials cause the overcrowding of courts (in 2010, in Courthouses, there was a load of 2010 court cases per judge, in Law Courts the load per judge was of 959 cases and in the Courts of Appeal, 696 court cases), undermining the effectiveness and impartiality of the judicial system and, consequently, the proper functioning of trade market activities.

Under these circumstances, the easy access of justice seekers to simple and effective judicial procedures and the acceleration of trial resolutions, even in cases of enforced judgements, remain simple desiderata.

The fundamental principles of civil lawsuits are not clearly rendered and, thus, they can be only inferred from constitutional norms or from the interpretations of certain texts found in the Code of Civil Procedure; these principles are rather a doctrinal creation, jurisprudentially sanctioned, than a legislator's act of will.

The citation and communication procedure of procedural acts is not adapted to current realities, nor to the target of assuring rapid and predictable court resolutions, in accordance with the fundamental principles of the civil code: the principle of contradictoriality and the right to defence (with the exception of using traditional means of communication based on law enforcement officers or other court employees, or through mail, there is no possibility to issue procedural acts using modern means of communication, such as telefax, e-mail or other communication means which ensure the transmission of texts and their confirmation of receipt).

Additionally, court postponements are not considered exceptional (this rule is expressed in Latin as *exceptio est strictissimae interpretationes* – which means that exceptions are construed restrictively and, when a juridical norm becomes an exception, this exception is not to be extended over other situations); on the contrary, disputing parties have the possibility to solicit and obtain repeated unjustified court postponements, which lead to the overcrowding of courts and negatively affect juridical activities. Moreover, there are no solid norms regarding case transfers and judge recusals, these insufficiencies being used as excuses to adjourn court trials.

Last but not least, the unpredictability of court resolutions represents another impediment for regular justice seekers, knowing that in our law system, unlike the Anglo-Saxon one, the jurisprudence and judicial precedent are not acknowledged *de iure* as sources of law.

We believe that the supremacy of law derives from the way it is implemented, not from the way it is written. The most important aspect of law is the effective functioning of the judicial system, not its potential power.

With reference to the functioning of the judicial system, in a report about the Romanian justice status in 2010, published by the Superior Council of Magistracy – institution responsible for ensuring judicial independence, as it is stipulated in Art. 133 (1) of the Romanian Constitution – there is mentioned a series of risk factors regarding the independence and effectiveness of the judicial system. The risks derive from the low level of allocated material and financial resources, from the lack of predictability and stability regarding the status of judges and prosecutors, from the increasing number of civil and commercial cases in courts etc.

We believe that the following example is revealing for the overcrowding level of courts:

- at Courthouse level, the total number of litigations deriving from civil juridical reports was of 317,952 (326,827 legal cases in the year 2009 and 328,933 in 2008), out of which 202,054 represent patrimonial legal issues (and out of these, 63,261 cases deal with property rights and other real rights), and the number of commercial litigations was of 310,174 cases (280,463 cases in the year 2009 and 162,909 in 2008);
- at Law Court level, the total number of litigations deriving from civil juridical reports was of 118,247 (94,022 legal cases in 2009 and 73,501 in 2008), out of which 64,639 represent patrimonial legal issues, and 24,875 of these deal with property rights and other real rights; the number of commercial litigations was of 147,629 cases (189,566 cases in 2009 and 158,595 in 2008), plus 75,567 bankruptcy files;
- at Court of Appeal level, the total number of litigations deriving from civil juridical reports was of 18,044 (17,503 legal cases in the year 2009 and 19,298 in 2008), out of which 9,529 represent patrimonial legal issues, and 7,638 of these deal with property rights and other real rights, plus a number of 28,058 commercial litigations (27,116 files in the year 2009 and 24,584 in the year 2008).

Moreover, a particular aspect that occupies our attention is the phenomenon of judicial corruption, which includes every attempt of influencing legal professionals and the impartiality of judicial procedures, with the purpose of gaining illegitimate benefits by either of the parties involved. Corruption manifests as a sum of pressure factors that cause a lack of integrity within the judiciary.

Among these factors we include the interference of politics in the recruiting and employment process of judges, in their payment process, as well as in the allotment of legal cases and in the appointment method of panels of judges (Dănileţ, 2009).

Judicial corruption is encouraged by a series of favourable factors which refer to the organisation of courts on several jurisdiction levels, to the complexity of procedural aspects and their lack of transparency, to the non-existence of alternative institutionalised systems capable of solving legal disputes; as a consequence, judges monopolise judicial activities, the jurisprudence becomes flawed and the judicial system is undermined by certain groups of organised crime (Buscaglia & Dakolias, 1999).

Judicial corruption generates efficiency losses in *ex post* contract enforcement, affecting the economic performance of private organisations and leading towards a loss of trust in justice acts and social values, as court resolutions for civil and commercial cases become unpredictable.

5. Final Remarks

Even though our study provided some general observations regarding the incoherence of the Romanian law and judicial system and his consequences on economic performance, thus imposing further more complex studies, we are still able to define some negative aspects that require rapid improvements.

We are witnessing a legislative instability, caused by the increasing number of normative acts issued by the Government, which consistently undermines the legislative power of the Parliament, while the role of institutions such as the Legislative Council and Constitutional Court is being continuously diminished.

The flawed and often interpretable legislative framework significantly delays court resolutions, while it also affects their predictability and increases transaction costs for private organisations. Trial procedures are slow and ineffective, causing the overcrowding of courts and prorogation of court hearings. Last but not least, the Romanian judiciary is often subject to improper influences from the political sector, affecting directly or indirectly its judicial exercise, in parallel with the lack of integrity of the ones controlling the laws.

Thus, it is necessary to implement an anti-corruption policy, to enhance the predictability of the law-making process, to reconsider and restore the attributions of institutions involved in the Romanian legislative and judiciary process, in order to promote proper civil and commercial judicial procedures, together with the analysis of the possibility to acknowledge jurisprudence as a source of law.

Considering the facts presented above, in our view, the existence of efficient legal institutions, who enforce contracts *ex post* while using the judicial infrastructure (courts and judicial procedures), is more than critical for the formation of an agreement of will between contracting parties, thus generating economic performance for private organisations by reducing transaction costs and by limiting the opportunism of economic agents. Equity, predictability, transparency and reduced costs are advantages deriving from the legal enforcement of contracts, which stimulate competition and trade, while reducing the risks associated with different types of transactions.

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7. References

Buscaglia, E. & Dakolias, M. (1999). A Comparative International Study of Court Performance Indicators: A Descriptive and Analytical Account, *Legal and Judicial Reform Unit Technical Paper*, The World Bank.

Cooter, R.D. (1997). The Rule of State Law and the Rule-of-Law State: the Economic Analysis of the Legal Foundations of Development, in Bruno, M. and Pleskovic, B. (eds.), *Annual World Bank Conference on Development Economics*, Washington, D.C., April 25-26.

Dănileţ, C. (2009). *Corupţia şi anticorupţia în sistemul juridic/ Corruption and anti-corruption in the legal system*. Bucharest: All Beck.

Dixit, A.K. (1996). *The making of economic policy: a transaction-cost politics perspective.* Cambridge, Massachusetts: MIT Press.

Gould, D.M. & Gruben, W.C. (1996). The role of intellectual property rights in economic growth, *Journal of Development Economics*, Vol. 48, No. 2 (March, 1996), pp. 323–350.

Gray, C.W. & Associates (1993). Evolving legal framework for private sector development in Central and Eastern Europe, *World Bank Discussion Paper 209*, Washington, D.C.: The World Bank.

Hay, J., Shleifer, A. & Vishny, R.W. (1996). Toward a theory of legal reform, *European Economic Review*, Vol. 40, No. 3-5 (April, 1996), pp. 559-567.

Naschitz, A. (1969). *Teorie şi tehnică în procesul de creare a dreptului/ Theory and technique in creating the legal process*, Bucharest: Academica.

Popa, N. (2008). *Teoria generală a dreptului/ General Theory of Law*. Bucharest: All Beck.

Sherwood, R.M., Shepherd, G. & De Souza, C.M. (1994). Judicial systems and economic performance, *The Quarterly Review of Economics and Finance*, Vol. 34, pp. 101-116.

Williamson, O.E. (1985). *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting*. New York: Free Press.

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REALITIES AND PERSPECTIVES

The Right to Life

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Abstract: In the present study, we set ourselves to analyze a subject, which, due to its importance and extreme complexity, generated many discussions and controversies both at national and international level: the right to life. The great evolution of the contemporary society and the progress registered in various fields brought into the attention of the states, international organizations, specialists in the field and public opinion the pressing problem of interpreting the content and limits of the human fundamental rights and liberties. We set ourselves to analyze the main international instruments regulating the right to life and to identify the situations where determining the content of this fundamental right in necessary. Without the intent of a complete work, we understand, throughout this study, to highline the great importance of the right to life respecting for the entire humanity.

Keywords: rights and liberties; the right to death; human dignity

1. Introduction

The human being, the supreme value of the humanity, benefits from rights, coming from its quality of human being, wherever, no matter the state or region where he was borne, lives, no matter the nationality, race, sex, religious and philosophical beliefs, material status. All these elements are the foundation of the equal and inalienable rights, a corollary of liberty, justice, security and world peace.

In the contemporary society, characterized by fast progress in fields like medicine, biology, chemistry, and most of all informatics, the problem of respecting the fundamental human rights is often invoked. The interest aroused by this problem is the indisputable acknowledgement of the importance of fundamental rights and liberties, extremely complex institution (Maftei, 2010, p. 113), without which we can't talk about a really democratic society, fundamental element – in order to promote the human dignity at national and international level.

Between the fundamental human rights regulated in different national and international documents, a special place is taken by the right to life. This way, the Universal Declaration of Human rights, provides the right of every human being to life, liberty and person's inviolability (art.3). Also, the human right to life health, interdiction of torture and of degrading and inhuman treatment, as well as the respect for private life (art. 2, 3, 7, 8) are provided by the European Convention of Human Rights. At national level, the Romanian Constitution by the art. 22, regulates the right to life, to physical and mental health of the person, in art.26, align. 2, it provides the right of every person to dispose of its own person, without prejudicing the rights and liberties of others, the public order or the morals, art. 34 of the fundamental law guarantee the right to health care.

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The special evolution of science and technique generated more than once situations when it was proved that the legislative system cannot keep up with the technical progress. Instead of giving answers to many unknown facts, the researches in medical, chemical, biological field generated other new questions, drawing the attention of the specialists from various fields both on national and international level. In the last years the controversies regarding the human euthanasia and of its legal regulation in various states grew. Also, the progress registered in medical research generated heated debates regarding the human cloning, the medically assisted reproduction, and the organs removal. These aspects, to which we may add the legal regulation of abortion, are poses of the right to life, aspects that generated special reaction both inside social groups at national and international level, and between specialists in different fields.

More and more often, the public opinion raises questions like: Can the right to die be considered correlative to the right to life? Is it or is it not a problem regarding "the help given in order to end suffering" of an incurable ill person? Is there a justification for ending a life if it is done with the intention to stop someone from suffering? Why abortion can be accepted by law and euthanasia not? Is there a warranty that taking the life of an unborn child is less serious than stop and incurable ill person from suffering (Pavel, Coman, & Boroi, 2011, pg. 771-775)? Which is the moment when we can talk about the existence of the person as subject of law? Must we recognize the quality of „potential human being" to a fetus (Ungureanu & Munteanu, 2011, p. 40)?

2. The Main International Instruments Ensuring the Protection of the Right to Life

2.1. Universal Declaration of Human Rights (10 December 1945)

In the attempt to fulfill the common wish to limit the human exploitation and violence, of eradication of racism and discrimination as well as of inequality between people, the preoccupation for promoting and defending the human rights and liberties extended at international level (Drăganu, 1998, p. 205).

The Universal Declaration of Human Rights, document with emblematic value, proposes in the Preamble a common ideal, which should be the target of all nations "*for all the persons and all the society's organisms, taking permanently into consideration this declaration, to make efforts, by study and education to develop the respect for which these rights and liberties to ensure, by progressive national and international measures, their universal and effective recognition and enforcement both in the member states and in the territories under their jurisdiction*" (Maftei, 2010, p. 117).

The Universal Declaration of Human rights is the first international document with vocation of universality in the matter of human rights. The starting point is the necessity to acknowledge a minimum level of human rights, its respecting at universal level and the identification of a unitary opinion regarding the human rights and liberties (Udroiu & Predescu, 2008, p. 5).

This international document acknowledges principle of great importance, from which we mention:

- art. 1: „*All the human beings born free and equal in dignity and rights*".
- art. 2: „*Each human is entitled to all rights and liberties proclaimed by the present declaration with no differences, race, colour, sex, language, religion, political opinion or any other opinion or any other circumstances*"
- art. 3: „*Any human being has the right to life, liberty and security of its own person*".
- art. 4: „*Nobody shall be kept into slavery, or easement, the slavery and the commerce with slaves are forbidden in all their forms*"
- art. 5: „*Nobody shall be subjected to torture, or to cruel, inhuman, degrading punishment or treatment*"[1].

By stating these principles, the declaration recognizes the main character of the right to life as

[1] http://www.onuinfo.ro/documente_fundamentale/declaratia_drepturilor_omului/.

inalienable and indispensable right in order to warranty all the human rights and fundamental liberties, "*the supreme value in the international hierarchy of human rights*" (Sudre, 2006, p. 213).

Even if it's not legally binding, because it isn't a treaty, the Universal Declaration of Human Rights imposes by the value of the principles it recommends to the states. The Romanian constitution, in art 20, says: "*The constitutional dispositions regarding the citizens' rights and liberties are to be interpreted and enforced according to The Universal declaration of Human Rights, with the Pacts and other treaties Romani is part*". (s.n.)

2.2. The international Pact regarding the civil and political rights

In December 1966, the General Meeting of UNO adopted two pacts regarding the human civil and political rights, which Romania ratified on 9 December 1974.

This international document has the juridical force of a treaty, generating juridical obligations for the signatory states. The international Pact regarding the civil and political rights acknowledges in the Third part the right to life.

This way, the article 6 from the Pact provides the compulsory care of the right to life by establishing a legal system, which will acknowledge the rule stating that no human being is to be deprived arbitrary by its life (point.1). Far more, is provided that the national legislations regulating the death penalty must be consistent with the dispositions of this Pact and with the ones in the Convention for preventing and suppression of the genocide crime (point 2).

From the quoted texts, it results that the provisions of this Pact states in the signatory states' obligations to develop a legislative system at national level, to ensure the absolute respecting of the human rights and fundamental freedoms.

2.3. The European Convention for the Human Rights and Fundamental Freedoms' Protection

The European Convention for the human rights and fundamental freedoms' protection (Rome 4.11.1950) is the fundamental document developed at the European Union's Council in the matter of human rights. (Udroiu & Predescu, 2008, p. 10) With the merit of being the first instrument to organize the protection of the individual towards the state of nationality, this convention provides the states' obligation to respect the right to life, to prohibit torture even when there is a danger threatening the life of the nation. (art. 15).

The right to life is regulated in article 2 from the Convention, according to which „*The right to life of any person is protected by law. Death cannot be caused with intention, except the death penalty given by the court of law when the crime in sanctioned with this penalty by law*".

Analyzing in detail the cases where there is no violation of the right to life, in the line 2 of the same article, the Convention provides that „*death is not considered to be caused by the violation of this article in case it results from force proven to be absolutely necessary:*

a) in order to ensure the protection of any person against illegal violence (self-defence);

b) in order to make a legal arrest or to prevent the escape of a person lawfully detained;

c) in order to suppress, according to the law, a riot or an insurrection".

According to this regulation, it results that the right to life is "*intangible*". By adopting the Protocol 6 of the European Convention of Human Rights, the European Council gave a special attention to death penalty, stating the rule according to which "*nobody can be convicted to such a penalty, nor executes*", excepting the cases when, at national level is provided the death penalty for exceptional situations (crimes of war or of imminent danger of war). The Protocol 13 of the same convention, signed at 3 May 2002, solves this problem in a radical way by determining the member states of the European

Council to eliminate the death penalty in any circumstances, eliminating any derogation from this rule.

The jurisprudence of the European Court of Human Rights was a fundamental element in the research of the content regarding the right to life, confronting with cases where there was asked to identify the limits of the right to life in cases of euthanasia, and regarding the right to life of the fetus.

In the jurisprudence of the Court there are various cases regarding the protection of the right to life including cases regarding euthanasia, the right to life of the fetus, and situations where there was asked for the conviction of the states for breaking the right to life by the lack of investigations in cases of missing or suspect death (Selejan-Guţan & Rusu, 2006, p. 136)[1].

Taking into consideration the existing regulations in the field, the great evolution of the society and of technical and scientific development registered in some fields, the existence of the human being and implicitly, the human rights raised a great interest at international level. This way, there were discovered techniques of medically assisted procreation, which helped to find an answer to sterility and infertility, and gave the right to be parents to persons suffering from this problem. But, at the same time, new questions raised. In many states there was no specific legislation and even if the vitro fertilization techniques were used to give birth to children.

A subject generating great debates was the one referring to the determination of the moment when the human being exists as person (Turcu, 2010, pg. 423-449.). There were formulated more hypotheses, from which we mention the response of the European Commission of Human Rights, who, in 1979, decided that „person" can be considered only the borne child, not the conceived one. There were other points of view starting from the principle *infants conceptus* and according to which, the right to life must be recognized event o the embryo (Ungureanu & Munteanu, 2011, pg. 39-40).

A special case deducted to the settlement of the European Court of Human Rights is *The case of Evans v. the United Kingdom* (2007).

Also, the European Court was asked to solve a recognition request of the right to death, as a component of the right to life (Selejan-Guţan & Rusu, 2006)[2]. In Europe, only a few states, Belgium, Holland, Luxemburg and Switzerland allow the assisted suicide, but only in the case of severely ill patients and in certain conditions.

At present there is a cause where the Romanian state is defendant, ECHR being asked to judge the situation of some embryos (a number of 16) which were taken from the Sabyc clinic after an investigation and gave into custody to the National Institute of Forensic Medicine.

3. Conclusion

The international society, scene of profound legislative changes, is confronting with a problem which always attracted the interest of the specialists, and not only, the matter regarding the respect of the fundamental human rights and liberties. At international level, a special attention is given to the juridical protection of the human rights, specialists being permanently looking for efficient solutions in order to protect the human being against any form of abuse.

Even if there are many national and international regulations, though, none of these texts gives a clear definition of this right. The existing controversies generated many questions regarding the concept of „life" in the context of the technical and scientific progress generated a great number of questions regarding the content of the right to life, the „frontiers" of this right, the European Court of Human Rights being asked to decide many times regarding the violation of these limits

[1] ECHR - Timutas Cicek şi Akdeniz. v. Turkey 2000-2001.
[2] ECHR - Pretty. v. United Kingdom 2002

4. References

Drăganu, T. (1998). *Declaraţiile de drepturi ale omului şi repercusiunile lor în dreptul internaţional public/ Human rights declarations and their repercussions in public international law.* Bucharest: Lumina Lex.

Maftei, J. (2010). *Drept international public/ Public International Law.* Bucharest: ProUniversitaria.

Pavel, L.-L., Coman, V.-L., & Boroi, A. (2011). *Human euthanasia - a violation of the right to decide about life? KBO.* Sibiu.

Selejan-Guţan, B., & Rusu, H. (2006). *Jurisprudenţa CEDO/ ECHR Jurisprudence.* Bucharest: Hamangiu.

Sudre, F. (2006). *Drept european și internațional al drepturilor omului/ The law of European and international human rights.* Iasi: Polirom.

Turcu, I. (2010). *Dreptul sănătății. Frontul comun al medicului și juristului/ Health law. The Common front of doctor and lawyer.* Bucuresti: Wolters Kluwer.

Udroiu, M., & Predescu, O. (2008). *Protecţia europeană a drepturilor omului şi procesul penal român/ The European Protection of Human Rights and Romanian Criminal Law Suite.* Bucharest: C.H. Beck.

Ungureanu, O., & Munteanu, C. (2011). *Drept civil. Persoanele în reglementarea noului Cod civil/ Civil law. Persons in the regulation of the new Civil Code*. Bucharest: Hamangiu.

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Short Remarks on the Principle of Separation of Powers

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Abstract: The principle of separation of powers, as a basic principle of a real democratic political system, concerns that state activities, powers are separated by the fact that they take place separately, distinct from one another, each with its specific, but in the social polical reality it can be seen that there are links between public authorities in terms of organizational and functional, namely cooperation and mutual determinations. In terms of organization, the link is given by the fact that some state bodies involved in the formation of other, and the functional aspect concerns the connection of collaborations: the constitutionality of laws passed by Parliament is controlled by the Constitutional Court or Government activity can be examined by Parliament. The modern form of the principle of separation of powers requires autonomous public authorities, sharing their incumbent functions, establishment of means of cooperation and mutual control, all in the ambience of a genuine and real autonomy. So a state cannot work unless the law adopted by thelegislature is applied to urge the executive and the judiciary by the executive contest carries out its decisions. This cooperation should be accompanied by a power control, equipped with legal and institutional means that will not neutralize eachother.

Keywords: freedom of individual; delimitation; liberal democracies

1. Introduction

The separation of powers is considered a condition of the existence of the rule-of-law state. The origin of the theory of separation of powers is in Antiquity, at the historians Herodotus and Thucydides, at the philosophers Plato and Aristotle, at the writers Aeschylus and Sophocles.

The matter of the separations of powers has been clearly formulated for the first time by John Locke, his preoccupation starting from the practical necessity to moderate the force of the state's powers. Locke considered that in the state exist three powers: the legislative power, the executive power and the confederative power. He does not differentiate a judicial power, having the opinion that this depends on the legislative power, but distinguishes four functions of the state, one of which is the jurisdictional function.

As for the confederative power, he defines it as being: "*a power which we can call natural, because it corresponds to a faculty which every man had before entering the society. This power comprises the right to peace and war, the right to form leagues and alliances and to have all kinds of negotiations with the persons and communities outside the state*".

John Locke, in his work "Essay on Civil Government" (1960), argues the necessity to transpose in practice this principle as follows "*The temptation to get at the power would be too great if the same persons who have the power to make laws would also have in their hands the power to execute them, for they could be exempted from the laws they are making*".

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2. The Principle of the Separation of Powers

The necessity to ensure freedom of individual towards public powers determined Montesquieu to resume the theme of the separation of powers and to propose as solution in order to defend the individual freedom, the mutual control of powers.

In the work of Montesquieu does not appear *in terminis* "the principle of the separation of powers", but, as Eisenmann noticed – one of the most profound exegetes of the work of the French illuminist philosopher – assigning three state functions to the authorities or groups of authorities absolutely distinct and independent, meaning to three authorities or groups of authorities perfectly separated in all aspects (functional, personal and material) Montesquieu subsumed his schema to one single idea: the idea or principle of the separation of the powers.

The principle of the separation of powers became a dogma of liberal democracies and the essential guarantee of individual in relations with power. According to this principle, the state has to fulfil three functions (Ioan, 2008, p.238 and following)

- enactment of general rules - legislative function;
- application or execution of these rules, meaning the executive function;
- resolution of disputes which occur in the process of applying laws – jurisdictional law.

The exercise of each function belongs to a power, so it results the existence of a legislative power, an executive power and a judiciary power. Montesquieu, in creating the theory of separation of powers also condensed it in the dictum which became a sublime hope: "Le pouvoir arrète le pouvoir". More precisely, Montesquieu showed that the powers in the state are: "*the legislative power, the executive power of things which depend on the right of kindred and the executive power of those depending on the civil law*", meaning the legislative, the executive and the judiciary powers, these powers being defined as compared with the state's functions.

In the conception of Montesquieu, each power had to be assigned to an independent body or a system of bodies so that each body or system of bodies carrying out its activity within the limits of the state's function which corresponded to the power to which belonged, practically was carried out a mutual control of the three powers and abuses were avoided.

Montesquieu wrote: "*There would be lost all if the same man or body of leaders, whether of noblemen or of people, would exercise these three powers: the power to make laws, the power to carry out the public decisions and the power to judge infractions or disputes between individuals*".

Practically, in the conception of the French thinker, was excluded the accumulation of powers.

Alongside with the events of the French Revolution (1789) has been extended the conception according to which each power is "a part of sovereignty, the representatives receiving from the nation, through proxy, the legislative power, the executive power and the judiciary power, which is exercised without interference of the other powers and without being able to act upon these, in a discretionary, sovereign way" (Nedelcu & Nicu, 2004, p.55 and following).

This way of understanding the principle of separation of powers – as an absolute, rigid delimitation of the legislative power, executive power and judiciary power – is not topical anymore (Vedinaş, 2002). With regard to this aspect other authors also expressed.

A first argument is that the state power is unique and undivided, belonging to a single holder – the people. Thus can be deducted that is not indicated to use the formulation "share of powers", possibly being able to speak about the share or distribution of the functions which the exercise of power implies.

Another argument has as fundament the idea that using the concept of "separation of powers" is put in contrast with the principle of indivisibility of sovereignty, for, admitting the existence of several distinct and independent "powers", we should also admit the possibility to constitute some "shares" of sovereignty which would be assigned to each power.

3. The Modern Concept

The occurrence of political powers in their modern form determined mutations in understanding the principle of the separations of powers. Practically, contemporaneously with most of the constitutional systems, the real matter is not that of the separation and balance of powers, but that of the ratio between majority and minority, between governors and opposition.

In the modern meaning of the principle of separation of powers it must be also considered the fact that to the traditional functions (legislative function, executive function, judiciary function) are added new ones, of the legislative, executive and judiciary bodies (managing function and the deliberation function of the Parliament, the function of control of legislative over the executive, etc.), occurring the so-called "mixed areas" between state's authorities and some new institutions, such as the Constitutional Court and the People's Lawyer.

The delimitation between powers, especially between legislative and executive power, is absolutely conventional as long as, on the one hand, the Parliament itself "executes" or "applies" the law (for example application of Constitution by issuing ordinary laws), and on the other hand, the executive branch of the state's bodies carries out itself a regulatory activity.

The separation of powers, in the classical meaning, has as criterion the role of state bodies as compared to law, more precisely the fact that some create it, others apply it and others solve the disputes. This approach concerns reality in a superficial manner. The assertion is based on the fact that in such a conception the entire state's activity is reduced to issuing, applying and guaranteeing the rules of law, while the state activity is a complex phenomenon, with delicate aspect of nuance, which obviously exceeds the pre-elaborated theoretical schemes (Iorgovan, 2001, p. 115 and following).

In the modern meaning of the principle of separation of powers it must be taken into account the following aspect: it is absurd to be believed that the legislative function is in balance with the executive function, that "making the law" is identical with "executing it". The execution of law is, by definition, subordinated to legislation, and in case between the two functions exist hierarchical ratios, then between the bodies which fulfil the relevant functions are the same ratios.

An important aspect which must be emphasized in such context is that the separation of powers cannot be conceived as opposition between them, because such conception is to be likely to paralyse the state's activity.

The fundamental vice of the theory of separation of powers has been seized by Rousseau, through a violent and spiritual diatribe: as the sovereignty cannot be divided into its principle, here it is divided into its object. Consequently, should the indivisibility of sovereignty is admitted, the elementary logics leads to the impossibility to admit the divisibility of power.

The Constitution of Romania does not use the word "separation" which could lead to an exclusivist, rigid interpretation of the term, and establishes the terms "the balance" or "co-operation of powers".

As it is mentioned in the specialty literature "*since the political power is a single one, and the functioning of state mechanism in which is organized, beginning with the inter-war period, exceeded the rigid framework of the <<trinity of power>>, the continuation, in the Constitution, of the classical language referring to the separation of powers would have meant to promote a terminology without a theoretical background*" (Balan, 1998, p. 37 and following).

In the juridical literature, it is considered closer to reality the formulation "the principle of separation of powers, of balance, cooperation and their mutual control" and as main argument in supporting this theory can be brought the manner of regulation itself by the Constitution of Romania of the matter of powers in state. Beginning with the Constitution of 13 April 1948, as a consequence of the fact that Romania became a state with a totalitarian political regime, the principle of separation of powers remained only a formal provision.

By the Constitution approved through the referendum of 8 December 1991 in Romania has been re-instituted the rule-of-law state. Consequently, as is shown in art.2 of the fundamental law, the unique

holder of the power is the Romanian People. The Constitution of Romania, avoiding the word "separation" which could lead to an exclusivist, rigid interpretation of the term, establishes the words "balance" or "co-operation of powers in the state".

However, in practice, the separation of powers was never (and should not be) a perfect, absolute as it would have led to an institutional stalemate.

In Romania, the 1991 constitutional text dosen't explicitly states this principle, although it underlies all institutional building, which has been a matter of political tension between majority and opposition of those years. Since 2003, following the national referendum of 18-19 October, the revised Constitution directly states (art. 1, para. 4) that "the state is organized according to the separation and balance of powers - legislative, executive and judicial - in the democracy constitutional"

In reallity. the implementation of the theory of separation of powers always has the focus on executive-legislative relationship, emphasizing the tendency to concentrate power in the executive (thus limiting the role of parliament). Legislative delegation by Parliament awarded Government regulatory powers, consisting of the right to issue ordinances and ordinance, or the government can commit to accountability to the legislature on a bill that gives a prominence Executive of the Parliament. On the other hand, the transfer of legislative power to the executive meets the efficiency trends of governance.

Bibliography

Alexandru, Ioan (2008). *Tratat de administraţie publică/Treaty of public administration.* Bucharest: Universul Juridic.

Iorgovan, Antonie (2001). *Tratat de drept administrativ*/*Treay of administrative law*. 3rd edition. Bucharest: All Beck.

Dănişor, Dan-Claudiu (2003). *Actorii vieţii politice*/*Actors of political life*. Craiova Sitech.

Apostol-Tofan, Dana (2003). *Drept administrative*/*Administrative law*. Bucharest: All Beck.

Bălan, Emil (1998). *Domeniul Administrativ, prefectul şi prefecture în adminsitraţia publică*/*Administrative domain, the Prefect and the Prefecture in the public administration system*. Bucharest: Lumina Lex.

Muraru, Ion (1993). *Drept constituţional şi instituţii politice*/*Constitutional law and political institutions*. Bucharest: Actami.

Iulian, Nedelcu & Nicu, A. L. (2004). *Drept administrative*/*Administrative law*. Craiova: Themis.

Popa, N.; Dogaru, I.; Dănişor, Gh. & Dănişor, Dan-Claudiu (2002). *Filosofia Dreptului. Marile Curente*/*Philosophy of law. Main trends.* Bucharest: All Beck.

Vedinaş, V. (2002). *Drept administrativ şi instituţii politic-administrative*/*Administrative law and political-administrative institutions*. Bucharest: Lumina Lex.

Vida, Ion (1994). *Puterea executivă şi administraţia publică*/*Executive power and public administration*. Bucharest: R.A. The Official Journal.

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Report of Donations. General Considerations[1]

Ilioara Genoiu[2]

Abstract: Law No. 287/2009 on the Civil Code confers a new configuration to hereditary field in general. Consequently, the analysis of hereditary law institutions is both useful and actual. Under the circumstances mentioned above, the present work aims to analyze the general aspects of the report of donations in the light of the new Civil Code. Thus, there will be analyzed the following aspects: definition of report of donations; scope of application; delimiting report of donations from similar legal institutions; conditions of report of donations; persons who can demand the report of donations; donations which must be reported and donations which are exempted from report; effects of exemption from the report of donation. All these issues shall be approached in a comparative manner, by taking into account the 1864 Civil Code and the new Civil Code. Thus, we will be able to point out in a clear manner the novelties brought in the field subject to our analysis by Law No. 287/2009 and to assess their just and appropriate character. Out of reasons of space, the present work shall not approach the issues relating to the way donations are reported, these being subject to another field.

Keywords: surviving spouse; deceased's descendants; donations which must be reported; donations exempted from report

1. Introduction

The new Civil Code[3] regulates the report of donations at Book IV "On inheritance and other liberalities", Title IV "Bequeath and partition of inheritance", Chapter IV "Partition of inheritance and report", Section 2 "Report of donations", articles 1146-115.

As pointed out in the summary, the present work will analyze only the general aspects involved by the report of donations, in order to comply with the number of pages established by organisers. We also mention that all the aspects involved shall be analyzed by taking into account both the Civil Code in force and the 1864 Civil Code[4] so as to underline in a clear manner the novelty elements brought by the former Code mentioned above in this field. We also consider that our initiative is both actual and useful, given that, in the short period of time which passed from the entry in force of Law 287/2009 up to the present, few specialized works were written in the field under discussion.

At the beginning of our analysis we will mention the definition given to report of donations by the Civil Code in force (abbreviated below NCC). Thus, according to provisions of article 1146 paragraph (1) of the NCC, "The report of donations is the mutual obligation of the deceased's surviving spouse and descendants, who come together and effectively to the legal inheritance, to bring again to inheritance the goods which were donated to them without the exemption from report by the person leaving the inheritance".

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[3] We are referring to Law 287/2009 on the Civil Code, republished in Romanian Official Gazette, part I, no. 505 from July 15th 2011.
[4] The Civil Code, published in Romanian Official Gazette, no. 271 from December 4th 1864, was abrogated (less its provisions regarding the evidence procedure), by Law No. 71/2011 on the enforcement of Law No. 287/2009. Law No. 71/2011 was published in Romanian Official Gazette, Part I, no. 409, from June 10th 2011.

Law presupposes that, by means of the donations made on behalf of a close person (such as the surviving spouse and the descendants), the deceased never intended to privilege the donee, by disadvantaging his other legal heirs, for whom has, in fact, the same affection; the deceased only offered an advance to the donee, to which he was entitled by law. Only on the basis of this reasoning, the report of donations is justified.

For instance, law provides for the report of donations to take place in the following hypothesis: after his death, someone leaves behind three children and assets amounting to 40.000 lei. But at the celebration of his elder son's marriage, the deceased gave him assets amounting to 20.000 lei. At the opening of the inheritance, the inheritance patrimony shall not be divided in 3 equal parts, as the value of the donation (of 20.000 lei) received by the elder son will be added to that of the assets amounting to 40.000 lei. Consequently, the inheritance patrimony shall be of 60.000 lei. By dividing the inheritance, according to the rules established by the legislation in the field, the elder son will keep the assets amounting to 20.000 lei, received by donation, whereas his other two brothers shall divide the assets amounting to 40.000 lei in equal shares. As a result of the inheritance division, through the report of donations made by the deceased during his life, it has been insured the full equality between the relatives of the same class and degree.

The duty of certain legal heirs to report the donations received from the deceased is regulated by norms with a suppletive character, so that the deceased can make provisions in favour of such heirs in a definitive manner, by means of donations exempted from report. By benefiting from a donation exempted from report, the donee adds the value of the donation in question to the legal share from the inheritance.

2. Application Scope of Report

The applicability of the report of donations must be analyzed not only from the perspective of the persons exempted from such duty (debtors of the report obligation), but also from the perspective of the acts involved (donations and/or legacies).

a) The report of donations regards only certain legal heirs (the surviving spouse and the deceased's descendants)

Among legal heirs, only the surviving spouse (when competing with descendants) and descendants[1] have the duty to report donations made by the deceased on their behalf. These liberalities have no definitive character, being only an advance made on the account of inheritance. On the contrary, privileged ascendants, privileged collaterals, ordinary ascendants, ordinary collaterals and third parties can be rewarded for good by the deceased, by means of *inter vivos* liberalities[2].

The duty of the deceased's surviving spouse and descendants to report donation has, therefore, a legal character. Under the circumstances in which this legal obligation does not concern also the deceased's other legal heirs, specialized literature has debated whether the donor himself can stipulate for the obligation of report to be ascribed to his ascendants and collaterals. According to the most frequent opinion, which we uphold as well, such duty cannot be stipulated by the donor, as the principle regarding the irrevocability of donations would be transgressed (Cantacuzino, 1998; Hamangiu, Rosetti-Bălănescu & Băicoianu, 1929; Chirică, 1996). According to the second opinion, which benefits from a less substantial support in comparison with the first one, the donor could impose the report duty also to his other legal heirs and even to the legatees whom he instituted (Eliescu, 1966). In such case, the report could take the exclusive form of the imputation of donation in relation to that part of the inheritance to which the donor is entitled. (Deak, 2002).

[1] Also in the field of the report of donations, the category of descendants regards both the descendants resulting from and outside marriage, on the condition that filiation is established according to legal provisions, but also the descendants resulting from adoption or human reproduction assisted by a third donor.

[2] Unlike Romanian legislation, the French one provides for the report to be performed by all legal heirs.

b) The report of donations regards only donations, not also legacies.

The legal duty of report belongs only to the donee, and not also to the legatee. Consequently, the legatee, whether is universal, by universal or particular title, is not bound, according to the law, to report the donations received from the deceased. Under the circumstances in which the new Civil Code[1] clearly shows that only the surviving spouse and the deceased who come together to the *legal inheritance* have the duty to report the donations received from the deceased, it cannot be upheld the opinion according to which the duty of report can be stipulated by the donor also as the responsibility of the legatee.

Only in the light of the 1864 Civil Code, which contained an inadvertence among its provisions[2], such an opinion could have been upheld (Cantacuzino, 1998; Eliescu, 1966).

3. Delimiting Report of Donations from Similar Legal Institutions

Report of donations is in great part similar, but without being mistaken with them, with reduction of excessive liberalities and partition of inheritance. Moreover, similarities can be identified also between the report of donations and the operation for establishing the calculation basis (Stănciulescu, 2008).

a) Delimiting report of donations from reduction of excessive liberalities.

The similarity between the two institutions of hereditary law discussed is represented by their main effect, namely that of bringing again the asset which made the object of the liberality to the inheritance patrimony. Nonetheless, between the two institutions can be identified major differences. Thus:

- the reduction of excessive liberalities operates exclusively in case the legal forced heirship of forced heirs is transgressed, whereas the report of donations operates even if forced heirship was not transgressed;
- the reduction of excessive liberalities concerns both legal heirs and legatees, whereas the report of donations regards only a part of legal heirs;
- the object of reduction of excessive liberalities is represented both by donations and legacies, whereas the object of the report of donations is represented only by donations;
- the reduction of excessive liberalities has as object both donations and legacies, whereas the report of donations has as object only donations;
- the report of donations is governed by the law in force at the date the donation contract was concluded, and not by the law in force at the date inheritance was opened, as it happens with the reduction of excessive liberalities.

b) Delimiting report of donations from inheritance partition.

The two institutions are mainly different in relation to the following aspects:

- the report of donations can be claimed not only within the partition procedure, by means of the action for joint possession termination, but also by means of a separate action – the report action, filed before or after the partition;
- the action for joint possession termination is, according to article 1143 of the NCC, not subject to the statute of limitations, so that it can be filed by heirs at any moment, unlike the report action which, by being a personal patrimonial action, has the general statute of limitations term of 3 years, calculated from the moment inheritance is opened.

c) Delimiting report of donations from the operation of establishing the calculation basis.

[1] The new Civil Code refers to legal inheritance at article 1146 paragraph (1) and article 1147 paragraph (1).

[2] Through some of its provisions (articles 752, 754, 756 and 846), the 1864 Civil Code referred to the report of legacies. In such hypothesis, specialized literature recommends that the value of legacy is ascribed to the inheritance quota enjoyed by legatee, and if this quota had a smaller value, the imputation had to be done by equivalent.

The report of donations must not be mistaken either with the operation for establishing the calculation basis, given that the latter is only fictive and does not involve, as the report of donations does, bringing effectively again the donated goods to the calculation basis.

4. Conditions of Report of Donations

In order for the donations made by the deceased to have to be reported, the following conditions must be met altogether:

a) To the deceased's inheritance must be entitled at least two descendants or one or more descendants, in competition with the surviving spouse.

According to the provisions of article 1146 paragraph (2) of the NCC, "If there is no contrary stipulation from the donor on that matter, the persons mentioned at article (1)[1] are bound to report only if they would have had a concrete vocation to the deceased's inheritance, in case the latter would have been opened at the moment the donation was made". Consequently, in order to be bound to report the donations received from the deceased, the legal heir must have had, at the moment the donation contract was concluded, a concrete vocation to the donor's inheritance. Thus, if the donor's inheritance had been opened at the moment the donation contract was concluded, the donor should have had a concrete right to his inheritance.

According to provisions of article 753 of the 1864 Civil Code, the surviving spouse or the deceased's descendants were bound to report donations, even if they had no concrete vocation to inheritance at the date the donation contract was being concluded, but met instead this condition at the moment inheritance was opened[2]. It can be consequently noticed the first novelty element brought by Law No. 287/2009 in the field of the report of donations.

Going on with our analysis, it must be mentioned that the deceased's descendants have the duty to report donations, no matter they are entitled to inheritance on their own or by representation. It thus emerges that the report of donations must be carried out by descendants, even when they are relatives of different degrees.

The other legal heirs, such as legatees and third parties, are not bound to report donations, but only to perform the reduction of excessive liberalities of which they benefitted, if these affect legal heirs' forced heirship.

b) Donees potentially having accepted inheritance.

The report of donations must be carried out, in principle, only by the heir accepting donations. As a rule, the person potentially giving up to inheritance has no duty to report donations, being allowed to keep them within the limits of the disposable portion.

Thus, according to provisions of article 1147 paragraph (1) of the NCC: "*In case he gives up to his legal inheritance, the deceased or surviving spouse has no longer the duty of report, being allowed to keep the liberality he received between the limits of the disposable portion*".

Yet, in exceptional cases, according to provisions of article 1147 paragraph (2) of the NCC and through clear stipulation made in the donation contract, the donee can be bound to report a donation also if he gives up to inheritance. In such case, the donee will bring again to inheritance only the value of the donated asset which overcomes that part of the deceased's assets to which he would have been entitled as legal heir. It can be therefore identified another novelty element brought by Law No. 287/2009 in the field of the report of donations.

[1] The surviving spouse and the deceased's descendants who come effectively and together to legal inheritance.

[2] Under the influence of the 1864 Civil Code, the deceased's grandson was bound to report the donation, even if at the moment when he received it he did not have the quality of potential heir as his father, by being alive, was removing him from inheritance.

By making this stipulation, the donor has no intention to advantage any of his descendants, as he donates an asset to them or bequeaths their inheritance in advance. It is thus avoided the inequality between descendants' rights. A potential inequity for that matter could be instituted if the donee gave up to his inheritance, keeping within the limits of the disposable portion the donation with a value which overcomes that of the assets inherited by other descendants.

c) The debtor with the report duty must have a double quality, that of legal heir and donor.

According to provisions of article 1146 paragraph (2) of the NCC, the obligation to report donations belongs only to the donee who, at the moment when he received the donation, had the quality of donor's presumable heir (but with concrete vocation). Thus, the moment when the two qualities are both met and must be reported is the one when the donation contract is concluded.

In principle, the report must be performed only for the donations received personally by the debtor of the report obligation [art. 1149 paragraph (1) of the NCC). Consequently, the heir has no duty to report the donations made by the deceased to his son or spouse. The heir in question will report only the donations which the deceased ordered in his favour. Thus, the new Civil Code does not institute a reward presumption by other person's involvement. Article 1149 of the NCC continues to distinguish at its paragraphs (2) and (3) between the donee's descendants who come to inheritance on their own and those who come to inheritance by representation. Thus, according to the provisions of article 1149 paragraph (2) of the NCC, the descendant who is not a close relative of the deceased and who comes to inheritance on his own is not bound to report the donation received from his ascendant, even if he accepted the latter's inheritance.

For instance, if the only son of a family receives a donation from his father, but dies before him, and to inheritance come the donor's surviving wife and grandson, the latter will not report the donation made by his grandfather, to whom inheritance comes on his own, even if he accepted the inheritance of his father.

On the contrary, the descendant who is not a close relative of the deceased and who comes to inheritance by the representation of his ascendant is bound, according to provisions of article 1149 paragraph (3) of the NCC, to report also the donation received by his representative (the person he inherits) from the deceased, even if the representative gave up to the inheritance of the person he represents.

For instance, if the son (donee) receives a donation from his father (donor) and dies before him, and to inheritance come the donor's surviving wife in competition with their daughter and donee's son, the grandson will report the donation made to his father by his dead grandfather, given that the grandson comes to inheritance through the representation of his father-donee and even if he gave up to the latter's inheritance.

It can be therefore noticed that, in what concerns the personal character of the report obligation, Law No. 287/2009 does not bring any innovation in comparison with the former civil regulations, by taking over their precise principles.

d) The donation ordered in favour of descendants or surviving spouse must not have been exempted from report.

Through the provisions of article 1150 paragraph (1) letter a) of the NCC, law allows the donor to exempt from report the donations which he orders. Still, this exemption must be provided either by means of the donation act, or of an ulterior act, drafted in one of the forms provided for liberalities. Therefore, the exemption from report must be performed by means of an authentic donation act or in one of the testamentary forms. We consider, just like other authors (Deak, 2002), that the lawmaker's request in relation to the way the exemption from report should take place is justified, since the exemption itself represents a genuine liberality.

Under the influence of the 1864 Civil Code, judicial practice and specialized literature also validated the tacit (indirect) exemption from report, if this one was undoubted (Eliescu,1966; Chirică, 1996;

Deak, 2002)[1]. Such intention was supposed to result from simulated donations, indirect donations or handed-in gifts. Going on the same line, it was underlined that the mere disguise of a donation was not equivalent to an exemption from reporting it, but generated instead a relative presumption of exemption from report, which could be challenged with the evidence that the disguise had been made for another purpose.

As to us, we consider that the orientation mentioned above can be preserved also under the circumstances in which the new Civil Code entered into force, but only in what indirect donations and handed-in gifts are concerned. Speaking about simulated donations (as it will be pointed out at point 7), the new Civil Code, by taking over the orientation described above, lists them, in principle, at the category of donations exempted from the report obligation, thus instituting a relative presumption of exemption from report, which can be challenged by the evidence that the simulation was performed for other purposes [art. 1150 paragraph. (1) letter b) NCC]. Therefore, in what simulated donations are concerned, it is not necessary anymore to plead for the admissibility of a tacit exemption from report.

In the end, we mention that an excessive donation, even if it is exempted from report, shall be subject to reduction, within the limits of forced heirship replenishment.

5. Persons who can Demand the Report of Donations

According to the provisions of article 1184 of the NCC, only the surviving spouse and descendants can demand the report of donations, but also their personal creditors, on a derivative way.

Thus, the novelty element brought by Law No. 287/2009 is that it clearly provides that the report of donations can be demanded also by the personal creditors of the deceased's surviving spouse and descendants. In the light of the former Civil Code, such possibility resulted only indirectly, from the interpretation of derivative action (Hamangiu, Rosetti-Bălănescu & Băicoianu, 1929; Eliescu, 1966; Stătescu, 1967; Cărpenaru, 1983; Chirică, 1996; Deak, 2002; Bacaci & Comăniţă, 2006)[2].

The obligation of report is mutual and constitutes the passive side of the relations established between the deceased's descendants, in case they come alone to inheritance, but also of the relations established between the deceased's descendants and the surviving spouse, if they come together to inheritance.

Thus, any of the heirs mentioned above can demand the report of donations, of which co-heirs benefitted. The creditor of the report obligation cannot waive such right before inheritance is opened, as he would perform a legal act regarding the future inheritance, affected by absolute nullity, but only after inheritance is opened, given that the right to demand report has an *individual character*. In the light of such character, the donation will be reported, in principle, only within the limits of the rights held by the heirs not giving up to it.

Moreover, the right to demand the report of donations has a *patrimonial character*, so that, if it is not exerted by the creditor, during his life, the right in question is passed to creditor's own heirs as it happens with the reduction of excessive liberalities, or to his personal creditors, who can exert it by means of derivative action.

Unlike heirs' personal creditors, who can themselves exert the right to demand the report of donations (not on their own, but on a derivative way), the inheritance creditors (deceased's creditors) cannot exert such right, since their right of general pledge does not concern the goods which constituted the

[1] See for example the Supreme Court, decision No. 805/1953, in „Register of decisions between 1952-1954", volume I, p. 120.

[2] Under the influence of the 1864 Civil Code, the personal creditors of the heirs entitled to demand the report of donations had unanimously acknowledged by specialized literature their possibility to exert themselves, by means of derivative action, such right.

object of donations[1]. Thus, no category of creditors can exert on its own the right to demand the report of donations.

Similarly, legatees are not entitled either to demand the report of donations, whether they are universal or by universal title, since their succession rights are ascribed only to the assets existing in the deceased's patrimony, at the moment inheritance is opened, and not to the assets which constituted the object of donations. No matter who the owner of the right to demand the report of donations is, he must prove the liberalities which he pretends to be reported, by means of any evidence way, since he has the quality of a third party in relation to such liberalities.

6. Donations which must be Reported

There must be reported the donations performed by authentic act, handed-in gifts and indirect donations. On the contrary, as we will point out at the next point, the donations disguised as alienations by onerous titles or made through interposed persons, must not be reported.

There must also be reported the donations with duties instituted upon them, but the report obligation regards in this case only the effective benefit to which the donee is entitled, resulting from the deduction of the counter-value of the duty from the total amount of the donation.

Also in the context in which the object of the report of donations is analyzed, specialized literature (Deak, 2002)[2] points out that the insurance allowance paid by the insurer is subject neither to report, nor to the reduction of excessive liberalities, if the deceased concluded a death insurance in favour of a heir having the duty of report. The heir in question will be bound to report at most the premiums paid to the insurance firm by the deceased, with title of indirect donation.

7. Donations which are not Subject to Report

The new Civil Code, through the provisions of article 1150, clearly exempts from report:

a) donations which the deceased made with exemption from report;
b) donations disguised as alienations by onerous title or performed through interposed persons, excepting the case when it is proven that the person leaving the inheritance pursued another purpose than the exemption from report.

Thus, the presumption regarding disguised donations has only a relative character, such donations being subject to report only if it is proven that, by instituting them, the donor pursued another purpose than the exemption from report. Law No. 287/2009 innovates also in respect to this aspect. Under the influence of the former Civil code, such orientation was being adopted only by specialized literature, the normative act mentioned not containing any provision for that matter.

c) ordinary gifts, remunerative donations and, if they are not excessive, amounts of money spent for the maintenance or, as the case may be, for the professional training of descendants, parents or spouse, but also wedding expenses, if the person leaving the inheritance left no contrary provision[3];

Thus, remunerative donations are exempted from report, as novelty element. Then, in order for the amounts of money spent for the professional training of descendants, parents or spouse not to be subject to report, they must not be excessive. It can be noticed that law refers here also to the amounts of money paid in advance by parents for maintenance. Thus, it is being consecrated an exception from

[1] The object of the pledge right enjoyed by the creditors of the inheritance can be ascribed only to the assets existing in the deceased's patrimony at the date the inheritance is opened. But the donated goods went for good out of the deceased's patrimony in what inheritance creditors are concerned.
[2] See also the Supreme Court, Civil section, decision No. 427/19712, in „Register of decisions for 1971", p. 121.
[3] The 1864 Civil Code also contained similar provisions. See, for that matter, article 759.

the general rule provided for by article 1146 of the NCC, according to which have duty of report only the surviving spouse and descendants (National Union of Notaries Public from România, 2011).

d) benefits obtained, incomes reaching maturity by the day inheritance is opened and the financial equivalent of the use exerted by the donee upon the donated good[1];

There will be reported only the benefits and interests ulterior to the opening of inheritance[2], without being necessary to put them on delay. The heir-donee can be nonetheless exempted by the deceased not to report, until partition is done, the benefits obtained and the interests cashed (Hamangiu, Rosetti-Bălănescu & Băicoianu, 1929). The provisions of article 1150 paragraph (1) letter d) also concern the hypothesis in which the object of donation is represented by the benefits or the incomes from an asset which remained in the donor's property, such as the usufruct right. (Hamangiu, Rosetti-Bălănescu & Băicoianu, 1929; Cantacuzino, 1998; Eliescu, 1966; Chirică, 1996; Deak, 2002; Bacaci & Comăniţă, 2006).

e) the asset which perished out of donee's guilt.

Nonetheless, in an exceptional matter, according to provisions of article 1150 paragraph (2) of the NCC, if an asset was reconstituted by using an allowance cashed as a result of its disappearance, the donee is bound to report the asset, if the allowance in question helped to the reconstitution of that asset. If the allowance was not used for that matter, it is itself subject to report. If the allowance results from an insurance contract, then it is reported only if it exceeds the total amount of the premiums paid by the donee. It can be therefore noticed that Law No. 287/2009 also regards the situation mentioned above, pointed by specialized law before the entry into force of this law, and thus not regulated by the former Civil Code.

8. Effects of Exemption from Report

The clause stipulated by the donor, namely that exempting the donee from reporting the liberality received, can produce two effects:

a) exempts the donee from his duty of report, although it leads to the transgression of the equality principle between the heirs of the same class and degree.

The donee will keep the whole value of the donated assets, only if, although exist forced heirs, their forced heirship is not transgressed.

b) donation is imputed in relation to the available quota.

9. Conclusions

At the end of our analysis, we are listing the novelty elements brought by Law No. 287/2009, in comparison with the 1864 Civil Code, in what regards the general aspects involved by the report of donations. Thus, Law No. 287/2009 innovates in the field subject to our analysis in respect to the following aspects:

- The surviving spouse and the deceased's descendants, in order to be bound to report the donations received from the deceased, must have a concrete vocation to his inheritance, if the inheritance was opened at the date of donation.
- Through clear stipulation in the donation contract, the donee can be bound to report the donation he received also in case he gives up to inheritance; in such hypothesis, the donee will

[1] The correspondent of this legal text in the 1864 Civil Code is represented by article 762.

[2] If the donee owed the benefits obtained and the interests reaching maturity before the opening of the inheritance, but also the equivalent of the use of the donated asset, the donation would not produce any advantage in respect to him, but would rather be instead "a burden" for him. This opinion belongs to professors C. Hamangiu, I. Rosetti-Balanescu, Al. Baicoianu, *quoted works*, p. 583.

bring again to inheritance only the value of the donated asset which overcomes that part of the deceased's assets to which he would have been entitled as legal heir.
- Besides the deceased's surviving spouse and descendants, the deceased's personal creditors also can demand the report of donations.
- Are exempted from report, as a novelty element, the donations disguised as alienations by onerous title or performed through interposed persons, on the exception that is proven that the person leaving the inheritance pursued another goal than the exemption from report, such as remunerative donations.
- Law No. 287/2009 regards the situation (pointed out by specialized literature before it entered into force) in which the asset was reconstituted by using an allowance cashed as a result of the asset perishing.

In our opinion, the new Civil code insures a modern, just and coherent regulation to the report of donations, by preserving the unchallenged principles of the former Civil Code, and by innovating, at the proposal of specialized literature and judicial practice, only in relation to the aspects not well regulated before its entry into force.

10. References

Bacaci, Alexandru & Comăniţă, Gheorghe (2006). *Drept civil. Succesiunile/Civil law. Inheritances.* 2nd edition. Bucharest: C.H. Beck.

Cantacuzino, Matei (1998). *Elementele dreptului civil/Elements of civil law.* Bucharest: All Educational Publ. House.

Cărpenaru, Stanciu (1983). *Dreptul de moştenire/The right of inheritance* in Deak, Francisc & Cărpenaru, Stanciu. „Drept civil. Contracte speciale. Dreptul de autor. Dreptul de moştenire"/"Civil law. Special contracts. Copyright. The right of inheritance". Bucharest: Bucharest University.

Chirică, Dan (1996). *Drept civil. Succesiuni/Civil law. Inheritances.* Bucharest: Lumina Lex.

Deak, Francisc (2002). *Tratat de drept succesoral/Treaty of succession law.* II edition, updated and completed. Bucharest: Universul Juridic.

Eliescu, Mihail (1966). *Moştenirea şi devoluţiunea ei în dreptul Republicii Socialiste România/Inheritance and its devolution into Socialist Republic Romania law,* Bucharest: Academiei Publ. House.

Florescu, Dumitru (2011). *Dreptul succesoral/Inheritance law.* Bucharest: Universul Juridic.

Genoiu, Ilioara (2012). *Dreptul la moştenire în noul Cod civil/The inheritance right in the new civil Code.* Bucharest: C.H. Beck.

Hamangiu, Constantin, Rosetti-Bălănescu, Ioan & Băicoianu, Alexandru (1929). *Tratat de drept civil român/Romanian civil law treaty.* Bucharest.

Stănciulescu, Liviu (2008). *Drept civil. Contracte şi succesiuni/Civil law. Contracts and inheritances.* Bucharest: Hamangiu.

Stănciulescu, Liviu (2012). *Curs de drept civil. Succesiuni/Civil law course. Inheritances.* Bucharest: Hamangiu.

Stătescu, Constantin (1967). *Drept civil. Contractul de transport. Drepturile de creaţie intelectuală. Succesiunile/Civil law. The contract of carriage. Rights of intellectual creation. Inheritances.* Bucharest: Didactică şi Pedagogică.

*** Uniunea Naţională a Notarilor Publici din România (2011). *Codul civil al României. Îndrumar notarial/Romanian civil Code. Notary guideline, vol. I.* Bucharest: Monitorul Oficial.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
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Protection and Conservation of the Aquatic Environment

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Abstract: Concerns about environmental protection and their legal expression led to the formation and affirmation of a set of common principles of national, regional and international law. Although they know various formulations and specifications in these three legal systems, their fundamental meaning remains the same, in different situations. They arise and contribute, at the same time, from / to the assertion of the environment in general, as common heritage of humanity.

Keywords: Environment; water; sea; protection

1. Introduction

Environmental concerns and their legal expression led to the formation and affirmation of a set of common principles of national, regional and international law. Although they know various formulations and specifications in these three legal systems, their fundamental meaning remains the same, in different situations. They arise and contribute, at the same time, from / to the assertion of the environment in general, as common heritage of humanity.

Taking into account all national legislations aimed at its protection, the adoption of regional or international binding rules converge to establish the special protection, conservation and improvement of the environment, as a world heritage, of all humanity, both in terms of present and future generations. Therefore, the following principles of environmental law are widely recognized: the public interest of environmental protection, conservation, prevention; precaution in the decision making process; the polluter pays principle. However, besides the specific national, communitarian or international expressions of these principles, some rules with territorial application and limited specific implications may be taken into consideration. Although with different contents and concepts, this shows the primordial concept that the environmental protection is a primary and universal objective, for individuals and peoples.

2. Fundamental Principles

In line with the specific objectives and functions which it performs, the environmental law is dominated by a series of general principles which are reflected, in one form or another, in the content and meaning of its rules.

They are recognized as such by law (such as the precautionary principle, the prevention principle, the principle of conservation of biodiversity or the polluter pays principle), or result from provisions scattered in various laws (environmental protection, the public interest objective).

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Along with these "principles", the environmental law establishes "the basic strategic elements", which "lead to the sustainable development of society", such as: creating a national system of integrated environmental monitoring, sustainable use, etc.

3. The Legal Regime of National Waters

The legal regime of national waters is regulated by Law no. 107 of 25.09.1996, Water Law[1]. According to article 1, waters represent a renewable natural resource, which is also vulnerable and limited, and indispensable for life and society; waters represent a raw material for productive activities, an energy source and a transportation means, and an important factor in maintaining ecological balance.

Waters are part of the public domain. Protection, enhancement and sustainable development of water resources are actions of general interest.

3.1. Public Property

Waters are of general interest, and the State exercises on them the attributes of the public property right, which is inalienable (removed from the civil circuit), indefeasible and undeterminable. Therefore, the following belong to the public domain:

1. Surface waters and their minor beds, with lengths of more than 5 km and with hydrographic basins exceeding 10 km^2, banks and lake basins and underground waters, internal maritime waters, the sea cliff and the beach, with their natural resources and the potential hydropower, the territorial sea and the bottom of seas;
2. Minor water beds with lengths less than 5 km and with hydrographic basins not exceeding 10 km^2, on which waters do not permanently flow, belong to the holders, with any title, of the land where they are formed or flow. The owners of these water beds should use these waters in accordance with the general conditions of water use in that basin;
3. Islands, which are not related to land, with the shore at the average water level, belong to the owner of the water bed;
4. Underground waters can be used by the land owner to the extent of their use under the law.

Determining the use of water resources, regardless of ownership, is an exclusive right of the Government, exercised by the Ministry of Waters, Forests and Environmental Protection, except geothermal water.

Public waters are administered by "Romanian Waters" National Administration, by the Ministry of Waters, Forests and Environmental Protection, under the law.

The regulation of shipping and its related activities on waterways is done by the Ministry of Transport, by specialized units. The atmospheric phase of the water cycle in nature can be artificially modified only by the Ministry of Waters, Forests and Environmental Protection and by authorized entities, under the law.

3.2. The Right to Use Surface Water

The right to use surface or underground waters, including wells, is determined by the water management authorization and is exercised under its legal provisions. This right includes the evacuation of wastewater, drainage waters or drainage, storm waters, mine waters or reservoir waters, in water resources, after their use.

[1] Published in the Official Gazette, Part I no. 244 of 08/10/1996. The Law of waters was completed and mdified by: H.G. no. 83/1997 and H.G. 948/1999; Law no. 310/2004; Law no. 112/2006 and O.U.G. no. 12/2007.

Surface or underground waters can be freely used, in compliance with health and protection of water quality rules for drinking, watering, washing, bathing and other household necessities, if, for these purposes, there are not used facilities or if there are used low-capacity facilities up to 0.2 liters/second, only in order to meet household needs. Any person, on honor, may freely use marine waters, outside the restricted zones, for bathing.

4. Protection of the marine environment

Prevention, reduction and control of marine pollution is regulated mainly by two normative acts: Law no. 17 (r) of 07.08.1990 on the legal status of marine waters, territorial sea, the contiguous zone and the exclusive economic zone of Romania[1] and by the United Nations Convention on the Law of the Sea, ratified by Romania by Law no. 110/1996.

4.1. Marine pollution

The marine pollution has some particularities. It is, first, the pollution of coastal and enclosed seas, pollution which has two main causes:

- Pollution from industrial residues;
- Oil pollution.

The pollution from industrial residues is derived from the direct discharge in the sea of wastewaters from industries located on the coast, under the (absurd) reasoning that the sea is broad enough to take everything. Seas absorb annually over 6000 t of hydrocarbons from tanker accidents, waste oil refineries, offshore mining, washing and deballasting of ships on the high seas.

The "black blanket" formed at the marine surface suffocates marine life. Instead of dispersing itself, the spilled oil bundles, creating a continuous pellicle that prevents water oxygenation. Towards the shore, the oil pellicle inhibits the photosynthesis of algae and thus the production of oxygen.

The oil is biodegradable under the action of bacteria, but this oxidation process depletes the marine oxygen. In order to decompose a liter of oil, 40,000 liters of water are needed. Thus, in the Indian Ocean (which has coastal countries with a common economic development) there are discharged annually 20,106 tons of residues, while only U.S.A. discharge in their territorial waters around 2105 m3 of industrial waste and about 11.1010 m3 of untreated municipal waters.

In the North Sea, the number of microscopic algae has increased 4 times due to the discharge of waters rich in phosphates and nitrates, besides heavy metals and organohalogen (only the Rhine discharges 30 and 100 tons / day of such pollutants). The disastrous effects of these practices were revealed, for the first time, in the Mediterranean Sea whose fish production has declined drastically in the last 10 years. Moreover, to a number of species, the content of ion of cadmium and mercury, which are highly toxic, exceeded the limits; the multiplication of poisoning microscopic algae, only in the summer of 1989, in the Norwegian fjords, led to the destruction 400 tons of salmon in 3 weeks. A tragic example is the Minamata disease (Japan), caused by severe mercury poisoning. At present, in sea waters, due to industrial discharges and to its accumulation on the food chain, the mercury affected both the fauna of the area (fish) and the man.

The well-known oceanographer J. Y. Cousteau brings into discussion another potential danger: the marine creatures communicate through chemicals, similar in principle, as function, to the pheromones

[1] Published in the Official Gazette, Part I no. 99 of 09/08/1990. It entered into force on 07.11.1990. Modified, completed by Law no. 36 of 16/10/2002, Republished in the Official Gazette, Part I no. 765 of 21/10/2002, when it entered into force. Law nor. 17/1990 was modified, for the second time, by O.U.G. no. 130/2007 and approved by Law no. 102/2008, both Documents published in the Official Gazette, Part I no. 780 of 16/11/2007, when it entered into force.

used by insects. A heavy pollution could "jam" this form of communication, with more serious incalculable consequences.

5. References

Alexandrescu, A. & Alexandrescu, C. (2006). *Tratat de Drept Maritim* / Maritime Law Treaty. Galaţi: Publisher Ed. Fundaţiei Academice DANUBIUS Galati.

Anghel, D. (2010). *Răspunderea juridică privitoare la protecţia mediului* / Liability relating to environmental protection. Bucharest: Universul Juridic.

Anechitoae, C. (2011). *Introducre în drept maritim internaţioanl. Ediţia a IV-a / Introduction in Maritime Law international.* IVth edition. Bucharest: BREN.

Anechitoae C. (2009). *Drept maritim şi portuar. Bibliografie selectivă. Vol. I. Ediţie trilingvă. Maritime and inland water law. Droit maritime et fluvial – Selectiv bibliography. Bibliographie sélective.* Bucharest: Editura Academiei Române.

Anechitoae, C. & Hanzu-Pazara R. & Surugiu, F. (2009). *Mediul acvatic – Evoluţia factorilor geoclimatici pe plan global, regional şi local în Dobrogea /Aquatic environment - evolution of geoclimatic factors on a global, regional and local (in Dobrogea) level* - în lucrări al sesiune de comunicări ştiinţifice cu participare internaţională „Strategii XXI"organizat de Universitatea Naţională de Apărare „Carol I" Bucureşti 9-10 aprilie 2009, „*Stabilitate şi Securitate Regională*". Publisher: Ed. Universităţii Naţionale de Apărare „Carol I", Bucuresti, 2009, Sectiunea 10, vol. 2 - Drept, pp. 91-112.

Anechitoae, C. (2008). *Geopolitica sistemelor maritime / Geopolitics maritime systems.* Bucharest: Militară & Top Form.

Anechitoae C. *Globalizarea activităţilor maritime /* Globalization of maritime activities. *Geopolitica*. Top Form Publishing. An VI, nr. 26 (2/2008), pp. 111-124.

Anechitoae, C. & Surugiu F. (2008) *Organizaţii şi convenţii maritime internaţionale/* Organizations and international maritime conventions. Constanţa & Bucharest: Alpha Publisher, Nautica & Top Form.

Anechitoae, C. (2005). *Convenţii internaţionale maritime – legislaţie maritimă* / International maritime conventions - maritime legislation. Bucharest: BREN.

Bădescu, V. S. (2011). *Dreptul mediului* / Law environmental. Bucharest: C.H. Beck.

Boldeanu, C. & Iordache, F. (2005). *Curs de Drept al Mediului /* Environmental Law Course. Constanta: Dobrogea.

Duţu, M. (2010). *Dreptul mediului* / Law environmental. Bucharest: C.H. Beck.

Grigorut, C. & Anechitoae C. & Staiculescu A.R. & Lisievici Brezeanu, A.P. (2012). *Management issues for the safe operation of ships and for pollution prevention*. Proceedings the 14th International Congress of International Maritime Association of the Mediterranean (IMAM), Genova, Italy, 13 – 16 September, 2011. In: *Sustainable Maritime Transportation, and Exploitation of Sea Resources*, Editors: Enrico Rizzuto (*University of Genova – DICAT, Genova, Italy*). Vol. 2, pp. 941 – 944.

Hanzu-Pazara, R. (2008). *Human error and the environment*. Constanta: Nautica.

Hanzu-Pazara, R. (2007). Pollution prevention in harbours. *Naval Transport magazine* no. 6. Constanta: Nautica.

Lucian, G. & Mihai, I. (2003). *Culegere de acte normative / Collection of laws*. Constanta: Publisher Muntenia.

Marinescu, D. (2010). *Tratat de dreptul mediului / Environmental law treaty.* Bucharest: Universul Juridic.

Negruţ, V. (2010). *Dreptul mediului* / Law environmental. Galaţi: Editura Universitara Danubius Galati:

Popa, G. (2011) *Prevenirea ş combaterea spălării banilor şi criminalitatea economico-financiară / Preventing and combating money laundering and economic-financial crime*. Bucharest: BREN.

Truşcă, A. M. & Marinescu, D. (2010). *Dreptul mediului* / *Law environmental*. Bucharest: ProUniversitaria.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

About the Dissolution of Marriage Settlement in the Context of Romania's Integration in the European Union

Gabriela Lupșan[1]

Abstract: According to the stipulations of the New Civil Code, the dissolution of marriage has undergone some changes concerning both material and procedural law. We aim at achieving a critical analysis of the new rules of divorce, making proposals *de lege ferenda*, based on the interpretation of the texts of these normative acts, the Romanian jurisprudence experience, comparative law (especially French law), of European law (Brussels II bis Regulation) in relation to the old regulation of the Family Code and the Code of Civil Procedure (current and future one).

Keywords: divorce; competence; the interest of the child; divorce certificate; European Law

1. About the Institution of Divorce in General and its Regulation in the New Civil Code

The Romanian legislator wanted that the New Civil Code, adopted by Law. 287 of July 17, 2009[2], to represent a unitary regulation of civil law relations, as it was originally and how to meet all modern codes of European states. This explains why the family relations, including those involving the dissolution of marriage, as well as those private international law, are found in Book II "On family" (Bodoaşcă, 2009, pp. 11- 34) and seventh book "Provisions of private international law" of this legislative act.

Regarding the New Code of Civil Procedure[3], retained traditional regulation of divorce proceedings in the present Code of Civil Procedure (article 607-619), as a special procedure, in Book VI, article 903-1049, most texts being taken over.

We must mention that some remarks on the structure chosen by the legislator, when it passed to the legislative construction of reserved for the dissolution of marriage in the new Civil Code. It is clear from Chapter VII "The dissolution of marriage" (article 373-404), found in Title II, entitled "Marriage", it results that was abandoned the traditional structure enshrined in the Family Code (article 37 - 44), that is it has not been adopted the same logical and natural sequence of presentation of the legal norms dedicated exclusively to rules of material law relating to cases where the court may the dissolution of marriage, to the legal effects that the divorce produces on the personal relations and patrimony between spouses, and among them, as their parents and their minor children, leaving procedural aspects of law to the Code of Civil Procedure.

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[2] Republished under article 218 of Law no. 71/2011 for the implementation of Law no. 287/2009 of the Civil Code, published in "Official Monitor", Part I, no. 409 of June 10, 2011. The new Civil Code was originally published in "Official Monitor", Part I, no. 511 of July 24, 2009, amended by Law no. 71/2011 and corrected in the Official Monitor, Part I, no. 427 of June 17, 2011 and "Official Monitor", Part I, no. 489 of July 8, 2011. The new Civil Code entered into force on October 1, 2011.
[3] Adopted by Law no. 134/2010 on Civil Procedure, published in "Official Monitor", Part I, no. 485 of July 15, 2010. See (Crăciunescu & Lupaşcu, 2011, pp. 19- 34)

Thus, in reading the chapter reserved to the dissolution of marriage from the New Civil Code, it appears that the material rules are combined with those of procedural law. There are two explanation of this situation, namely: first, the fact that the two new codes - Civil Code and the Code of Civil Procedure, have not entered into force simultaneously, which means that as of October 1, 2011 a request for dissolution of marriage is to be settled, by reference to the new Civil Code in terms of material law and in terms of procedure, by applying the old Code of Civil Procedure. According to this situation, it was adopted the technique of regulation development in its dissolution of marriage within the New Civil Code and in matters of procedure, changing the text to the extent considered necessary the Code of Civil Procedure, which it will be replaced by the New Code of Civil Procedure (Deleanu, 2010, pp. 22-43) (Recently it was announced June 1, 2012 by Minister of Justice as the date of its entering into force).

Another reason for the current regulation it results from the inspiration of the legislator. Thus, unlike the institution of parenthood, among whom the authors the Romanian Civil Code chose the Quebec Civil Code[1], it appears that the regulation provided by the French Civil Code (article 227-310) for the institution of divorce was closer to their "soul", some articles being found as its translation (such as, for article 388 it is correspondent article 266 of the French Civil Code regarding the right of innocent spouse to be compensated by the judgment of divorce, as article 390 and 391 correspond to article no 270 and article 271 of the French Civil Code, except that the Romanian legislator imposed the condition of the duration of a marriage at least 20 years). Also, some texts were taken from the French Civil Code which are no longer in force, being amended or repealed by Law no 2004-438 of 26 May 2004 concerning the divorce, which has produced a fundamental reform in the dissolution of marriage matters in France.

As a consequence of the structure of the New Civil Code, we consider that the depositions for divorce from the current Civil Code regulations are somewhat difficult to follow, as long as these items are combined with the Code of Civil Procedure. In addition, because the New Code of Civil Procedure shall enter into force after the Civil Code, although both codes were written at the same time, we notice some legislative inconsistencies (such as article 923 which provides the dissolution of marriage based on the separation in fact of at least 5 years).

Referring to the **legal language**, without identifying all the inaccuracies, the inconsistencies or gaps in the texts, we found that the legislator uses an ordinary, everyday language, since the term "divorce" is preferred legal expression "the dissolution of marriage".

Several observations can be made about the content of the dissolution of marriage settlement. Thus, it appears that the legislator intended to capitalize the valuable doctrine and the case law matters, putting the forefront the interests of minor children and spouses wish to divorce, assigning elements of continuity and tradition (such as, the dissolution of marriage due to health status of a spouse), of modernity (the legislator's concept being of divorce –cure and not divorce-sanction, also the joint exercise of parental authority) and comparative law (such as, the dissolution of marriage based on the actual separation of the spouses for at least two years, found in article 238 of the French Civil Code).

Also, the New Code of Civil Procedure, the last common residence of the spouses is what determines the territorial jurisdiction of the court in divorce matters (article 903), as a continuation of the provisions of article 375 of Civil Code and a the takeover of the rule of habitual residence of the spouses of article 3 of Regulation (EC) of 27 November 2003 no. 2201/2003 on jurisdiction, recognition and enforcement of judgments in matrimonial matters and parental responsibility, repealing Regulation (EC) no. 1347/2000.

Furthermore, due to limited space, we intend to present some aspects of the design of legislator's concept adopted in the dissolution of marriage regulation, the legal effects of fault in the dissolution of

[1] *Code civil du Quebec/ Quebec Civil Code*. Edition 2002-2003, J.L.Boudouin, Y. Renaud, Wilson & Lafteur, Montreal. See (Lupşan, 2011, p. 67; Crăciunescu & Lupaşcu, 2011, pp. 54- 72).

marriage, highlighting the new and comparative law elements, making some proposals *de lege ferenda*.

2. On the Concept of the Romanian Legislator in the Dissolution of Marriage Settlement

Regulating four ways of dissolution of marriage in article 373 (divorce based on the agreement of the spouses, divorce caused by serious harm to family relationships that led to the impossibility of continuing the marriage, divorce based on the actual separation of spouses of at least two years and the divorce because of health status of one of the spouses which makes impossible to continue the marriage), makes widely accepted the idea that the New Civil Code continued the same mixed design of remedy-sanction divorce as established in article 38 of the Family Code and the fact that we find in most European laws.

In addition, there were diversified the ways of obtaining divorce. Thus, with the judicial process, unique in the regulation of family law, to which it was added briefly also the divorce by administrative and notary means, introduced by Law no. 202/2010 on measures to accelerate judgments[1] - now, there have been stated three ways to obtain a dissolution of marriage, leaving it to of a spouse to chose one or another, depending on their interests, and especially the speed with which they wish to end the marriage.

It is noted that the legislator was gentle and severe at the same time, when creating a new dissolution of marriage settlement.

Why gentle? Because whether after the marriage resulted or not children, regardless of duration of marriage, on the one hand the New Civil Code provides the spouses more opportunities for the dissolution of marriage, and on the other, in the dissolution of marriage matters it was given more liability to more authorities (civil status officer, public notary, judge). Also the agreement of the spouses produces legal effect in all that relates to marriage (divorce, name, liquidation of matrimonial regime, parental authority, home of the children, alimony, etc.), accelerating a lot the dissolution of marriage proceedings (e.g. within 30 days after filing for divorce request to the public notary or civil service status, if the spouses keep their agreement, the certificate of divorce is released, which proves the dissolution of marriage the very day of its release; by the judicial proceedings, the divorce decision is final in the day of its passing).

Getting the divorce outside the courtroom, without court intervention, as was it was our tradition seems to turn marriage into a simple contract that can come out at the appreciation and will of the spouses.

Why severely? Because when there is no understanding between spouses about the dissolution of marriage settlement, the court intervenes and it will decide according to the law. However, the novelty is the fault of the spouse whose marriage breaks will be accountable for his conduct in marriage relationships and not only morally, but especially at patrimonial level, as we show below, the guilt remains an important factor in the effects of divorce. The divorce settlement out of the guilt of one spouse reflects the idea of individual responsibility of the spouses in family life. What brings new the current Civil Code in addition to the previous regulation is binding the fault to real financial consequences that guilty spouse for divorce will incur.

3. On Some Legal Effects of Fault in the Divorce Decision

The provisions of article 384, paragraph 2 of the New Civil Code, the wording "*the spouse against whom the divorce was pronounced loses the rights that the law or the conventions concluded previously with third parties which were assign to*"[2] we must particularly mention. Seeking the

[1] Published in Official Monitor, Part I, no. 714 of October 26, 2010.
[2] Text renders article 265 of the French Civil Code.

inspiration source of this text, we found in the old forms of article 265 of the French Civil Code, to which it given up by Law no. 2004-439 of 26 May 2004. Currently, article 265-1 of the French Civil Code provides: "*Le divorce est sans incidence sur le droits que l' un ou l'autre des époux tient de la loi ou des conventions passées avec des tiers / Divorce does not affect the rights one or the other spouse according to the law or past agreements with the third parties*".

Returning to the Romanian legislator, without indicating in the text which are those rights that a husband loses due to the fault established by the court's decision of divorce, it remains to identify them in the contents of the New Civil Code, on the one hand, or to imagine them, in the absence of case law, when we consider the agreements with third parties.

For the first category of rights, from reading the divorce settlement, it is noted that with alimony between the former spouses (article 389 paragraph 2-5, which is a revival of article 41 of the Family Code), the New Civil Code has granted to the fault in the breakup of marriage relationship new and important legal effects for the legislative landscape in Romania, namely: the innocent spouse is entitled to a compensation for the damage caused by the divorce (article 288[1]), entitled to compensatory benefit (article 390-395) as a criterion in attributing home, whether the home is under renting contract (article 324 paragraph 1) or the common property of spouses (article 324 paragraph 4), the loss of the right to receive the compensation to cover the installation in a new home expenses, paid by the husband who was granted residence (article 324 paragraph 2), may also have certain material benefits arising from matrimonial convention concluded according to article 332 paragraph 2 of the New Civil Code.

As regards the rights that the husband guilty of marriage dissolution it will lose them in the third parties relations, one can imagine the following situations: the revocation of donation signed by the family of the innocent spouses and the guilty spouse (e.g. in-laws donate a property to the groom, taking into consideration its quality, if the donation was completed under this condition, of not retaining the fault in case of the grantee's divorce), revocation of the legate.

Another unique situation is found in article 380 of the New Civil Code (correspondent of article 616 index 2 of the Code of Civil Procedure, taken entirely by article 914 paragraph 2 of the New Code of Civil Procedure), which enable further action by the heirs of the husband's divorce applicant, referral to the court under an action for divorce based on the fault of the defendant husband. There is a series of questions: the respondent spouse retains or loses the quality of surviving spouse under the conditions where the judgment shall retain the exclusive fault to divorce? What are the interests of heirs to continue the divorce proceedings on behalf of the deceased applicant?

According to article 382 paragraph (1) of the Civil Code "the marriage is dissolved on the days that the judgment according to which the divorce was pronounced remain final." By the exception to this rule paragraph (2) of the same article it shows that in the case of further action by the heirs of the husband's divorce applicant, if the action is allowed, "the broken marriage is counted from at the date of death". At the same time article 954, paragraph (1) of the Civil Code states that "a person's legacy is open at the moment of the death." In these conditions it might ask whether or not the respondent husband has the calling to her husband's legacy applicant, if one of the two effects of death occurs on the same day - opening inheritance and the divorce judgment – it takes precedence over the other. According to article 970 Civil Code "the surviving spouse inherits the deceased spouse if at the date of opening of inheritance, there is a final divorce judgment." So the death date is the date the inheritance is opened, but also the date of the dissolution of marriage. Basically, the two moments overlap, without having the law to predict which of them prevails. But if we analyze further the reasons for introducing the possibility continuing the divorce proceedings by the applicant husband's heirs, namely to protect their economic interests, it might conclude implicitly, the legislator has given priority to the divorce becoming final to the legacy to opening. However, an express statement of the legislator to this effect would be appropriate.

[1] It corresponds to previous formulation or article 266 of the French Civil Code, to which it was given up by Law of May 26, 2004 in order to separate the monetary consequences of divorce in granting the divorce guilt.

Returning to the legal inheritance, the defendant husband of sole fault for the divorce decision will lose the quality of surviving spouse, it will not inherit the deceased, from which will benefit the heirs who continued the divorce.

As regards testamentary inheritance, in case the applicant's spouse has made a legacy in favor of defendant spouse and not revoked before his death, the accused husband is destined for inheritance. It could still be removed from the testamentary inheritance by the co-heirs, if they would seek dismissal of the court related to article 1069, paragraph 2 b, being retained the sole fault in the breakup of his marriage, as shown in the judgment of divorce obtained in article 380 of the New Civil Code (and maintained the possibility and condition of the New Code of Civil Procedure, article 914)

4. Conclusion

Responding to statistics that show a large number of divorces, over the last 12-15 years, the New Civil Code reform is characterized by three elements: the diversity of access ways to divorce, each couple will choose how to dissolute of marriage, according to their desire; simplifying the divorce procedure, regardless of its path; establishing significant patrimony consequences for the guilty spouse for the dissolution of marriage.

When the New Civil Code provisions will be better known by spouses, especially through the effects that they produce in the dissolution of marriage, they will give up to an amicable divorce in order to obtain a court divorce decision by fault of the spouse, that represent then grounds to obtain compensation benefits and amends and other matrimonial benefits. The result of this awareness will translate trough sharpening the conflicts between spouses, seeking the construction and justification for the fault on the spouse to convince the judge in giving a favorable solution.

Lawyer's role is to give legal advice to show the spouse, if applicable, the appropriate legal remedy for its interests. The path chosen will depend on the legal effects it produces, the rights that a spouse counts to win after a divorce.

5. Bibliography

Bodoaşcă, T. (2009). Examen de ansamblu şi observaţii critice privind familia şi căsătoria în reglementarea noului Cod civil. *Dreptul/Law, no. 12*, 11- 34.

Crăciunescu, C.-M., & Lupaşcu, D. (2011). Mica reformă justiţiei şi marea reformă a divorţului/The little justice reform and the great reform of divorce. *Pandectele Române/Romanian Pandects, no. 1*, 19- 34.

Deleanu, I. (2010). Divorţul - în ambinaţa prevederilor Proiectului Codului de procedură civilă/The Divorce, according to the draft Code of Civil Procedure. *Pandectele Române/Romanian Pandects no 4*, 22-43.

Lupşan, G. (2011). *Instituţia filiaţiei în dinamica dreptului românesc. In Dinamica dreptului românesc după aderarea la Uniunea Europeană, Academia Română/The institution of filiation in the dynamics of Romanian law. In the Dynamics of Romanian law after EU accession, Roman.* Bucharest: Institutul de Cercetări Juridice "Andrei Rădulescu", Universul Juridic.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

Short Remarks on the Rule-of-law State Concept

Iulian Nedelcu[1]

Abstract: State law has not always existed in its current form, state concept has evolved over time, in this aspect, various theories have developed doctrines which they founded and strengthened him as the most viable form of political organization of human society. By analysis of the doctrine it is necessary to define the state legally, politically and socio-economic. Legal concept explains many relationships and situations established between active subject and passive state, a subject of rights and obligations and other social groups. Moreover, we can say about the political concept, that it originates in the formulations of thinkers on the origin and formation of the State, its evolution and its current meaning, according to political realities, while the socio-economic terms is a system of subordination organization, aiming to achieve a balance between legitimate personal interests of individuals and those of the communities, but first of all the interests of the nation and then the assembled humanity. There is a diversity of views on the state, which addresses two trends - an abstract one and another realistic, so we can say that it defines a unit of institutions, a human community situated on a territory and subject to an authority.

Keywords: democracy; public authorities; public administration

1. Introduction

The first article, paragraph (3) of the Constitution of Romania provides that "Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values and shall be guaranteed".

The concept of rule-of-law state has been established and founded by the German doctrine in the second half of 11th century. The idea of rule-of-law state constituted, beginning with the 18th century, the model of fundamental guarantee for citizens' rights and freedoms. The philosophic and juridical doctrine about human natural and imprescriptible rights[2] (Universal Declaration of Human and Citizen Rights, 1789) represents the original source of the rule-of-law state principles.

2. The Rule of Law

The rule-of-law state means the subordination of state towards law, the approach of this notion being made from two standpoints:

- the power of state as constraint force;
- the relation between normality and power.

As for the power of state as constraint force, it is interesting the relation freedom - power.

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[2] „*The aim of every political association is the preservation of the natural rights, which rights must not be prevented. These rights are freedom, property, security and resistance to oppression.*"

The feeling of freedom was born at the same time with man. The freedom, for man, was and will remain as natural and legitimate as the existence itself. The relation between freedom and constraint must be rational. Freedom without authority alters (Locke, 1690, p. 53 and following) such as authority without freedom degenerates. The law models, by behaviour rules which express general will, human disposition, which is natural otherwise, towards absolute, unconditioned freedom. The law is also that one which institutes and legitimates constraint, by framing it in a system of means and procedures.

The power and normality are in a mutual relation of inter-conditioning, thus the power creates norms which limit the power.

The problem of defining the rule-of-law state or the legality state, at a first sight, seems simple. Most of the authors asserts that the rule-of-law state is characterized by the fact that materializes the rule of law in its entire activity whether through its relations with citizens, whether with different social organizations on its territory (See the Constitution of Germany, Spain and Romania). At a thorough analysis, the problem of rule-of-law state appears more complex, as the state, as institutionalized organization, endowed with sovereignty, never acts as such in its interior and external relations, but through different organizational structures inside it. This finding is valid both for direct democracies and for the representative ones.

Direct democracy – namely that one characterized as being a government system where the people exercises its public power by himself, without resorting to an individual or group of individuals (Parliament) – it is more like a theoretical concept as the legislative function is exercised, in reality, by a body which is not identical with the people, in its entirety, namely the People's Assembly. Direct democracy is more and more rarely met in compared law, as its functioning suppose to meet a bigger number of conditions which are difficult to be accomplished concomitantly.

The State organized within the parameters of representative democracy acts, as a rule, through three main categories of bodies: Parliament, executive bodies, judicial bodies. In order to be in the presence of a rule-of-law state, the legislative, executive and judicial powers must carry out activity in compliance with judicial norms, working together and controlling reciprocally.

The Parliament, the authority which has the mission to adopt and alter the norms which are at the bases of the State's functioning, must subject to Constitution, the supreme law of every State.

The other public authorities must subject both to Constitution and to other laws.

The rule-of-law state cannot exist as long as through the Constitution is established the absolutism of one of the powers existent in the state, because the rule-of-law state supposes the existence of a political disposal based on the separation of powers in the State.

The definition of the rule-of-law state cannot be complete if we would not add, besides the fact that is characterized as being a state where the law rules, also the specification that through its content this law must also comprise regulations based on the recognition and effective guarantee of fundamental human rights and freedoms, inherent to human nature.

In order for a rule-f-law state to exist, it is not enough to be instituted a judicial mechanism which guarantees the strict observance of laws, but it is necessary that this law be given a content inspired from the idea of promoting human rights and freedoms in the widest liberal spirit and democracy.

The rule-of-law state is a state organized based on the principle of separation of powers in the state, where for its application the justice acquires a real independence and through its legislation aims at promoting rights and freedoms inherent to human nature, ensuring the strict observance of its regulations by its entire body, in its entire activity.

An essential trait of the rule-of- law state is represented by its judicial personality. In the conception of majority, the state, which is the holder of the public power, has not only a public domain, but also a private one. The State has the same civil condition which an individual has. It has the capacity to be owner and has the capacity to exercise all civil and legal acts which arise from the attributes of the

right of property, acts which can do any capable person, in person or by representation, if is an unable person.

There has been stated the question if the State, holder of public power, is or not different from the State, holder of private rights.

The solution given here (Disescu, 1915, p. 22 and following) has been that there is no difference, this unity characterising the rule-of-law state, state which must be subject to its own laws, whose rights and powers are limited within the relations with the other private persons.

Consequently, the rule-of-law state presents the following particularities:

1. There is established a status of power through Constitution;
2. The power is organized and its prerogatives are fulfilled in compliance with the provisions stipulated in the Constitution;
3. There is instituted a system which sanctions the supremacy of Constitution;
4. Judicial norms are constituted in a ranked and staged unit;
5. Human fundamental rights and freedoms are guaranteed and established as effective means of protection of people in their relations with power.

In order to identify how Member State of the European Union can offer to their citizens an effective and efficient administration, The Swedish Agency for Public Management conducted a research, four years ago, regarding identification of the best good practices in the public administrations of the Member States of the European Union. The purpose of this research has been the identification of some essential principles to ensure a good administration. Following this research, there have been identified 12 principles widely spread within the Member States, and without them we cannot talk about a good administration. The principles emphasized in this research are also found within the public administration in our country, as follows:

- Principle of legality, non discrimination and proportionality
- Principle of impartiality and correctness
- Principle of promptitude
- The right to be listened to – Ordinance no.27/2001
- The right to have access to personal file
- Access to information of public interest – Law no.544/2001
- Obligation of the public institution to declare, in written form, the reasons which led to this decision
- Obligation of the public institution to notify all interested parties on making a decision
- Obligation to recommend possible solutions to the problems presented by citizens, identification of several solutions to solve some situations and their presentation to the interested person
- Obligations to draw up minutes after each meeting
- Obligation to keep registers
- Obligation of public officers to be entitled to improve the quality of services

3. The Principle of Legality

The principle of legality is the fundamental principle of organizing and functioning public administration, principle which is found in every rule-of-law state.

In the case of rule-of-law, democratic state, based on the separation and balance of powers in state and on the observance of citizens' fundamental rights and freedoms, the assurance of the supremacy of legality principle constitutes the centre of maximum interest of any modern society.

The establishment of this principle, as basic principle for the organization and functioning of state administration, has been accomplished quite tardily, at the end of the 18th century, alongside with the

profound transformations which took place in Europe. The French Revolution in 1789 and the adoption of the Declaration of Human and Citizen Rights marked the transition from a police state to a state based on rules of law. This meant that there has been carried out, for the first time, the basis necessary for the creation of a modern system of administrative law, namely public administration subject to the rule-of-law state (Alexandru, 2007, p. 38 and following).

Within the context of the rule-of-law state, "the State must be a state governed by law. The State must establish with precision the limits of its competences under the shape of law, as is doing with the citizens' freedoms; it must not act more than its legal competency."

The principle of administration legality is an essential pillar of the rule-of- law state (Jurgen, Schwarze, 1994, p.219 and following) which, alongside with the structural separation of the powers in the state, must guarantee citizens' fundamental rights and freedoms. The development of equality principles of all before law and those of legal safety, as well as the protection of individual rights by the independent Courts, played a major role in completion of the subjection of state to the sovereignty of law.

The same content of the principle, subjection of administration, law, means, in Jacques Ziller (Jacques, Ziller, 1993, p.291 and following) opinion, the fact that particular persons dispose of jurisdictional means of appeal to assert the principle of legality, inwardly being independent from the actual organization of the control of administration. From this perspective, the limitation, through the laws of Parliament, of the powers of the executive constituted the first step to an effective guarantee of citizens' freedoms.

The Constitution of Romania, reviewed in 2003, enounces in art.1, par. (3) that Romania is a rule-of-law state, opting for the collocation "rule-of-law state", literally translation of the word "Rechtsstaat" proposed by the German doctrine, and not for that of "legal state", preferred by the French doctrine, considering that the legal state is only one of the levels of the rule-of-law state, which does not offer enough guarantees towards the arbitrary nature, the legislative remaining uncontrollable (Ion, Deleanu, & M., Enache, 1993, p.14 and following).

Trying to define the rule-of-law state, we notice that there exist many definitions, due to the complexity of its significances and implications. In the doctrine is hold that the shortest definition and apparently the clearest one is the definition given by Rudolf Wassermann, according to which the rule-of-law state is the state whose activity is determined and limited by law.

In the specialty literature has been expressed the opinion that two elements are always present in defining the rule-of-law state, namely: the relation between state and law, as well as the subordination of state to law (Deleanu, 2003, p. 77 and following).

According to art.1, par. (5) "In Romania, the observance of the Constitution, its supremacy and the law shall be mandatory". This formulation may raise the question if the constituent considered two distinct principles, that of constitutionality and the legality or the principle of legality must be understood *lato sensu* as obligation to observe the pyramid of the legal system, in whose top is situated the Constitution.

Accordingly, the obligation of law, the principle of legality which ensure the rule-of-law order, is something else than the principle of supremacy of Constitution or legality, which constitute the essence of the rule-of-law state, meaning the pre-eminence of law in regulating the social relations in the sense of art.16, par.(2) of the Constitution (Rozalia-Ana & Lazăr, 2004, p. 44 and following).

4. Bibliography

Alexandru, Ioan (2008). *Tratat de administraţie publică*/*Treaty of public administration.*Bucharest: Universul Juridic.

Iorgovan, Antonie (2001). *Treaty of administrative law* 3rd edition. Bucharest: All Beck.

Dănişor, Dan-Claudiu (2003). *Actorii vieţii politice*/*Actors of political life*.Craiova: Sitech.

Apostol-Tofan, Dana (2003). *Drept administrativ*/*Administrative law*. Bucharest: All Beck.

Bălan, Emil (1998). *Domeniul Administrativ/Administrative Domain*. Bucharest: Lumina Lex.

Muraru, Ion (1993). *Drept constituţional şi instituţii politice /Constitutional law and political institution.* Bucharest: Actami.

Nedelcu, Iulian & Nicu, A. L. (2004). *Drept administrativ/Administrative law*. Craiova: Themis.

Popa, N.; Dogaru, I.; Dănişor, Gh. & Dănişor, Dan-Claudiu (2002). *Filosofia Dreptului Marile Curente/Philosophy of law. Main trends.* Bucharest: All Beck.

Vedinaş, V. (2002). *Drept administrativ şi instituţii politic-administrative*/*Administrative law and political-administrative institutions*. Bucharest: Lumina Lex.

Vida, Ion, (1994). *Puterea executivă şi administraţia publică/Executive power and public administration*. Bucharest: R.A. The Official Journal.

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REALITIES AND PERSPECTIVES

A New Approach in the Social Field – Law No. 62/2011

Radu Răzvan Popescu[1]

Abstract: Law no. 62/2011 of social dialogue, as it was regulated by the lawmaker, comes and reunites within it a series of fundamental institutions in social matters, such as: social dialogue (trade unions, employees' representatives, owners' associations), the Economic and Social Council, the collective employment contract, labour conflicts and, not lastly, a series of elements pertaining to labour jurisdiction. It thus abrogates the old regulations in the matter: Law no. 54/2003 with respect to trade unions, Law no. 356/2001 regarding owners' associations, Law no. 109/1997 regarding the organizing and functioning of the Economic and Social Council, Law no. 130/1996 with respect to the collective employment contracts, Law no. 168/1999 regarding the settling of labour conflicts and Government Decision (G.D.) no. 369/2009 regarding the establishment and functioning of the social dialogue commissions at the level of the central public administration and at the territorial level.

Keywords: collective relations; trade union; collective labour conflicts; jurisdiction

1. General Aspects

Law no. 62/2011 of social dialogue (published in the Official Gazette no. 322 of May 10th, 2011), as it was regulated by the lawmaker, comes and reunites within it a series of fundamental institutions in social matters, such as: social dialogue (trade unions, employees' representatives, owners' associations), the Economic and Social Council, the collective employment contract, labour conflicts and, not lastly, a series of elements pertaining to labour jurisdiction. It thus abrogates the old regulations in the matter: Law no. 54/2003 with respect to trade unions (published in the Official Gazette no.73 of February 5th, 2003), Law no. 356/2001 regarding owners' associations (published in the Official Gazette no. 380 of July 12th, 2001), Law no. 109/1997 regarding the organizing and functioning of the Economic and Social Council (published in the Official Gazette no. 141 of July 7th, 1997), Law no. 130/1996 with respect to the collective employment contracts, Law no. 168/1999 regarding the settling of labour conflicts (published in the Official Gazette no. 227 of April 7th, 2009) and Government Decision (G.D.) no. 369/2009 regarding the establishment and functioning of the social dialogue commissions at the level of the central public administration and at the territorial level.

Thus, the lawmaker takes one step forward towards what means modern legislation in which all fundamental problems in social matters are found regulated in a single normative act. We consider that all these aspects regulated by Law no. 62/2011 of social dialogue could have been established by the Labour Code, in a unitary vision on social legislation. Still, if the lawmaker opted for a separate regulation of these issues, we consider that it would have been more suitable the name of **"law that regulates the collective work relations"** and not only social dialogue.

It must be mentioned, right from the beginning, the fact that the new law no longer covers the entire problematic subjected to the previous regulation by Law no. 130/1996 of collective employment contracts and by Law no. 168/1999 of labour conflicts. Thus, the new law establishes in Title VII only

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the aspects pertaining to the collective labour negotiations (for instance, the institution of the suspension of the collective employment contract is no longer present), and Title VIII, which regulates the modalities for solving labour conflicts contains a series of brief provisions, in comparison to the old regulation. These aspects, we believe, are not in the sense of a modern regulation, which should be clear, precise, and which should cover the possible problems notified, in time, with respect to the old regulation (not to create new ones).

2. Disputed Aspects regarding Law no. 62/2011

Art. 3 of Law no. 62/2011, as regulated, at present, respectively: ”*the persons employed with individual employment contract, the public servants and the public servants with special statute in the conditions of the law, the cooperative members and the agricultural workers employed are entitled, without any restraint or prior authorization, to establish and/or to adhere to a trade union*”, restrains the freedom of association in trade unions, as follows: the liberal professions are excepted from the category of persons who can establish and/or adhere to a trade union.

In this sense, we consider that, in virtue of the principle of trade union freedom, all workers, except those employed within the armed forces and the police, should have the right to establish and to affiliate to organizations of their choice.

Also, the request, upon the establishment of a trade union, that the founding members are employees of a single owner also represents a breach of the principle of trade union freedom. In the specialty literature was underlined the fact that ”*it is an axiom of contemporaneity the fact that public power, in a democratic society, does not intervene with respect to the materialization of the association right”*.

Moreover, according to the actual regulation, the persons apt for work but who are, temporarily, without a job or in unemployment, cannot be part of a trade union, which, in our opinion represents also a breach of the exercise of the right to free association (in the notion of worker, as defined at the European level by the Court of Justice in Luxemburg, being also classified the persons apt for work but who are not working at a given time, being between two jobs).

The formulation in art. 8 of the law is unclear, since it states that:”*in the management bodies of the trade union organization can be elected the* ***persons*** *who….”,* as long as art. 3, para. 2 clearly establishes that ”*for the establishment of a trade union is necessary a number of at least 15* ***employees*** *within the same unit”*. We consider that, logically, from the trade union management body can be part only a person who is a member of the respective trade union, hence, only a person who has the quality of employee (and not any person); thus, the formulation in art. 8 is improper, instead of the term ”persons” there should have been used ”employees”.

Art. 9 of the law establishes the fact that *”to the members of the elected management bodies of the trade union organizations is provided the protection of the law against any form of conditioning, constraint or limitation in the exercise of their functions”,* while art. 63 para. 2, which regulates the same kind of protection, only for owners’ associations, states: ” *to the members of the management bodies of the owners’ associations organizations is provided the protection of the law against any forms of* ***discrimination****, conditioning, constraint or limitation in the exercise of their duties and/or mandate”*. We feel that this normative act should contain a series of provisions, in the mirror, similar, for both organizations, such as the possible forms of discrimination to also be indicated in the legal text targeting the trade union organization.

We consider that art. 10 para. 1 of Law no. 62/2011 implicitly abrogates art. 220 para. 2 of the Labour Code, respectively: *”there are forbidden the modification and/or termination of the individual employment contracts of the trade union organizations members for reasons pertaining to the belonging to the trade union and the trade union activity”* implicitly abrogates *”throughout the entire term of exercising their mandate, the representatives elected to the trade union management bodies,*

cannot be fired for reasons pertaining to the fulfillment of the mandate they received from the employees in the unity".

We believe that the harshening of the criteria for establishing representativeness for the trade union organizations at the level of the unit, where the number of the trade union members must represent half plus one of the number of employees within the unit (previously, it was set at 1/3 of the number of employees in the entity) is one that, although does not contradict the international regulations in the matter, will lead to the real impossibility for the trade unions to be able to fulfill this criterion and, as a consequence, the social protection of the employees within the unit will be affected, since they will no longer benefit of a representative trade union organism.

In order to gain legal personality, the special empowered person of the founding members of the owners' organization will have to submit a registration application to the court in whose territorial range is the headquarter, following the same procedure as in the case of gaining the legal personality by the trade union organization. With the application, there will also be attached the following proving documents:

- minute with the establishment of the owners' organization;
- statute;
- list of the members of the executive managing body of the owners 'organization;
- proof of the headquarters existence.

In this way, in the case of owners' organization the same procedure is followed for gaining the legal personality as in the case of the trade union organizations (without the need for the owners' organizations to gain legal personality on the grounds of another special law).

In case an owners' or trade union organization which signed a collective employment contract loses it representativeness (either upon the completion of the 4 year term it no longer fulfills the representativeness conditions required by law, or, during the 4 years, it loses this quality, regardless of the manner) any interested party having the ability to negotiate the respective collective contract is entitled to request (from the other party) the renegotiation of the contract, prior to its expiry term. If this renegotiation is not requested by anyone, the collective employment contract will remain in effect until the expiry of the term for which it was concluded (Ştefănescu, 2010).

This art. 222 para. 3 of Law no. 62/2011, as regulated, we believe may create a state of uncertainty (insecurity among the employees with respect to the provisions within the collective employment contract), and at the moment when the trade union organization, in the conditions of the new regulations, no longer fulfills the representativeness criteria, the owner may request the renegotiation until the expiry of the respective collective employment contract validity. Thus, through the renegotiation which no longer occurs between the same two parties that initially negotiated the collective employment contract, the employees may find themselves in the situation in which the new renegotiated provisions are unfavorable to them (which contradicts the spirit of what mean the institution of the renegotiation between the same parties and of the differences that may occur when either party is changed).

Art. 88 of Law no. 62/2011 establishes the fact that the *Economic and Social Council has the obligation to analyze the drafts of normative acts received and to transmit its approval within maximum 7 working days since the receipt of the request.*

Hence, the lawmaker established the obligation to request the approval of the ESC for all categories of normative acts which are of its competence, as well as its obligation to answer the requests; in case the ESC does not answer or answers exceeding the term established by law, this will allow the initiator of the normative act draft to send it for approval without the ESC consent, but with the mentioning of this situation.

The Romanian lawmaker substantially modified the legal provisions regarding the collective negotiation, giving them a new legal perspective, as follows:

- collective negotiation is mandatory only at the level of the unit (according to art. 229 para. 2 of the Labour Code and to art. 129 of Law no. 62/2011); thus disappears the provision according to which the collective negotiation is mandatory, regardless of the level.
- the negotiation initiative belongs to the employer, and if it refuses to start negotiation, in the conditions of the law, the deed is a misdemeanor;
- in case the employer does not initiate the negotiation, it will be able to commence, upon the written request of the representative trade union organization, or of the employee's representatives, within maximum 10 calendar days since the communication of the request; therefore, within 10 calendar days will start the actual negotiation;
- within this term of 10 days, a new term of 5 calendar days starts running, during which the employer or the owners' organization has the obligation to summon all entitled parties in view of negotiating the collective employment contract (we consider that the non-fulfillment of this obligation by the employer should bring forth the same contraventional sanction established by art. 217 letter b) of the Law of social dialogue, since it is also a matter of the employer's refusal to negotiate, seen *lato sensu*);
- the duration of the collective negotiation cannot exceed 60 calendar days, except with the parties' agreement (hence, it is a recommended term);
- the provision establishing the minimal content of the object of the collective negotiation was removed; this situation, in practice, can create a series of problems to the social partners who are no longer held by the obligatory negotiation of clauses essential to any employment contract.

Also, it must be underlined the fact that, according to the provisions of the ILO Convention no. 87/1948 regarding trade union freedom and the protection of the trade union right, one of the main goals of guaranteeing trade union freedom is to allow owners and their employees to associate in organizations independent from the public powers and to regulate by means of collective employment contracts certain salary rights and labour conditions. At the same time, the ILO Convention no. 98/1949 regarding the application of the principles of the right to organize and to collective negotiation, in art. 4, which refers to the encouragement and promotion of collective negotiation, is established the fact that these rules apply both to the public and to the private sector (A. Popescu, 2008).

- the clauses of the collective employment contracts can be renegotiated periodically, according to the contractual provisions; this provision comes and modifies the previous legal text, which established the fact that these clauses are renegotiated annually; we consider that the current regulation is a modern, flexible one, which corresponds much better to the social realities, allowing the parties to establish in mutual agreement if and when they will renegotiate certain clauses;
- all aspects pertaining to the object of the negotiation will be comprised in minutes drafted at the end of each negotiation round, and which must be signed by the parties' empowered representatives; the withdrawal of a party from the negotiation is not equivalent to the interruption or cease of the negotiations, but constitutes a modality through which the parties understand to capitalize on their right to negotiate; the lawmaker established that the date on which the parties meet for the first time represents the date since which is it considered that the negotiations were commenced and the 60 day term starts running;
- we believe that, as art. 133 para. 1 of the Law of social dialogue was written, it is a restrictive vision, as follows: the clauses of the collective employment contracts produce effects as indicated below:

a. for all employees within the unit, in case of the collective employment contracts concluded at this level;

b. for all employees hired within the units which are part of the group of units for which the collective employment contract was concluded;

c. for all employees hired within the units of the activity sector for which the collective employment contract was concluded **and which are part of the owners' organizations signatories of the contract;**

- the collective negotiation in the public sector requires the verification of the available resources within different bodies or enterprises, if these resources depend on the state budget, and if the validity period of the collective employment contract in the public sector does not always coincide with that of the budget law, a series of problems will emerge.

The lawmaker established a new modality for representing the parties at the negotiation of the collective employment contracts, in the units in which there is no (more) representative trade union, as follows:

- if there is a trade union within the unit, legally established, but not representative, affiliated, though, to a trade union federation representative within the activity sector to which the unit belongs, the negotiation will be performed by the representatives of the trade union federation, upon the request and on the basis of the trade union mandate, together with elected representatives of the employees;
- if there is a trade union not affiliated to a trade union federation representative within the activity sector to which the unit belongs or if there is no trade union, the negotiation will be performed only by the employees' representatives.

The collective employment contract is concluded, in all cases, for determined time, which cannot be shorter than 12 months and longer than 24 months (according to art. 141 para. 1 of Law no. 62/2011). By means of this regulation, the Romanian lawmaker opted for restricting the maximum period for which the contract can be concluded, to 2 years, with the possibility of extending it, only once, with at most 12 months, but within the term of 24 months.

Also, the new regulation no longer establishes the possibility of concluding a collective employment contract for a period shorter than 12 months, for a certain determined work; hence, a collective employment contract can be concluded for a determined work, on condition that it lasts at least 12 months, but no more than 24 months. We consider that, exceptionally, a collective employment contract will be able, in reality, to last less than 12 months, only if it was concluded for a duration of minimum 12 months, for the execution of a determined work, which was completed earlier than the 12 months and, thus, the collective employment contract rightfully terminated (R.Popescu, 2011).

3. Conclusions

Law no. 62/2011 no longer regulates the possibility of concluding a single collective employment contract at the national level. We believe that this lawmaker's option considerably diminishes the importance of the collective employment contract institution. The absence of a single collective employment contract at the national level will be felt especially by the employees, who, in this way, will be deprived of a level of social protection, between the law and the individual employment contract, creating a void through the disappearance of this institution. The collective employment contract must be considered the working instrument of the trade union organizations, in the same way as the internal regulation is the work instrument of the owners' organization; the disappearance of the collective employment contract at the national level means, in reality, one less protection instrument, for the employees, which, in our opinion, contradicts the spirit of the community regulations in the matter, which promote the concept of social protection at the national level, through means specific to each state.

Art. 153 of Law no. 62/2011 establishes the fact that "*any trade union organization legally established may conclude with an employer or with a owners' organization any other types of agreements, conventions or understandings, in written form, which represent the law of the parties, and whose provisions are applicable only to the members of the signing organizations*". We consider that this

provision should be interpreted in the sense that: any trade union organization, regardless of where it is representative or not, can negotiate and conclude with the owners' organization of the same level an understanding which to become the law of the signing parties, only with respect to those aspects that do not make the object of the regulation on the basis of a collective employment contract.

The lawmaker, in the current regulation, no longer distinguishes between conflicts of interests and conflicts of rights, but performs a different division, respectively, in collective labour conflicts and individual labour conflicts. In reality, the settlement of the labour conflicts must follow the same two large problematic issues, respectively, the conflicts risen with the occasion of negotiating the collective employment contracts and the conflicts that have as object the exercising of certain rights or the fulfillment of certain obligations deriving from laws or other normative acts, as well as from the collective or individual employment contracts (Alex.Țiclea, 2011).

In conclusion, through the Law of social dialogue were established a series of limitations of the right to strike, a right with constitutional roots, as follows:

- the decision to declare the strike is made by the representative trade union organizations participating to the collective labour conflict, **with the written agreement** of at least half of the members of the respective trade unions (art. 183 para. 1) and for the employees of the units where there are not organized representative trade unions, the decision to declare a strike is made by the employees' representatives, **with the written agreement** of at least one quarter of the number of employees within the unit, or, as the case may be, of the sub-unit or compartment (art. 183 para. 2).

By means of this legal text a limitation of established on the right to strike, consisting in the express requirement of the agreement expressed **in writing**. The mandatory establishment of the written form for the agreement expressed in view of starting the strike is of a nature to limit even more the exercise of the right to strike. In what concerns the situation established by art. 183 para. 2, we consider that the disposition from the old regulation should have been preserved, regulation which mentioned the fact „*that the decision to declare a strike is made through secret vote …*", such as to not put additional pressure on the employees within the unit.

- the actual strike cannot be started unless previously were exhausted the possibilities of solving the collective labour conflict, through the obligatory procedures, only after the running of the warning strike, and if the moment of its start was brought to the knowledge of the employers, by the organizers, with at least 2 working days in advance (art. 182);

We believe that the correlation of the possibility of starting the actual strike with the previous running of the warning strike breaches the right to strike, because it is a matter of two legal, distinct, types of strike, which must not be necessarily correlated; the obligation of the employees to previously go through this stage actually makes more difficult the access to exercising a fundamental right.

4. References

Ştefănescu, Ion Traian (2010). *Treaty of Labour Law*. Bucharest: Universul Juridic.

Țiclea, Alexandru (2011). *Treaty of Labour Law*. Bucharest: Universul Juridic.

Voiculescu, Nicolae (2007). *Labour Law*. Bucharest: Wolters Kluwer.

Țop, Dan (2008). *Treaty of LabourLaw*. Bucharest: Wolters Kluwer.

Popescu, Radu (2011). *Labour law.* Bucharest: Universul Juridic.

Popescu, Andrei (2008). *International and European Labour Law.* Bucharest: C.H. Beck.

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REALITIES AND PERSPECTIVES

Electronic Commerce – An International Phenomenon, Generating Commercial Litigations

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Abstract: Although the e-commerce boom of the past few years has produced plenty of satisfied e-shoppers and successful Web-based companies, many consumers and businesses are left wondering where they can go to resolve their online disputes. The legal system (such as the court system and classical arbitration) cannot effectively respond to the challenges posed by conducting electronic commerce and this paper is proposed to analyse the types of disputes that can arise from those e-commerce operations. The aim of this approach is represented by our attempt to explain why conflict resolution cannot be reasonably accomplished using traditional legal system and consequently the measures that have been taken by the international bodies to facilitate consumers' right to a fair and effective trial services.

Keywords: electronic commerce; commercial litigations; online dispute legislation

1. Introduction

The Internet has created a new economic ecosystem, the e-commerce marketplace, and it has become the virtual main street of the world.

Providing a quick and convenient way of exchanging goods and services both regionally and globally, e-commerce has boomed. Business-to-business and business-to-consumer which represent the main categories of electronic commerce has rapidly developed over the past decade, based largely on the exponential diffusion of the internet, increased broadband access and the rise of mobile commerce throughout the world.

Along with this extraordinary development of electronic commerce the number of conflicts has increased considerably in this area. E-commerce disputes originate with particular characteristics due to the way internet transactions are entered to.

Disputes arising in the online context are diverse, and include failure to deliver, late delivery, false or deceptive information on price and product.

Those disputes were difficult for courts to handle for a variety of reasons, which included high volume of small value claims, the contrast between the low value of the transaction and the high cost of litigation, questions of applicable law in both electronic commerce and consumer protection contexts and difficulties of enforcement of foreign judgments.

On the one hand, as electronic commerce develops at a furious pace all over the world it is becoming clearer that traditional means of dispute resolution are not well-suited to the fast-paced and relentlessly globalized world of business-to-consumer electronic commerce.

E-disputants experiences are that in court litigation cost is very high (due to its international element) and delays are very long. This provokes resistance to the risk of court litigation. In other words, the way national courts work sometimes lacks flexibility, rapidity and the specialization demanded in dealing with cyberspace cases.

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Secondly, given that electronic commerce has become an international phenomenon it needs more than similar national frameworks; as through e-commerce it is possible to obtain access to goods from all over the world wherever one is connected to the net, it is obviously that national legislations, characterized by the principle of territoriality, are inappropriate to regulate the virtual market. Judges have problems to conciliate the e-commerce's nature with the traditional competent jurisdiction and choice of law concepts, which have been funded by the notion of *territoriality*.

Thus, we can say without risk of mistake that traditional legal system which is organized according to national boundaries is outdated in a world organized into networks and internet services providers.

In this research, we proposed to use the observation as a common method, after using some court resolutions in matter of electronic commerce.

2. The Adjustment of E-Commerce to National Legislation

In addition to differences in substantive law, countries have different approaches toward regulation. Consumer rights and obligations, for example, vary considerably from one jurisdiction to another. Some countries use generic regulation, developed in other consumer protection contexts, to address e-commerce issues, while others have adopted regulation dealing specifically with e-commerce and consumers.

A difficult question in cross-border consumer redress related to the determination of the appropriate forum, and the legal consequences attached thereto. That solution, which may be ideal for consumers, raised a number of practical problems if transposed to the international level, the most obvious being the difficulty for the consumer to utilize enforcement remedies and for the vendor to handle large volumes of claims in many different countries where consumers were located.

3. Online Dispute Resolution

Considering all the forgoing, it is clear that electronic commerce disputes will form a significant proportion of complaints in the coming years and, in this context, they require tailored mechanisms that do not impose costs, delays and burdens that are disproportionate to the economic value at stake.

Thus, the dramatic growth of e-commerce transactions has brought about increased interest in the development of specific dispute settlement procedures (Nick & Field 2000), making possible a virtual resolution of disputes through the use of the Internet which is commonly known as online dispute resolution (ODR).

ODR can be practically defined as a dispute resolution method that takes advantage of internet features. For our purpose it means ADR procedures conducted with the assistance of computer technology.

Currently, in many countries have developed specific techniques for resolving these conflicts e-commerce, this development could be explained by the fact that the evidence which led the parties to use electronic commerce in place of classical one must be respected in terms of disputes between them.

ODR procedure is designed to enable a simple and effective resolution of disputes; the hallmark of the ODR is using the Internet to conduct the procedure. ODR procedure tends to find remedies by reference to a body of rules (general conditions, codes of conduct, the choice of applicable law).

4. International Frameworks of E-Commerce

Now days, the regulatory frameworks for e-commerce vary among countries. At international level, this situation has generated reactions in the international or regional bodies for the purposes of support a possible future work on online dispute resolution in e-commerce transactions.

It has been recognized that Online Dispute Resolution will be a helpful means of solving the growing number of e-disputes. In many cases they will be far more efficient than regular dispute resolution methods[1], which will often involve lengthy and expensive legal procedures.

This issue has been addressed both internationally and nationally. In the European Union, despite the improved legal framework resulting from the adoption of a number of directives in the field of consumer protection and electronic commerce[2], the remaining differences in the European Union (EU) between the various national regulatory frameworks, in particular consumer protection rules, required that e-shops, irrespective of their location, whether inside or outside the EU, comply with varying national sets of consumer protection rules of the EU member States[3]).

Moreover, the European Commission maintained a central database of alternative dispute resolution bodies for consumer complaints, which were considered to be in conformity with the European Commission's Recommendations on Dispute Resolution.

Also, it is notably the non-governmental organizations' activities which have developed many different types of systems and guidelines that have contributed to resolving domestic and cross-border disputes arising from online transactions.

Those mechanisms provided good results when based on a framework of best practice standards, model codes of conduct, and standards from international organizations such as the OECD and the Global Business Dialogue on e-Society (GBDe). It constitutes an international complaint -handling network for cross-border on-line shopping.

ODR specialists are convening that as traditional judicial mechanisms for legal recourse do not offer an adequate solution for cross-border electronic commerce disputes, the solution - providing a quick resolution and enforcement of disputes across borders - lies in a global online dispute resolution system for small value, high volume business-to-business and business-to-consumer disputes.

The creation of a global online dispute resolution system based on general principles and generic rules of fairness and commercial practices that can be adapted to local needs will have to answer a series of challenges.

Some of the challenges faced in designing a global online dispute resolution system are of a technical nature and relate to the ability to create a system which is able to continue functioning effectively as the number of cases increases and a central structure for data communication protocols that ensures that all the various endpoints of the network can communicate in real time with each other, despite existing differences in language and culture.

Another key challenge for development of online dispute resolution is the absence of the online environment and infrastructure in certain countries. Some of the challenges are of a legal nature, and relate to the difficulty of capturing a global definition of "*consumer*", and of designing a global conciliation and arbitration system to deal specifically with online disputes, which would be fully compliant with due process requirements and able to provide fair results to all parties involved.

[1] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts , OJ L 144, p. 19–27 (June 4, 1997).
[2] Directive 2000/31/EC, European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the internal market "Directive on electronic commerce", OJ L 178 (June 8, 2000).
[3] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 on unfair business-to-consumer commercial practices in the internal market , OJ L 149, p. 22-39 (June 11, 2005).

5. Conclusion

E-commerce is a reality, governments and legal practitioners must provide useful assistance by offering effective, practical, executable legal solutions for those who find themselves involved in e-commerce disputes.

The characteristics that have encouraged increased computer use among contracting parties are the same justifying the adoption of ODR methods.

Consequently, Online Dispute Resolution is gaining new momentum as a desired extra-judicial procedure for the fair and expeditious settlement of such disputes we think it is necessary that participants must also be vigilant so that technology does not dominate and subsume the human element that is at the core of ADR values and procedures.

6. References

Nick, J. & Field, R. (2000). *E-Commerce, Critical Success Factors that will make or break your online business.* Canada: CDG Books.

Esther van den Heuvel, *Online Dispute Resolution as a Solution to Cross-Border E-Disputes. An Introduction to ODR,* available on: http://www.oecd.org/dataoecd/63/57/1878940.pdf.

***Directive 2000/31/EC, European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the internal market "Directive on electronic commerce", OJ L 178 (June 8, 2000).

***Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 on unfair business-to-consumer commercial practices in the internal market, OJ L 149, p. 22-39 (June 11, 2005).

***Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts , OJ L 144, p. 19–27 (June 4, 1997).

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Alternative Dispute Resolution – Justice without Trial?

Angelica Roşu[1]

Abstract: This research is proposed to analyze the alternative means of dispute resolution, as an alternative of justice, or as a justice alternative, after studying both European critical literature and national one. The phrase „alternative dispute resolution" means any alternative way of dispute resolution method whereby two or more people try using a third party to reach a solution to the problem that precludes them, whether it is mediation, conciliation, assisted negotiation. In this research, we proposed to use the observation as a common method. We concluded that the main reason of the alternative means for dispute resolution results from the possibility to avoid the judicial system that makes it available for the litigants. It was also shown that users of alternative means for dispute resolution not seek to resolve the dispute outside a court as an amicable settlement, negotiated, consensual of their dispute.

Keywords: mediation; agreement; trial; litigation; conciliation

1. Introduction

By this study we proposed to remove the "one size fits all" litigation mentality and prove that more creative problem-solving processes are available through alternative dispute resolution (ADR).

Justification of our approach stems from the fact that "conventional" matter is already present in judicial proceedings, a part being able to claim the other's party claims, to abandon the promoted action, to abandon the right before the Court, to conclude a transaction, to quit to the right to action. In this paper, we try to give an answer to the next question: alternative means of dispute resolution are they a matter for state jurisdiction or they are under the strict contractual field, escaping from the control of any judge?

ADR is an umbrella term that refers to alternatives to the court adjudication of disputes such as negotiation, mediation, arbitration, mini-trial etc. (Nolan-Haley, 2008). Thus, we consider it necessary to remove *ab initio* terminological ambiguity.

In this work, when we enunciate the concept alternative way, we understand any way of resolving a dispute in which two or more people try, using a third party, to reach a solution to the problem that opposes whether it is mediation, conciliation, assisted negotiation etc.

In this respect, we invoke the UNCITRAL Model Law on International Commercial Conciliation[2] and Directive 2008/52 of the European Parliament and Council regarding certain aspects of mediation in civil and commercial matters[3] , but also different definitions given to alternative means by doctrine and common dictionaries.

As a result, *reconciliation is seen as "a procedure called conciliation, mediation or in any other equivalent manner in which the parties request a third person (" the conciliator ") the support in their attempt to reach an amicable solution to a dispute arising between them "(article 1 section 3), and mediation as "a structured process, however it is named or referred to it as, in which two or more parties in a dispute attempt on their own initiative, to reach an agreement on the settlement of their*

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[2] Adopted by UNCITRAL on 24 June 2002.
[3] Published in European Union's Official Journal no. L 136 / 3 of 24th of May 2008, 2008.

dispute with the assistance of a mediator. This process can be initiated by the parties, recommended or imposed by the court or required by law of a Member State "(art. 3 (a)).

In theory there is no consensus on the legal nature of alternative means of dispute resolution.

Thus, on the one hand it was argued that the alternative modes have been designed in order to avoid the traditional justice system (American doctrine), on the other side it was noted that they are used by those who seek an amicable settlement, negotiated, consensual (French doctrine) to conclude that ADR is neither an alternative to justice, no justice alternative, but an integral part of justice.

2. Legal Nature

According to the specialized dictionaries, to study the legal nature of an institution means to analyze its essence, to identify the factors related to its substance, in short, to identify what defines it.

The term *"contractualisation of justice"* is much more used in the works and articles on alternative modes. This translates progressive intrusion and the increasing role of the model of contract, agreement, in fields that normally are beyond the areas the game of free will of the parties and are subject to mandatory rules, in the centre of which is reflected in the justice.

Contractualisation of justice takes place both as a contractual provisions that envision the organisation of the way in which shall refer to judge and the limits that he will decide and also the growing use of the Convention as a legal document aimed to produce legal effects, such as approval, consent agreement reached following a consensual means of dispute resolution.

Also, if the question is the nature of the document concluded as a result of an amicable settlement and the enforceability of its execution, there is no doubt that alternatives means shall be considered in relation to procedural law.

Therefore, it is necessary to emphasize that the study of the report between the alternative possibilities of dispute resolution and procedural law is clearly problematic because of the fact that, in common and original sense, the first are *a priori* designed to remove the application of the second one.

This is the American connotation of the term "alternative" or at least, this is the conclusion reached by French lawyers when they examined the teleological foundations of expansion of alternative means of disposal in the U.S.A.

Regarding the issue set out, it was outlined that the best alternative to protect their rights and get some satisfaction, it remains for justice that to move away from some of them by private arrangement. (Chevalier & Desdevises & Milburn 2003).

We can conclude that the main reason of the alternative means for dispute resolution results from the possibility to avoid the judicial system that makes it available for the litigants. It was also shown that users of alternative means for dispute resolution not seek to resolve the dispute outside a court as an amicable settlement, negotiated, consensual of their dispute. Different motivation shall arise from the way in which is organized the public service from France justice, that ensures even by its principles an equal treatment for those who appeal to him.

The terms attached to them as "*alternative justice, alternative to justice*" began to be regarded and frequently used with caution, preferring the term *"complementary*" over the term *"alternative*" (Cadiet & Clay & Jeuland 2005).

Mediation may exert a complementary function, in generally the case of *"judicial mediation"* (for example, when the judge initially asked, proposes or sometimes requires the parties the mediation, for all or part of the dispute). He does this because he particularly estimates that resumption of dialogue and incitement of parties to seek their own solution is without doubt the best way to conclude their dispute.

The mediator is complementary to the judge. It provides, but in another way, the task which originally belonged to the latter.

The judge, in his turn, is complementary to the mediator, since the institution remains anchored to the judiciary body and in principle remains subject to a certain control of the same body. In the same time, it was noted that alternative methods of dispute resolution are not any alternative to justice, not a legal alternative but an integral part of justice (Cadiet & Clay & Jeuland 2005).

3. Alternative Means between Agreement and Process

Classically, the contract is an agreement intended to create legal effects. The procedure is a set of rules and principles governing the chain of acts and formalities that aim for a decision. Freedom of will is manifested in alternative means that materialize is the possibility to choose whether or not for one of them, the opportunity to establish a dispute settlement procedure and the adoption of the solution itself.

During the procedure of solving the conventional alternatives as those judicial, the parties, directly or through a third party, will lead to genuine negotiations, standing on equal footing and free of any procedural constraints.

Finally, a solution to the dispute will not be adopted unless a consensus could be reached. Equality between the parties prohibits, in principle, to impose a decision to the other party. It should be noted the fact that state procedural rules prohibit the negotiation, if the dispute shall carry rights which the parties cannot have and are incidents for the "approval", consent given by the judge of understanding reached between the parties, this consent is necessary for the acquisition of the agreement of enforceability.

It is also apparent that if there is a contentious situation, it is important to identify the most appropriate way to reach a solution acceptable to both parties, those being free to settle their dispute as they want, without being required to comply with procedural law. At the same time, if the parties agree to designate a third party to facilitate the efforts in this regard, they engage in contractual relations, subject to the rules of common law.

But for them to be identified, an effort of qualification is necessary, requiring that the document concluded by the two sides and a neutral third party to give rise to an obligation (third party undertaking to assist the parties in finding a mutually advantageous solution).

We note, however, that the contract cannot avoid entirely procedural context since its subject is nothing else than performing a procedure, the amicable settlement procedure. As a consequence, identifying the conditions of validity of the contract has, necessarily, a procedural colouring. For example, removing the possibility to express a vitiated consent is obtained by introducing an obligation to declare the links that you might have with a neutral third party or the other party, otherwise, the misinformed party may invoke an error regarding his person.

We can also advance the idea that the requirement for determining the object requires the definition provided in the contract to award support for an amicable settlement, the way in which the parties understand how to proceed, or, this condition will require the parties to take a stand against Procedural law issues - communication documents, determining the place of meetings, duration the procedure.

From this perspective, the procedural law fails to appear as a constraint on the validity of conventions concluded for an amicable settlement; it simply serves as a reference to specify the content, validity conditions imposed by rules of law applicable for this type of convention.

Admission of procedural nature of amicable settlement agreements also allows the use of procedural law in order to strengthen their effectiveness. Thus, for a maximum effect of mediation clauses, French jurisprudence appears to consider that the existence of such a clause is a ground of inadmissibility, thus being a procedural effect devoted to mediation conventions. In the same spirit,

the transaction, a contract representing the result of a normal commercial mediation, has procedural effect par excellence, namely, the authority of *res judicata*.

Article 6 - 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, text considered the cornerstone of the procedural law, confirms in part the solutions adopted by French Intern Law (Mole & Harby, 2011).

4. Conclusions

In matters relating to contractual freedom, the application of procedural law mainly permits object the granting of a full effect for the settlement of the dispute settlement agreements, procedural law will be regarded as a support, and not as a constraint. From this perspective, alternative means were considered as a third way of opening up access to the law.

5. References

Cadiet, L. & Clay, Th. & Jeuland, E. (2005). *Mediation and Arbitration. Alternative Dispute Resolution, Alternatives to the justice or alternative justice? Comparative perspectives*; *Médiation et arbitrage. Alternative dispute résolution, Alternatives a la justice ou justice alternative ? Perspectives comparative.* Paris: Edition LITEC.

Chevalier, P. & Desdevises, Y.& Milburn, Ph. (2003). *Alternative dispute resolution: pathways new another justice ; Les modes alternatifs de règlement des litiges: les voies nouvelles d'une autre justice.* Paris: La documentation francaise.

Mole, N. & Harby, C. (n.d.). Retrieved January 2011, from *The right to a fair trial, guide on the implementation of art. 6 ECHR*; *Dreptul la un proces echitabil, Ghid privind punerea în aplicare a art. 6, CEDO*: http://www.bice.md/UserFiles/File/publicatii/Manuale/manual3.pdf

Nolan-Haley, Jaqueline, M., (2008). *Alternative Dispute Resolution*. USA: Thomson West.

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Consideration on Monocratic and Dualist Executive Powers as Components of the State

Mariana (Vanghelie) Nedelcu[1]

Abstract: The concept of rule of law implies the limit of the state rights, it regulates their activity, the excess and the arbitrary and sets his own rules of conduct. Montesquieu was the one who clearly formulated the principle of separation of powers, inspired by the ancient Aristotle and the English philosopher Locke, having the English regime as amodel, which had known separation of powers from the XIII century (legislative, executive and judicial). Montesquieu preconfigured a political system that highlighted a moderate government, by ensuring separation of powers and political freedoms, where political freedoms can be exercised only in a government where power is limited. The doctrine of specialty defines executive power as a distinct function of the state, among the legislative and judicial functions. Thus, in this function are found certain duties which are subject to distinct activities of public authorities. Among these tasks, Jacques Cadart nominated: defining the general policy of the country, drafting of laws necessary for the carrying of this policy, the adoption of necessary regulations and individual law enforcement decisions for the operation of public services, enterprise performance measures material on public order, territorial arrangement of the armed forces and police, and management of international relations.

Keywords: separation of powers; presidential system; constitutional regimes

1. Introduction

The pluralist and liberal systems advance the democracy. From the institutional point of view, the democracy brings into focus the principle of separation and balance of powers of State. The level of separation and cooperation within the powers is the one making the distinction between:

- strict separation of powers, characterized by the independence granted by the executive to the legislative and also by the cooperation forwarded among them by the Head of State: the presidential regime;
- flexible separation of powers, characterized by cooperation between the legislative and executive, the former being equipped with action and pressure: parliamentary regime;
- semi-presidential regime appeared as a result of combination of the first two systems, so both the legislative and the executive have bodies derived from the nation, equipped with direct legitimacy from the holder of sovereignty. This regime does not support the superiority of one power over the other, but most often it goes to the other extreme, promoting the Head of State, which is called to ensure the balance between powers, even though it is part of the executive power, therefore, most of the times, it becomes a presidential regime (Nedelcu, 2009, p. 53 and following).

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2. Regime of Strict Separation of Powers

The absolute or strict separation of the three powers often characterizes the presidential regimes. The Constitution decides the clear separation of powers. For a theoretical analysis of the system, the separation of the legislative and executive powers is particularly relevant. In presidential political systems, the interactions between the two governmental structures are fewer and less complex than the parliamentary political regimes. There is definitely cooperation between the executive and the Parliament, but it is limited and most often it is in favor of the executive (Ioan, 2008, p. 238 and following).

Nowadays, besides the US, whose presidential system was initially institutionalized and founded on constitutional doctrine, the Latin American and African states have also adopted this regime.

Generally, the presidential regimes are characterized by the following:

- the executive power is entrusted by Constitution to the president, who's given simultaneously large responsibilities in the general management of the State;
- the president is elected by universal, equal, direct and secret vote, for a time varying from one constitutional system to the other (4 years in the US, 7 years in Turkey, etc);
- from the representation point of view, the president election procedure is similar to the one related to the election of Parliament. Thus, the president and the Parliament have equal positions on nation's representation;
- the president may not dissolve the Parliament and the latter cannot call off or release the president. The impossibility of calling off the president's mandate does not set aside the possibility of charging the Head of State for specific actions according to certain procedures. Nevertheless, in the US for example, the president is given a legislative veto right;
- the ministers are not made liable for the governmental activity they develop before the Parliament.

The practice of the presidential system proved the capacity of the executive and legislative powers to cooperate, but the risks of conflict are numberless and there is no institutional way of solving such disputes, compared to the parliament regime.

3. Monocratic Executive

In this sense, it is said that the monocratic executive or monist regime represents reminiscence of the imperial antiquity and the monarchic absolutism, adapted to the constitutional rules. Thus, the issuance of the powers separation theory, first in England and then in France, initially led to the transformation of the absolute monarchy into limited monarchy, then to the discovery of the executive's forms subjected to the rules of parliament democracy. It is worth mentioning that, by passing from the absolute monarchy to the one limited by the Constitution, the monarch lost most of his liability omnipotence, being given the exclusive prosecution of his executive function, at rivalry with the legislative one, which he exercises together with the Parliament. This model is valid today in many states, but in certain cases, the roles of the monarch became almost formal.

The contemporary executive monocracy experiences the most severe expression of the State's powers separation in the presidential political regimes where the executive is reduced to the president of state or country who's responsible for the law application and enforcement.

The presidential system is not applied only in the northern half of the American continent. This presidential model extended towards the Latin-American and African states and recently, to Russia, after the Constitution has been adopted. It is noticeable that, in the states influenced by the American presidential system, the Government appeared adjacent to the president of the republic. Still, this institutional innovation has not altered the nature of the political regime due to the competences of the president related to the development and operation of this part of the executive. In most of these states, the American model has been altered, becoming a presidential political system (Iorgovan, 2001, p. 115 and following).

4. Dualist Executive

The dualist executive is first of all a structure of the parliamentary regimes where the executive function is granted to a person or a collegial body, with responsibilities that can be carried out quite independent; the person acts as head of state and the collegial body is called ministerial cabinet. By its nature, the dualist executive varies from one state to another and within the same state depending on the real nature of the report that exists between the head of state and the collegial body (Vedinaş, 2002, p. 101 and following).

Besides the harmonious cooperation and balance between the legislative and executive powers, the parliamentary system is characterized by:

- the election of the president of the republic by the Parliament. This characteristic is obvious only in republican forms of government;
- the political liability of the Government members and of the Government as a whole before the Parliament. The Parliament members are the ones electing the Government by a direct majority suffrage;
- the investiture of the head of state (monarch or president of the republic) with limited responsibilities on effective leadership. The head of state does not assume any political responsibility but can be sanctioned according to a special procedure, just for certain actions: capital treason, or violation of the Constitution and of the laws;
- constitutional prerogatives grant the executive certain conditions, expressly and limited stipulated by the fundamental law, to dissolve the Parliament. Nevertheless, the dissolution of Parliament is not a sanction applicable to Parliament, but a way of solving the conflict. In general, the politics actors, head of state, Parliament (chairmen of the two Chambers, leaders of the parliamentary groups), party chairs – have political and legal instruments to prevent social crisis and missions, conflict situations generated by inappetence or even refusal of one party to cooperate or try to find a constitutional solution to solve a particular problem. Ultimately, new general elections can be applied to form a new Parliament and a new governmental team.

In legal practices, there are different types of parliament regimes, more or less resembling to the original one. Referring to this diversity, Professor Charles Cadoux justly considers that the constitutional mechanisms, national traditions and the game of political parties explain the differences, often significant, within the Parliament operation (Negulescu. 1934).

By methodological simplification, one can identify three institutional possibilities to distort the classical model of parliament system:

- preponderance won by the Government through a long-lasting constitutional evolution compared to the Parliament. The characteristics of this "distortion" or the constitutional resort of the operation of such a regime consists in the government prerogative to organize beforehand parliamentary elections in case of disagreement with the parliament or impossibility to solve a problem of major interest. The new parliament, as well as the new government formed according to the results of the anticipated elections shall try to get out of the impossible situation that has blocked the previous political actors;
- preponderance of parliament over the executive.

In the French constitutional system, the parliament had a preponderant role compared to the executive power of the 3rd and 4th republic (1875-1958). This system is known, as mentioned above, as the "regime of assemblies". The reaction towards this model was very prompt, at least in the doctrine. Thus, it was delineated the theory of the „rationalized parliament", which tend to minimize and rationalize the responsibilities of the legislative forum and to re-balance the reports between the parliament and the executive;

- strengthen the prerogatives of the head of state. This deformation of the theoretical parliamentary model is generated by the intention of the head of state to overcome its

conditions of constitutional body lacking effective power and practically politically irresponsible. Consequently, he is ascribed legal and political instruments through which the Head of State can impose its will before the parliament. He continues to be politically irresponsible but ceases to be a constitutional decoration piece.

Professor Charles Cadoux identifies three ways of accomplishing a preponderance of the head of state:

- establish a double responsibility of the government towards the parliament and towards the head of state who is however subordinated to the legislative power;
- maintain the responsibility of the government towards the parliament together with the Head of State's investiture with real powers by universal and direct suffrage. The Head of State has special power, enjoys the national privilege and is the moderator between all the other political actors. As doctrine, many actors have called this system "presidential regime" and "rationalized presidentialism". It is considered that it was the present French constitutional system that implemented it;
- the head of state assumes the duty of a premier (monocephalic executive), but is subjected to a political control performed by the parliament. This system characterizes certain African constitutional regimes which tend towards a presidential political system.

The theory of separation of powers in state has revolutionized political thought and practice of world states at the end of the eighteenth century and generated a process of constitutional renewal in Europe and North America, because it offeres an alternative to absolutist government and a bulwark against government tyranny.

During the two centuries of applying the theory of separation of powers it took different forms in each regime. Basically, two states meet the practical aspects of separation and distribution functions (powers) legislative, executive and judicial branches have an identical form.

Even within the same state, in an evolving history more or less long, they found changes in the ratio of power for the benefit of either of them, although constitutional provisions governing the distribution of power attributes remain unchanged.

Contemporary expression of monocratic executive knows is the rigid form of separation of powers in presidential regimes. In these regimes, the executive is reduced to the president of the country, which is responsible for implementation or enforcement of the law, and on the other hand dualist executive nuances from state to state and in the same state, depending on the specific nature of the relationship between president and collegial body. Parliamentary regimes are, essentially, dualistic, they have a head of state, appointed by parliament, and a government that is headed to a prime minister who acts as chief executive. The position of president, appointed by parliament, is twisted by the role of political parties in his appointment as the head of the Government is subject to rules of parliamentary majority.

5. Bibliography

Alexandru, Ioan (2008). *Tratat de administraţie publică/Treaty of public administration.* Bucharest: Universul Juridic.

Alexandru, Ioan (2007). *Dreptul adminsitrativ al Uniunii Europene*/*Administrative Law in the European Union*. Bucharest: Lumina Lex.

Bălan, Emil (1997). Prefectul *si prefectura în sistemul administratiei publice*/*Prefect and prefecture government system*. Bucharest: House of Tomorrow Foundation Romania.

Dănişor, Dan-Claudiu (2007). *Tratat de drept constituţional/Constitutional Law. Treaty*. Craiova: Sitech.

Vedinaş, V. (2006). *Drept adminsitrativ*/*Administrative Law*. Bucharest: Universul Juridic.

Vedinaş, V. (2009). *Statutul Functionarilor Publici*/*Status of civil servants*. Bucharest: Universul Juridic.

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State Structure and Political Regime Structure

Paul – Iulian Nedelcu[1]

Abstract: The political regime is the concrete form of organization and functioning of political system and therefore, the regime means the concrete way of organize, institutionalize and function a political system and of the exercise of political power by a social-political force in a social community or global social istem. The political regime is not limited to institutions and state bodies, but it covers the entire political system. Form of expression in social practice plan is the result of balance of forces between classes of citizens, organizations, between them and civil society and politics.Designates the concrete form of government formation and organization, of state bodies, in aspect of their characteristics and principles, the relations between them and other state bodies, and also as the relationship between them and other institutionalized forms of political systems. Instead, the political regime is an explicit realization of axiological operations, a specific hierarchy of values, in general and political values, in particular. Even if some elements of the political regime overlap to some extent and in some respects, those of form or structure of guvernamnt state, thus they dissolve his identity, distinct quality of being specific traits of the political regime.

Keywords: public administration; ministries; government; authorities of public administration

1. Introduction

The State, whose birth is determined by historical circumstances, is, first of all, an idea, a product of human intelligence.

Regulator of the political struggle, the State has to ensure a homogenous base which situates it above all divergent social interests. The liberal state, the state of the unique party or the pluralist state have tried, each in its manner, to answer to this requirement.

The fundamental elements inherent to the existence of a state are: the territory, the population, the power of the sovereign policy.

Constitutionally, the territory is interesting first of all as structure of state, component of the form of state, alongside with the form of government and political regime.

The state structure is object of study both for international law and for the constitutional law. This fact is explained through the complexity of the problematic and, of course, through its political, juridical and scientific involvements.

The state structure has been defined in the doctrine as being the organization of the state power in certain spatial limits, meaning on a certain territory, designing the specific relations established among the elements which compose the state assembly, as well as the specific relations between "whole" and "components" (Ioan & Ivanoff, & Gilia. 2008, p.38-58.). From the state structure point of view, the states can be divided into unitary states and federal states.

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2. Organizational Structures in Public Administration

As consequence of those showed previously, it must be emphasized the fact that, from the judicial point of view, the public administration is an activity or group of bodies endowed with certain competency which carry out a certain activity.

As it has also been shown in the specialty literature (Negoiţă, 1993. p.60;), by system of public administration is understood the totality of bodies which carry out public administration, understood as activity of organization of execution and the concrete execution of law, bodies among which exist relations through which is assured the functioning of the system. We consider that, within the context of the social-political reality in a contemporary democratic state where acts the principle of local autonomy, graded by the principle of administrative control, the principle of administrative decentralization, as compared to the principle of legality and the principle of supremacy of Constitution, there is not indicated to use the expression "the system" of public administration, the happiest expression being the ensemble of organizational structures or the ensemble of administrative bodies.

The bodies of public administration are those bodies of the state or bodies existent at the level of administrative – territorial units (commune, town/municipality, county) which carry out an activity of organizing the execution and the concrete execution of laws and other judicial acts having a regulatory character.

The bodies of public administration act whether directly based on law, through individual judicial acts and material facts, whether through regulatory acts which they are competent to issue based on and executing the law.

Moreover, the bodies of public administration materialize their activity in several categories of judicial acts, appreciated by the majority of authors from a dichotomous perspective. Thus, some authors consider that judicial documents adopted by public administration may be administrative documents and contractual documents.

Other authors consider that administrative authorities may adopt: actual administrative documents, unilateral administrative documents which do not carry out the state power and contractual judicial documents.

Regarding the judicial regime of administrative law, two interpretations delineated: a dichotomous interpretation and a trichotomous interpretation. Regardless the manner in which is seen the activity of public administration bodies, to this is applied the judicial regime of administrative law as component of public law, because only in this way can be assured the coherence of the activity and the functionality of the ensemble of public administration bodies.

Among the public administration bodies there are relations of hierarchic subordination or relation of collaboration.

In compliance with the constitutional provisions, the system of public administration comprises:

I. Central administration: *Supreme bodies of public administration: President of Romania and Government; Specialty central bodies: ministries and bodies subordinated to the Government, autonomous authorities, respectively; Central institutions subordinated to ministries or autonomous authorities.*

II. State administration in the territory: *The Prefect; The administrative commission (or directors' board); The services of ministries and other central bodies.*

III. Local administration: The local Council and the mayor,The County Council

Practically, it can be asserted that one of the means through which the public administration effectively carry out the functions is the improvement of the administrative – territorial structure.

As for the functional criterion also named the criterion of material competency, this allows the division of the authorities of public administration in authorities with general competences and authorities of public administration with specialty competency.

Based on this criterion is carried out the functional structure of public administration.

On the other hand, based on the provisions of Constitution, in compliance with the principle of separation of powers, the system of public administration is in fact a subsystem of the system of public authorities.

In the doctrine (Ioan, 2008, p.238) has also been proposed a detailed organizational chart of the system of public administration, seen as a subsystem of the system of public authorities in Romania.

Regardless of the scheme which would be analyzed, it may be noticed that, depending on the territorial criterion, there exist central authorities (Government, ministries and other central bodies of public administration), whose competency extends to the whole territory of the country, territorial authorities (decentralised public services of ministries and other central bodies) whose competency extends to one part of the national authorities and local authorities, whose competency refers to a single administrative – territorial unit (communal, town, municipal, county local councils), and from the point of view of functional criterion there can be delimited authorities with general competency, which exercise the executive power in any fields of activity (Government, local councils and town halls) and authorities of specialty public administration, which carry out the executive power in a certain branch or field of activity (it is the case of ministries and other specialty central bodies of public administration as well as their decentralised public services).

There is essential to make some considerations regarding concrete components of the system of administration bodies in our country.

The Government is the central body of executive power which organizes the carrying out of public administration on the whole territory of the country and in all fields of activity. The Government is formed of: the Prime Minister, State ministers, ministers and State secretaries. The Prime Minister is appointed by the President of Romania, and the composition of the Government is approved at the proposal of the Prime Minister by the Chamber of Deputies and Senate. The Government carries out its competences through the deliberative activity, adopting decisions and regulations.

In order to adopt the decisions and regulations, the law requires the consent of the Prime Minister and open vote of simple majority of Government's members. The regulations are issued only under the conditions in which the special law stipulates this and only relating to the application of this law. In order to solve emergency problems, the Government establishes an executive body formed of the Prime Minister, the Minister of Interior, ministers of State, the Minister of National Defence, the Minister of Finance and the Minister of Justice.

Near the Prime Minister functions a Council of reform, public relations and information, a Cabinet of the Prime Minister and his/her counsellors. In order to carry out the tasks which go to the Government operates a General Secretariat administered by the General Secretary of the Government, General Secretary who is nominated by the Prime Minister.

The General Secretariat if formed of officers who carry out legal activities of training and implementation of the Government's decisions.

The Prime Minister represents the Government in the relations with the Parliament, the President, the Supreme Court of Justice, the General Public Prosecutor, the parties and political formations and other organizations of national interest and in international relations. The ministries are central bodies of the executive power which manage and coordinate public administration in different fields of activity.

Ministries carry out the service of management and organization under the conditions stipulated by law according to each fields. They are managed by ministers, who are helped by State secretaries and sub-secretaries nominated by the Government, appointed by the Prime Minister and approved by the Parliament.

In the specialty literature, from the point of view of forms of government, we talk about monarchies and republics.

The monarchy is that form of reign where the body which functions as head of the state is transmitted, usually, hereditary, and exceptionally the occupant is chosen for life.

Within the form of government as republic, the function of head of the State is fulfilled by an authority which can have either an impersonal or collegial character. As the head of State is chosen for a determinate period, we will be in the presence of a republican form of government, regardless the composition of this authority.

In the specialty judicial literature some authors, when defining the notions of monarchy and republic, are guiding after the meaning which is given to them in the people's political practice and do not proceed in compliance with subjective reasons.

Thus, Léon Duguit asserts that election is in all cases a criterion of the republic form of government. Therefore, in his opinion, even if the head of the State is chosen for life, there should be considered as form of the State the Republic. Instead, Jean Dabin, starting from the idea that when forms of government are researched, the problem is not in finding historical forms, which are always changing, but in finding logical forms, he thinks that anytime a single person governs, regardless the way in which is designated, we talk about monarchy, while during governors are a few, we have an aristocracy, and when the majority governs we have a democracy.

In conclusion, we may say that the concept of form of government designates the way of using and organizing the State's bodies, as well as the principles which lay as fundaments in the relations between them, especially between the legislative body and the executive bodies, including the head of the State. The form of government is determined in the manner in which are appointed the agents of this power and the way in which they exercise it (Burdeau. 1988. p. 165 – 166. At the same time, must be taken into account the economical and social structure o f that State, the principles which are at the bases of organization and functioning of the power, its objectives and forces, the manner in which the society reflects in the power and the style the governors impress)

3. Bibliography

Alexandru, Ioan (2008). *Tratat de administraţie publică*/*Treaty of public administration.*Bucharest: Universul Juridic.

Iorgovan, Antonie (2001). *Treaty of administrative law* 3rd edition. Bucharest: All Beck.

Dănişor, Dan-Claudiu (2003). *Actorii vieţii politice*/*Actors of political life*.Craiova: Sitech.

Apostol-Tofan, Dana (2003). *Drept administrativ*/*Administrative law*. Bucharest: All Beck.

Bălan, Emil (1998). *Domeniul Administrativ/Administrative Domain*. Bucharest: Lumina Lex.

Muraru, Ion (1993). *Drept constituţional şi instituţii politice /Constitutional law and political institution.* Bucharest: Actami.

Nedelcu, Iulian & Nicu, A. L. (2004). *Drept administrativ/Administrative law*. Craiova: Themis.

Popa, N.; Dogaru, I.; Dănişor, Gh. & Dănişor, Dan-Claudiu (2002). *Filosofia Dreptului Marile Curente/Philosophy of law. Main trends.* Bucharest: All Beck.

Vedinaş, V. (2002). *Drept administrativ şi instituţii politic-administrative*/*Administrative law and political-administrative institutions*. Bucharest: Lumina Lex.

Vida, Ion, (1994). *Puterea executivă şi administraţia publică/Executive power and public administration*. Bucharest: R.A. The Official Journal.

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The Responsibility of Subjects Implicated in the Adoption of Unconstitutional Norms in Romania

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Abstract: The purpose of the present paper is to analyze certain aspects regarding the responsibility of actors involved in the enactment activity, with an emphasis on the case of adopting unconstitutional norms. This subject was chosen starting from the situations occurring in practice following the creation of legal rights through judicial norms, subsequently declared as being unconstitutional. The analysis of the existent judicial frame in this matter leads to the conclusion that the judicial commitment of the actors involved in the enactment process cannot be involved, with the exception of the personnel of the Legislative Council and the Government. Practically, there is no specific sanction for these situations. Our conclusion is that in such situations, the Romanian legislation does not protect the citizen against the results generated by the defective practice in the enactment activity. In consequence, we have formulated propositions de lege ferenda.

Keywords: responsibility; judicial liability; enactment; malpractice; unconstitutional judicial norms

1. Introduction

The restoration of the state of law in Romania gave a new dimension to the principle of legality. According to the provisions of the Romanian Constitution "the respect of the Constitution, its supremacy and laws it is mandatory"[2] which means that the social and judicial mechanisms of the democratic state have to allow being a reality and not a simple statement or a sterile judicial regulation. The fundamental change produced at the level of the mind of each individual, following the restoration of the state of law in Romania should be the replacement of the concept that the legislation has to be respected by fear with the concept that the legislation is a means of protection of the citizen as person and of the environment he lives in- with its natural component and the social realities in which the lives- and as a consequence, has to respect the legislation if he wishes for a better life. In order that such a line of thought to become part of our subconscious, it is necessary for all of us to feel that the authorities, which offer content to the norms composing our legislation, act with maximum professionalism and maximum responsibility, to feel that in the judicial norms are consecrated those values that are real fundaments for the collectivity.

We proposed an analysis of the aspects regarding the responsibility of the actors involved in the enactment process, with an emphasis on the situation of the adoption of unconstitutional norms. We chose this subject starting from the situations that appeared in practice after the creation of some legal rights through the judicial norms subsequently declared as being

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[2] Article 1, par. 5, Romanian Constitution, republished in the Official Monitor, no. 767 on October 31st, 2003.

2. Problem Statement

In practice, some litigious situations appeared when, following the emergency of a legal right, it was necessary to promote some judicial actions for the exploitation of that right. Sometimes the judicial norm that consecrated the legal right- comprised in laws or emergency ordinances of the Government- was declared unconstitutional.

Unfortunately, the level of professionalism of the actors involved in the enactment process or their good faith are denied by the decisions of the Romanian Constitutional Court which declares some regulations as being unconstitutional. By statistically analyzing the jurisprudence of the Romanian Constitutional Court[1] we notice that beginning with 1993, between 9 and 35 exceptions of unconstitutionality were admitted, out of which the majority have resulted from subsequent control, namely 26. In the past 20 years, following the posterior control, the Constitutional Court has observed that at least 3 judicial norms (in 2005) of the Romanian legislation were in contradiction with the provisions of the Romanian Constitution, if we admit that a decision declares as being unconstitutional only one judicial norm.

By analyzing the content of the decisions of admission for the same period of time, we observe that beginning with 1998, the Court admitted also a significant number of exceptions of unconstitutionality regarding judicial norms adopted by the Government in the virtue of the government prerogative "legislative delegation". Even if out of the very large number of exceptions of unconstitutionality that reach the Constitutional Court a small very small number are admitted, the question marks regarding the quality of the performance of the actors involved in the enactment activity still remain. Practically, the decisions of admittance of the exceptions of unconstitutionality only give us a clue regarding the fact that there are unconstitutional judicial norms, fact which we can find not because the Legislative Council would signal it, but because a subject of law has the legal right to refer the Constitutional Court had the initiative to refer to the Court, for one reason or another. We do not know how many unconstitutional norms are still pending. We will mention the example that determined the present study. Thus, the Romanian legislative adopted Law 221/ 2009 regarding the political convictions and the administrative measures assimilated to them issued between March 6 1945 and December 22 1989[2]. Through this normative act, the legislator defined "the political conviction" and "administrative measures assimilated to it" disposed during the communist regime in Romania and consecrated the legal right of any person, their descendants, of any legal or private person interested and the prosecutor's office[3] of the court within the person's jurisdiction to dispute the political character of the conviction. Also, through article 5, paragraph 1 of the same Law it has been established that "(1) Any person with political convictions between March 6, 1945 and December 22, 1989 or any person representing the object of administrative measures with political character as well as, after the decease of that person, their descendants up to the second degree, can require the instance, within 3 years from the entering in force of the resent law, to oblige the state: a) to grant damages for the moral prejudice suffered as a consequence of the conviction (…); b) to grant damages representing the equivalent of the goods confiscated through conviction or as an effect of the administrative measure, if the goods haven't been reimbursed or the person did not receive equivalent reimbursements under the provisions of Law 10/2001 regarding the judicial statute of some buildings abusively taken between March 6, 1945 and December 22, 1989, republished, with the subsequent amendments and completions or Law 247/2005 on the reform in property and justice, as well as several adjacent measures, with subsequent amendments and completions; c) to restore rights, in the cases in which the decision leading to the conviction included the incapacitation or military degradation". According to the mentioned paragraph 2, article 5 the judicial rulings "issued in the virtue of paragraph 1, a) and b) are applied by the Ministry of Public Finances through the general directorates of county public finances, respectively Bucharest". As a consequence of the emergency of the legal right to benefit from damages for the

[1] See Annex 1 at the present study, being based on the information on the website http://www.ccr.ro, accessed on March 12, 2012.
[2] Published in the Official Monitor, Part I, no.396 on June 11, 2009.
[3] Article 4, paragraph 1, Law 221/ 2009.

moral prejudice, damages representing the equivalent of the value of the confiscated goods by conviction or as an effect of the administrative measure and restoration of rights, in case in which the decision of conviction disposed the incapacitation or military degradation, judicial actions were promoted for the exploitation of that right. When the Constitutional Court declared the regulation creating the right to damages for moral prejudice as being unconstitutional, the procedural undertaking could have been listed in one of the three cases: a) the court definitively and irrevocably admitted the request, the right being recognized and awaiting exploitation; b) the request has been admitted by the instance, the litigation is pending for the ruling of an appeal, the decision of the Constitutional Court having effects on the solution issued by the court judging the appeal; c) the action is pending and in this case the Constitutional Court will produce effects on the solution. Consequently, a non uniform and discriminatory practice is created regarding the people that benefited from the judicial norm that was after declared as being unconstitutional. Therefore, the persons that promoted judicial actions but did not obtain a definitive and irrevocable solution will not be able to exploit the right which led to the question we are trying to answer through this undertaking. To such a question we assert that an answer must be given, especially for the cases in which the judicial norm would produce effects for a sufficiently long time for the deployment of a complete procedural complex (issuance of a definitive and irrevocable judicial decision).

3. Concept and Terms

The concept of responsibility refers to the capacity of a subject of law to admit the consequences of the conduct adopted thus the facts and inactions. The judicial liability is concrete and consists in the consequence- from a sanction point of view- of adopting a certain conduct by a subject of the law, conduct that breaches those enlisted in the judicial norm. The judicial liability is materialized in a sanction, while the responsibility is only a theoretical concept. (Nicu, 2007, p.318).

4. Solution Approach

In the analysis of the Romanian legislative frame regarding the enactment, we start from the provisions in the Romanian Constitution in the form revised in 2003. In the articles 74 to 78 it is stated who does the legislative initiative belong to, which are the fundamental aspects related to the debate of the bills, adoption of laws, their promulgation and their entering into force but in paragraph 1, article 72 the constituent legislator stated: “Deputies and senators cannot be judicially liable for their votes or for their political opinions expressed in exerting their mandate”. Since the adoption of the laws is made by vote, the formulation of amendments for the texts of the laws, their support or rejection is made through the expression of opinions at the Parliament tribune in exerting the mandate of parliament member and their adoption or rejection is made through vote, it clearly results that the deputies and senators have a moral responsibility, as article 72, paragraph 1 in the Constitution interdicts the liability of the members of the parliament for the “ votes or political opinions expressed in exerting their mandate” this being the first component of what in the Fundamental law is called “parliamentary immunity”.

We continue the analysis with the provisions of Law 73 on November 3, 1993 for the establishment, organization and functioning of the Legislative Council, republished, correlated with the provisions in article 79 in the Constitution, which states that: “The Legislative Council is a special consultative organism for the Parliament, which approves the drafts of normative acts in order for the entire legislation to be systematized, unified and coordinated. The Council keeps the official record of the Romanian legislation”. In article 2, paragraph 1.a) and b) it is stated that “Article 2 (1) of the Legislative Council has the following attributions: a) analyses and approves the drafts of law, legislative proposals and ordinance and decision projects with normative character of the Government, in order to bring them to enactment and approval, depending on the case; b) analyses and approves, upon the request of the President of the parliament commission, the amendments before the

commission and the drafts of law or legislative proposals received by the commission after their adoption by one of the Parliament Chambers" and in paragraph e) "it examines the conformity of the legislation with the provisions and principles of the Constitution and apprises the permanent offices of the Parliament Chambers and, in some cases the Government, on the cases of unconstitutionality; it presents, in maximum 12 months from establishment, proposals for the compliance of the legislation prior to the Constitution with its provisions and principles". These mentions underline the fact that at the Constitutional Court, all the exceptions should be rejected as not being grounded if the Legislative Council would exert their attributions in a correct manner. The fact that there are decisions of admittance of the exceptions of unconstitutionality indicated that there are acts of un-thoroughness in many of the current activities of the Legislative Council. If in what concerns the members of the parliament the immunity makes impossible the judicial liability, in what concerns the members of the Legislative Council, article 23 in Law 73 on November 3, 1993 on the establishment, organization and functioning of the Legislative Council, republished, states that "Article 23 (1) The breach of the provisions in the present law and the dispositions of the organization and functioning regulation of the legislative attracts the liability of those guilty and the application of the disciplinary sanctions provisioned by law for the public servants. (2) The president of the Legislative Council and the section presidents are investigated for the disciplinary misconducts by the joined judicial commissions of the two Chambers and the disciplinary sanctions are applied by the permanents offices of the Senate and Chamber of Deputies. (3) The execution specialized personnel is investigated for the disciplinary misconducts by the Commission of appointments and discipline of the Legislative Council and the sanctions are applied by the president of the Legislative Council, under the provisions of the law and of the organization and functioning regulation". In article 25 of the same normative act it is stated that the statute of the public servants in the specialized structures of the Legislative Council is approved by special law. Therefore it is possible to ensure the quality of the judicial norms if this link involved in the enactment activity is actively involved and rigorously fulfills its attributions. As long as there are decisions of the Constitutional court admitting exceptions of unconstitutionality it means that there are cases of the Legislative Council not fulfilling its attributions but also the judicial commissions of the two chambers not fulfilling these attributions, respectively the permanent offices of the Senate and chamber of Deputies.

Another actor involved in the process of enactment is the President of Romania who, according to the provisions of article 80, paragraph (2) in the Constitution "watches over the compliance with the Constitution and the good functioning of the public authority". When an exception of unconstitutionality is admitted, the President can call the Legislative Council and the Presidents of the two Chambers for discussions in order to analyze together the cause that determined the enactment in disagreement with the provisions of the Constitution or can request information from the two institutions regarding this aspect and depending on the conclusion of this information, can request the engage of liability for the culpable ones. What happens if the President does not take action against the existence of unconstitutional regulations that had effects for a period of time and their unconstitutionality was observed afterwards? Article 96 in the Constitution regulates incrimination only for high treason and article 95 of the fundamental law states that "in case of committing serious acts that breach the provisions of the Constitution, the President of Romania can be suspended from function by the Senate and the Deputies Chamber, in joint session, with the majority vote of the deputies and senators, after the consultation of the Constitutional court". There is no legal ground that would lead to the conclusion that between the obligation "to watch over the compliance with the Constitution and good functioning of the public authorities" and "committing serious acts that breach the provisions of the Constitution" would exist a relation of determination namely not investigating which is the cause of the existence of unconstitutional regulations could determine the sanctioning of the President. Although the fact that a number of citizens enter in judicial relations regulated by norms that breach the Constitution is serious, affecting a number of Romanian citizens, it is not accepted that the procedural costs determined by its suspension will be supported as long as the regulation does not harm the legal rights or legitimate interests of the majority of the Romanian citizens.

The Romanian Government, in the virtue of article 115 of the Constitution- Legislative Delegation- can issue ordinances, based on an empowerment law, in areas that are not part of the organic laws. The empowerment law mentions the domain and date the ordinances can be issued. Also, the Government can issue emergency ordinances but only in extraordinary cases in which the regulation cannot be postponed, with the obligation to motivate the emergency in their content. Therefore, the Government is another important actor involved in the enactment activity. In what concerns the judicial liability, article 2 in Law on the ministerial liability no.115/1999 republished stipulates only a political liability towards the Parliament, following the vote of confidence granted by it on the appointment and a political liability of each member of the Government in cohesion with the other members for the activity of the Government and for its actions.

Article 5 of the same normative act stipulates that "besides the political liability, the members of the Government can answer from a civil, contravention, disciplinary or criminal perspective, according to the common law in these matters, to the extent in which the present law comprises derogatory dispositions" but obviously individually and not the Government on the whole.

In the Law of administrative contentious no.554/2004, in article 9 (1) it is stipulated that "the person who's right or legitimate interest was breached through ordinances or ordinance dispositions can submit an action with the court of administrative contentious, accompanied by the exception of unconstitutionality, as far as the main object is not the finding of the unconstitutionality of the ordinance or the disposition in the ordinance" and paragraph (5) stipulates that "The action provisioned by the present article can have as object granting damages for the prejudice caused by the Government ordinances, the annulment of the administrative acts issued based on them and, in some cases, the request that a public authority to issue an administrative act or perform a certain administrative operation". Regarding this regulation, a few observations are imposed, demonstrating the necessity of improving the regulation that is not sufficiently precise, having the role of notifying the institution of a procedural means rather than the actual institution of that procedure. The first observation is that the "solution promoted by the new law regarding the actions against the ordinances of the Government is a new solution, unprecedented and it follows the creation of the possibility of the person aggrieved by Government ordinances to begin a litigation at the court of administrative contentious that would allow the elimination of the exception of unconstitutionality, in the cases in which the Court hasn't ruled on the ordinances and dispositions considered detrimental" (Tofan, 2005, p.90-103).

Another observation is that "this article can be criticized from many perspectives. First, it doesn't regard the fact that, in practice, the Government sometimes issued individual ordinances. These individual ordinances cannot be assimilated to legislative acts and, consequently, they are not susceptible of being attacked at the Constitutional Court using the exception of unconstitutionality. In consequence, they can be annulled for being illegal in any court of administrative contentious without being necessary for them to be declared as being unconstitutional by the Constitutional court and the court of common law will be able to eliminate them from the solution of the process using the exception of illegality". (Drăganu, 2004, pp. 57-65). Also, it has been voiced that "the unconstitutionality of the ordinance or some dispositions in it cannot be automatically and integrally grounds for liability but rather the element around which the problematic of the damages will be linked to, according to all the rules of liability: direct damage, existence and spread of the direct prejudice, the cause etc. It is the reason for which article 9 (3) stipulates that at the court of administrative contentious the cause is to be resumed after the ordinance or dispositions in the ordinance are declared as being unconstitutional case in which, starting from the new normative reality thus constituted, the process follows its natural course with the administration of evidence in order to prove the damage, the spread of the prejudice, with the finality of the liability of the issuer. But since in the in the text philosophy the simple declaration of unconstitutionality cannot be equivalent with the presumption of individual direct prejudice, as the two thesis are joined in the idea of cumulatively fulfillment for the existence of the issuer's liability, it is obvious that the instance of administrative contentious will be able to reject a certain action if, for example, the administrative evidence doesn't

indicate a prejudice or if between the application of the unconstitutional texts and the existing and demonstrated prejudice a relation of cause. In practice it will remain as an issue of "weighing" by the judge and the hypothesis of establishing to what extent the application of the unconstitutional dispositions in the ordinance is the cause of the prejudice so that, unlike the classic illicit fact which generates a prejudice, this issue might impose more complex approaches in certain situations" (Scutea & Popa, 2006, pp. 84-101).

In what concerns the Romanian Constitutional Court, according to the provisions in article 146 from the Constitution, among its attributions it is comprised: "a) decided upon the constitutionality of the laws, before promulgating them, at the notification of the President of Romania, one of the presidents of the two chambers, the government, the Hugh court of cassation and justice, the Ombudsman, a number of at least 50 deputies or at least 25 senators, as well as ex officio, on the initiatives of reviewing the Constitution; b) decides upon the constitutionality of the treaties or other international agreements, upon the notification from one of the two presidents of the chambers, at least 50 deputies or at least 25 senators; c) decided upon the constitutionality of the Parliament's regulations, at the notification of one of the two presidents of the two chambers, a parliament group or at least 50 deputies or at least 25 senators; d) decides upon the exceptions of unconstitutionality regarding the laws and ordinances, brought to the judicial courts or commercial arbitrary courts".

According to the provisions of article 147 (4), the decisions of the Constitutional Court are published in the Official Monitor of Romania, from the date of publishing the decisions have mandatory character and have power only for the future. It results therefore in a discriminatory treatment between the subjects of the judicial reports constituted and finalized before the adoption of the decision of the Constitutional Court and the ones participating in the judicial relations still ongoing at the moment of the adoption of the decision. If the regulation would conclude that the dispositions of the decision have also retroactive effects, a higher concern for the quality of the regulation will be noticed. According to the provisions in article 2, Law 47/1992 republished, on the organization and functioning of the Constitutional Court, republished, the Constitutional Court decides only on the constitutionality of acts upon which it was apprised without being able to modify or complete the provisions under control and the article 61, paragraphs (1) and (2) stipulates that the "judges of the constitutional court are independents in exerting their attributions and are immovable during their mandate. (2) The judges of the constitutional court cannot be held accountable from judicial perspective for their opinions and votes expressed when adopting the solutions".

5. Analysis of Results and Conclusions

In conclusion, from the interpretation of the regulations it results that except for the Government – in case of the simple and emergency ordinances- and the personnel of the Legislative Council, no other actor involved in the enactment process can be held accountable for the poor quality of the regulations but in the case of the Legislative Council, the citizen is not the one that can determine the liability.

The judicial courts, if they would be appraised by a citizen who, following the decision, would oblige the Parliament, President of Romania or the Legislative Council to damages following the breach of a legitimate right or a legitimate interest or because he was materially prejudices, by declaring a judicial norm as unconstitutional, the court would have nothing to analyze because the Parliament and President of Romania do not have passive procedural quality in relation to the quality of judicial norms and the Legislative Council does not have judicial personality, therefore cannot be placed in justice on its own behalf. In consequence, if the judicial norms in the laws are declared as being unconstitutional no one can be called to justice for damages, although in article 147 in the Constitution the effects of the decisions taken by the Constitutional Court of admitting exceptions of unconstitutionality are the same for the norms comprised in laws and for the norms comprised in ordinances.

In what concerns the notice of the Legislative Council, according to the provisions of article 3, paragraph (3) in Law no.73/1993 "the notice is consultative and has as object: a) accordance of the proposed regulation with the Constitution, with the frame laws in that domain, with the regulations of the European Union and with the international acts Romania is part of and in case of the drafts of law and legislative proposals, the nature of the law and what is the first chamber that will be appraised; b) ensuring the correctitude and clarity of the judicial language, eliminating the contradictions or inconsistencies within the draft of the normative act, ensuring the complete character of its provisions, respect of the norms of legislative technique as well as the normative language; c) presentation of the implications of the new regulation in relation to the legislation in force by identifying the legal dispositions which, having the same object of regulation, would be abrogated, modified or unified, as well as avoiding to regulate identical aspects in different normative acts".

Regarding the drafts of ordinance and normative decisions, article 4 in the same normative act stipulates that they "are to be adopted by the Government only with the notification of the Legislative Council regarding the legality of the measures stipulated and the way in which the requirements mentioned in article 3, paragraph (3) are accomplished and applied correspondingly" the notification having consultative character.

In conclusion, in our opinion, the improvement of article 3, paragraph 3 and article 4, paragraph 2 in Law 73/1993, republished, namely by transforming the notification with consultative character in notification with imperative character, in stating the consequence of the existence of negative measures in the notification, meaning that the text needs to be reformulated so that the inconsistencies signaled by the Legislative Council are eliminated.

We assert as being viable also the option of introducing in the law a new article that would stipulate that in case the Legislative Council criticizes and signals the inconsistencies between certain texts in a draft of law and the constitutional norms, the law will be transmitted to the Constitutional Court for prior control before promulgation, together with the notification given by the Legislative Council. In what concerns the inconsistency of certain texts in a draft of ordinance or emergency ordinance with the constitutional norms, we assert that the only possible option is the imperative character of the notification given by the Legislative Council.

De lege ferenda we assert as being necessary also the review of the Constitution, namely the reformulation of paragraph (1) in article 72 as follows "(1) The deputies and senators cannot be held judicially accountable for the votes or political opinions expressed in exerting their mandate, except for the cases of adopting regulations that are contrary to the Constitution, case in which their civil liability can be involved" and in article 80, the text of paragraph (2) would have to stipulate that "(2) The President of Romania supervises the respect of the Constitution and the good functioning of the public authorities, his civil liability being involved for the promulgation of laws that contain unconstitutional regulations. To this end, the President exerts the role of mediator between the powers of the state as well as between the state and the society".

Annex 1: Evolution of the number of decisions of admittance of the exceptions of unconstitutionality by the Constitutional Court of Romania between 1992 and November 19, 2011

YEAR	Total number of decisions of admittance	Number of decisions of admittance within the previous control (Number of the decision)	Number of decisions of admittance within the subsequent control (Number of the decision)	Mixed decisions (with interpretation reserves) (Number of the decision)	Number of decisions of admittance within the control of the Parliament Regulations (Number of the decision)
1992	2	2 (4;6)	0	0	0
1993	13	2 (6; 34)	10 (1;22;31;32;33;35;38;49;60;65;)	1 (1)	0
1994	29	5 (47; 48;49;75;139)	18 (3;9;11;18;24;32;52;56;59;60;64;72;81;99;114;128;131;137)	2 (1;2)	4 (45;46; 65;87)
1995	18	7 (19;44;45;62;72; 73;124)	8 (1;10;66;81;90;91;101;128)	3 (1;2;3)	0
1996	17	6 (6;35;36;85;93; 122)	11 (2;25;64;65;69;71;73;91;96;121; 129)	0	0
1997	11	1 (392)	10 (82;97;105;214;279;342;463;482; 486;546)	0	0
1998	21	1 (34)	19 (3;22;25;30;45;66;73;81;83;97;101; 106;107;108;110;111;112;177;184)	0	1 (95)
1999	19	1 (70)	18 (5;11;24;28;29;47;72;80;85;87;88; 89;90;143;150;160;165;234)	0	0
2000	14	1 (20)	13 (9;10;15;50;54;55;56;145;147;191; 208;225)	0	0
2001	18	2 (98;104)	16 (70;82;101;106;136;148;171;176; 193;253;255;277;303;322;348;349)	0	0
2002	9	1 (192)	8 (7;98;223;259;294;308;312;333)	0	0
2003	14	2 (148;300)	12 (67;86;89;127;176;187;193;217; 233;259;388;463)	0	0
2004	9	1 (196)	8 (39;40;100;194;293;408;433;482)	0	0
2005	12	6 (217;235;255;375; 418;600)	3 (90;176;568)	0	3 (62;601;602)
2006	15	3 (95;279;545)	11 (189;258;277;345;384;513;544;567; 647;866;953)	0	1 (317)
2007	35	10 (16;147;230;355; 421;666;970;971; 972;1177)	23 (61;62;65;227;228;264;347;392; 610;660;661;665;69;797;870;87; 969;1058;1059;1086;1133;1137; 1219)	0	2 (148;266)
2008	35	6 (38:453;472;857; 1029;1218)	27 (51;66;190;369;467;569;602;603; 604;737;742;755;818;819;820;82; 823;830;884;997;1055;1150;1221; 1325;1345;1352;1354)	0	2 (989;990)
2009	35	8 (54;55;710;1008; 1039;1257;1557; 1636)	26 (82;104;185;303;365;458;599;605; 652;731;732;778;783;784;785;842; 859;913;923;983;984;989;1037; 1258;1555;1629)	0	1 (1558)
2010	24	6 (414;820;872;873; 874;1018)	18 (109;269;415;503;570;571;694;723; 903;984;1202;1276;1354;1358; 1360;1394;1609;1614)	0	0
2011	8	1 (799)	7 (223;302;335;536;573;670;766)	0	0
General total	358	72	266	6	14

References

Apostol Tofan, D. (2005). *Modificările esenţiale aduse instituţiei contenciosului administrativ prin noua lege cadru în materie (I)/ Essential amendments brought to the institution of administrative contentious through the new frame law in the matter (I) in the Judicial courier magazine* no.3/ 2005, pp. 90-103

Drăganu, T. (2004). *Câteva reflecţii pe marginea recentului Proiect de Lege a contenciosului administrativ/ A few reflections on the recent Draft of Law of the administrative contentious, in Public Law magazine* no.3/ 2004. pp. 57-65.

Nicu, A.L. (2007). *Drept administrativ/ Administrative law*, Bucharest: Didactică şi Pedagogică.

Scutea, N., Popa, M. (2006). *Unele controverse doctrinare privind legea contenciosului administrativ la un an de la intrarea sa în vigoare (II)/ Some doctrine controversies on the law of administrative contentious a year from entering into force (II), in Public Law magazine*, no. 2/2006, pp. 84-101.

*** Constitution of Romania.

*** Law no. 47/ 1992, republished.

*** Law no.73/ 1993, republished.

*** Law no.115/1999, republished.

*** Law no.554/ 2004, republished.

*** Law no. 221/2009, amended.

*** http://www.ccr.ro.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Protection of Personal Data – actual and proposed issues

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Abstract: "Personal data" means any information relating to an identified or identifiable natural person. An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity. There are different ways in which an individual can be considered 'identifiable'. A person's full name is an obvious likely identifier. But a person can also be identifiable from other information, including a combination of identification elements such as physical characteristics, pseudonyms occupation, address etc. International and national authorities tried to adopt different types of regulations in order to protect individuals' personal data and to inform them with respect to their rights. The legal provisions are continuously changing according to the new realities (society and economy are changing, individuals are using different kind of communications). In order to have a strong protection of personal data and unitary rules for all member states, the European Commission published in January 2012 a proposal for a General Data Protection Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data, which will supersede Directive 95/46/EC. A regulation was considered the most appropriate legal instrument to define the new framework for the protection of personal data in the European Union: is directly binding upon the Member States, is directly applicable within the Member States and as soon as a regulation is passed, it automatically becomes part of the national legal system. The document shall be discussed by the European Parliament and the EU Member States meeting in the Council of Ministers for discussion. *The rules will take effect two years after they have been adopted.*

Keywords: data protection; personal data; data transfer; EU law

The term "personal data" includes information touching the individual's private and family life "*stricto sensu*", but also information regarding whatever types of activity is undertaken by the individual, like that concerning working relations or the economic or social behaviour of the individual. It includes therefore information on individuals, regardless of the position or capacity of those persons (as consumer, patient, employee, customer, etc).

The definition contains four main building blocks:

- "any information",
- "relating to",
- "an identified or identifiable",
- "natural person".

From the point of view of the nature of the information, the concept of personal data includes any sort of statements about a person. It covers "objective" information, such as the presence of a certain substance in one's blood. It also includes "subjective" information, opinions or assessments. This latter

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sort of statements makes up a considerable share of personal data processing in sectors such as banking, insurance or employment.

In general terms, information can be considered to "relate" to an individual when it is *about* that individual. In many situations, this relationship can be easily established. For instance the data registered in one's individual file in the personnel office are clearly "related to" the person's situation as an employee.

The legal provisions apply to information related to a natural person that is "identified or identifiable". This raises the following considerations. In general terms, a natural person can be considered as "identified" when, within a group of persons, he or she is "distinguished" from all other members of the group. Accordingly, the natural person is "identifiable" when, although the person has not been identified yet, it is possible to do it. Identification is normally achieved through particular pieces of information which we may call "identifiers" and which hold a particularly privileged and close relationship with the particular individual. A person may be identified directly by name or indirectly by a telephone number, a car registration number, a social security number, a passport number or by a combination of significant criteria which allows him to be recognized by narrowing down the group to which he belongs (age, occupation, place of residence etc.).

The protection afforded by the rules applies to natural persons, that is, to human beings. The right to the protection of personal data is, in that sense, a universal one that is not restricted to nationals or residents in a certain country. The concept of natural person is referred to in Article 6 of the Universal Declaration of Human Rights, according to which "*Everyone has the right to recognition everywhere as a person before the law*".

The activity of protection and processing the natural persons' personal data represents a challenge for Romanian companies and their employees, but also for Romanian authorities, taking into consideration the fact that the applicable legal provisions shall be observed. In our country, Law No. 677/2001 regarding the protection of individuals with respect to processing of personal data and free movement of such data (hereinafter the "Law No. 677/2001") represents the general background, but the legal provisions were influenced by different European regulations, such as:

- Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (hereinafter the "Directive 95/46/EC");
- Commission Decision on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC (hereinafter the "Decision 2001/497/EC");
- Commission Decision amending Decision 2001/497/EC as regards the introduction of an alternative set of standard contractual clauses for the transfer of personal data to third countries (hereinafter the "Decision 2004/915/EC").

Based on the provisions of Law No. 102/2005 was created the National Authority for the Supervision of Personal Data Processing as public authority, autonomous and independent from any authority of the public administration, as well as from any natural or juridical person from the private area, having as objective protection of the fundamental rights and freedoms of the natural persons, in connection with the processing of personal data and the free circulation of these data.

The authority supervises and controls the legality of the personal data processing which falls under the Law no. 677/2001. For this purpose, the supervisory authority has the following prerogatives:

- receives and examines the notifications on the processing of personal data;
- authorizes the data processing in the situations stipulated by law;
- can decide, if it ascertains the infringement of this law, the temporary suspension or the cessation of the data processing, the partial or entire erasure of the processed data and can inform the penal bodies or sue;

- informs the natural and/or juridical persons about the necessity of complying with the obligations and carrying out the procedures stipulated by Law No. 677/2001;
- cooperates with the public authorities and public administration bodies, centralizes and examines their annual reports regarding the people's protection concerning the processing of personal data;
- issues recommendations and approvals on any matter connected to the protection of fundamental rights and freedoms, concerning the personal data processing, at any person's request, including public authorities and public administration bodies.

According to Article 3 of Law No. 677/2001 the notion "personal data" represent "any information relating to an identified or identifiable natural person; an identifiable person is a person who can be identified, directly or indirectly, in particular with reference to an identification number or to one or more factors specific to his physical, physiological, psychological, economic, cultural or social identity."

The provisions of Law No. 677/2001 apply to:

- processing of personal data, carried out within the activities performed by operators established in Romania;
- processing of personal data, carried out within the activities performed by diplomatic missions or consular offices of Romania;
- processing of personal data, carried out within the activities performed by operators who are not established in Romania, using the means of any kind located on the Romanian territory, with the exception when these means are only used for the transit of the personal data on Romanian territory, which are subject to such processing.

Personal data which are intended to be processed must be:

- processed fairly and in accordance with the existing legal provisions;
- collected for specific, explicit and legitimate purposes; further processing of personal data for statistical, historical or scientific research, will not be considered incompatible with the purpose they were initially collected for, if it is carried out according to the provisions of Law No. 677/2001, including those referring to the notification submitted to the supervisory authority, as well as according to the guarantees regarding personal data processing, set out by the legal provisions on statistics' activity or the historical or scientific research;
- adequate, pertinent and non excessive in relation to the purpose for which they are collected and further processed;
- accurate and, if necessary, updated; for this purpose, appropriate measures shall be taken in order to erase and/or rectify inaccurate or incomplete data, from the point of view of the purpose for which they were collected and later processed;
- stored in such a manner that allows the identification of the data subject only for the time limit required to fulfil the purposes for which they are collected and later processed; the storage of data for a longer period of time than the one mentioned, for statistical, historical or scientific research purposes, shall be carried out in accordance with the guarantees regarding personal data processing, provided in the relevant legal framework, and only for the period of time required to achieve these purposes.

The personal data collected based on the previous notification registered with the authority may be processed and/or storage in Romania, but they may be transferred to different countries. The transfer to another state of personal data that are subject to processing or are destined to be processed after being transferred may take place only if the Romanian law is not infringed and the state of destination ensures an adequate level of protection.

Data transferred to another state shall always be subject to prior notification to the supervisory authority. The supervisory authority may allow the data transfer to another state which does not offer

at least the same protection level as the one offered by the Romanian legislation, provided that the data controller offers enough guarantees regarding the protection of fundamental individual rights. These guarantees must be established through contracts signed by the data controllers and the natural or legal person(s) who have offered the transfer.

The above mentioned provisions do not apply when the data is processed exclusively for journalistic, literary or artistic purposes, if the data were made public expressly by the data subject or are related to the data subject's public quality or to the public character of the facts he/she is involved in.

The level of protection will be, in all cases, assessed by the supervisory authority from Romania taking into account all the circumstances in which the transfer is to be performed, especially:

- the nature of the data to be transferred;
- the purpose and the period of time proposed for the processing;
- the state of origin and the state of final destination;
- as well as the legislation of the state of final destination.

In case the supervisory authority notices that the level of protection offered by the state of destination is unsatisfactory, it may prohibit the data transfer or may authorize it provided that the operators offers enough guarantees regarding the protection of fundamental individual rights. These guarantees must be established through agreements signed by the operators and the natural or legal person(s) who have disposed the transfer.

In case the legal persons intend to process and/or storage and/or transfer the employee's name, address, contact details, date of birth, they are required to obey the legal regulations regarding the operation of the personal data. Therefore, the company has the obligation (i) to inform the new employees, according to Article 12 of the Law No. 677/2001, with respect to the transfer of their personal data abroad; (ii) to obtain their explicit consent for the transfer of data in different countries outside the European Union (hereinafter "EU"). The explicit consent of the employees with respect to the transfer of their data abroad shall be obtained in written, as mentioned in Article 30, letter a) of the Law No. 677/2001.

The Romanian legal provisions were influenced by Directive 95/46/EC, applicable to countries of the European Economic Area (hereinafter "EEA"), which includes all EU countries and in addition, non-EU countries Iceland, Liechtenstein and Norway. The Directive 95/46/EC protects the rights of everyone, irrespective of nationality or place of residence, the personal data being protected from misuse and from falling into unauthorised hands. We give our name, photograph, telephone numbers, birth date and address on a daily basis, whether to open a bank account, book a flight, apply for a job or to get a library card. Personal data is collected and processed for a variety of legitimate and necessary purposes. However, the data that we provide directly or indirectly should not be used for purposes other than originally intended. Nor should it be passed on to entities we haven't chosen to be involved with.

The personal data may be collected and used only under strict conditions and individuals must always be informed about the intention to collect and use your data. The Directive 95/46/EC creates obligations for the persons or entities which collect your personal data ("data controllers") who must respect individuals' rights while processing personal data entrusted to them.

Under EU rules, the natural persons have the following rights vis à vis data controllers:

- to be informed when they collect personal data;
- to be informed about the name of the controller, what the processing is going to be used for, to whom the data may be transferred;
- to receive the information whether the data was obtained directly or indirectly, unless this information proves impossible or too difficult to obtain, or is legally protected;
- to ask the data controller if he or she is processing the personal data;
- to receive a copy of this data in intelligible form;

- to ask for the deletion, blocking or erasing of the data.

Special precautions need to be taken when personal data is transferred to countries outside the EEA that do not provide EU-standard data protection. The Directive 95/46/EC states that personal data can only be transferred to countries outside the EU and the EEA when an adequate level of protection is guaranteed. Also, it requires that data transfers should not be made to non-EU /non-EEA countries that do not ensure adequate levels of protection. However, several exceptions (or "derogations") to this rule could be applicable.

Personal data are increasingly being transferred across borders – both virtual and geographical – and stored on servers in multiple countries both within and outside the EU. The globalised nature of data flows calls for a strengthening of the individual's data-protection rights internationally. This requires strong principles for protecting individuals' data, aimed at easing the flow of personal data across borders while still ensuring a high and consistent level of protection without loopholes or unnecessary complexity.

To respond to these challenges, the Commission is proposing a system which will ensure a level of protection for data transferred out of the EU similar to that within the EU. This will include clear rules defining when EU law is applicable to companies or organisations established outside the EU, in particular by clarifying that whenever the organisation's activities are related to the offering of goods or services to EU individuals or to the monitoring of their behaviour, EU rules will apply.

The Commission is proposing a streamlined procedure for so-called "adequacy decisions" that will allow the free flow of information between the EU and non-EU countries. An adequacy decision is an acknowledgement that a given non-EU country ensures an adequate level of data protection through its domestic law or international commitments. Such adequacy decisions will be taken at European level on the basis of explicit criteria which will also apply to police cooperation and criminal justice.

Businesses operating globally will benefit from clear and explicit rules for making use of binding corporate rules, as well as from the fact that prior authorisation will no longer be needed for transfers covered by binding corporate rules or standard contractual clauses. The proposal will promote effective international cooperation for data protection enforcement between the Commission, European data protection authorities and authorities outside the EU, through investigative assistance, information exchange and complaint referral.

Data subjects would have more rights, such us:

- Wherever consent is required for data to be processed, it would have to be given explicitly, rather than assumed;
- Individuals would have a "right to data portability" which would allow them to transfer personal data from one service provider to another more easily;
- Individuals would have a "right to be forgotten" which would allow them to obtain the deletion of the data that they furnished online if there are no legitimate grounds for retaining it (with exceptions);
- Individuals would be able to refer to the data protection authority in their country, even when their data is processed by a company based outside the EU.

Organizations would have more obligations and responsibilities, such us:

- Organizations would be required to notify the national supervisory authority of data security breaches *if feasible* within 24 hours; and if the breach would adversely affect the protection of the personal data or privacy of individuals, the controller would be required to communicate the personal data breach to the data subjects without undue delay;
- Organizations would only have to deal with a single national data protection authority in the EU country where they have their main establishment;

- Organizations would no longer have to notify their data protection practices to national data protection authorities, but would still have to obtain permission for some categories of processing;
- Instead of notification, there would be increased responsibility and accountability for those processing personal data; including significant disclosure and record keeping requirements.

EU rules would apply if personal data were handled abroad by companies that are active in the EU market and offer their services to EU citizens. Organizations would be exposed to penalties of up to €1 million or up to 2% of the global annual turnover of a company in case of breaching the applicable legal provisions.

The Commission intends to guarantee free and easy access to individuals personal data, making it easier for individuals to see what personal information is held about them by companies and public authorities, and make it easier for transfer their personal data between service providers – the so-called principle of "data portability".

Conclusion

In case the proposed Regulation will be adopted, new rules regarding the protection of personal data will become applicable and legislative changes will take place. The new provisions will apply also on the territory of Romania, the legal persons and authorities will have the obligation to observe their content. The new rules related to data protection impose new responsibilities for those who hold and process personal details, intend to offer a better protection to individuals and a unitary application of the legal provisions. Also, the EU rules include new sanctions applicable to companies in case of using personal data, transferring personal data.

References

Hill, David G. (2009). *Data Protection: Governance, Risk Management, and Compliance*. CRC PressTaylor & Francis Group.

Carey, Peter (2009). *Data Protection: A Practical Guide to UK and EU Law*. Third Edition. Oxford.

Solove Daniel J. & Schwartz, Paul M. (2011). *Privacy, Information, and Technology*. Third Edition. Wolters Kluwer Law & Business.

***Law No. 677/2001 regarding the protection of individuals with respect to processing of personal data and free movement of such data.

***Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

***Commission Decision on standard contractual clauses for the transfer of personal data to third countries, under Directive 95/46/EC.

***Commission Decision amending Decision 2001/497/EC as regards the introduction of an alternative set of standard contractual clauses for the transfer of personal data to third countries.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

Considerations on the Right to Public Property

Adriana Pascan[1]

Abstract: From ancient times, property has been perceived as being something absolutely necessary for life as the human society could not have been perceived without property which was characterised in the doctrine as being "the matrix of the modern subjective rights". According to the Bible, at the origin of the humanity, the owners of goods could only have been Adam and Eve, a social equity in an ideal world that could have existed in the pre state age and will continue to exist in a future world. We can therefore consider the property as being natural and necessary for humans. Without it the social organization cannot be possible as the property relations are the most important element in the production relations, together with the exchange activity between humans. The individual property is the indispensable condition for freedom.

Keywords: private property; right to property; administrative units; holder of right to property; legislation

1 Introduction

The property (Dogaru & Sambrian, 1966) represents a social relation of proximity being at the same time an economic relation of property, acknowledged as a proximity relation between people for the material goods as a condition of their existence, of assuming the material premises of a production process that also creates a particular behaviour for the neighbours (Ungureanu & Munteanu & Rujan, 2005). "Good proximity entails at least two duties: first, the neighbour will not prejudice the neighbour and second, the neighbour will not inconvenience the neighbour in an intolerable manner". When this property is protected and guaranteed by the coercive force of the state, it becomes a property relation, namely the right to property and is part of the economic basis of every human society the jurisprudence having the creative role and difficult task to conciliate the legitimate interest of the proprietor with social interest, when the discussion regards the proximity relations based on laws, regulations, customs and jurisprudence (Boroi & Stanciulescu, 2003).

2. Judicial Features of the Right to Public Property

Analysing the constitutional dispositions in the matter of the right to private property as well as the provisions of the laws comprising incidental norms in the matter of the judicial regime of the right to property, the doctrine underlined that the following judicial characteristics are specific to the latter: inalienability, non prescriptible character, indeterminable. This triple area of features for the right to public property results from the texts of law. Accordingly, article 136, paragraph 4 in the Constitution establishes that the public property goods are inalienable, article 5 paragraph 2 in Law 18/1991 stipulates that the terrains part of the public domain are inalienable, non prescriptible and indeterminable. Article 120, paragraph 2 in Law 215/2001 regulates the principle according to which the goods part of the public domain are not alienable, non prescriptible and indeterminable as follows: a) they cannot be alienated but can be given in administration, concession or rented, under the

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conditions of the law; b) they cannot be subjected to forced execution and no real guarantees can be placed over them; c) they cannot be acquired by other persons by the effect of possession in good faith over the mobile goods".

The inalienable character as judicial feature of the right to public property results from the legal regulations listed above and signifies the circumstances that the goods under this judicial regime cannot be alienated, meaning that the alienation acts over these goods are absolutely void.

As indicated in the literature, this feature of the right to property is not the consequence of the righteous holder- the state or the territorial administrative units, nor the nature of the public domain but the result of the fact that the goods making the object of this right are affected by the use of public interest. Because of the fact that the mobiles and immobile goods are destined to the use of the public interest, they have been declared inalienable namely *res extra comercium* in order to maintain their destination.

Expressly, article 22, paragraph 2 in the Law on the public property stipulates that the judicial acts concluded with the breach of the provisions in article 1 on the judicial regime of the goods in public domain are void and not annulled (Adam, 2002).

Also, article 120, paragraph 2 in the Law on local public administration no. 215/2001, republished, states that "the goods that are part of the public domain are inalienable, non prescriptible and indeterminable. An important provision is comprised in Law 182/2000 according to which the mobile cultural assets in the public property of the state of the territorial administrative units are also inalienable, non prescriptible and indeterminable. Therefore, the acts of alienation concluded regarding these goods are absolutely void.

Over the goods representing the object of the right to public property cannot be pledged or pawned. The servitudes over the assets in the public domain are valid only if they are compatible with the use or public interest to which the affected goods are destined to (Adam, 2002). In case servitudes have been constituted prior to the entering of the good in the public domain, they are maintained only in case they serve the use or the public interest. The terrains part of the public domain can only be given for administration, concession or rented under the provisions of the law. In case a terrain has been place from public property to private property of the state or territorial administrative units, then the terrain can be alienated under the provisions of the law.

The public domain goods are imprescriptible, namely that over the goods in the public domain the right to demand is imprescriptible and third parties cannot invoke, against the holder of the right to property the effect of the good faith possession as way to acquire the property. The assets which by nature or by law cannot be constituted as objects or private property cannot be assigned.

The goods belonging to the public property are indeterminable, namely the creditors of the state or of the administrative territorial units cannot follow, in order to satiate their claims and cannot represent real guarantees over the goods that are part of the public domain. The goods in the public domain cannot make the object of forces execution. The judicial acts concluded with the breach of the legal provisions of the goods in the public domain are absolutely void.

3. Subjects of the Public Property

The public property belongs to the state or the territorial administrative units while the private persons and the other legal persons cannot own goods in this category. The state is legal entity in the relation in which it participates as subject of rights and obligations represented by the Ministry of Finances, except for the cases in which the law established and assigns other organs for this purpose.

In the text of law 215/2001 the territorial administrative units are: the commune, the city, municipality and county. As legal entities of public law, with own patrimony and full judicial capacity, the communes, cities, municipalities and counties have, in public property, under the conditions of the

law, the goods of use or public local or county interest, expressly established by law (Ungureanu & Munteanu, 2008).

The holders of the right to property over the forest fund which is public property exert their right to property within the limitations and under the conditions of the law and have the obligation to follow the preservation, sustainable development of the forests. Irrespective of the form of property, the state establishes the strategy for the exploitation, economic, social or ecologic of the forests. The national forest fund comprises the forests, terrains destined for forestation, those serving the necessities of culture, production or forest administration, riverbeds, ponds as well as the non productive terrains included in the forest landscaping under the conditions of the law and irrespective of the right to property. The forest national fund is either private or public property and is an asset of national interest. The right to property over the terrains representing the national forest fund is exerted according to the Forestry Code. The forest fund public property of the state is administered by the National Directorate for Forests (Chelaru, 2000).

4. Object of the Public Property

It has been observed in the literature (Ungureanu & Munteanu, 2008) that the criteria for the determination of the goods representing the object of public property are controversial.

The assets making the object of the public property are listed in article 136, paragraph 3 in the Romanian Constitution as follows: assets of public interest of the subsoil, air space, waters with energy potential that can be exploited in national interest, beaches, territorial sea, natural resources of the economic area and continental plateau, other assets established by organic law. These assets have been also listed in Law 213/ 1998, which stipulates in paragraph 1 of the annex that the following represent the public domain of the state: subsoil richness, air spaces, surface waters with minor riverbeds, underground waters, interior seawaters, beaches with exploitable energetic potential, territorial sea and sea bottom, interior waterways, forests and terrains destined for foresting, those serving the necessities for culture, production or forest administration, ponds, riverbeds as well as non productive terrains introduced in the forest administration which are part of the national forest fund and are not private property etc (Chelaru, 2000).

The territorial administrative unit scan become holder of the right to public property over assets only if the quality of owner is recognised based on an organic law (Nicolae, 2001). The public domain can also be of local or county interest, case in which the property over those goods belongs to the counties, cities or communes in regime of public law. The goods for public use comprise also those goods which by nature are of general use: markets, bridges, public parks etc. and the goods of public interest comprise those goods that by nature are destined to be used or exploited within a public service such as: railways, power distribution networks, buildings of public institutions etc.

Although the Constitution uses the term of public property, some special laws use the expression of "public domain" and we assert that from judicial point of view, the two terms are identical.

The right to public property is different from the right to private property under the aspect of the specific judicial features it presents, features that shape an own judicial regime and distinct from the right to private property (Ungureanu & Munteanu, 2008). According to article 136 paragraph 4 in the Constitution, the goods that are included in the public property are inalienable. In developing the constitutional provisions, paragraph 1 in article 74 of Law 69/1991 on the local public administration stipulates that the goods part of the public domain are inalienable, non prescriptible and indeterminable.

5. Limitations of the Right to Public Property Determined by the General Interest

It is mentioned in Law 213/1998 on the public property and judicial regime that the servitudes on the goods in the public domain are valid only to the extent in which these servitudes are compatible with the public interest to which the goods are destined.

There are a series of limitations among which we mention the limitation in urban and urban purposes (C. Hamangiu & I Rosetti-Bălănescu & Al. Băicoianu, 1997). To this end, Law 50/1991 established certain limitations for the civil, industrial, agricultural or any otehr type of buildings in what concerns the lines, the height and respect of the sistematization plan.

Article 44, paragraph 7 in the Constitution mentions the limitations for the protection of the public health and sanitation concern the obligations resulting from the plan for landscaping, general urban plan, detailed urban plan and urban regulations, including the obligations regarding the hygiene of the buildings, swage system, environment protection.

For the defence of the country, there are a series of limitations concerning the creation of military bases or for the protection of airports, ports or other economic and objectives of general interests. Decree no. 95/1979 mentioned that it is forbidden for building to be placed near takeoff or landing areas that can endanger the safety of the flights. There are limitations also near the protection spaces and air transportation.

Among the other limitations regarding public utility we mention the limitations on the space near waterways, on the location of the constructions near the railways, on which the emergency Ordinance no.12/1998 establishes that in the protection area it is forbidden the placement of any type of construction, even with temporary, material storage or plantations (C. Hamangiu & I Rosetti-Bălănescu & Al. Băicoianu, 1997)

The public utility limitations also include those resulting from the judicial regime of waters, forests, road construction and some mobile goods. Regarding the latter, the private persons cannot sell or use in certain conditions, a series of mobile goods among which we list: medicine or toxic substances, drugs, weapons and ammunition, goods in the archive fund, assets in the national and cultural patrimony.

References

Dogaru, I., Sâmbrian, T. (1966). *Drept civil român. Teoria generală a drepturilor reale/ Romanian Civil Law. General theory of the real rights,* Treaty, volume II. Craiova: Europa.

Boroi, G., Stănciulescu, L. (2003). *Drept civil. Curs selectiv/ Civil Law. Selective course.* 2nd edition. Bucharest: All Beck.

Ungureanu, O., Munteanu, C., I.C.Rujan (2005). Evoluţia istorică şi fundamentele filosofice, juridice, sociologice, economice şi teologice ale proprietăţii asupra pământului/ Historic evolution and philosophic, judicial, economic, theological fundaments on the property over the land. *Pandectele Române/ Romanian Pandects*, no. 5/2005, p. 108.

Chelaru, E. (2000). *Curs de drept civil. Drepturi reale principale/ Civil law course. Real principal rights*. Bucharest: All Beck.

Nicolae, M. (2001). *Discuţii privind interdicţiile legale de înstrăinare a unor bunuri imobiliare/ Discussions on the legal alienation interdictions of immobile goods* in *Dreptul/ Law* no. 7/2001.

Hamangiu, C., Rosetti-Bălăcescu, I, Băicoianu, A. (1997). *Tratat de drept civil român/ Treaty of romanian civil law*, 2nd volume, reedited. Bucharest: All.

Adam, I. (2002). *Drept civil. Drepturi reale*/ *Civil law. Real rights*. Bucharest: All Beck.

Ungureanu, O., Munteanu, C. (2008). *Tratat de drept civil. Bunurile. Drepturi reale principale/ Treaty of civil law. Assets. Real principal rights*. Bucharest: Hamangiu.

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Mediation in Romanian Legislation

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Abstract: The complexity of the current social relations generates the necessity of developing and applying new methods of settling conflicts. Mediation can serve as an effective tool in resolving various conflicts including the criminal matters. This article gives a panoramic view on the application of the concept of mediation and highlights the main features of mediation in criminal cases as they are reported to the national legislation and the legislation of Romania. Therefore the advantages of mediation and the opportunity to apply the latter in order to slave the conflicts caused by the commission of criminal offences are still being discussed. The Romanian legislation and the Community rules establish the scope of expressly exempted areas, the sides of freedom being the main principle, the mandatory dispositions being the exception. From the contents of the Law 192/2006 result that mediation is exercisable in all areas with the condition that the rights which make the subject of mediation could be used by the sides of the mediation. The mediation theory analyses the extrajudicial mediation and judicial mediation settlement.

Keywords: mediation; criminal law; criminal offences; conflict

Le monde moderne est confronté à un processus entier de la mondialisation, tant dans les plans politiques, sociaux et économiques et l'un de l'aspect du plan politique est le régime juridique.

En Europe, nous rencontrons différents systèmes nationaux de droits. Ils sont conçus pour être le système de Common Law (droit Anglo-Saxon jurisprudentielle du monde) ou par le système juridique romano-germanique, appelé droit civil (États particulièrement continental). Dans le monde du cadre politique et juridique de l'Europe il se manifeste de plus en plus la tendance aiguë sur le rapprochement des deux systèmes, achevée avec l'adoption d'un modèle juridique unique. Les principes fondamentaux qui soutiennent le monde juridique (publicité, salle des séances rôle actif des juges, le rôle de l'éducation) pourront acquérir de nouvelles significations.

L'objectif de rejoindre les lois est l'obligation de la procédure. Cela est dû à l'influence des instruments internationaux concernant l'extraordinaire liberté et des droits de l'homme fondamentaux, les documents de politique[2], ainsi que des applications contrôlent corps[3].

Dans ces documents et de la jurisprudence dans leur base, le droit occupe le processus de la place central. C'était vraiment juste un réalésé en grande partie à un procès équitable, pas juste une simple garantie d'une juste justice.

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[2] La déclaration universelle des droits de l'homme, le Pacte International des 10.12.1945 sur les droits civils et politiques 19.12.1966, la Charte des droits fondamentaux de l'Union européenne à Nice du 18.12.2000, la Convention américaine relative aux droits de l'homme (Pacte de San José, Costa Rica) de 1969 est entré en vigueur en 1978, la Charte africaine de l'homme et les droits des peuples à Nairobi en 1981, est entré en vigueur en 1986.La Convention européenne pour la protection des droits de l'homme et des libertés fondamentales à Rome en 1950 Convention sur les droits de l'homme et des libertés fondamentales, adoptée par les 12 États indépendants ont été traités soviétiques en 1995, CEE, EURATOM et CECA.

[3] Le Comité des droits de l'homme des Nations Unies, la Commission et la Cour des droits de l'homme, la Commission interaméricaine et Cour sur les droits de l'homme et des peuples, la Commission et la Cour européenne des droits de l'homme, la Cour de Justice des communautés européennes etc.

Aussi vrai qu'il est toujours à la recherche de moyens d'avoir des procédures du procès, sans sens à la recherche des modèles alternatifs de résolution des conflits: conciliation, transaction, médiation pénale et civile. Et ici nous devons nous rappeler le droit américain où cette solution système de résolution des différends-est peut-être la plus développée .

Parole juste une „privatisation", en ce sens que les crimes plus seront étudiés seulement s'il y aura la volonté de la victime[1] à cet égard[2]. En conséquence, le rôle du procureur va être redéfini: un représentant de l'État, il devient un représentant de la société. Le défendeur est traité différemment: il ne sera plus stigmatise par la compagnie, mais il regarde comme un "malade" propre, s'est un malade qu'elle peut se rendre coupable. La justice répressive évoluera en justice réparatrice; avec des peines de prison seront l'exception, ils sont remplacés par des peines de la communauté[3].

La médiation[4] est la principale forme de justice réparatrice matérialisée, un nouveau courant dans la philosophie pénale actuelle, un concept plus large qui propose un changement de l'optique au système judiciaire classique.

Du point de vue de la justice réparatrice, la réalisation de la justice ne doit pas se limiter à la détermination et l'imposition d'une culpabilité, mais devrait être considérée comme un émotionnel, relationnelle et restaurer le matériel à une triade "victime-auteur-communauté". À la différence de la système pénal classique, la justice réparatrice est basée sur le principe de la responsabilité et il représente une justice horizontale, une Justice de respect mutuel.

Au niveau de l'Union européenne, des efforts ont été faits pour mettre en œuvre de ce système dans les pays membres. Ainsi, conformément à la décision-cadre du Conseil de l'Union européenne du 15 mars 2001 sur le statut des victimes dans les procédures pénales, il se relève l'obligation des États de promouvoir la médiation dans les affaires pénales pour les infractions criminelles qu'ils jugent appropriées pour cette approche, et en tenant compte de toute entente conclue entre la victime et l'auteur de l'infraction dans une procédure de médiation[5].

Ces dernières années les États ont fait des efforts considérables pour légiférer la médiation comme un moyen alternatif de résolution des conflits. La plupart a adopté le règlement dans ce domaine: l'Albanie a une loi sur la médiation par 2003, Autriche par 2003, Bulgarie par 2004(code de procédure civile par2 007 est synchronisée avec l'acte de médiation), Croatie par 2003, Macédoine, Serbie, Hongrie depuis 2002. Moldova a adopté en 2007 une loi de médiation, il y a lieu de janvier 2008.

[1] Décision-cadre du Conseil de l'Union européenne sur le statut de victimes du 15.03.2001 dans des procédures criminelles.

[2] Dans notre droit, c'est utilitaire „gémissante avant", en droit français „la citation directe", parler en droit Anglo-Saxon, „private prosecution".

[3] http://www.juridice.ro/32189/efectele-globalizarii-asupra-justitiei.html

[4] Le processus de médiation a été mis en œuvre en Europe depuis environ 20 ans, et contrairement au modèle américain, où la médiation est discrétionnaire, le modèle européen est surtout un non obligatoire. Le terme vient de „la médiation" de lat. et signifie l'ingénieur médiation une entente entre les parties, de travailler afin de finir un conflit. Le Royaume-Uni de la Grande-Bretagne, à la première fois est utilisée médiation complémentaire et la réparation, puis est devenu plus commun, le déterminative, restaurait de la justice réparatrice. En France, vous pouvez voir une distinction essentielle entre les officiels, l'utiliser „la médiation" et de „la réparation". La première est utilisée dans le lexique du contenu dans le cas de procédures juridiques, les participants qui sont des adulte. La seconde déterminative est utilisée uniquement dans le cas de l'examen des affaires criminelles avec les participants mineurs. En Allemagne, le terme est utilisé, „Tater-Opfer-Ausgleich" et en Autriche, „Aufiergerichtlicher Tatausgleich". Fonctionne avec le maclawye de la notion, norvégiens, et de la médiation. Toutes ces notions ont une atteinte grave, à savoir: la médiation est le processus de résolution de conflit avec la participation d'une tierce partie pour convaincre l'opinion impartiale qui tend vers un accord mutuel des parties.

[5] Autres recommandations internationales: Recommandation no. R (99) 19 concernant la médiation en matière pénale, adopté par le Comité des ministres du Conseil de l'Europe, le 15 septembre 1999-republié, M. Of.. de. de la Roumanie, Partie I, non. 98 du 7 février 2011; Sans opinion (Opinion). 6 (2004) à l'arrêt de l'équité et dans un délai raisonnable et le rôle des juges dans les procès compte tenu des moyens alternatifs de résolution des différends, compte tenu de (a) le Comité consultatif européen de juges (CCJE), avis aux corps en outre au Conseil de l'Europe; Guide pour une meilleure mise en œuvre, le renvoi de l'affaire criminelle en médiation, adopté par la Commission européenne pour l'efficacité de la Justice le 7 décembre 2007; Les programmes de résolution 2002/12 sur les principes de l'Organisation des NATIONS Unies sur l'utilisation de la justice réparatrice fondamentale en matière pénale.

Chaque pays a adapté à la réglementation en matière de savoir-faire de la médiation. Si l'accord de médiation en **Bulgarie** et de la compréhension même partie arrivant peuvent être orales, ce n'est pas le cas dans le reste de l'Europe. En Serbie, il exige l'expérience dans le domaine de la résolution des conflits, de médiation ou de moins de 5 ans pour devenir un médiateur. En **Norvège**, les juges peuvent être médiateurs aussi. La **Pologne** est une des rares pays européens où la Cour peut envoyer l'affaire à la médiation, sans le consentement des parties, mais ils ont la possibilité de refuser la médiation.

Dans les affaires criminelles, la médiation ne se peut pas produire dans les cas impliquant une processus pénale ,il existe la condition de l'existence des plaintes déposées par la victime, et la mise en place d'un accord entre les parties, à la suite d'un processus de médiation, a l'effet la cessation des procédures pénales, dans n'importe quelle phase de celui-ci. Dans le cas des crimes suivis, la médiation entre la victime et l'auteur peut constituer la base juridique pour la suspension de la procédure criminelle, conditionné conformément aux dispositions de la peine prévue par la Loi ne dépasse pas la prison de 3 ans ou 5 ans si dans une réconciliation, le délinquant a réparé les dommages ou a convenu d'un plan visant à réparer. Autriche (le premier pays où la profession de Médiateur a été reconnue par une loi du Parlement) est un autre État dans lequel la médiation s'est révélée satisfaisante, intéressant étant ici le fait qu'entrer dans la compréhension les parties après la médiation est soumis au contrôle d'un tribunal ou un notaire.

En **Autriche**, ceux qui veulent devenir des médiateurs, entre autres conditions, doivent également être à l'âge de 28 ans. Dispositions spécifiques relatives à la médiation en matière pénale devraient figurer dans le code pénal et la procédure pénale de l'autrichien. La médiation victime-délinquant joue un rôle essentiel dans le processus restaurait, considéré comme une réparation, restitutoire ou dommage causé compensatoire.

Croatie a une règle spéciale en ce qui concerne la médiation, dont si les parties ont convenu de s'engager ou de continuer un processus une certaine période du temps, mais d'avoir recours à la médiation, s'ils violent cette obligation assumée par les deux parties, la Cour rejette leur action comme prématurée.

En **France**, l'affaire criminelle en médiation est obligatoire et n'est pas confidentiel. Le refus de la médiation de la part du criminel de devenir l'objet de poursuites pénales, faisant ainsi par médiation une manière de coercition.

En **Suisse**, la médiation est possible uniquement sur les délinquants mineurs (Bieri, 2011, p. 17) et parvenir à un accord entre la victime et l'auteur attire le classement du processus criminel.

En **Espagne**, la médiation est possible, en principe, dans tous les types des délits, sauf ceux expressément exclus par la Loi, telles que les infractions criminelles relatives à la vie domestique. Le procès restaurativ ne peut pas être matérialisé dans une cessation d'emploi obligatoire de la procédure pénale, mais peuvent avoir un effet sur comment vous ferez la réalisation de la peine ou la possibilité de libération en phase d'exécution (Dragne, Trancă, 2011, p. 17).

En **Allemagne**, la médiation est possible, en principe, dans le cas de la délinquance juvénile et les crimes des crimes simples commis par des adultes avec une importance réduite, dans ce cas, il est possible d'appliquer une peine d'un an de prison. D'après du code de procédure pénale, le procureur et la Cour ont l'obligation d'essayer le règlement par le biais de processus de médiation et d'appuyer les efforts des parties à cet égard, ayant la possibilité de soumettre un bureau ou le centre de médiation.

En **Hongrie**, la médiation est possible en cas d'infractions contre la personne ou dirigés contre la propriété en prison, punie d'un maximum de cinq ans.

Reconnaissance de culpabilité est une condition préalable à l'admissibilité de la médiation obligatoire. De la processus de médiation sont exclus les infractions criminelles qui ont eu de la mort de la personne, ou multirécidiviste ou des infractions commis par un groupe de criminalisâtes organisée. La médiation est volontaire, et le processus peut être suspendu à la demande des parties pour un maximum de six mois, tant dans la phase d'enquête criminelle, ainsi que dans la celle de l'arrêt (Dragne, Trancă, 2011, p. 17).

En **Roumanie** la prévoyance delà médiation comme un moyen alternatif de résolution des conflits résulte seulement de l'année 2006 par la Loi no. 192 sur la médiation et l'organisation de la profession de médiateur[1], qui a consacré plusieurs articles sur la médiation dans les affaires pénales pour les infractions pour lesquelles la Loi prévoit à l'avance pour le retrait des pièces gémir ou la réconciliation, supprime la responsabilité criminelle. Ainsi, le législateur a opté uniquement pour le roman, une certaine catégorie d'infractions, à savoir, que ceux pour lesquels les parties ont le droit d'exiger que' ils peuvent influencer un déclencheur ou lancer des processus criminel[2].

S'il n'est pas utilisé la terminologie expresse, le droit de classer la procédure de médiation dans la médiation judiciaire et la médiation extrajudiciaire, cependant, en matière pénale, plusieurs auteurs ne considèrent qu'expression plus appropriée: médiation et les procédures de médiation pénale extraprocesuelle.

La médiation extrajudiciaire se produit avant la victime déposer plainte efficace, le résultat, par a contrario, en cas de médiation, se produira après la formulation de ces plaintes. Mais, la procédure pénale (phase court) ne commence pas nécessairement dans le moment du début des plaintes, prenant en considération les questions déférées par la personne, qui peut ou ne peut pas attirer le début de la procédure pénale. Par conséquent, l'expression „la médiation judiciaire" n'est pas exacte.

La médiation au stade d'extraprocesuale présente une importance pour poursuites criminelles sous plusieurs aspects. Tout d'abord, chercher la question de l'introduction de la gémissante, qui est le deuxième mois, et qui coule depuis le moment où la victime ou la personne ayant droit à la demande de savoir[3] qui est la personne qui a commis l'infraction.

Selon l'art. 69 al. 2 de la loi no. 192/2006, si la procédure de médiation a été déclenchée automatiquement dans le délai prévu par la Loi pour l'introduction d'un avant, cette gémissante ajourner pour la durée de la médiation. Comment les règlements ne sont pas couverts par la procédure de démarrage de la médiation, on croit que le terme soit suspendu de la date de la signature du contrat de médiation, comme la forme écrite du contrat est établie par l'art. 47 du règlement comme une condition de validité (Dragne, Trancă, 2011, p. 113).

Cependant, l'effet de la suspension du contrat de médiation n'est pas intervenue dans le cas de ces infractions que la médiation est possible, mais pour qui le processus criminel commence automatiquement, parce que l'action est mise en procédure pénale requête ex officio-possession et séduction, ou vous pouvez mettre en action pénale requête ex Office infractions pénales prévues à l'art. c 180 et 181. pen., lorsque les faits sont des crimes contre des membres de la famille lorsque les défenseurs sont des individus selon leur capacité et sans la possibilité de capacité et après l'expiration du délai de deux mois.

Dans la phase de démarrage du processus criminel, antérieurs au cours de laquelle les organes judiciaires font des recherches sur leur appel (plainte ou le renvoi de son propre), il n'est pas exclu que médiation, sans qu'il existe le règlement entraver l'ouverture de cette procédure.

[1] Publié dans M. Of. de la Roumanie, Partie I, non. 441 du 22 mai 2006, modifié et complété par la Loi no. 370/2009 pour la modification et l'achèvement de la nr du droit. 192/2006, publié dans M. Of. de la Roumanie, Partie I, non. 813 le 3 décembre 2009, O.G. nr. 13/2010 pour la modification et l'exécution de certains actes juridiques dans le domaine de la Justice en vue de la transposition de la Directive 2006/123/ce du Parlement européen et du Conseil du 12 décembre 2006 sur les services dans le marché intérieur publié dans M. Of. de la Roumanie, Partie I, non. 70 du 30 mars 2010.

[2] Cependant, nous croyons que c'est une médiation possible dans le cas de la procédure régie par l'article. 2781 C.proc.pen de résoudre les plaintes contre les décisions du procureur ou de l'ordonnance poursuivant ne l'envoyez, n'importe si il s'agit d'un crime à l'un de l'Office. Ainsi, par décision N° 27/2008 des Sections ICCJ passée, il a été établi que la plainte déposée contre l'opposition solution du procureur a la volonté de se retirer et un juge à la suite de prendre note de cette manifestation de volonté par une entière discrétion. Toutefois, ce retrait de la gémissante peut résulter de l'initiative exclusive, suite à la tentative du plaignant pour la conciliation par un juge ou un résultat de la procédure de médiation (accord de médiation dont certaines clauses concernant le demandeur et l'intimat, dont le plaignant et obligé de se retirer sa plainte).

[3] La personne a le droit d'exiger que le renvoi peut être fait au nom d'un mineur ou incapable.

Médiation dans cette affaire est initiée dans la phase extraprocesuelle, alors que la procédure criminelle n'a pas commencée, mais en phase court comme instances judiciaires ont été saisis de l'affaire, les activités sont effectuées, dans le cas de poursuites pénales ultérieures de démarrer.

Ainsi, deux mois avant d'introduction les gémissements, ajourner pour la conclusion du contrat de médiation, si vous avez référé à l'autorité judiciaire ou non, par voie de référence, moins la plainte efficace immédiatement.

Par conséquent, nous avons deux situations:

- corps judiciaire est pas question de tout façon, les parties à la procédure de médiation concernant cette dilemme, compter les gémissements avant d'ajourner l'usage abusif de la médiation à la fin du procès-verbal de clôture de la procédure de médiation;

- l'organe judiciaire doit informer la plainte ou l'ex officio, pendant ce temps, sait la victime, concernant la procédure de médiation et de compte les gémissements, mais avant l'ajournement de l'instance judiciaire peut interrompre les activités de la recherche de donner un avis si elle sont compétentes, la connaissance de la procédure de médiation entrepris ou avoir ses compétences, surtout lorsque l'action pénale peut être mise en mouvement et ex officio, faire connaissance sur le début de la médiation, auquel cas nous sommes en situation de procédure et médiation judiciaire.

Tout du point de vue de la médiation extraprocesuelle les actes juridiques des données, nécessaires pour déterminer si une situation particulière permet effectivement de médiation.

Une certaine orientation donne l'art. 55 de la loi no. 192/2006, qui stipule qu'en cas de conflit soumis à la médiation présente des aspects de la nature difficile ou controversée dans tout domaine spécialisé juridique ou autre, avec l'accord des parties avec le Médiateur peut demander le point de vue d'un spécialiste. Ainsi, un problème peut se produire lorsque le Médiateur n'informe pas ou spécialiste appelé à apporter des précisions ne remarquons pas que, selon les circonstances particulières dans lesquelles la Loi a été commit, sont les incidents et autres infractions pour lesquelles la médiation n'est pas possible. La résolution pourrait être un exemple de la solution selon laquelle la porte à toute médiation et de la fermeture d'un accord de garder à l'esprit, dans une procédure pénale départ possible ou dans un criminel du procès a déjà commencé, la seule matière qui font l'objet de la médiation dans les affaires criminelles.

Dans le cas où la médiation ferme en réconciliation parties, ils peuvent conclure une convention écrite qui peut être soumis à l'authentification par le notaire public, possibilité de n'exister pas de validation par le juge. La Loi prévoit expressément que la personne peut désigner n'a plus de victimes pour la même infraction, les organes judiciaires (art. 69, par. 1). Si la victime a présenté un avis de médiation plainte après qu'un organe judiciaire réussi est tenu de donner effet à la volonté des parties fait de demande de réconciliation. 10 (c). h C.proc.pen).

Si la procédure de médiation pendant le criminel traite, donc après le début des compétences (médiation pénale processuelle), l'initiative peut appartenir aux instances judiciaires des parties ou par ailleurs tenu d'informer les parties sur le processus et les suivre (art. 6 de la Loi). Il n'y a pas de dispositions dans le code de procédure pénale pour réglementer la suspension de la procédure pénale par la volonté des parties. Mais le droit nr. 192/2006 prévue à l'art. 70, dans le cas où la médiation se déroule après le début du processus, de poursuites pénales ou de jugement, si nécessaire, ajourner, en raison de sa présentation par les parties au contrat de médiation[1]. Ainsi, il n'est pas nécessaire de présenter les parties à la Cour ou la soumission par un soumis pour demander la suspension de la procédure, comme cela arrive dans les affaires civiles les deux. La suspension dure jusqu'à ce que dans la procédure pénale de la ferme de la médiation par l'intermédiaire des méthodes fournies par la présente loi, mais pas plus de 3 mois de la date de signature du contrat de médiation. Procédure pénale

[1] C'est un nouveau cas de disponibilité des parties dans le processus criminel qui, par leur consentement à l'utilisation de la médiation implique des procédures de suspension.

doit être reprise d'Office immédiatement après réception du rapport de conclure que les parties ne pas combiner ou, s'il n'est pas, à l'expiration des 3 mois.

Le Médiateur n'impose pas une solution sur les parties au conflit soumis à la médiation (art. 50, al. 3). Cependant, il est évident que, en termes de processus criminel (nous dire cela à la médiation implique l'affaire civile ou criminelle de côté qui aura lieu après les règles habituelles de la matière civile, y compris les décisions de durcissement d'une fortune-se souvenir de la partie civile peut faire l'objet d'un accord de médiation indépendamment de la nature de l'infraction), seulement deux sont une solutions de médiation réussie: la réconciliation et le retrait des parties, mais par la victime gémir l'acte préalable[1]. Quand médiation est recommandée par les instances judiciaires, à la clôture de la médiation, le médiateur doit être tenu, dans tous les cas, d'informer par écrit la Cour si les parties ont conclu l'accord dans le processus de médiation (article nouvellement introduit 70 par. 6).h

Comme j'ai montré plus haut, cette information contient des informations pratiques fournies dans le rapport rédigé à la procédure de clôture.

Lorsque la médiation est réussie, le 58 para 1 de la Loi prévoit que, si les parties en conflit sont parvenus à un accord, vous pouvez modifier une entente qui comprend tous les termes consentis et la valeur d'une soumis sous signature privée

Si nous sommes d'accord avec cette solution si les parties montrent que la réconciliation, la médiation peut être un succès seulement si la personne décide de retirer la plainte, peut-être le reste de l'accord entre les parties à l'effet juridique dans l'affaire civile

La solution du procureur, du juge est grande que dans les affaires civiles, le pouvoir judiciaire devra adopter une solution qui englobe la façon même de résoudre des dispositions pénales, solution imposée par l'art. 10 (c) h. C.proc.pen :

- tout d'abord, que l'autorité judiciaire (un employé de police, procureur ou juge de tribunal) doit tenir compte de la compréhension est directement entre les parties[2]. Par conséquent, pour la colonie pénitentiaire, sur la base de l'accord conclu à la suite d'une médiation, art. 70 para.5 nouveau introduit dans la Loi stipule que les parties doivent présenter à l'organe judiciaire de la forme authentique (ce qui signifie un paiement de frais de notaire) ou à être présenté en face de l'organe judiciaire de prendre note de leur volonté.

- Ensuite, le juge n'aura pas se limiter à la fin de la procédure pénale, après le retrait des parties avant de gémir ou de la réconciliation (article 11, paragraphe 2, lettre b rap. à l'article 10, point (h) C.proc.pen.), mais il sera l'accord de médiation en ce qui concerne les règles générales de la loi qui est appliquée correctement et dans les affaires criminelles, comme a l'art. 67 par. 1 de la Loi sur la médiation.

Cette validation peut avoir lieu mais dans la phase d'isolateur de l'enquête criminelle. Ainsi, un accord de médiation présenté directement au procureur, sans appel au notaire, les parties vous réconcilier ou de la victime déclarant qu'ils retirer la plainte, peut avoir pour effet de diriger le procureur que par la conclusion de la procédure pénale conformément à l'art. 11 paragraphe 1 est allumé. c) dans le cas prévu par l'art. 10 (c) h) C.proc.pen. Autres clauses de la Convention de médiation peuvent devenir exécutoires qu'après que qu'ils ont subi l'authentification uniquement par le notaire.

Dépenses avancées par le judiciaire pénale État a eu lieu est supporté par les deux parties dans le cas de faire le rapprochement (art. 192, par. 1, point 2, lettre b) C.proc.pen), c'est-à-dire la victime en cas

[1] Il est à noter que le retrait de l'avant gémissements (correspondant à l'annulation de l'arrêt de la matière civile) peut être un moyen de résoudre le différend unilatéralement, soit volontairement ou par suite de la réconciliation atteint par l'organe judiciaire ou de médiation par un médiateur avec l'aide de tiers.

[2] Décision ICCJ-Unis XXVII articles publié dans m. de. Nr. 190 du 20 mars 2007: la fin de la procédure pénale dans le cas des crimes pour lesquels la responsabilité de la responsabilité criminelle la réconciliation il peut être d'humeur par exemple uniquement lorsque cette entente établira en direct de l'accusé et le lésé ne vous réconcilier inconditionnellement et irrévocablement, exprimé lors de la session de l'arrêt ces pièces, le personnel ou par des personnes avec mandat spécial, ou par le premier authentique.

de retrait avant les lamentations (art. 192, par. 1, article 2, lettre c) C.proc.pen), sauf que les deux parties s'entendent autrement.

Bien que la loi spéciale ne prévoit pas expressément dans le cas où la médiation est réussie et pénale se termine, après le retrait des parties ou de la victime avance la réconciliation des gémissements ne peut conclure à une nouvelle plainte avec le même objet.

Lorsqu'un nouvel avis de plainte est inséré sur le même auteur et de la même infraction, viole le principe du retrait avant d'irrévocabilité, c'est-à-dire les lamentations du caractère des parties de la réconciliation. Poursuivant sur cette solution une seconde fois sera la base pour le travail convenu dans l'adoption de solutions nouvelles qui seront des compétences pour le retrait de la page d'accueil de la réconciliation, pièces ou avant lamentations comme le prévoit l'art. h 10 (c) C.proc.pen (si déjà ces questions sont dans la phase d'isolateur de l'enquête criminelle) et finale prévu par l'art. 10 (c). j) C.proc.pen (si elles ont eu lieu auparavant en face de la Cour).

Concernant l'application de l'article 13, comme C.proc.pen, dans lesquelles le défendeur peut demander l'auteur/poursuite de la procédure pénale et se retire à plainte plus demandé, efficace afin d'obtenir une solution plus favorable, il est a noté que, étant donné que la médiation a été conclue un accord entre les parties concernant le retrait, l'application auteur accusé de continuer les poursuites pénales, conformément aux dispositions de l'art. C.proc.pen 13. apparaît comme inadmissible.

Si les parties n'ont pas combiné dans la procédure de médiation, procédure pénale doit être repris automatiquement, immédiatement après avoir reçu le procès-verbal de trouver cela ou, s'il n'est pas, à l'expiration de 3 mois à compter de la date de signature du contrat de médiation (article 70 par. 4).

Il est possible que plus de la poursuite et le jugement de confirmer avec l'auteur en détention préventive. Cette situation peut être commune dans le cas de l'infraction de viol (art. 197, par. 1 (C). pen.), trouble de la possession (art. 220 C.pen.), gestion frauduleuse (art. 214, par. 1 (C). pen.), séduction (à art. 199 C.pen.).

Il n'y a aucun obstacle juridique d'ouvrir la procédure de médiation dans une telle situation, exécution de la procédure d'élever comme médiation seulement les questions relatives à l'emplacement ou à la convenance des parties. Les séances de médiation seront dans un tel cas, à la place de l'arrestation.

Suspension de la procédure pénale dans les compétences, n'empêche pas un procureur Court pour demander l'extension de l'utilisation de l'arrestation préventive de l'accusé, motivée par la nécessité de compléter la procédure d'octroi de la probation et la médiation.

Du point de vue du risque social de l'accusé, la simple intention de participer à une procédure de médiation ne représente pas un merveilleux acte d'annihiler son danger. D'autre part, constitue un préalable à la mise en liberté provisoire sous contrôle judiciaire, si le législateur pourrait lui fournir.

Confidentialité de la médiation, le Médiateur pour empêcher la Cour de l'arrêt de toute information utile sur la situation de l'accusé qui pourrait être utilisé en mode d'évaluation et de la periculosite a accusé le rapport sur l'accomplissement de l'acte. Le seul qui peut divulguer les données de ce type est la victime, mais sa participation à l'arrêt est impossible, parce que le jugement de la proposition d'extension de l'utilisation de la détention préventive doit être fait au cours de la session qui n'a pas un caractère public, et les seules façons les renseignements soumis à la Cour sont une partie de la victime, qui n'est pas nécessaire.

Critiques de la médiation en matière pénale, comme elle l'est actuellement réglementée, sont liées aux aspects suivants:

- modalité droit ne régit pas tout contrôle sur la part des autorités judiciaires quant à la façon dont ils sont remplies d'obligations en vertu de l'accord de médiation;
- impossible d'envoyer eux-mêmes un médiateur des instances judiciaires.

Donc, le législateur devra tenir compte du fait que pour la mise en œuvre réussie de la justice réparatrice, les pas un justicier a tenu seulement à fournir des occasions de réaliser, mais aussi de donner de leur efficacité dans la réalisation de l'objet pour lequel il a été fourni.

Bibliographie

Bieri, I. **(**2011). *Medierea și concilierea sau soluționarea prealabilă și extrajudi ciară a litigiilor în dreptul elvețian/Mediation and Conciliation or Alternative Dispute Resolution of Litigation in the Swiss Legal Order*. Bucharest: Universul Juridic.

Dragne, L.; Trancă, A. (2011). *Medirea în materie penală/Mediation in criminal field*. Bucharest: Universul Juridic.

***http://www.juridice.ro/32189/efectele-globalizarii-asupra-justitiei.html.

***http://www.mediate.com/articles/sustacZ3.cfm.

***http://www.gemme.eu/nation/portugal/article/law-criminal-mediation.

***http://www.lectlaw.com/files/cjs08.html.

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REALITIES AND PERSPECTIVES

The Evolution of Human Rights Protection within the EU Legal System

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Abstract: Having in mind the EU's policy to rebuild the democratic systems within the former European communist countries and its involvement in international actions regarding human rights enforcement, there is no doubt about the importance of individuals rights protection in the European Union's legal system. In this respect, the present paper analyzes the evolution of the principle of EU's human rights protection. The research done on the EU legislation and courts' jurisprudence shows that there are three main stages related to the EU evolution of human rights protection: first – the rejection, by the ECJ, of human rights principle as part of Community Law; second - its acceptance, recognition and protection by the EU's judges; third - the regulation and monitoring of the fundamental rights and freedoms at the European level. Based mainly on the ECJ's jurisprudence, this paper tries to answer the following questions: What was the political motivation not to explicitly protect human rights through the coafnstituent treaties? What was the contribution of ECJ to remedy this situation? How the European acquis was developed in order to guarantee the principle of fundamental rights? What is the current state of EU legislation for guaranteeing human rights within the European legal order?

Keywords: human rights; Charter of Fundamental Rights of the European Union; EU law; Court of Justice of the European Union; European acquis

1. Introduction

In the early '50s, it was considered that the duties to respect and guarantee human rights should be exclusively borne by the Council of Europe, arguing that the European Community's institutions, which operated mainly in the economic field, could not affect the principle of human rights protection (Betten & Grief, 1998, p. 53). However, the European political and legal reality proved otherwise. Since the first years of its existence, the European Court of Justice (further, ECJ) was asked to rule on the conformity of EU institutions' acts with the constitutional provisions of Member States relating to fundamental rights.

It can be seen that, although the founding Member States of the European Communities have played an important role in the adoption of the Universal Declaration of Human Rights, as well as in the regional and international development of human rights law, the main treaties establishing the European Communities were not included such legal provisions.

The analysis of protection of individual rights and fundamental freedoms within the European Union human rights system pointed out that, in the first decades on the Court of Justice existence, a vast number of individual cases raised the issue of guaranteeing individual rights, an approach in order to analyze the facts through the principle of human rights. So, there were identified three main stages, namely:

- the Court rejected the principle of human rights as part of EU Law;
- the acceptance, recognition and its protection by the Court;

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- the regulation and monitoring of human srights and fundamental freedoms.

The need to guarantee individual rights by the European institutions began with the establishment of European Coal and Steel Community.[1] Therefore, the documents issued by the High Authority was challenged before the Court by citizens of Member States whenever they have infringed the individual's rights and freedoms guaranteed by national constitutions.

By a careful analysis of ECJ case law there could be identified a gradual evolution of the way how the principle of human rights is protected in Europe. Studing the EU acquis, especially the jurisprudence of courts from Luxembourg, it has allowed us to identify three main stages in the evolution of fundamental rights protection, as follows:

- the stage of principle of human rights and fundamental freedoms rejection (1953 - 1962);
- the stage of acceptance to interpret the primary legislation in order to create individual rights (1963 - 1968), the recognition of the rights and fundamental freedoms to be respected in the Community legal order (1969 - 1974) and the protection of these rights and freedoms (1975 - 1992);
- the stage of legislation (1992 - present) and monitoring (2007 - present) the fundamental rights and freedoms by institutions and EU Member States.

Further, these stages are presented, supported and analyzed based on the reasons identified in the case law of the Court and in the evolution of the EU substantive law.

2. Rejection of the Human Rights Principle by the Court of Justice

By the second half of the '60s, the Court refused to interpret acts of Community's institutions in accordance with the constitutional provisions of the Member States in order to ensure the rights and fundamental freedoms. In 1958, Friedrich Stork[2] submitted to the Court a complaint against the ECSC's High Authority, claiming that its decision of November 27, 1957, violated his rights under the German Constitutional Law. In these circumstances, the Court decided that the High Authority is held only by the Community Law, not bound by the law of the Member States. In addition, the European Court argued that it can decide only on the interpretation and application of the provisions of the Treaty,[3] without the possibility, in motivating its decisions,[4] to refer to national legislation of Member States. Therefore, the High Authority was not required, through its acts and actions, to comply with national constitutional laws.[5] So, the Court rejected the application of fundamental rights principle at the Community level, giving to the High Authority full freedom of action. A year later, four more complaints[6] were filed before the Court of Justice, which have raised the same issue of the disparity between the High Authority's decisions and constitutional rights of Member States' citizens.

By joining and trial together of the four cases on July 15, 1960, the Court upheld the arguments used in the motivating the Stork decision based on which the Community Court has competence to rule on the legality of the High Authority's acts in accordance with the Treaty, but it was not responsible to determine if these acts are in accordance with national legislation of each Member State, default with

[1] The establishment of European Coal and Steel Community (the ECSC) was governed by the provisions of the Treaty establishing the European Coal and Steel Community, signed in Paris on April 18, 1951 and left the force on June 23, 2002.
[2] ECJ, Stork & Cie. vs. the ECSC High Authority, C - 1/58 of 4 February 1959, published in European Court Reports (ECR), p 17.
[3] This power is conferred on the Court by the art. 31 of the Treaty establishing the European Coal and Steel Community.
[4] Throughout this material, we use the generic term of "judgment" for all courts or tribunals mentioned.
[5] ECJ, Stork & Cie. vs. the ECSC High Authority, C - 1/58 of 4 February 1959, published in European Court Reports (ECR), p. 17, § 3 (A).
[6] ECJ, Präsident Ruhrkohlen-Verkaufsgesellschaft and others vs. ECSC High Authority, C - 36/59, 37/59, 38-59/59, 40-59/59, 15 July 1960, published in the ECR 1960, p. 423.

their constitutional law.[1] Moreover, referring to the request from the Nold case,[2] the Court noted that "Community Law, as shown in the ECSC's Treaty, does not contain any of the general principles that guarantee fundamental rights."

In the first decade of its existence, the Court refused to interpret the Community Law in order to protect rights and freedoms guaranteed by the constitutions of the Member States. As shown in the analysis of the above decisions, the Court expressly held that Community Law did not contain, at that time, none of the general principles guaranteeing fundamental rights and, therefore, the Community institutions were not held, in their actions, of respecting these rights.

3. The Interpretation of Primary Legislation in order to Create and Respect Individual Rights within the EU's Legal Order

The analysis of ECJ's case law shows that it took more than ten years to accept the principle of human rights and fundamental freedoms as part of the Community Law. The first step in this direction was the Court's ruling of 1963,[3] which stated that independently of the Member States' legislation, the Community Law imposed not only obligations on individuals, but it provides - at the same time, fundamental rights as part of the European legal traditions. Moreover, the Court held that Community treaties must be interpreted "to produce direct effects and to create individual rights, which national courts must protect."[4] We may observe that this judgment of the Court, which ruled, with the direct effect of Community norms, the recognition of individual rights also, which was maintained in subsequent Luxembourg Court's case law.

In 1964, the Costa decision[5] established the supremacy principle of Community Law to national ones. Complementary interpretation of the Community Law conferred by the Luxembourg Court in Loos and Costa decisions contributed irreversible to the praetorian acceptance of the principle of fundamental rights within the European legal order. This was facilitated by the fact that primary legislation was applicable with priority to national laws while the constitutive treaties contained no provisions on fundamental rights. Therefore, the only viable solution was the development of case law in this area.

Existing, in the Community legal order, more and more the need of acceptance of respect for human rights principle, in 1969 the Luxembourg judge established that this principle is part of the general principles of Community Law and it is protected by the Court. So, the Court, by reasons given in the Strauder case, said that "the provision invoked by the applicant does not contain elements capable to affect the fundamental rights guaranteed by general principles of Community Law and protected by the Court."[6] This decision is the first guarantee of the fact that individual rights were accepted as part of the Community legal order.

Although the Court's recognition of the fundamental rights had been completed, their effective enforcement continued to be debated. Thus, in the International Handelsgesellschaft decision,[7] Community judge returned to the matter of human rights protection "inspired by the common constitutional traditions of the Member States", stating that "the validity of Community measures and

[1] ECJ, Präsident Ruhrkohlen-Verkaufsgesellschaft and others vs. ECSC High Authority, C - 36/59, 37/59, 38-59/59, 40-59/59, 15 July 1960, published in the ECR 1960, p. 423.
[2] ECJ, Nold vs. ECSC High Authority, C - 40/59, para. 2, July 15, 1960, published in the ECR, p. 426.
[3] ECJ, Van Gend en Loos vs. der Belastingen Administration, C - 26/62, February 5, 1963, published in the ECR, p. 1.
[4] ECJ, Van Gend en Loos vs. der Belastingen Administration, C - 26/62, February 5, 1963, published in the ECR, p. 1, § 3, § 4 and § 5.
[5] ECJ, Costa vs. E.N.E.L., C - 6/64, 15 July 1964, published in the ECR, p. 585.
[6] ECJ, Stauder vs. Stadt Ulm, C – 29/69, 12 November 1969, published in the ECR, p. 419.
[7] ECJ, Internationale Handelsgesellschaft mbH vs. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, C - 11/70, 11 December 1970, published in the ECR, p. 1125.

their effects in the Member States[1] cannot be removed based on the fact that they contravene to the fundamental rights or constitutional principles."

In conclusion, the Court held that "fundamental rights protection... shall be secured in accordance with the structure and objectives of the Community"[2] and it applies the principle of Community Law supremacy to the German national legal norms, denying thus the need to respect fundamental rights in relation to Community's objectives, although it had express reference to human rights protection as they were guaranteed by the constitutional common traditions of the Member States. Therefore, individual rights could not be guaranteed if it would be detrimental to the Community's interests.

In 1974, through the Nold II decision,[3] the Court reaffirmed that fundamental rights are part of the general principles of law whose observance the Court is obliged to provide.[4] In addition, this decision introduced a new aspect in the development of the case law of the Luxembourg Court because it established the possibility that, " in the application and interpretation of Community Law, the Court is able to be guided by and to refer to the norms of the human rights international treaties on which Member States are signatories".[5] Thus, the legislative gap of the EEC's Treaty to guarantee human rights was partially remedied, and the recognition of fundamental rights as part of the legal principles applicable to the Community legal order has become undeniable. However, this recognition did not solve the issue of ensuring effectively the respect for fundamental rights in the European Communities as it is stated further.

Praetorian recognition of the principle of fundamental rights as part of Community Law was followed by a policy statement issued on April 5, 1977.[6] Community institutions have officially recognized that the principles underlying the European Convention should be, at the same time, integrated into Community Law.[7] The Parliament, Council and Commission have stressed "the overriding importance importance they attach to the protection of fundamental rights, as they result from constitutional traditions of the Member States and from the European Convention on Human Rights". Moreover, European institutions have pledged that "in the exercise of their duties to meet the objectives of the European Communities, they should respect these fundamental rights".

4. The Regulation and Monitoring of the Fundamental Rights within the European Union

4.1. The Stage of Fundamental Rights' Regulation

The constitutive treaties of the European Communities have not regulated to guarantee rights and fundamental freedoms within the European Union's legal system. Thirty years after the establishment of Communities, the Single European Act[8] made, for the first time, reference to the principle of human human rights. In the third paragraph of the Preamble, it sets out that EU States "work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter"[9]. In this respect, the Single European Act is the foundation of human

[1] ECJ, Internationale Handelsgesellschaft mbH vs. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, C - 11/70, 11 December 1970, published in the ECR, p. 1125, § 2.
[2] Ibidem
[3] ECJ, Nold KG vs. Comisiei, (Nold II), C - 4/73, 14May 1974, published in the ECR, p. 491.
[4] ECJ, Nold KG vs. Comisiei, (Nold II), C - 4/73, 14 May 1974, published in the ECR, p. 491, § 2.
[5] *Ibidem.*
[6] Joint Declaration of the European Parliament, Council and Commission on fundamental rights protection and the European Court of Human Rights was adopted in Luxembourg on April 5, 1977.
[7] ECJ, Johnston vs. Chief Constable of the Royal Ulster Constabulary, C - 222/84, 15 May1986, published in the ECR 1984, p. 1651, § 1.
[8] Single European Act (hereinafter SEA) was signed in February 1986 (entered into force in July 1987).
[9] See the Community Charter of Fundamental Social Rights (not to be confused with the new European Social Charter adopted in 1996 by the Council of Europe).

human rights principle at the European level's regulation as it paves the way of including this principle within the primary Community Law.

The Treaty of Maastricht[1] completed the SEA's provisions with regard to the human rights recognition recognition and explicit stated this principle. Thus, its art. F para. 2 was provided that the European Union shall respect fundamental rights as guaranteed by the European Convention on Human Rights and "as they result from the constitutional traditions of Member States, as general principles of Community Law". We mention that the arguments used by the Court in the Hauer and Rutili cases were taken and specifically regulated within the content of this article.

Maastricht Treaty regulates issues on the principle of human rights in other articles, too, as well as in its Preamble, while the requirements to ensure this principle became part of EU foreign policy. Many bilateral and/or multi-lateral agreements contain severe provisions on the respect for human rights and fundamental freedoms.[2] Also, in February 1992, at Maastricht there was signed a protocol by all the EU Member States,[3] which agreed that in the field of social policy they should follow "the path of the Social Charter of 1989". Thus, the protection of fundamental rights and freedoms has a central role in the further development of the European Union.

The regulation process of human rights and freedoms was marked by the proclamation of the European Union's Charter of Fundamental Rights,[4] following the conclusions of the European Council Council summit in Koln. The document consists of 6 titles[5] - dignity, freedoms, equality, solidarity, citizens' rights and justice, established by merging the three main generations of rights. This new catalog of fundamental rights is essential for the EU legal system, having a different fate of the 1989 Declaration[6] and gaining the status of primary legislation once with the entry into force of Lisbon Treaty.

In 1997, the Treaty of Amsterdam[7] brought innovations in the field of fundamental rights and freedoms protection at the European Union's level. Thus, the Treaty provided that "the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States"[8]. Therefore, the Treaty allows the Court to apply to all acts of the EU institutions the minimum standards related to human rights protection, as they are set by the constitutional common traditions of the Member States and by the international human rights law.

The important role of human rights principle held in the European Union's policy is highlighted by legal norms such as the suspension of certain rights[9] incumbent on a Member State when it violates one of the principles enshrined in Art. 6,[10] as well as by the sentence under which "only those European states that respect the principles set out in art. 6 para.1 may request the EU membership".[11]

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[1] Treaty on European Union was signed in Maastricht on February 7, 1992.

[2] See VI Lome Convention which expressly includes claims relating to suspension of the economic cooperation under violation of human rights.

[3] It is envisaged that the UK is a signatory to the Protocol.

[4] EU Charter of Fundamental Rights was proclaimed by European institutions and Member States representatives on December 7, 2000.

[5] It is envisaged generations of human rights as they have been classified by Professor Karel Vasak.

[6] Declaration of the Rights and Fundamental Freedoms, adopted on April 12, 1989, was adopted by Parliament as a reference tool in human rights and fundamental freedoms throughout the Community and in particular, for the Court. Declaration was the first Community catalog of fundamental rights and freedoms containing civil and political rights, economic, social and cultural as well as a series of new principles - the principle of freedom in art, science and research (Article 5 of. 2), principles constitutive of democracy (art. 17), consumer protection (Article 24) etc.. This document was still no significant meaning as a simple statement of recognition of these rights by signatory States, without the power to produce legal effects.

[7] The Amsterdam Treaty was signed on October 2, 1997 and entered into force on May 1, 1999.

[8] Paragraph 8 of the Treaty, amended art. F of the Treaty on European Union as it was quoted.

[9] See art. 309 UET.

[10] „The Union is founded on principles of liberty, democracy, human rights and fundamental freedoms and the rule of law, principles which are common to the Member States."

[11] See art. 49 UET.

The Treaty of Amsterdam made a real "reform" in the field of guaranteeing human rights in the Union's legal system, both through explicit provisions on fundamental rights that it introduced in the EU primary legislation and through the individual rights transfer which took place between the third pillar - justice and home affairs, and the first Community pillar.

European institutions have provided a particular attention to the procedure for the fundamental rights and freedoms regulation which has yielded in a draft of the Treaty establishing a Constitution for Europe,[1] which included a catalog of rights and freedoms proclaimed in the Charter of Fundamental Rights, thus solving a number of issues raised over time in front of the Court of Justice. The draft of Constitutional Treaty was replaced by the Treaty of Lisbon, notwithstanding the legal force of regulations on principle of respect for the rights and fundamental freedoms.

The Charter of Fundamental Rights does not create new rights, but comprises in one document all the rights and freedoms of EU's citizens, stated by the European Convention on Human Rights, the European Social Charter, the Community Charter of Social Rights of Workers, the constitutional common traditions of the Member States, case law of the European Court and of the Court of Justice, as well as the international conventions on protection of human rights adopted by the United Nations, the Council of Europe and International Labour Organization to which Member States are parties. Therefore, the new catalog adds to the European Convention's provisions, not only other economic, social and cultural rights, but also new civil and political rights, such as the right to good administration[2], the right to a healthy environment,[3] the right to protection of personal data,[4] and it extends the protection of individual integrity through prohibition of eugenic practices and human cloning for reproductive purposes.[5]

The new catalog of fundamental rights does not apply to all situations in which individual rights are violated within the European Union space, but only to those actions taken by EU institutions or other EU bodies and by the Member States when implementing EU Law, in accordance with Article 51 para.1. If the Charter does not apply to a specific situation, the fundamental rights continue to be protected, at local level, in accordance with national constitutional systems of each Member State. In addition, all EU states have joined the European Convention on Human Rights under which their commitments are independent of the EU Law's obligations. Therefore, any individual may bring an action before the Strasbourg Court for breach of a fundamental right guaranteed by the Convention after exhausting all remedies available at national level. Thus, the Charter completes and does not replace the protection offered by the national constitutional systems and by the legal system of the European Convention.[6] So, the democratic deficit invoked by the German Constitutional Court in the Solange I case, nearly 30 years ago, has been found a solution.

4.2. "Monitoring" Fundamental Rights and Freedoms through the Establishment of the EU Agency for Fundamental Rights (FRA)

Tampere European Council[7] launched the idea of a Fundamental Rights Agency to provide institutions institutions or other EU bodies and Member States "the assistance and expertise needed in order to fully guarantee the fundamental rights and freedoms" in implementing EU legislation.

[1] Treaty to enter into force when it was ratified by at least 20 of the 25 Member States signatories. Difficulties in the process of ratifying the Constitutional Treaty led to its temporary suspension. Recovery effort The ratification process was supported by the German EU Council Presidency The Berlin Declaration of March 25, 2007, although no specific reference is made to the Treaty, as provided for that immediate purpose "of placing the European Union on a renewed common basis before the European Parliament elections in 2009". This statement is basically relaunching the process of reforming the European Union, which led to the entry into force of the reform that replaced the Constitutional Treaty on 1 December 2009.
[2] See art. 41 of the Charter of Fundamental Rights.
[3] See art. 37 of the Charter of Fundamental Rights.
[4] See art. 8 of the Charter of Fundamental Rights.
[5] See art. 3 para. 2 of the Charter of Fundamental Rights.
[6] European Commission Report on implementation of the Charter of Fundamental Rights, 2010, p. 6.
[7] To be taken into account, the European Council meeting of 15-16 October 1999, held in Tampere, Finland.

The Agency was established by EU Council Regulation no. 168/2007, with its work starting on March 1, 2007. The new body has extended the former European Monitoring Centre on Racism and Xenophobia, based in Vienna, from the European problem of monitoring acts of discrimination to the protection of human rights and fundamental freedoms in general, but without proper monitoring competence over the Member States.

The Regulation establishes the Agency and governs its objectives, competences, missions, fields of activity, methods of work and cooperation, organization and operation. Among its attributions, the Agency collects, analysis and distributes information and relevant data, including results from research and monitoring activities provided by the Member States, by EU institutions and its bodies, offices and agencies, other national or international institutions and by Council of Europe; develops methods and standards to improve data, in cooperation with the Commission and Member States; achieves and encourages scientific research and surveys, preparatory studies and feasibility studies, at the request of Parliament, Council and Commission; publishes conclusions and opinions of EU institutions on thematic issues; publishes reports on matters relating to fundamental rights, including examples of good practices and thematic reports based on their analysis, research and studies; develops communication strategy and promotes dialogue with civil society for information on fundamental rights etc.

Agency does not interfere, in its activities, with the powers of other UE institutions or regional organizations in promoting human rights, but has competence to provide assistance and expertise to ensure implementation of legislation and programs to promote, protect and fulfill human rights in the European Union. Once the Treaty on the Functioning of the European Union and, default, the Charter of Fundamental Rights entered into force, there was, to the moral obligation established by the Regulation, a political one of supporting the Agency's mandate regarding its assistance and expertise relating to guaranteeing fundamental rights in the development and implementation of EU legislation.

5. Conclusions

In conclusion, we may say that more than half a century ago the principle guaranteeing human rights in the EU legal order was difficult to be implemented. Gradually, socio-political changes have led to acceptance of human rights and fundamental freedoms as part of the Community Law principles, reaching as far European Union to be founded on values common to all Member Statesaf and on the principle of respect for human rights and fundamental freedoms.

European Union and its Member States must respect human rights in the implementation of European legislation in accordance with the constituent and amended treaties, the Charter of Fundamental Rights, European Convention on Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and Council of Europe, as well as the jurisprudence of the Court of Justice and of the European Court of Human Rights.

The evolution of fundamental rights and freedoms protection within the UE legal order had a difficult way to go, slow and still far from being complete. We believe that the entry into force of the Treaty on Functioning of the European Union and the establishment of the Agency for Fundamental Rights will allow a better monitoring of human rights and individual freedoms in Europe, based on such legal framework and means necessary to achieve this objective.

6. References

Betten, L., & Grief, N. (1998). *EU Law and Human Rights.* UK: Longman Press.

****ECJ, Stork & Cie. vs. the ECSC High Authority, C - 1/58 of 4 February 1959, published in European Court Reports (ECR).*

****ECJ, Präsident Ruhrkohlen-Verkaufsgesellschaft and others vs. ECSC High Authority, C - 36/59, 37/59, 38-59/59, 40-59/59, 15 July 1960, published in the ECR 1960.*

****ECJ, Nold vs. ECSC High Authority, C - 40/59, para. 2, July 15, 1960, published in the ECR.*

****ECJ, Van Gend en Loos vs. der Belastingen Administration, C - 26/62, February 5, 1963, published in the ECR.*

****ECJ, Costa vs. E.N.E.L., C - 6/64, 15 July 1964, published in the ECR.*

****ECJ, Stauder vs. Stadt Ulm, C – 29/69, 12 November 1969, published in the ECR.*

****ECJ, Internationale Handelsgesellschaft mbH vs. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, C - 11/70, 11 December 1970, published in the ECR.*

****ECJ, Nold KG vs. Comisiei, (Nold II), C - 4/73, 14May 1974, published in the ECR.*

****ECJ, Johnston vs. Chief Constable of the Royal Ulster Constabulary, C - 222/84, 15 May1986, published in the ECR 1984.*

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

Maritime Rescue

Constantin Anechitoae[1], Calin Marinescu[2]

Abstract: The maritime rescue, as any other legal institution related to maritime events - collision, crash, etc. - has its distinctive features. The maritime rescue may be considered as the operation that arises from maritime collision, because, while collision stems from a breach of a negative duty necessary in maritime navigation, i.e. of not harming the other, the maritime rescue is the implementation of positive obligations required to vessel captains by the material requirements of the marine life that adds to the elements of the legal concept which can be summed up as follows: to go to the aid of a vessel in danger, provided that the vessel does not expose itself, through this action, to a serious danger. The institution of maritime rescue encourages maritime commercial activities by the fact that, thus, there are governed such clear rights and obligations saving life at sea and shipping goods.

Keywords: maritime rescue; sea life; goods

Introduction

Historically, the aim of rescue rules was to counteract the temptation of the savior to acquire goods from stranded ships. In modern times, the aim was actually the desire to provide an incentive for the rescue efforts and, therefore, to maintain property values.

In practice there were used the concepts of "assistance" in order to refer to the help rendered to vessels in danger, with the purpose of avoiding a more serious accident, and "rescue" in order to consider the contrary, when the aid is provided under serious conditions or when a first accident has already occurred. Theoretically, "assistance" means the aid provided to a ship in danger in order to get out from a situation, and "rescue" – the help rendered to a vessel in danger, which, because it lost its maneuver ability, cannot cooperate with the opportunity of the aid it receives. We speak of "assistance" when the help comes in time in order to avoid danger, i.e. before sinking, and of "rescue" when the act does not occur until after the shipwreck has already begun.

1. Introductory Terms

The rules that apply to salvage are unique in maritime law. There are no similar rules on the land that would entitle a person which has just saved another person's property to ask for a generous reward. The reason is partly historical, but actually another major reason is the actual physical situation. With the exception of fire, the land does not need such a big help in salvage services.

From the historically point of view, the aim of salvage rules was to counter the temptation of the wrecker to acquire goods from vessels that ran ashore. In modern times, the goal is actually a desire to provide an incentive for the efforts made in order to save and, therefore, to maintain property values.

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In practice, there has been used the concept of "assistance" to describe the help provided to a vessel in danger, with the purpose of avoiding a more serious accident, and "salvage" in order to have in view the opposite, when aid is provided in serious conditions or when this first accident has already occurred.

Theoretically, in doctrine, "assistance" means the assistance provided to a vessel in danger in order to overcome the situation it is in, and "salvage" means the aid rendered to vessels in danger, which, losing their ability to maneuver, cannot work at the aid that they receive. We talk about "assistance" when the aid intervenes in time in order to avoid danger, that is before the shipwreck takes place, and "salvage" when the act in question does not intervene until after the shipwreck has already begun. (Manolache, 2001, p. 12)

2 The Distinction between Maritime Rescue and Maritime Assistance

The Convention for the unification of certain rules of law relating to assistance and rescue (Brussels, September 23, 1910) makes no distinction between maritime rescue and maritime assistance.

The Rescue International Convention, adopted in London on April 28, 1989 shows that the rescue operation means any act or activity undertaken to assist a vessel or any other property in danger, in navigable waters or in any waters.

The obligation to assist is imposed by Art. 10, section 1 of the Convention: "Every master is bound, to the extent that he can do it, without endangering his ship and the persons on board, to assist any person in danger of being lost at sea".

In practice, the term "assistance" is used to refer to the help provided to a vessel in distress, in order to avoid a more serious event, and the notion of "rescue" - to designate the help given after the production of maritime distress.

The assistance always involves the existence of a state of real danger.

The rescue is conceivable only if the vessel, being in the open sea, is in such danger that, without immediate help, it would be completely lost; the assistance consists of preventive measures in order to avoid major damage to both the body of the vessel and the goods.

3 The Stimulating Factor by Reward

The stimulating factor is particularly evident in the rules for calculating the rescue reward. If the rescue effort was successful, the reward has to clearly exceed the normal remuneration for such services. The assessment must recognize the danger associated with the rescue operation – i.e., the danger faced by the savior, the risk to fail, or the risk to damage the saved party - and the value of the property saved. The rescue reward, which is from 5 to 10 percent of the total value of the property saved is not an unusual percentage, which means that a reward for a general cargo ship loaded to its maximum capacity may be a considerable amount. It goes without saying that the perspective of such compensation is a strong incentive for any potential savior.

The stimulating factor is also a reason for another rescue law, namely, the so-called "no cure, no pay" principle (if the rescue operation fails, the reward is not granted). This means that no reward can be asked unless the rescue operation was successful. If the attempt fails, the rescuer cannot make any claim, not even for the direct reimbursement of expenditures. The principle of "no cure, no pay" encourages rescuers to do everything they can, hoping to win a generous reward if their efforts result in success.

Another incentive is provided for the establishment of a maritime lien on the ship and cargo in order to ensure the claims after rescue. Thus, rescuers can be relatively sure that the rescue reward will be paid.

4. Principles of Maritime Rescue

The philosophy of the rescue service was epitomized in maritime law literature as follows:

"*The maritime rescue principles are based on the simple premise that everyone who helps in order to save marine property is entitled to reasonable compensation for their efforts, and those who have benefited from these efforts should contribute to a reward in proportion to the value of the property saved. This, of course, led to the famous triumvirate of danger, volunteering and success that, with few exceptions, must exist in order to be able to talk about a rescue service*"(Gold).

Thus, in order to reward a rescue service, three main factors should exist: danger, volunteering, success.

According to article 87 of O.G. 42/1997 (r) on maritime transport and on inland waterways, when the commander / leader of the vessel flying the Romanian flag receives a message indicating that there is a vessel in danger, is obliged, to the extent that he does not endanger his own vessel, crew, passengers and / or cargo, to move with all possible speed to that vessel in order to provide it the necessary assistance and to save the people in danger on board of that ship.

The vessel commander / leader is obliged to give, after collision, support to the other vessel, crew and passengers and, where possible, to indicate to the other vessel the name of his own vessel, its port of registry and the nearest port to which it will get Article 88, O.G. 42/1997 (r)].

The vessel commander / leader has no obligation to provide assistance and rescue if the master / leader of the vessel in distress expressly refuses help and if he receives information that help is no longer necessary [Art. 88, O.G. 42/1997 (r)].

The grounds for not granting the aid, due to refusal will be recorded in the logbook.

5. The Existence of Danger

The situation threatening the vessel which needs help is an objective and necessary circumstance qualifying an aid as rescue. It has a rather vague nature, especially since there is no legal definition in the internal and international regulations, so that it inherently raises the question on the nature or the type of danger affecting the vessel, so that the effective intervention of the rescuer determines a royalty, or the question related to the lower limit of possible dangers.

The first question that arises is: what can be called "danger"?

The answer is that, basically, there should be a risk of physical and extensive damage of the ship and cargo. Thus, if there is a risk of total loss of ship or cargo, we can clearly speak of a rescue situation. An unfortunate example is the case of Costa Concordia cruise ship with 4,229 people on board which, on January 13, 2012, struck the rocks and partly sank near the Giglio Island in the Tyrrhenian Sea. The supreme value to defend, i.e. the life and integrity of the passengers, was threatened by documents containing false information about the true state of danger, which would have required urgent rescue actions.

Volunteering

Concerning volunteering, the wrecker should not be under the pre-existing duty to provide salvage services. The Law of Salvage does not apply where there is an official duty of the coastal guard, the Navy etc. to provide help.

The claim of the wrecker to a reward depends on the successful outcome. This premise is reflected in the traditional phrase "no cure, no pay". Until recently, the matter of the success of the salvation effort did not have any difficulties. If a vessel was in danger, it should have been immediately removed from the state of danger to safety. When the vessel had difficulties due to engine problems, it had to be

towed into a port where it could benefit at least from temporary repairs. As a consequence, the wrecker was rewarded for salvage of the property.

Thus, a wrecker who had managed to tow a vessel loaded with explosive substances which had a fire on board, and thus prevented damage to the shore, would not enjoy any kind of reward if the ship exploded and sank. A similar situation existed when the wrecker has saved the ship-owner from liability on the saved property.

Major disasters involving oil carriage proved serious problems with the rules of property salvage.

Imagine a tank loaded to maximum capacity which is out of control and heading to the shore, having the potential trajectory to break and cause to a significant environmental damage. The prospect that the wrecker who prevented the oil pollution was not entitled to a reward may not be satisfactory if the ship sank during the rescue operation. No need to say that such an operation has saved the ship-owner from liability for damage caused by pollution.

6. Conclusions

The maritime rescue is a maritime event with distinctive features that are based on the spirit of solidarity and on mutual human aid, which must govern the activity at sea. The legal rules established in this regard give expression to this spirit. But they cannot offer the possibility to obviously frame the maritime rescue in a pre-existing legal typology.

7. References

Alexandrescu, A. & Alexandrescu, C. (2006). *Tratat de Drept Maritim* / Maritime Law Treaty. Galati: Ed. Fundaţiei Academice Danubius.

Anechitoae, C. (2009). *Drept maritim şi portuar. Bibliografie selectivă/Maritime and inland water law. Selective Bibliography.* Vol. I. Trilingual edition. Bucharest: Ed. Academiei Române.

Anechitoae, C. (2005). *Convenţii internaţionale maritime – legislaţie maritimă* / International maritime conventions - maritime legislation. Bucharest: BREN.

Boldeanu, C & Iordache, F. (2005). *Curs de Drept al Mediului /* Environmental Law Course. Constanta: Dobrogea.

Grigorut, C. & Anechitoae C. & Staiculescu A.R. & Lisievici Brezeanu, A.P. (2012). Management issues for the safe operation of ships and for pollution prevention. Proceedings the 14th International Congress of International Maritime Association of the Mediterranean (IMAM), Genova, Italy, 13 – 16 September, 2011. In: *Sustainable Maritime Transportation, and Exploitation of Sea Resources*. Editors: Enrico Rizzuto (*University of Genova – DICAT, Genova, Italy*). Vol. 2, pp. 941 – 944.

Lucian, G. & Mihai, I. (2003). *Culegere de acte normative /* Collection of laws. Constanta: Muntenia.

Manolache, O. (2001). *Contractul de salvare maritimă /* Maritime Rescue contract. Bucharest: All Beck.

Popa, G. (2011) *Prevenirea şi combaterea spălării banilor şi criminalitatea economico-financiară*/Preventing and combating money laundering and economic-financial crime. Bucharest: BREN.

Stan, A. V. (2003). *Tratat de transporturi /Transportation Treatise.* Bucharest: Universul Familiei.

Tonegaru, C. (1933). *Procedura în caz de avarii şi sinistre maritime aplicabile şi în navigaţia maritimă, ed. a III-a /* Procedure in case of damage and sinister applicable maritime and shipping, IIIrd Edition. Bucharest: Tipografia „Lupta".

Voicu, M. (2002). *Instituţii de drept maritim /* Maritime Law Institutions. Constanta: Ex Ponto.

*** International Maritime Organization (1992). *Maritime law for ships' officers. Course – Compendium.* Printed and published by the International Maritime Organization, London, p. 138.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
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Legal Status of Waste

Florica Brașoveanu[1]

Abstract: Within states statutes designed to combat the environmental pollution through waste and hazardous substances grow multiplied. The legal system reacts first by using known techniques and then in a progressive manner, by creating new techniques. Environmental protection will go further and turn into a powerful factor that will determine the improvement of fundamental concepts regarding environmental protection through prevention, according to the principle "it is better to prevent than to repair environmental damage". The implementation of this principle is inevitable given that environmental protection has become a global objective of the international society, resulting in a harmonization of environmental legislation and radicalization of international cooperation in environmental protection. Given the globalization of environmental protection action, economic factors play an important role in the fight to safeguard the environment, states taking measures to protect the internal environment, but also regional and global environment.

Keywords: Environment; waste; sustainable development; legal protection

1. Introduction

After accession to the European Union, following the commitments assumed by Romania during the negociations of unit. 22 - Environment is very expensive: by the end of 2018 (latest year for which we obtained the transition period for implementation of all negotiated provisions of the environmental acquis) a need of 29.3 billion Euro was estimated.

The higher costs are needed to ensure environmental infrastructure performance, which ultimately leads to the "recovery" of the economy of Romanian society. In the context of the existence of real problems of environmental pollution in Romania, the partnership principle, along with the precautionary principle, pollution prevention, sustainable use of natural resources, proximity, producer responsibility and, especially, the "polluter-pays" principles is the foundation of all measures and actions to be taken to protect and improve the environment in Romania.[2] This can be achieved only through an active partnership between government authorities, local government, professional associations, employers, unions, NGOs and all citizens of this country.

At the same time, all government institutions, business sector representatives and civil society and financial institutions need to cooperate with relevant agencies and organizations, at regional and international. We are particularly interested in speeding up the transition to a consumption and production for a viable social and economic development of Romanian society, the rational and efficient exploitation of natural resources.

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[2] Environmental Protection Law defines only the potential environmental risk - as the probability of adverse effects on the environment can be prevented using a evaluation study and not the *significant risk* to humans, environment and material assets.

2. The Matter Seat

The G.O. no. 195 of 2005 on environmental protection defines waste generally as "substances resulting from biological and technological processes that can not be used as such, some of which are reusable."

It follows from this definition that waste, in general, are natural - resulting from biological processes and industrial-technological - produced by various human activities, some of which can not be used as such and need therefore be neutralized or destroyed, while others are reusable as secondary raw materials present no toxicological or environmental[1].

The above reproduced definition has to be completed with that listed in the Government Emergency Ordinance no. 78/2000 on waste[2] which defines waste as "any substance or object in the categories set, which the holder discards, intends or is required to throw them."

This definition, as is the one given by Government Decision no. 340/1992 on the import of waste and residues of any kind and other dangerous goods for health and the environment (Tomescu, 1994, p. 29) showing that waste and debris of any kind are "products and materials with warranty terms obsolete, used products that have no physical or use-value and household waste", are vulnerable, such as discussed in legal literature, for that they do not include hazardous waste nor focus on worthless waste, contrary to their need for recycling.

The Environmental Protection Law contains a number of general rules on dangerous substances and preparations, waste and hazardous waste that concern, on the one hand, the obligations of environmental authorities and other authorities empowered by law, if necessary to supervise and monitor compliance with relevant regulations and take measures to prevent and reduce the impact of chemicals and hazardous chemicals and wastes on human health and the environment and, on the other hand, individuals and legal obligations to manage substances and preparations dangerous or carry out import, export, transit and international transport of waste and rules on water quality, soil and air, terrestrial and aquatic ecosystems protection, protection of human cities and nuclear activities .

Waste management activities, regarding the protection of human health and the environment, which include: household waste, waste production, construction and demolition waste, hazardous waste, such categories being expressly mentioned by law are covered by Government Emergency Ordinance no. 78/2000.

Waste of any kind, resulting from many human activities, is a matter of great current due to the continuous increase of their quantities and types, but also because the quantities of raw materials, reusable materials and energy that can be recovered and placed back in the economic cycle.

The current practice of collecting, transporting and storage of municipal waste are still inadequate in many cases, generating a negative impact on the environment and facilitating the multiplication and dissemination of pathogens and their vectors. Waste, particularly industrial. constitute sources of health and environment risk due to their content of toxic substances such as heavy metals, pesticides, solvents, petroleum products.

Ilegal storage of waste, maintaining the operation of non-compliant landfills, collection of household waste mixed with hazardous waste are sources of pollution for both surface water, groundwater and soil. Due to the lack of selective collection systems in the urban areas, the percentage that waste are selectively collected is still very small. There are not any integrated systems for separate collection of packaging waste, hazardous waste from municipal waste, bulky waste.

Hazardous waste in household waste are the waste batteries, oil, fluorescent tubes, medicines, paints, solvents and their packaging, etc.. These wastes can make the process of decomposition in landfills difficult and, ultimately, can pollute groundwater.

[1] O.U.G. No 78/2000 was published in the Official Monitor no. 283 of 22.06.2000 and subsequently amended and approved by Law no. 426 of 18.07.2001, published in the Official Monitor no. 411 of 25.07.2001.
[2] Published in the Official Monitor no. 281 of 26.01.1992, amended by H.G. no. 437/1992, published in the Official Monitor no. 201 of 18.08.1992 and completed by H.G. no. 145 of 14.03.1995, published in the Official Monitor no. 54 of 23.03.1995.

Construction and demolition waste, namely, building demolition materials, excavated soil, wastes are generated in increased quantities in large urban areas. These wastes are stored or disposed in organic deposits without prior screening and treatment. The amount of construction and demolition waste disposed of in landfills increased from year to year, reaching in 2007 43,048 tons.

Electrical waste and electronic equipment were collected by the collection points, in accordance with Government Decision 448/2005 (on waste electrical and electronic equipment), in Constanta and Mangalia. Most of these waste come from operators who have scrapped electrical and electronic equipment they had on. Population brought a small amount of such waste to collection centers, which are very often encountered in waste collection platforms without sanitation operators to collect them separately.

States taking steps to protect the environment should consider the costs and efforts that will affect their own economy. Certainly, long-term investments made to eliminate pollution are cost-effective because restoring damaged natural resources is very expensive. However, short-term costs of environmental protection are felt instead of long-term savings.

Whether the cost of the measures taken to protect the environment will be paid by the manufacturers or service providers or if these measures are the direct responsability of public authorities, the economy will always be the one that will support short-term consequences and additional costs will be passed on to export prices. States that protect their own environment are likely to be penalized in international competition because of the distortions that appear to their disadvantage. These distortions are particularly felt in systems based on freedom of interstate trade.

Another factor in the internationalization of legislative, administrative and institutional measures is the danger of pollution and hazardous substances. A step forward in this line is the Basel Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal, ratified by Romania by Law nr.6/1991. Also, post-Chernobyl conventions regarding nuclear safety concluded in Vienna in 1986 mark a new era in the protection against nuclear pollution and cooperation of States in this field.

According with the law, the nuclear activity is based on an authorization from the National Commission for Nuclear Activities Control, issued to units engaged in nuclear activities, provided that they comply with rules that consider security of installations, protection of professional personnel, population and environment. Subject to Authorization is the introduction into the economic and social circuit, for use or consumption by the population of products that have undergone irradiation and use of radionuclides, radiation sources and pharmaceuticals containing materials radioactive for medical treatment and diagnostic. Authorization issued by the Ministry of Health, at the request of units, under section 14 of Law no. 111/1996.

At the deployment of operating nuclear units the following elements: the direct effect of nuclear activities on population and environment, both in normal operation and in case of nuclear accident, quantities and means of disposal of radioactive waste, density and average age of the population in the area and its specific diet will be considered.

The main measures for effective protection against radiation are adequate building facilities used as nuclear facilities, organizing safe disposal and storage of hazardous waste, radioactive and dosimetric monitoring of the entire territory, particularly crowded areas, water and atmosphere, providing projection against radiation for all units used in one form or another, ionizing radiation.

Another important convention on the prevention of negative environmental impact of industrial activity in a transboundary context is the *Convention of February 25, 1991 Espoo, Finland, on Environmental Impact Assessment in a Transboundary Context.*

3. Conclusions

International environmental law, still evolving, is founded on some traditional principles of international law, namely that it is prohibited causing damage to other states through waste and hazardous substances.

1. Defining the legal regulations concerning waste management in terms of Strategy and National Waste Management Plan such as: regional landfill, collection points (in rural areas), isolated settlement, transfer stations, composting plants. On approval by H.G. 1470/2004 Strategy and National Waste Management Plan, within the legislation on waste management terms were not defined, otherwise used within the requirements to implement European legislation in this field.

Strategy and National Waste Management Plan aimed at creating the necessary framework to develop and implement an integrated waste management, energy efficient and environmentally-friendly system.

For example, the legal framework for implementation of the Directive 99/31/EC was created by GD 162/2002 on waste disposal, the Minister of Waters and Environment Protection Order 1147/2002 approving the Technical Norms on waste disposal - construction, operation, monitoring and closure of landfills and Order 867/2002 concerning the definition of waste criteria to be satisfied for to find the list specifies a deposit on the national list of waste accepted in each class of landfill. In 2005, Technical Norms on storage was being promoted repealed Order 756 - Technical Standard for the storage, Order 867/2002 was replaced by Order 95/2005, GD 162/2002 was repealed by H.G. 349/2005. The new regulations ensure that European requirements on landfill waste, in terms of building operation, monitoring, closure and post-closing follow-up of new deposits, as well as those existing. Some of the terms mentioned (regional landfill, isolated village) have been explained by GD 349/2005.

2. Differentiated approach to the issue of deposits in rural areas, in the case where they were filled only with waste generated in cities they serve. The approach will have to consider the practical ways of closing the landfill in these areas and new possibilities for storage (temporary) of generated waste.

A very important issue, related to integrate waste management is the closure of old landfills. These deposits have significant impact on the environment: polluted groundwater, biogas emissions, odors, degraded, uncontrolled waste, including hazardous waste, may damage the health of the population of surrounding areas. Operators of waste from old landfills have not been required to provide funds for the closure and post-closure monitoring of them. Most deposits are owned by city halls and were not given in concession to operators. Closing them requires significant funds for: the studies and projects, implementation of proper closing, post-closure monitoring, providing site security.

In H.G. 162/2002 the closing and monitoring post-closure of existing deposits was seen together regardless of location, urban or rural. It is necessary the promotion of a guide for closing landfills of non hazardous waste is necessary.

3. To develop a strategy for waste management in the medium and long term strategy embodied by the Local Waste Management. Its main purpose is to highlight the waste streams and treatment options of these wastes. Local Waste Management Plan is an important contributor to implement waste management policies at national and European level.

To achieve the recycling targets for packaging waste, and the targets of Directive 99/31/EC on landfill of waste, capacity mechanical biological treatment, composting capacity, transfer stations, collection systems for packaging waste will be proposed in this plan. Costs can not be assimilated to the specific conditions in Romania; what can be highlighted is the high cost of the proposed waste management systems. An important aspect is related to the location of local / regional systems (for example, location capacity mechanical biological treatment, composting of the deposits near the area) and their number.

4. Important projects are carried out locally to attract financing in managing their household and similar waste. Before a project waste management these should be considered:

- for all waste management activities public agreement is a must, especially for stations of composting, mechanical biological treatment plants, incinerators, landfills;
- awareness campaigns are useful for all investment projects;
- environmental impact of each alternative, technical, economic, financial implications in terms of required fees.

4. Bibliography

Anechitoae, Constantin (2009). *Drept maritim şi portuar/Maritime and inland water law. Droit maritime et fluvial – Bibliografie selectivă. Selective bibliography. Bibliographie sélective. Vol. I*. Trilingual edition. Bucharest: Editura Academiei Române.

Anechitoae, Constantin (2009). *Introduction to international maritime law*. Second Edition. Bucharest: Editura Militară & Top Form.

Anechitoae, Constantin (2008). *Geopolitics of marine spaces*. Bucharest: Editura Militară & Top Form.

Cămăşoiu, Camelia (2004). *Economy and defying nature. The alternative of sustainable development in Romania*. Bucharest: Economică.

Duţu, Mircea (2006). *Environment law*. Bucharest: Economică.

Duţu, Mircea (2008). *Environment law*. Bucharest: Economică.

Mazilu, Dumitru (2009). *EU environment law*. Bucharest: Lumina Lex.

Tarca, Stefan (2005). *Environment law*. Bucharest: Lumina Lex.

Neagu, Niculae (2006). Romania and the security environment in the Black Sea Area. *Colectia Anuarul Muzeului Marinei Romane/ Romanian Navy Museum Yearbook Collection*.

Popa, George Dorel (2009). International Crissis in the context of Globalization and Money Laundering. *Analele Universităţii Ovidius Constanţa, Seria: Ştiinţe Economice/Ovidius University Annals, Series: Economic Sciences, Vol. XI, No. 2/2011*.

Popa, George Dorel (2012). International cooperation in the struggle against trans-border organized crime and money laundering. Volumul Conferinței de Drept și Ordine Socială/Conference Proceedings of Law and Social Order, edited by Addleton Academic Publishers of New York.

***Law no. 426/2001 for the approval of GEO no. 78 / 16 iunie 2000, regarding the legal status of waste.

***GEO no. 78 / 16 iunie 2000 regarding the legal status of waste. Official Monitor no. 283 / 22 June 2000.

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The Legal Status of the Danube Delta Biosphere Reservation

Florica Brasoveanu[1]

Abstract: In recent years the world has become aware that natural resources are not inexhaustible, that many species are threatened with extinction and that is is necessary to strive for judicious use of natural resources to fulfill the needs of the present without compromising the ability of future generations to meet their needs (principle of sustainable development). To conserve species and habitats protected areas have been established worldwide. The protected area is a geographically defined area, with rare natural elements and / or endangered species, regulated and managed in order to achieve specific conservation objectives. Although ranked Europe's second in size (after the Volga River) and the 20th in the world, because of the rich landscape and wildlife, with the birds ranked most important, the Danube Delta has a very special interest scientifically as it is a natural laboratory of forming delta, tourism and economic ecosystems, through its renewable natural resources of which the most important resources are living aquatic resources.

Keywords: rotected area; environment; sustainable development; legal protection

1. Introduction

Danube Delta was included in the international network of biosphere reserves in the "Man and Biosphere" to conserve the natural areas, ecosystems representative genetic resources capable of maintaining and expanding plants and animals endangered or threatened program. Unlike other protected areas, a Biosphere Reserve is not exclusive for protection but has several purposes, among which only a few: conservation of ecosystems and balanced use of renewable natural resources, the preservation of traditional forms of economic activity, which contribute to produce ecological imbalances, research and continuous monitoring of protected ecosystems components, harmonizing the interests of local population with the primary purpose of Biosphere-preservation **(**Gâştescu, & Ştiucă, 2006)

In this study, in order to understand the importance of protection and sustainable exploitation of aquatic resources within a reservation - the Danube Delta Biosphere Reserve, we presented the concept of protected areas, types of protected areas and Danube Delta Biosphere Reservevation's place nationally and internationally.

We know that natural resources are subject to various anthropogenic pressures. No aquatic resource has escaped the impact of people directly (capture) or indirectly (destroying habitats and breeding areas by drainage, dams, etc.). We summarized the impact of activities on the Delta over time with emphasis on the impact on natural resources.

We have paid special attention to preserving the Delta as wetland of international importance that is part of the Ramsard (Convention on Wetlands of International Importance especially as Waterfowl Habitat [2]). To conserve the rich biodiversity hosted by the Danube Delta Biosphere Reserve, the Danube Delta Biosphere Reserve Administration has developed (periodically) management plans that

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[2] Ratified by Romania by Law no 5/1991 published in Official Monitor, part 1, no 18/26.01.1991.

included objectives materialized through projects leading to improved environmental conditions, protection of protected species, sustainable use of resources natural, etc.. A Master Plan was presented by the Danube Delta Biosphere Reservation Administration in support of sustainable development[1], in which the investment projectswere included which are expected to be achieved by focusing on ecological restoration works aimed on actual environmental aspects (hydrologic regime by restoring network channels to improve water circulation, restoration and improvement of degraded lands renaturation economic areas used for agricultural and fishery facilities) and socio-economic (traditional activities).

Effects of ecological restoration of these plans are beneficial to the delta ecosystem and will result in expansion of existing natural habitats, improve ecological conditions in natural aquatic complex, natural extension of spawning, feeding and rest of fish and wild birds. Ecological restoration projects in the delta support the sustainable development of the fisheries. To this end the National Agency for Fisheries and Aquaculture Fisheries initiated an Operational Plan in accordance with EU regulations and sustainable development.

For sustainable exploitation of aquatic resources clear rules and a restructuring of the fisheries and aquaculture by maintaining a constant number of fishermen and fishing vessels (even encouraging fishermen to give up this activity by compensation) orientation and financial support for aquaculture development of this branch are required. To avoid over-exploitation of water resources to assess the areas and quantities available and planned for is necessary.

None of the plans will have the expected success, if there are no efforts to fight poaching in two areas: fish and wildlife. Aquatic fauna and hunting are hit, especially when poaching is done during the prohibition and using inappropriate but performant fishing gear or when trapping is non selective

2. The Matter Seat

Located in the geographical center of Europe, Romania has five of the 10 biogeographic regions officially recognized in the European Union, holding the largest biogeographical diversity compared to other countries Community (47% and semi-natural ecosystems). The Network of protected areas covers about 7.5% of the country (and rising), plus about 17, 84% of Natura 2000 sites designated in 2007 (SCI - Sites of Community Importance to protect species and habitats and SPA important Bird sites to protect birds). Tulcea is the largest area of protected areas in the country (85%) where Delta has a special place.

The Danube Delta has got a good international recognition:

- Inclusion in the international network of biosphere reserves, under the "Man and Biosphere" Programme - MAB UNESCO (1990);
- Declared as wetland of International Importance especially as Waterfowl Habitat - Ramsar Convention (September 1990);
- Inclusion in the Cultural and Natural Heritage List of UNESCO (December 1990);
- European Diploma of Protected Areas awarded by the Council of Europe (2000);
- EUROSIM Awards: 1995 - for ecological restoration projects and Cernovca Babina polders; 2001 - for the public awareness.[2]

The Danube Delta Biosphere Reserve is also part of Natura 2000 network site being declared SCI (Site of Community Importance) and SPA site

[1] www.ddbra.ro
[2] www.ddbra.ro Starea mediului/ The state of the environment. RBDD 2007.

Biosphere reserves are those protected areas for furthering the protection and conservation of natural habitat areas and biological diversity specific. Biosphere reserves are spread over large areas and include a complex of terrestrial and / or water, lakes and streams, wetlands with unique biocenotic flora and fauna communities with natural harmonious landscapes resulting from traditional land use planning, ecosystem modified in human influence and that can be restored to natural state, human communities whose existence is based on exploitation of natural resources, sustainable and harmonious development. (defined by GEO 57/2007 on the regime of protected natural habitats, flora and fauna).

Throughout the biosphere reserves one can delineate areas with different protection regime:

- strictly protected areas where only research is conducted;
- buffer zones, with a protective role of strictly protected areas where certain activities are allowed to exploit natural resources;
- ecological restoration areas in which the environmental rehabilitation measures become effective -economic areas where traditional or new environmental activities are allowed.

Biosphere reservations with settlements are managed so that models of human communities in harmony with the natural environment are developped. The Reservation Administration is the administrator of the public domain of national interest, and the environmental authority throughout the Danube Delta Biosphere Reserve.

The activity of the Reserve Administration is to create and implement a special administration for biological diversity conservation and protection of natural delta ecosystems for human settlements development and organization of economic activities in connection with the carrying capacity of these ecosystems.

To achieve these objectives management plans have been drawn up that include measures and projects for conservation of the biodiversity.

An important plan, adopted in 2005, is the Master Plan that supports sustainable development developed by DDBRA and representing an integrated development plan, drawn up to promote projects and programs that meet the principles of sustainable development. The overall objective of this plan is the preservation and protection of natural heritage and promoting DDBR sustainable exploitation of natural resources.

For achieving the overall objective the following objectives have been identified:

- Improving the monitoring system for the Danube Delta ecosystems using modern satellite surveillance;
- Improvement of public utilities, transport and communications to reduce pollution, isolation of human communities to raise living standards in villages in the Danube Delta;
- Support the development of alternative traditional economic activities to reduce pressure on fishery resources;
- Local traditions conservation and the preservation of natural resources and local traditions in housing (rural landscape), promoting the use of conventional energy (windmills, solar cells, electric propulsion navigation, etc..)
- Rebuilding the natural eco-systems and natural habitats of endangered species in the Danube Delta.

3. Conclusions

Conservation, management and exploitation of living aquatic resources, aquaculture activities, processing and marketing of products from fisheries and aquaculture are regulated by GEO 23/2008 on fisheries and aquaculture.

The legislation *defines sustainable exploitation as "exploitation of living so as not to compromise their future operation and not have a negative impact on aquatic ecosystems"*

Of the 300 species in Europe and 185 in Romania 133 species were recorded in DDBR. To this aquatic resource and other aquatic creatures less exploited are added (crayfish, frogs, leeches, clams).

For restoration and conservation of living resources:

- a fishing quota species is set annually, based on a study by research institutes and approved by the Romanian Academy;
- annually the order of prohibition determines fishing periods, areas with fishing ban, the type of tools allowed, prohibited species to fishing;
- fishing effort is regulated (by limiting the number of ships / fishing vessels and fishing activity time, the number of tools used in fishing and fishing off.

Fishing rights in natural fish ponds belong to the state and are assigned by the National Agency for Fisheries and Aquaculture

The fishing permit, a temporary (issued annually) additional fishing license, contains data for identifying the ship / fishing boat, the validity period, the fishing zone and quota species[1] The fishing license is awarded directly to fishermen, individuals and / or legal organizations of fishermen in commercial fisheries.

Fishermen are issued a commercial fishing license is an individual document and non-transferable

To activate within the Danube Delta Biosphere Reserve territory fishermen, fishing organizations or companies have to obtain environmental authorization for seizure activity and / or acquisition and / or sale in compliance with Order no. 410 of April 11, 2008. Aquatic resource is in decline due to pollution, impoundment by reducing breeding areas, poaching.

For recovery of the fisheries sector several plans and projects have been initiated.

DDBRA made (and still ongoing) ecological restoration projects consisting of desilting of channels, the flooding of abandoned facilities, etc.(renaturate islets were Babina, Cernovca, flooding of southern Popina -- and other areas are in the planning phase) Abandoned facilities proposed for ecological restoration, ecological restoration under the Strategic Plan of the Danube Delta, the period 2005 - 2015, will restore the delta ecosystem by restoring natural hydrologic functions, biogeochemical, ecological wetlands typical

NAFA has developed Operational Programme for Fisheries for 2007-2013 taking into account environmental aspects, social and economic welfare. This program can obtain funds for:

1. modernization and safety of ships boats (eg new engines with low fuel consumption and reduced environmental impact);
2. fittings (modernizing) ports for selling fish;
3. trening;
4. aquaculture development to reduce fishing pressure on natural environment.

[1] Order 4 of 14.01.2009 for approval of access to living aquatic resources in the public domain in the practice of commercial fishing in internal waters and inland waters

Implementation of Operational Fishery Programme[1] in accordance with environmental regulations will lead to a restructuring of the fishery resource exploitation in line with sustainable development.

Implementation of ecological restoration plans and sustainable fishery development will not have the expected result if no action is taken to combat poaching. It is hard to believe that poaching will be eradicated but one can take steps to limit and diminish it.

Measures to reduce and prevent acts of poaching can be divided into three groups-legislative measures, institutional capacity building and information and awareness measures:

- Development of clear legislation that does not leave room to interpretation
- Normative acts to transpose EU legislation but also take into account the specifics of our country
- Sanctions regime to be established depending on the gravity
- Magistrates specializing in environmental law (because no one within five years was punished for an offense committed against environmental protection legislation on reservation land)
- Providing performant transportation to authorities of controls
- Specialized and continuing training of control bodies to intervene promptly and fairly when investigate any illegal acts
- Informing the population by means of interest regulations with examples of sanctions
- Information campaigns and training of hunters and fishers organizations, the local population of the reservation
- At this time it is impetuously necessary to enhance fishermen awareness to the fact that they primarily have to guard the fisheries if they continue to fish. It is found more often that authorized fishermen when fishing accept even unauthorized persons on boat that they pay over in fish (obviously more than it is listed in the report). Fishermen do not advise the control authorities about the presence of poachers in their fishing area.

In conclusion, to prevent poaching awareness is needed that both wildlife and fish are resources to be exploited rationally in order for the future generations to enjoy them.

Danube Delta Biosphere Reservation Administration, together with other institutions with the right to control must strive for a better cooperation for natural resources to be valued in accordance with their potential for regeneration and ecosystem support capacity.

4. Bibliography

Anechitoae, Constantin. (2009). *Introduction to port law. 2nd Edition*. Bucharest: BREN.

Anechitoae Constantin. (2011). *Romania's Territorial Sea – Eastern frontier of EU.* Published in: Mădălina Tomescu, Luminița Dragne – Coordinators: International law between science, politics and diplomacy. Bucharest: Universul Juridic, pp. 37-74.

Gâștescu, Petre & Ştiucă, Romulus (2006). *Danube Delta-Reservation of the Biosphere.* Dobrogea Publishing.

Mircea Duțu, (2007). *Environmental Law*. Bucharest: C.H. Beck.

Baboianu, Grigore; Benea, Cornelia & Rusu, Tiberiu (2009). *Strategies and policies in sustainable development and biodiversity protection.* Cluj Napoca: UTP PRESS.

[1] Operational Program = *document approved by the European Commission to implement those sectoral priorities and / or regional national development plan which are approved for funding through the Community Support Framework*

Popa, George Dorel (2009). Globalization of markets and money laundering. *Economical Problems magazine*, Bucuresti, nr. 202, page 16.

Popa, George Dorel (2006). Theoretical and practical aspects of preventing and combating money laundering. *Economical studies and research magazine*, Bucuresti, nr. 39, page 59, anul 2006.

Rusu, Tiberiu (2008). *The Basics of Sustainable Development Concept*. Cluj Napoca: U.T. PRESS

Oţel, Vasile (2007). *Atlas of fish in the Danube Delta Biosphere Reservation*. Tulcea: Ed. Centrul de informare tehnologică Delta Dunării.

**** Transboundary cooperation in protected natural areas Danube Delta and Lower Prut - Management objectives for biodiversity conservation and sustainable development* - Project TACIS 2004.

*** Convention of 02/02/1971 *on Wetlands of International Importance especially as Waterfowl Habitat Ramsar* , 2 februarie 1971 as amended by the Protocol of Paris on December 3, 1982 Published in Official Gazette no. 18 of 26.01.1991.

*** Bern Convention on the conservation of wildlife and natural habitats in Europe, ratified by Romania by Law No. 13 of 1992.

*** Convention on International Trade in Endangered Species adopted in Washington on March 3, 1973 CITES Official Gazette No. 211/12 august 1994.

*** Law 82/1993 on the establishment of Danube Delta Biosphere Reservation Published in Official Monitor 283 of 1993.

*** Government Emergency Ordinance No. 195/2005 on environmental protection, approved by Law 265/2006, amended by Ordinance 114/2007, GEO 164/2008.

*** Government Emergency Ordinance 57/2007 on the regime of protected natural habitats, flora and fauna, Official Monitor, modified by GEO 154/12 November 2008, published in MO Part I 787/25. Nov. 2008.

THE 7TH EDITION OF THE INTERNATIONAL CONFERENCE
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Mediation – Political-Diplomatic Means for Solving International Conflicts

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Abstract: The peaceful settlement of international disputes is a fundamental requirement for the preservation of international peace and security. The contemporary international law consecrated the states' obligation to settle the conflicts between them exclusively through peaceful means. In the modern age, characterized by the dynamics of the international relations and structures, the problem of using the modalities of peaceful settlement of disputes is closely connected to the adaptation of international law to the requirements of the new international economic and political order. Together with negotiation, good offices, conciliation and international investigation, mediation represents an important modality in the peaceful settlement of international conflicts. In the paper at hand, we shall present the historical evolution of this institution and will analyze the procedure for achieving mediation, in comparison to the other modalities. Also, an important role in our research will be held by the analysis of the role of the United Nations Organization in solving international conflicts through political-diplomatic means.

Keywords: International Conflicts, mediation, regulation, process of peaceful

1. Introduction

The peaceful settlement of international disputes and the concrete means for solving them are the result of a long historical evolution of the relations between states and of the development and improvement of the institutions and regulations of international law, representing one of the fundamental principles of international law.

The most important norms which make up the content of this principle are the states' obligation to settle their international disputes only through peaceful means and through the free choice of the solving means.

The peaceful means of solving international disputes are divided into three categories (Geamănu, 1983, p. 39):

- peaceful means without jurisdictional character (diplomatic) – the talks or negotiations, good offices, mediation, inquiry and conciliation;
- peaceful means with jurisdictional character – arbitration and mandatory (compulsory) jurisdiction;
- the procedure of settling the disputes between the states by means of the international organisms and organizations.

The means without jurisdictional character or the diplomatic ones are those which target the reaching of an agreement between the states for the settlement of the dispute.

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2. The Regulation of the Process of Peaceful Settlement of International Disputes

The approach of the international conflicts from the perspective of mediation became a priority both on the global agenda, and on that of the European Union, the EU legislation stipulating, through different recommendations the resorting to mediation in international litigations, litigations which involve extraneity elements. Thus, ”states should consider setting up mechanisms for the use of mediation in cases with an international element, when appropriate ... Taking into account the particular nature of international mediation, international mediators should be required to undergo specific training[1].”

The history of the legal regulations and the international law practice knew different evolutions in what concerns the different peaceful settlement means. The first consecrations in the international law instruments of the principle of the peaceful settlement of international disputes were reflected in the Peace Treaty of Paris (1856), and more comprehensively in the Conventions of Hague in 1899 and 1907. Although they failed in the issue of disarming, the Conferences of Hague managed to systematize and improve the diplomatic procedures for solving disputes, referring to all disputes, widely treating mediation, good offices and the inquiry. In art. 2 of both Conventions it is stated: „In case of serious disagreement or conflict, before an appeal to arms, the Signatory Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers". The expression „ as far as circumstances allow" made this declaration directly dependent on the will of each party to the dispute and, leaving the choice to the parties’ discretion, was not a compulsory stage for the settlement of the dispute.

Article 7 of the Convention regulated the fact that "The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying, or hindering mobilization or other measures of preparation for war... If mediation, occurs after the commencement of hostilities it causes no interruption to the military operations in progress, unless there be an agreement to the contrary".

The consecration of arbitration in the category of peaceful means was performed through the Convention of 1907, which created the Permanent Court of Arbitration, institution destined to facilitate the resorting to this manner of regulation. The pact of the League of Nations, adopted in the Peace Conference of Versailles in 1919, marks a considerable progress compared to the Conventions of Hague. Thus, according to the provisions of art. 12 of the Pact, the League member states committed that, in case among them there would emerge a dispute susceptible to lead to a conflict, they will subject it to a procedure of arbitration or to a legal regulation, or to the examination of the League Council. The pact established, before resorting to force, a moratorium of three months from the arbitral or legal decision or from the Council report. The UN Charter of 1945 adopted by the Conference of San Francisco brought important developments in this field, being the one consecrating the peaceful regulation of disputes as a fundamental principle of international law, proclaiming that All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered [2].

It was considered that any international dispute, regardless of its nature, content and seriousness, must be settled peacefully. In this respect, the UN Charter, in art. 11(3), 34 and 35 refers to situations „are likely to endanger international peace and security”, considered as conditions that could lead to international frictions or which could give birth to a dispute, which means that also such situations or conflicting states must be settled peacefully. We also underline that the distinction between political disputes – considered as susceptible of being settled only through diplomatic means (negotiations, good offices, meditation, inquiry, conciliation or resorting to international organizations) and the disputes with legal character, which, in principle, could be settled through jurisdictional means (arbitration, International Court of Justice) (Miga- Beşteliu, 2003; Bolintineanu, Năstase, 1995,

[1]https://wcd.coe.int/ViewDoc.jsp?Ref=Rec(98)1&Language=lanRomanian&Ver=original&Site=CM&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864

[2] Art. 2 of the UN Charter

p.1288), appears as lacking grounds, because any dispute involves both political and legal aspects. Indeed, it could not be claimed that the political disputes, unlike the „legal" ones, must not be settled according to the rules of international law. The promotion of alternative methods for conflict settlement represents a constant preoccupation at the international level, as well, fact which also derives from the activity of the Council of Europe, from the numerous recommendations regarding the mediation activity regarding: international family mediation, international civil mediation, international criminal mediation and international trading mediation.

3. Analysis of the Procedure of International Dispute Mediation

In solving the dispute, mediation means an active participation of the third party in the negotiations; he/she "can offer advice and proposals in view of solving the conflict (Selejan-Gutan, 2003, p.39); the negotiator's action is over only after a final result has been reached. Mediation takes into account the running of the negotiations, the matter of the dispute, in order to reach a peaceful and convenient solution for the parties. In the doctrine, mediation was defined as being "the action of a third party, state, international organization or even recognized personality, by means of which is targeted the creation of the atmosphere necessary for running the negotiations between the parties to the dispute and the direct offering of the third party's services in order to reach solutions favourable for the parties."

Mediation is as old as conflict.

In case of conflicts emerging within international relations, mediation appears as the best answer for solving conflicts having as triggering basis problems related to ethnicity, sovereignty or independence. The mediation activities apply in an increasingly larger number in conflicts in the international arena. Mediation is different from the good offices, by means of the direct and active participation to the negotiations and through the proposal of solutions by the mediator. As a form of solving the conflict, mediation differs from the other forms, such as arbitration or negotiation, especially through the fact that this third person, the mediator, has no decisional power and no last word with respect to the conflict between the parties (Moore, 1986, p. 58).

The procedure for running the mediation is not regulated in international law, being established by the parties together with the mediator in what concerns the location, the terms, the running of the meetings, the oral or written character of the debates, the type of meetings (common or separate) etc. Mediation is essentially structured by the principles laying at the basis of this institution, each of the mediation principles intrinsically contributing to the value and the good functioning of mediation and to the building of trust that the parties and, implicitly, the wide public, grants this manner of conflict solving (Lempereur, Salzer, Colson, 2008, p. 61).

The principles on which mediation is based are *volunteering* (no party can be forced, by another person or authority, to participate to a mediation procedure), *self-determination* (the understanding belongs to the parties, any term established by the understanding must be proposed and accepted by the parties), *confidentiality* (both the mediator and all other parties present undertake to keep the confidential character of all aspects discussed in the mediation), *neutrality* (presupposes that the mediator remains outside the conflict between the parties, he/she does not get involved in this conflict, except within the limits imposed by procedure), *impartiality* (the mediator sits in a middle position towards the parties; he/she does not wish at all that either party wins or is favoured during the mediation procedure), as well as the *prior informing of the parties* with respect to the process, their duties and rights. The mediator must be a third party mutually agreed by all parties in dispute. He/she must prove special diplomatic skills which impose tact, prudence, discretion and perseverance. Also, he/she must know very well the facts and each party's attitude regarding the conflict between the states. The third party must act such as to determine the parties to cooperate in finding a solution, but avoiding constraints or pressures of any type, in order to impose the solution. Of course, the solutions do not have compulsory character for the parties. Mediation can be offered or requested. Mediation

has an informal and confidential character in order to avoid the political pressures between the states. Both mediation and the good offices target the nearing of the viewpoints, until accepting a common solution by all parties in dispute and they can be used for all types if litigations. They allow using all de facto and de jure argument (Ruzié, 2002, p.203). The intervention of the international organizations is based on the commitment of the member states to fulfill with good faith the obligations undertaken and on the capacity recognized through the constitutive act of an international organization to intervene for the peaceful settlement of a dispute (Elien, 1977, p. 457-470). The difference between mediation and good offices consists in the fact that, in the case of the latter, with the resuming of the negotiations, the third party's role ends. Some authors consider that the limit of the two procedures is difficult to establish, and they are sometimes confused (Shaw, 1997, p.723)[1].

4. Conclusion

International disputes are inherent to the development of contemporary international relations. On its way to progress and civilization, mankind is confronted with numerous new and complex problems whose solving calls for the participation of all states, often their approaches and viewpoints being different, which generates the emergence of disputes. The practice of international life demonstrated that there are no conflicting situations, no matter how complex, which to not be possible to solve through peaceful means. In conclusion, we can state that involvement in the mediation process can have only a positive result: even in the situation when the litigation is not solved through mediation, the parties will have their claims much better outlined following the mediation and, aware of their positions with respect to the litigation object, they will be much closer to solving it.

5. Future work

Studying and analyzing the mediation process in the context of international disputes, I want to deepen the study and another methods of peaceful settlement of disputes. We also believe that greater attention needed to the role of the international organizations in the process of peaceful settlement of disputes. So, I want to do a study on regional and international statistics regarding the number of disputes resolved peacefully, and a statistical methods used to solve them.

6. Bibliography

Bolintineanu, A.; Năstase, A. (1995). *Contemporary International Law*. Official Gazette Press. Bucharest.

Elian, G. (1977). Rolul organizaţiilor internaţionale în reglementarea paşnică a diferendelor dintre state/The role of international organizations in the peacefull settlement of disputes between states. *RRSI*, no. 4.

Geamănu, Grigore. (1983). *International Public Law*. Bucharest: Didactică şi Pedagogică.

Miga-Beşteliu, Raluca. (2003). Contramăsurile în dreptul internaţional contemporan/Countermeasures in contemporary international law, in *Romanian Review of Internatinal Law*, no. 1/X-XII/2003.

Moore, C.W. (1986). *The mediation process. Practical strategies for resolving conflict*.

Lempereur, Alain Pekar; Salzer, Jacques; Colson, Aurelien. (2008). *Methode de Mediation. Au coeur de la conciliation/Method of Mediation. At the heart of reconciliation*. Paris: Dunod.

Ruzié, D. (2002). *Droit international public/ International Public Law.* 16th Edition. Paris: Dalloz.

Selejan-Gutan, Bianca. (2003). *International Public Law*. Sibiu: Lucian Blaga University Press.

Shaw, M.N. (1997). *International Law*. 4th edition. Cambridge: University Press, p. 723.

****UN Charter.*

[1] This confusion exists in the Convention of Hague in 1907, in art. 2,3 and 6 which refer to good offices or mediation. In art. 33 of the Charter the good offices are not listed, although, in practice, this article was many times invoked as legal grounds

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The Community Trademark and the Office for Harmonization on the Internal Market (OHIM)

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Abstract: The registration of products and services through the Community trade mark give them an extended protection, acceptable throughout the European Union (EU). By means of a single registration, protection is obtained in all the 27 Member States and the previously recorded Community trademarks or those presented for registration automatically extend their effects in the countries that will join the European Union. The advantage of registering a Community trade mark is highlighted by minimal registration costs, extended protection across the EU and a minimal time to become legal, for the benefit of exporters and of those providing services, in order to avoid divergence (payment of damages) and conflicts with the companies and businesses in this area.

Keywords: trade; marks; designs; OHIM; EU

1 Introduction

The existence of an international system for the registration of trade marks and the creation of the community trade mark allows a holder to benefit from a much larger protection in terms of the geographical area. Harmonization in the context of trademarks is desirable, as it provides the skeleton on which the holders of trade marks can plan their marketing strategy, while being sure that their trademarks are protected in different countries with in the same or in a similar way.

The European Union is one such area where suppliers of goods and services can benefit from a unique protection in all Member States.

Unlike the international registration system, that requires registration only in several countries of interest, the Community trade mark confers registration in all 27 countries and the most advantageous way for exporters and service providers within the European Community.

2 The Community Trade Mark

The community trade mark, as any other industrial property right, is a vital element of corporate strategy. The increase of the brand value leads to broadening and strengthening the market share held by the company. On January 1, 1993, the freedom of movement for goods, services and people within the European Community has given a European dimension to the trade practiced by a large number of companies, this date becoming a landmark for the community trade mark. These companies, who were conceiving their strategy in the area of industrial property in relation to their main market, which often was the national market, were

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forced to reconsider their strategies. The community market became the main market, which led to a revision of the previous strategy.

Before the existence of the Community trade mark, trade mark protection was being achieved in two ways, i.e. nationally and internationally. The national way refers to trademark registration separately in each EU country, respecting the existing national procedures. The international way refers to the "international registration" through the International Bureau of the International Intellectual Property in Geneva / Switzerland. By filing a single application for registration to the Bureau, with the designation of the countries in which protection is desired, under the Madrid System (Madrid Arrangement or Protocol), based on a registered trademark (Madrid Arrangement) or registered trademarks / applications for registration (Madrid Protocol) existing in the applicant's country – the country of origin - the administrative side of running the operation of protection was simplified. However, it should be noted that this route was only for those applicants who had a real and effective industrial or commercial company in a member State of the Madrid Agreement / Protocol, or who had the domicile in such a Member State or the nationality of such a Member State.

2.1 Exhaustion of Trademark Rights

The trademark protection only in a Member State is not sufficient in order to provide protection throughout the Community. In this regard, the existence of the community principle "the exhaustion of trademark rights", established by the European Court of Justice, included both in Community and national laws, is extremely important. It is about the loss or "exhaustion", by the trademark owner, of certain rights, after the first use of the products under the protected trade mark. This principle was developed in the context of parallel imports and refers to the fact that the trademark owner can not control the subsequent sales of a product under its trade mark; his/her right is "exhausted" by selling that product.

2.2 The Advantages of the Community Trade Mark (CTM)

The community trademark offers the advantage of protection through a single registration procedure at the OHIM and gives the holder valid rights throughout the European Union. In addition, there are restrictive conditions related to the applicant, who can be any person or entity. Simplifying procedures and significantly reducing fees are obvious advantages. In addition, the CTM system can be alternative or complementary to the national or international ways. The three ways are connected by a "link" that allows the applicant to choose, depending on the specific requirements, for a system or another. This connection was materialized in 2004, by the connection between the Madrid Protocol and the CTM system. Thus, an applicant may designate, in an international application filed under the Madrid Protocol, the European Union; an application for the registration of a community trade mark or a registered community trade mark may be a basis for an application for the international registration under the Madrid Protocol.

The geographical area of a Community trade mark includes 27 countries, with a population of almost 500 million inhabitants, with a different living standard, from medium to high. The community trade mark is a tool designed to meet EU market requirements.

The unitary nature of the community trade mark results from the fact that it can be registered and canceled only throughout the European Union. It is valid for a period of 10 years and it can be renewed whenever the holder deems it necessary.

In addition, the legislation governing the Community trade mark is similar to the national laws applied on marks in EU countries.

2.2.1 CTM Rights

The community trade mark gives the holder a right applicable throughout the European Union, through a single procedure, and covers the three essential functions of the mark, i.e.: it indicates the origin of products and services; it guarantees their quality, by the company's commitment to the customer; and it is an excellent medium of communication, promotion and advertising. There are community trade marks belonging to the manufacturer, commercial and service community trade marks and collective trade marks. The collective community trade mark distinguishes the goods and services of an association of producers or traders, from those of other people

3. The Office for Harmonization on the Internal Market (OHIM)

The Office for Harmonization on the Internal Market (OHIM) is a European Union agency responsible for promoting and managing the Community trade mark (in 1994) and of the registered Community design (since 2003). OHIM is, in fact, both an EU institution and an industrial property office, which registers the property rights for Community trade marks and designs.

The legal basis for the Community trade mark is the Council Regulation no. 40/94 of 20.12.1993, as well as: 1) the Commission Regulation no. 2868 of December 13, 1995, for implementing the Council Regulation no. 40/94 of 20.12.1993; 2) the Regulation (EC) no. 2869/95 of 13 December 1995 on the fees payable to the Office for Harmonisation on the Internal Market; the Regulation (EC) no. 207/2009 of February 26, 2009 on the Community trade mark.

The first CTM registration applications were filed in 1996, and, for Community designs - in 2003. The Community trade mark and the Community design are essential for the single European Union market, being valid throughout the Union. Their management is very simple because we have a single registration application, a single legislation and a single valid protection on the geographic territory of the European Union. In addition, costs are substantially reduced compared to those required, taken cumulatively, for each country.

OHIM examines records and manages Community trade marks and designs and ensures their protection at European level. Also, OHIM maintains the registers of Community trademarks and designs, and, together with the courts of EU Member States, decides on requests for cancellation of community trade marks. Being a legally, administratively and financially independent public institution, it is also a legal entity governed by Community laws. The legality of its decisions is overseen by two Community Courts: the Court of First Instance and the European Court of Justice (ECJ). OHIM should have a balanced budget, its income deriving from fees for applications, registrations or renewals of Community trade marks and designs.

OHIM headquarters is in Alicante (Spain).

4. Conclusions

The first phase of EU enlargement, after the entry into force of the legislation on the Community trade mark, took place in 2004, when there has been extended the validity of this industrial property right, without any formality, in 10 countries (the Czech Republic, Lithuania, Estonia, Latvia, Poland, Hungary, Slovakia, Slovenia, Malta, Cyprus). As a consequence, in 2004 and 2005, OHIM received a record number of applications for CTM registrations. The entry into force of the Madrid Protocol for the European Union allows its designation, along with other European countries, in an application for the international registration of a mark, filed with the International Bureau of the International Intellectual Property Organization (WIPO). At the same time, the filling in, at the International Bureau, of an international application, based on an application for a CTM registration or on a registered CTM, represents another possibility for the applicants.

A second phase of EU enlargement took place on January 1, 2007, when Romania and Bulgaria joined the Union as full members, the Community trade mark extending its validity automatically within these countries

5. References

Anechitoae, C. (2011). *Introducere în dreptul proprietăţii intelectuale/Introduction to intellectual property law. 6th Edition*. Bucharest: BREN.

Anechitoae, C. (2009). *The protection of community "design" right (drawing and design) within the domain of naval activities*. International Congress of International Maritime Association of Mediterranean (IMAM2009), 12-15 October, 2009, İstanbul, Turkey. *Towards the sustainable marine technology and transportation, 12-15 October 2009 Istanbul, Turkey*, Proceedings: ITU Faculty of Naval Architecture and Ocean Engineering, İstanbul, vol. III, pp. 1043-1048.

Anechitoae, C. & Grigoruţ C. (2011). The Seniority Principle and the Conversion Principle in the Defense of the Community Trademark. *Annals of the "Ovidius" University, Economic Sciences Series,* Volume XI, Issue 1 /2011, pp. 89-93.

Anechitoae, C. (2004). *Dreptul proprietăţii intelectuale / Intellectual property law*. Bucharest: BREN.

Ionica, Ş. (2007). Oficiul de armonizare în Piaţa internă (OHIM) şi marca comunitară/Office for Harmonisation in the Internal Market (*OHIM)* and the Community trade mark. *Romanian Industrial Property Review*, No. 1/2007, pp. 16-18.

Macovei, I. (2010). *Tratat de drept al proprietăţii intelectuale / Intellectual property law treaty*. Bucharest: C.H. Beck.

Romiţan, C. R. (2010). *Dreptul proprietăţii intelectuale /* Intellectual property law. Bucharest: Universul Juridic.

Roş, V. & Spineanu M. O. & Dragoş, B. (2003*). Dreptul proprietăţii intelectuale / Intellectual property law*. Bucharest: All Beck.

Ştrenc, A. C. (2010). *Tehnologia informaţiei. Protejarea şi respectarea dreptului proprietăţii intelectuale / Information Technology. Protecting and respecting intellectual property rights*. Bucharest: Universul Juridic.