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Legal Sciences in the New Millennium

The Liability of Local Elected Representatives

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Abstract: In this study we propose, based on the laws and jurisprudence, to highlight the issues of the legal liability of local elected officials in their own behalf and joint and several. To this effect we consider that we have to start from the status of the local elected officials, established by article 51, paragraph (1) of Law no. 215/2001, which states that in "the exercise of their mandate, the local councilors are serving the local community." This aspect is developed by the special regulation in the field, Law no. 393/2004 on the Statute of local elected officials, which in article 1 indicates the subject of this legislative act, namely "establishing the terms for the exercise of the mandate by the elected local officials, the rights and obligations under the entrusted mandate".

Keywords: mandate; elected officials; liability; penalties

1. Introduction

In article 3 of Law no. 393/2004 it specifies that "*the participation of the local elected representatives to the authorities' activity of local public administration has a public and legitimate feature, being related to the general interests of the community in which they exercise their mandate. In exercising the mandate, the local elected officials are serving the local community and they are accountable to it*."

These provisions are complemented by articles 20-23 of Law no. 393/2004, which highlight the fact that local elected representatives[2] cannot be held liable for the political opinions expressed in the exercise of mandate, at the meetings of local councils or county or within the assignments given by the council (in the case of councilors) and the exercise of duties provided by law (in the case of mayors and deputy mayors), being guaranteed the freedom of opinion and action under the mandate.

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[2] When referring to "elected local officials/representatives" we consider local councilors and county councilors, mayors, including the general mayor of Bucharest, vice presidents and vice presidents of county councils. Law on the Statute of local elected officials no. 393/2004 assimilates with elected local officials and village delegate (Preda, 2007).

Moreover, during the entire duration of the mandate, the elected local officials are deemed in the exercise of public authority and they enjoy protection under the law.[1]

But the elected local officials can no longer rely on that protection for the expressed opinions outside their mandate, i.e. for those that do not stem from the nature of the mandate, but they are expressed in a personal capacity. Also, the protection of local elected officials cannot be effective in the case of insults, slander, defamation and other acts of this kind, no matter what framework and in what form they would be committed, as they cannot be regarded as springing from the "nature of the mandate".

As the renowned professor said in one of his works (Iorgovan, 2005, p. 508), "this does not mean that they and, then, the council as a whole are irresponsible." The author continues by mentioning that all current regulations in the Western countries include provisions which establish a form of liability: political, disciplinary, criminal or financial.

2. The Regulation of the Local Elected Officials Liability

Article 56, paragraph (1) of Law no. 393/2004 states: "*counselors are reliable in their own behalf for the conducted activity in the exercise of their mandate, and joint and several for the council activity to which they belong and for the decisions they voted. In the minutes of the board meeting the voting results shall be recorded and, at the request of counsel, it shall expressly be mentioned its vote*."

We believe that this text develops the provisions of article 128 of Law no. 215/2001 on local public administration, establishing the legal liability of the local elected officials, secretaries and administrative-territorial units, the staff from the specialized department of local public administration, stating that they are held accountable, as appropriate, contraventionally, criminally for the acts committed in the exercise of their duties. (Preda, 2007)

In the specialized literature it is emphasized that in the case of local elected officials, for the acts committed in the exercise of the mandate, we must distinguish between political liability, for which political sanctions and legal liability are applied, under the law. (Preda, 2007)

In article 57 of the Statute of local elected representatives there are listed penalties to be applied to counselors. Renowned Professor Antonie Iorgovan noted that it is about administrative sanctions – disciplinary, which are in the category of the discipline related to the counselor function and the administrative - disciplinary sanctions are related to the discipline of the meeting (Lilac, 2005, p. 511). These are: a) warning; b) call to order; c) withdrawal of the words; d) removal from the meeting hall; e) temporary exclusion from the work of the committee and specialized commission; f) the withdrawal of the allowance meeting for 1-2 sessions.

The first four penalties may be imposed by the Chairman and the other by the local council or county, where appropriate, by decision, with the vote of at least two thirds of the elected councilors in charge.[2]

For committing the first infringement, the warning applies when the Chairman draws attention the counselor at fault and he is advised to comply with the rules.

[1] Law no. 393/2004 in article 23, paragraph (2) states that "Of the same legal protection it benefits the family members - husband, wife and children - where the aggression against them pursues directly the exertion of pressure on local elected officials in connection with the exercise of its mandate."

[2] See Civil Decision no. 1895 of 03.06.2009, Cluj Court of Appeal, Commercial Division of administrative and fiscal contentious.

If the warning and the Chairman's advice is ignored by the counsels and they continue to deviate from the Regulation and also those who violate seriously, even for the first time, the provisions, they shall be called to order. This (call to order) is recorded in the minutes of the meeting.

However, before being called to order, the counselor is invited by the Chairman to withdraw or explain the words or expressions that generated the incident that would lead to a sanction.

The penalty will not be applied if the expression employed was withdrawn or if the explanations are considered by the Chairman as being satisfactory.

According to article 61 of the Statute[1], where after the call to order a counselor continues to deviate from the regulation, the Chairman will withdraw the floor, and if he persists, he will be removed from the room. The removal from the room is the equivalent of unauthorized absence at the meeting.

In the case of serious offenses committed repeatedly or of particular seriousness, the Council may apply the sanction of temporary exclusion of the counselor from the activities of the council and specialized committees, a sanction which results in non-granting the meeting allowance for that period. The temporary exclusion of the counselor from the activities of the council and specialized committees may not exceed two consecutive meetings.

The Law no. 393/2004 contains special provisions on the penalties to be applied to deputy, presidents and vice presidents of county councils, for repeated serious violations committed in the exercise of their mandate.[2] Depending on the seriousness of the offense, the penalties shall be in compliance with the quorum established by the law. Thus, reprimand and warning applies at the decision of the board, at the mayor's reasoned proposal, that is the county council president. Judgment shall be taken of a majority of the elected councilors. For the other two penalties i.e. 5-10% salary reduction for 1-3 months and dismissal, the decision shall be taken by secret vote of at least two thirds of the elected councilors. The application of these two penalties can only be made upon the proof that the deputy mayor, chairman or deputy chairman of the county council violated the Constitution, other laws of the country or damaged the interests of the country's administrative-territorial unit or the inhabitants of the administrative-territorial unit.

As regards other forms of legal liability of the local elected officials, article 55 of the law states that the "elected local officials are liable, under the law, administratively, civilly or criminally for the committed actions in the exercise of their duties."

Therefore, these forms of legal liability mentioned in special laws, which apply only in the situation where the provisions regard the attributions of the local elected representatives, prescribed by law.

For facts unrelated to their duties, the elected local officials will be liable under the common law.

Regarding the suspension sanction of the council mandate in case of his prosecution, according to article 56 of Law no. 215/2001, the "local councilor mandate is suspended only if he has been taken into custody. The measure of pre-trial detention shall be immediately communicated by the court to the prefect who, by order, within 48 hours of communication, will decide the suspension of the mandate."

[1] See Decision no. 564 of 28 May 2009 of the Court of Appeal Galati.
[2] These penalties are: a) reprimand; b) warning; c) 5-10% salary reduction for 1-3 months; d) dismissal.

Through this legal text it has been clarified a number of problems from practice, generated by the differences in interpretation of the previous law, which allows the prefect to apply the mandate suspension measure (Apostol Tofan, 2014, p. 333).[1]

According to the Statute of local elected officials (article 9), the quality of local or county councilor shall automatically be terminated before the normal expiry of the mandate in the following cases: resignation; incompatibility; relocation to another administrative-territorial unit, including as a result of its reorganization; absence from more than 3 consecutive ordinary meetings of the council; inability to exercise the mandate for more than 6 consecutive months, except the cases provided by law; conviction by final court decision to a custodial sentence; placing under judicial interdiction; loss of voting rights; loss of membership of the political party or organization of national minorities on whose list he was chosen (Stoica, 2011, p. 192);[2] death.

As for the loss of membership of the political party or organization of national minorities on whose list he was elected, by the Constitutional Court Decision no. 915 of 18 October 2007 it was established that the provisions of article 9, paragraph (2) h1) of Law no. 393/2004 aimed at "preventing political migration of local elected officials from one political party to another and securing the stability in the local public administration to express the political configuration, as it resulted from the will of the electorate"[3]. Also, in a recent decision[4], the Court reevaluated the arguments on the loss of membership of a political party or organization of national minorities on whose list he was elected by the local councilors, as a result of examining the constitutionality of the depositions of Law on approving the Ordinance Emergency Government Ordinance no. 55/2014 for regulating some measures regarding local public administration.

In paragraph 41 of that decision it states that: "the sanctioning of the loss of mandate, regardless of way in which it is lost the party membership (resignation or expulsion) it refers only to local and county and councilors, who are elected within an election list. So their vote expressed by the electorate regarded the political party, namely the list presented by him, and not individual candidates, which determined the political configuration of the local / county council reflected by the number of mandates obtained by political parties. As such, the legislative solution contained in article 9, paragraph (2), letter h1) of Law no. 393/2004 is a requirement arising directly from the provisions of article 8, paragraph (2) of the Constitution, a contrary legislative solution - that would not condition the cease of the local or county councilor's mandate by the loss of membership quality of a party or a national minority organization or on whose list he was elected – it may be accepted only under the conditions of modifying the type of election, in which the local and county councilors are elected."[5]

[1] It is Law no. 69/1991.

[2] The specialized literature shows that the quoted legal text is incompatible with the legal regime applicable to the mandate in public law, the legal regime considered as being common, in terms of its defining features, all mandate categories that have this qualification. See (Stoica, 2011, p. 192). The author points out that "*The Law no. 393/2004 operates an unjustified distinction within the same category of mandate, namely of the local elected officials, setting different causes for termination of that quality, so the implicit termination of the mandate between local officials - local and county councilors, on the one hand, and mayors on the other hand, the latter due to the termination of the mandate (linked to political affiliation) being losing by resignation of membership of a political party or national minority organization on whose list they were elected (article 15, paragraph (2), letter g of the Law no. 393/2004. In the case of the mayors, ceasing of mandate due to loss of membership of the political party on whose candidate list the candidate in question has ran for, is conditioned by an act of will of the elected - resignation - in the case of local or county counselor the legislator makes no relevance on the will of the elected one, having cease their legal mandate by law."*

[3] http://lege5.ro/Gratuit/geydgnbuga/decizia-nr-915-2007-referitoare-la-respingerea-exceptiei-de-neconstitutionalitate-a-dispozitiilor-art-9-alin-2-lit-h1-din-legea-nr-393-2004-privind-statutul-alesilor-locali.

[4] Decision no. 761 of 17th December, 2014.

[5] http://www.ccr.ro/files/products/Decizie_761_20141.pdf.

3. Conclusions

As stated in the doctrine (Iorgovan, 2005, p. 334), one can speak of the following forms of liability of a counselor: a) an administrative-disciplinary liability that may result in: declaring vacant the seat of councilor; suspension from office; other penalties provided in the statute of local elected representatives; b) an administrative-patrimony liability consisting of the compensation for the damage caused by the decision of the city council declared as being illegal by the administrative court; c) criminal liability.

Conversely, beyond the arguments constantly mentioned by the Constitutional Court in its decisions, we consider that it is necessary to amend the Law no. 393/2004, for the purposes of applying article 9, paragraph (2) letter h1) not only to councilors (local or county), but also to mayors.

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The European Divorce (Applicable Law)

Council Regulation (EU) No 1259/2010 of 20 December 2010 Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation

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Abstract: The main objectives with this paper are to give a brief overview of the Scope of application of the regulation; of the main conflict-of-law rules adopted by the regulation, in special those that are more relevant to the role that a notary might have in an international divorce situation. The regulation provides citizens with appropriate outcomes in terms of legal certainty, predictability and flexibility, protects weaker partners during divorce disputes and prevents 'forum shopping'. This also helps avoiding complicated, lengthy and painful proceedings. More specifically, it allows international couples to agree in advance which law would apply to their divorce or legal separation as long as the agreed law is the law of the Member State which they have a closer connection with. In case the couple cannot agree, the judges can use a common formula for deciding which country's law applies. This paper will bring to light some risks and coordination difficulties with the regulation and a few matters that the regulation does not apply to.

Keywords: international couples; Member State; European Union

1 Introduction

The European Union has set itself the objective of developing an area of freedom, security and justice, by adopting measures relating to judicial cooperation in civil matters having cross-border implications. At the same time, increasing the mobility of citizens within the internal market calls for more flexibility and greater legal certainty.

Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (called Rome III Regulation)[2] is an instrument implementing enhanced cooperation between the participating Member States. The enhanced cooperation allows a group of at least nine Member States to implement measures in one of the areas covered by the Treaties within the framework of the Union's non-exclusive competences (Vucheva, 2008).

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[2] (OJ n. L 343, p. 10 ff.).

Pursuant to its Art. 21(2), **the regulation should apply from 21 June 2012 in the 14 Member States which currently participate in the enhanced cooperation** (Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia).

2 Enhanced Cooperation

Rome III Regulation is the first EU PIL instrument adopted using enhanced cooperation (art. 326 of the Treaty on the Functioning of the European Union)

This immediately poses a question: which member-states are bound by the Regulation?

We find the answer in the concept of participating Member State defined in article 3 (1) of the Regulation.

Participating member states can be:

- the ones that participate in the enhanced cooperation since its implementation. We can call them the "founders" of this enhanced cooperation; and
- any other Member States that manifest its intention to participate in the enhanced cooperation, pursuant to article 331 (1) of the Treaty on the Functioning of the European Union[1].

Recital 6 enunciates the Member States that addressed a request to the Commission indicating that they intended to establish enhanced cooperation between themselves in the area of applicable law in matrimonial matters.

It is important to note that on 3 March 2010 Greece withdrew its request and, as such, does not participate in the Rome III Regulation.

By way of the Commission Decision n.º 2012/714/EU the Lithuania was the first "non-founder" Member State to express is intention to participate in this enhanced cooperation.[2]

3. Temporal Scope. General Rule

The general rule regarding the temporal scope of application is provided by article 18 (1) of the Regulation.

It states that the regulation is applicable to divorce or judicial separations proceedings instituted and choice-of-law agreements concluded on or after 21 June 2012.

However, in the case of Lithuania, the regulation is only applicable to divorce or judicial separations proceedings instituted and choice-of-law agreements concluded on or after 22 may 2014.

[1] Art. 3 (1) "participating Member State' means a Member State which participates in enhanced cooperation on the law applicable to divorce and legal separation **by virtue of Decision 2010/405/EU**, *or* **by virtue of a decision adopted in accordance** with the second or third subparagraph of Article 331(1) of the Treaty on the Functioning of the European Union;"

[2] (Recital 6) **Decision 2010/405/EU:** Belgium, Bulgaria, Germany, Spain, France, Italy, Latvia, Luxembourg, Hungary, Malta, Austria, Portugal, Romania and Slovenia; **Decision 2012/714/EU**- Lithuania

4. Material Scope

The rules set forth in Regulation No. 1259/2010 are uniform rules. Uniformity should therefore be ensured in their application: uniform interpretation actually allows uniform rules to achieve their goals.

The teaching of the Court of Justice of the European Union, as developed in respect of other normative instruments regarding judicial cooperation in civil matters, is equally relevant for the purpose of the Rome III Regulation. In particular, the legal expressions employed in the Regulation should be treated as «autonomous» notions, and thus be interpreted independently from national legal systems (Aude, 2008).

In determining the scope and meaning of the said expressions, reference shall be made, as a rule, to the object and purpose of the Regulation and to the meaning ascribed to the corresponding expressions in other relevant instruments («inter-textual» interpretation), be they rules belonging to the «secondary» legislation of the European Union (the Brussels II *bis* Regulation is of particular importance in this respect on account of recital 10) or international conventions concluded by the Union itself (such as the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations).

Divorce, the dissolution of the marriage with mostly the same legal effects to the marriage as the death of one of the spouses, is known in all legal systems of the European Union.

The regulation applies, in coherence with the Brussels II *bis* Regulation, to every kind of divorce judgment made by a "court", in the meaning of these Regulations.

Legal Separation is not a divorce, but a "weakening" of matrimonial ties. The duties of marriage are redefined. Normally the obligation to live together and to build a marriage community ends. The duty of maintenance remains.

As it pertains only to divorce and legal separation, the dissolution of registered partnerships are outside of the material scope of the regulation.

Case 1: A and B, are Portuguese nationals, habitually resident in Spain. A institutes today divorce proceedings against B, also asking for alimony. Which law or laws applies?

The regulation only applies to the dissolution or loosening of matrimonial ties.

It does not apply to the consequences of the dissolution or loosening of matrimonial ties.

This is clear from the subject matters that, under article 1 (2), are outside the material scope of this regulation.

In our case, we can infer from article 1 (2) and recital 10 that the consequences of a judgment dissolving or "weakening" the marriage do not fall within the scope of the regulation.

Rather, they are regulated by (1) other European Union Regulations; (2) by international conventions adopted by the forum or (3) by their national conflict-of-laws rules.

In this case, the Portuguese court will have to apply:

- the Rome III regulation to determine the applicable law to the dissolution of marriage; and
- the Maintenance Regulation (n.º 4/2009) to determine the applicable law to maintenance obligation (art. 1 (2) (g)).

Recital 10

"(…) Preliminary questions such as legal capacity and the validity of the marriage, and matters such as the effects of divorce or legal separation on property, name, parental responsibility, maintenance obligations or any other ancillary measures should be determined by the conflict-of-laws rules applicable in the participating Member State concerned. (…)"

And, as we can see from the wording of recital 10 the EU Legislator appears to have adopted the *lex fori* approach to the treatment of preliminary questions. (de Almeida, 2014)

This same idea is present in article 13 of the Regulation: "Nothing in this Regulation shall oblige the courts of a participating Member State **whose law** (…) **does not deem the marriage in question valid** for the purposes of divorce proceedings to pronounce a divorce by virtue of the application of this Regulation"

5 Spatial Scope. Applicable Law

The expression in article 1 (1) "(…) involving a conflict of laws (…)" — also present in the «Rome I» and «Rome II» Regulations— is meant to clarify that the Rome III Regulation is exclusively concerned with situations featuring a foreign element. Divorce and legal separation occurring within a purely domestic scenario will be in no way affected by the rules we are examining.

This idea is reinforced by article 16 of the Regulation that states that "A participating Member State (…) shall not be required to apply this Regulation to conflicts of laws arising solely between different internal systems of law or sets of rules.

A situation is international in nature when it has relevant points of contact with two or more Sovereign States. A point of contact is relevant if it is an element that can, *in abstracto*, to play some role in the conflict-of-laws rules on divorce and legal separation.

Case 2: Two Spanish nationals, with common habitual residence in France, are married. They choose the French law as the law applicable to their divorce. This agreement is concluded in 22 August 2012 and complies with articles 6 and 7 of the Regulation. In January of 2013 they change their common residence to Spain. Today one of them institutes divorce proceedings in the Spanish courts.

- Is it an international divorce?

One could say that this is not a situation international in nature because, at the moment the court was seized, all the elements of the situation point to Spain.

And as the Rome III Regulation is only concerned with the dissolution or loosening of marriage, and not with marriage itself, the relevant moment for the purpose of ascertaining «the international nature of the situation» should be the moment at which divorce or legal separation proceedings are instituted.

On this assumption, the applicability of the Regulation should be excluded in a situation where the matrimonial relationship at stake, though initially international in nature, had since lost all of its foreign elements.

This position can be argued quite effectively.

However, we don't agree with this position. I believe that this case reflects an international divorce and that the Rome III regulation should apply. The reasoning is as follows:

1. At the time the agreement was made, the situation was evidently international in nature (the spouses had Spanish nationality and habitual residence in France);
2. The idea behind allowing the spouses to choose the applicable law is to increase the mobility of citizens through more flexibility and greater legal certainty (as Recital 16 informs us). To not apply the Rome III Regulation would be to disregard the reasonable expectations of the parties, that made an agreement according to the rules of the regulation and chosen a law that, at the time the agreement was made, had a genuine and strong connection with the situation.
3. To not apply the regulation could be seen as a restriction to the right of every European Union citizen to move and reside freely within the territory of the Member States (see article 21 of the Treaty on the functioning of the European Union).

If the first interpretation is upheld, then the couple in our case have to decide if they want to keep the agreement valid or, on the other hand, if they would like to return to their national country.

Art. 3 (2) of Rome III

"the term 'court' shall cover **all the authorities** in the participating Member States **with jurisdiction** in the matters falling within the scope of this Regulation."

Art. 2 (1) of Brussels II *bis*

*"*the term 'court' shall cover all the authorities in the Member States with jurisdiction in the matters falling within the scope of this Regulation pursuant to Article 1;"

As we can see the definition of "court" in the Rome III Regulation is identical, almost word for word, to the definition of "court" stated in the Brussels II *bis* Regulation. The same rule can also be found in article 1 of the 1970 Hague convention on the recognition of divorces and legal separations.

From the definition one can infer that court does not necessarily mean a judicial court.

On most participant member states divorce remains a judicial proceeding.

In some participant member states however there are administrative proceedings for divorce: in Portugal a public authority - the Conservatória do Registo Civil - has competence over consent divorces.

However, in most cases, the notary will not be considered a court for the purposes of this Regulation. He can, nevertheless, play a role in the preparation of the divorce, by advising the spouses.

In this regard, the most important rules of the Rome III regulation for the notary in an advisory role are the ones about choice-of-law.

5.1. Limited Choice-of-law

The regulation allows for a limited choice-of-law by the spouses. This is a remarkable innovation for most of the participating member states. Germany and the Netherlands recognized party autonomy in their national conflict-of-laws rules, but not with as wide a scope as the Rome III Regulation.

Recital 15 explains that giving the spouses a limited choice-of-law simultaneously increases flexibility and certainty. In a way this statement rings true. The choice-of-law provides greater certainty in two different ways: in one hand, a law that is chosen by both parties is a law that is more easily known by the parties than a law that is determined by a legislator using abstract connections. On the other hand,

it "freezes" the applicable law, and this not only provides more certainty, as the couple can change habitual residence without changing the applicable law, it also provides more flexibility as the couple does not have to worry if a change of habitual residence or the acquisition of a new nationality can cause a change in the applicable law.

Looking at the choices that are possible we see that they mainly rely on the connecting factors of habitual residence or nationality. This can be seen as a compromise between the different traditions in Private International Law. The national conflict-of-law rules of most member states of the European Union favoured or the law of the common nationality or the law of the common habitual residence or domicile. Some, like the UK and Denmark, apply the law of the forum.

It can also be seen as a way to favour the dissolution or weakening of the matrimonial ties. Party autonomy allows the spouses to choose the law that is the most divorce-friendly.

It should be noted that the spouses can only choose the law of a State or, in cases of States with two or more legal systems, either territorial (art. 14) or inter-personal (art. 15), the law of one of those legal systems. The Spouses cannot choose religious rules directly.

It should also be noted that there is no ranking among the laws mentioned in article 5 (1).

Art. 5 (1)

"(a) The law of the State where the spouses are habitually resident at the time the agreement is concluded; or"

(b) the law of the State where the spouses were last habitually resident, in so far as one of them still resides there at the time the agreement is concluded; or

"(c) the law of the State of nationality of either spouse at the time the agreement is concluded; or"

Case 3: A and B are married. They have habitual residence in France and are Portuguese, Italian and Brazilian nationals. Can they choose the law of Brazil to rule their divorce?

According to the letter (a) of article 5 (1) the spouses can choose the law of their common habitual residence at the time of the agreement.

The concept of habitual residence, as usual, is not defined in the Regulation.

The European Court of Justice provides a somewhat helpful element of interpretation.

Ruling on the concept of habitual residence of a child regarding article 8 (1) of the Brussels II *bis* regulation, the Court said "that the concept of 'habitual residence' (…) must be interpreted as meaning that it corresponds to the place which reflects some degree of integration by the child in a social and family environment.

To that end, in particular the duration, regularity, conditions and reasons for the stay on the territory of a Member State and the family's move to that State, the child's nationality, the place and conditions of attendance at school, linguistic knowledge and the family and social relationships of the child in that State must be taken into consideration.

It is for the national court to establish the habitual residence of the child, taking account of all the circumstances specific to each individual case."

This definition is not directly applicable to the Rome III regulation, simply because the spouses will be adults and not children. However we can use some, if not most of the concepts:

Taking in consideration the European Court of Justice ruling, one could say that the law of the habitual residence corresponds to the place that reflects some degree of integration by the spouses in a social and family environment.

The duration, regularity, conditions and reasons for the stay in the territory of a Member State must be taken into consideration.

For the sake of the Rome III Regulation, the intentions of the concerned individual, as they objectively appear from the circumstances, can also be relevant.

And it is a mission of the national court to establish the habitual residence of the spouses, taking account of all the circumstances specific to each individual case.

The difference between letters (a) and (b) is small. In the letter (b) the spouses don't reside in the same State at the time of the agreement. It presumes that one of spouses has abandoned the habitual residence of the couple. But, for the choice of the last common habitual residence to be possible, one of the spouses has to continue to reside in that State.

If both spouses leave the last habitual residence, then there is a risk that the law of the last habitual residence does not have a special connection with the situation that can justify the possibility of choice.

The biggest issue that I see with the letter (c) of article 5 (1) is how to solve cases in which one or both of the spouses have multiple nationalities.

The regulation does not have any rule regarding multiple nationalities.

It does however have recital 22.

Recital 22

"Where this Regulation refers to **nationality as a connecting factor** for the application of the law of a State, the question of how to deal with cases of multiple nationality **should be left to national law**, in full observance of the general principles of the European Union."

However we don't believe that we should interpret article 5 (1) (c) according to recital 22.

One formal reason is that under article 5 the connecting factor is not nationality. The connecting factor in article 5 is party autonomy.

One other argument that can be used is the Hadadi ruling, case C-168/08, in which the European Court Justice established that the spouses could choose the courts of any of their common European nationalities to institute proceedings of divorce under article 3 (1) (b) of the Brussels II *bis* Regulation.

Recital 10 of the Rome III and the need for coherence with the Brussels II *bis* Regulation make it advisable to transpose this ruling to the choice of applicable law. As such, at least when the spouses have common multiple nationalities of two or more Member States, they can choose the law of any of their nationalities.

But even if the there are no common nationalities or even if the multiple nationalities are of non-Member States, we still believe that the best solution is to allow the spouses the right to choose any of their nationalities.

The main argument is a systematic interpretation. The solution to allow the parties to choose any of their nationalities was expressly adopted by the Succession Regulation in article 22 (1) and by the

Maintenance Regulation in article 8 (1) (a) of the Hague Protocol on Maintenance Obligations, applicable by way of article 15 of the Regulation.

This means that in questions of similar in nature (as they all refer to or are close to the personal status of an individual) the European legislator has already adopted the solution that any nationality is a sufficiently strong connection. That any nationality is generally capable of expressing a sense of «belonging» in respect of an individual, based on historical, ethnic and cultural ties.

As such, and taking in consideration that no provision exists in Rome III Regulation that expressly tackles the question of multiple nationalities, I argue that we should follow the solution expressly adopted in the Successions and Maintenance Regulation.

So, in our case and in our view, the couple could make an agreement to choose the Brazilian law.

The regulation allows the choice of the law of the forum, I think, for practical reasons, as it guarantees that court will apply local law (Pop, 2011).

However, I believe that choosing the law of the forum is not advisable in most situations.

One of the advantages of choosing the applicable law is a greater certainty in determining what law will apply to the divorce or legal separation. In fact, in letters (a) to (c), the applicable law is determined at the time the agreement is concluded. So the applicable law is fixed and can't be changed except by a new agreement made by the spouses.

On the contrary, the law of the forum is necessarily determined at the time the court is seized.

This makes it uncertain. At the time of the agreement the spouses cannot know which law will apply to their future divorce or legal separation.

This point is aggravated by the rules on international jurisdiction of the Brussels II *bis* Regulation.

The spouses can't choose the applicable jurisdiction, as there is no provision allowing choice of jurisdiction in the Brussels II *bis* Regulation.

And the Brussels II *bis* regulation provides for multiple alternative grounds of international jurisdiction. This means that the spouse that initiates the divorce proceedings can choose any of the courts of the Member States indicated in Article 3.

As such, if the spouses choose the lex fori as the applicable law they are, indirectly, agreeing that the first spouse to initiate divorce or legal separation proceedings can determine not only the applicable jurisdiction but also the applicable law to the divorce or legal separation.

So, in conclusion, we don't believe that this choice of law is advisable at the moment. If, in the future, Brussels II bis is amended to allow the choice of jurisdiction by the spouses, then the choice of the forum law can be a worthwhile option.

5.2. Formal Validity

Case 4: A and B are Romanian nationals, habitually resident in Germany. They want to make an agreement on choice of applicable law to divorce.

What are the formal requirements?

Article 7 rules on the formal validity of the choice of law.

The general requirements are stated in article 7 (1) and are as follows:

- the agreement should be (1) expressed in writing (2) dated and (3) signed by both spouses.

As we can see these requirements are quite easy to comply and should not raise any problem.

However the same cannot be said for the additional requirements stated in article 7 (2) (3) and (4).

Articles (2), (3) and (4) impose a duty to investigate the national law of the participating member states to check if they impose additional requirements on formal validity.

In our case, as A and B are habitually resident in Germany and Germany is a participating member state, so we must check if German national law lays down any additional formal requirements.

German law imposes an additional formal requirement in article 46-d (1) of the introductory act to the civil code. In this article it is stated that the choice of applicable law has to be recorded in a notarial act.

And, as in our example, the spouses had a common habitual residence in Germany, the choice of law will only be valid if it complies with article 7 (1) of the Regulation and article 46-d (1) of the German introductory act to the civil code.

So the choice of law would only be valid if it was recorded in a notarial act.

This is a serious blow to the uniform application of the regulation and to the greater certainty that the regulation brings. If one can imagine, with some difficulty, couples getting to know the Rome III Regulation, it is not likely that "normal" couples, without legal counselling, will be able to predict the application of national formal requirements.

It is important to know that the participating Member States have a duty to inform the Commission of any additional formal requirements their national law lays pursuant to article 17 (1) (a).

The information provided will be accessible in the European Judicial Atlas in Civil Matters (de Almeida, 2014).

5.3. In the Absence of Choice

Although not as important for the notaries as article 5, article 8 determines which law applies if the spouses don't choose the applicable law.

The connections here are all determined at the time the court is seized. So one can only presume what law is going to be applied. One cannot be certain, because at least the habitual residence can easily change during the course of the marriage and can even cease to exist.

One or both of the spouses can also acquire or renounce nationality during the course of the marriage.

So it is quite possible to have modifications on the applicable law to divorce in the absence of choice during the course of a marriage.

Letter (a) imposes an actual common habitual residence. That is to say, both spouses have to be habitually resident in the same State.

Letter (b) has a time limit of one year. This means that the spouse that abandons the common habitual residence will not be able to benefit from this connection if he wishes to initiate divorce proceedings in the State of his new habitual residence.

This is because the Brussels II *bis* regulation only gives international jurisdiction to the courts where the applicant is habitually resident if he or she resided there for at least a year immediately before the application was made (art. 3 (1) fifth dash). The only exception to this rule is if the applicant has chosen for his new habitual residence the state of his nationality. In that case, he only needs to wait 6 months (art. 3 (1) sixth dash).

Letter (c) poses again a question regarding multiple nationalities. There is no doubt that recital 22 applies to article 8 (c).

But it is not without difficulties.

Case 5: A is a Portuguese and Brazilian national. He is married to B, who is a Brazilian national. Following some disagreements, A left France, where he and B habitually resided, and started living in Portugal. After one year and 2 months, he initiates divorce proceedings in the portuguese courts. The spouses didn't make an agreement on choice of law.

Which law applies?

As we can see letter (a) doesn't apply because at the time the court is seized, there isn't a common habitual residence.

Letter (b) does not apply because the last habitual residence of the spouses ended more than 1 year before the court was seized.

What about letter (c)? If we follow recital 22 to the letter, then the Portuguese courts have to determine the prevailing nationality of A. According to article 27 of the Portuguese nationality law, if a person has Portuguese and foreign nationality, the Portuguese nationality will prevail.

So, in this case, A will be considered a Portuguese national and B a Brazilian national. Letter (c) will not be applicable because there is no "common" nationality.

We argue that this solution is not the best. It does not promote uniform decisions, quite the opposite.

And, in cases like this one, it will make us apply the law of the forum, when the Brazilian law has a more substantial connection with the situation, as it is the national law of both spouses (Goering, 2008).

In our opinion, the best solution is to apply the Brazilian law recognizing that this law has a closer connection with both spouses.

6 Limits to the Application of Foreign Law

Article 10

"Where the law applicable pursuant to Article 5 or Article 8 makes no provision for divorce or does not grant one of the spouses equal access to divorce or legal separation on grounds of their sex, the law of the *forum* shall apply".

When advising one or both the spouses on the choice-of-law, it will probably be recommended to make them aware of some risks inherent to the regulation.

One of the first risks regards the limits to the application of foreign law.

If one is advising the spouses on which law to choose, one must bear in mind that:

(1) the regulation, in most of its articles, follows the principle of *favor divortii*, this means that most of the provisions of the regulation are designed with the intent to facilitate the dissolution or weakening of matrimonial ties.

This is quite clear in the first part of article 10. If the law chosen by the spouses makes no provision for divorce, the court must set aside the chosen law and apply its own local law.

"Makes no provision for divorce" means that, under the applicable law, the possibility of obtaining divorce is excluded altogether (ex. Philippines). If divorce is, in abstract, possible under the designated law, and Article 10 shall not step in.

(2) one must analyse the contents of the chosen law, because this law must also be set aside if it does not provide equal access to divorce or legal separation.

It is assumed that the application of the *lex fori* under Article 10 of the Regulation as a «remedy» for the designated law being discriminatory, will occur in respect of those legal systems that provide for repudiation of the wife on the part of the husband, and deny the former any equivalent opportunity for obtaining the dissolution of marriage.

So one must counsel the couples that a choice of a law that is discriminatory or that makes divorce impossible is of little consequence, because the court of participating Member State will set it aside.

7 Vulnerability of the Agreement on Choice-of-law

Case 6: A and B are married. They reside in France and are citizens of the United Kingdom. They made an agreement under the Rome III regulation choosing French law to rule their divorce. The agreement complies with all the requirements set forth in the Regulation.

A wants to get a divorce but does not want French substantive law to be applied. Is it possible?

The possibility of an agreement on the applicable law to divorce or legal separation is an innovation. Most Member States do not allow the spouses to choose the law applicable to their divorce.

This, coupled with the fact that the regulation is only applicable in 15 of the 28 Member States gives each of the spouses an indirect way to make a valid agreement under the Rome III Regulation ineffective.

If A does not want to be bound by the agreement he only has to choose the right Member State where to initiate proceedings for divorce.

Under Article 3 (2) of the Brussels II *bis* A can initiate proceedings for divorce in a court of the United Kingdom.

As the courts of the United Kingdom **are not bound** by the Rome III regulation, the agreement made will be deemed invalid according to the national private international law rules of the United Kingdom.

The court of the United Kingdom would consider that he has jurisdiction over the case and he would apply the forum law.

In conclusion, one of the spouses can, in most cases, with proper counselling, "escape" an agreement previously made on the law applicable to divorce.

This is mostly due to a deficient coordination between the Rome III Regulation and the Brussels II Regulation.

We can see two ways to improve, in the future, this coordination:

- the first, that more member states follow the Lithuanian example and participate in the Rome III Regulation;
- the second, and probably easier to accomplish, is to amend the Brussels II *bis* Regulation inserting a provision allowing for an exclusive choice of jurisdiction on matters of divorce, legal separation and marriage annulment.

8 Conclusions

As shown in this paper the Regulation (EU) No 1259/2010 seeks to protect parties with the limitation of the choice in family matters. They have the opportunity to decide for themselves which law will regulate their affairs.

This Regulation does not, on the other hand, apply to the following matters: the legal capacity of natural persons; the existence, validity and recognition of a marriage; the annulment of a marriage; the name of the spouses; the property consequences of the marriage; parental responsibility; maintenance obligation and trusts and successions. It also does not affect the application of Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility.

Whether this protection is adequate remains to be seen in practice, just like whether parties will take the opportunity to choose the law that will apply to their divorce.

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Circulation of Authentic Instruments under Regulation (EU) No. 650/2012

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Abstract: The European legal space unites Member States with different legal systems. The majority of them recognize the concept of an authentic instrument, as the primary instrument for preventive justice and the Notary as the person and institution, in whom the state has vested the right to authenticate certain transactions and facts. Other Member States do not recognize the concept of an authentic instrument and the institution of a Notary, who is responsible for drawing such instruments. Within the European Union there is no single or unified document – a "European Authentic Instrument". So this paper wants to draw attention upon the necessity to define the criteria an act has to comply with, in order to be considered as an "authentic instrument" and to enable its special effects to be recognized in a Member State different from the Member State of origin. In order to completely fulfil the objectives of Regulation 650 from 2012, to eliminate the obstacles to the free movement of persons within the European Union, through eliminating the difficulties in exercising their rights in the areas, related to succession with international consequences, the Regulation includes provisions, regulating the acceptance and execution of authentic instruments.

Keywords: succession with international elements; public authorities; Member States; European Union.

1 Introduction

Facilitation and encouragement of free movement of European Union citizens is a main goal and priority for its institutions. In order to achieve this goal, the European Union has developed and adopted numerous documents, reports, programs and action plans. The mobility of Union citizens is a practical reality, evidenced in particular by the fact that some 12 million of them study, work or live in another Member State of which they are not nationals.

Consequently, the European Parliament and Council adopted on the 4th of July 2012, at Strasbourg, Regulation (EU) no. 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession, which was a major step to facilitate cross border successions, revealing the need for legal certainty and easier proceedings (Council, 2014).

2 Problem Statement

The European legal space unites states with different legal systems. The majority of them – the Romano-Germanic type of states – recognize the concept of the authentic instrument, as the primary instrument for preventive justice, and the Notary as the person and institution, in whom the state has

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vested the right to authenticate certain transactions and facts, in order to guarantee their compliance with the law, their evidentiary effect(s), protection of the rights of related parties, safe-keeping and storage of such instruments, and facilitation of their execution. Such authentic instruments, drawn up in those states, whose authors in the field of succession law are usually Notaries, have an increased evidentiary effects and specific evidentiary weight, which needs to be taken into account both by private persons and public authorities, until such evidentiary effects are refuted under special legal proceedings. These authentic instruments incorporate special enforceability effects, providing, whenever necessary, the right to enforce the obligations included in them, following an alleviated procedure, compared to the one, in cases of private documents/instruments, whose enforcement is, in almost all cases, related to a court decision on the case, as part of a dispute before a court of law.

Other Member States, "Common Law" states, do not recognise the concept of the authentic instrument and the institution of a Notary, who is responsible for drawing such instruments. Even when in such states there are persons called "Notaries/Notary Publics," in most cases their functions are limited to certifying the signatures, placed under specific documents, but without an obligation to verify the legality of the content, or the execution of transactions and statements of will, described therein (Ivanov, 2014).

It is evident from the above that within the European Union there is no single or unified document – a "European Authentic Instrument," which is identical in all Member States (regarding name, format, procedure for drafting, scope of implementation, issuing authority). Even in the countries with Romano-Germanic legal systems, the authentic instruments drawn up, despite having some similar basic characteristics, have some differences.

Therefore, it is of utmost importance to define the criteria that should fulfil a document in order to be considered as an "authentic instrument," so to enable the legal effects of this instrument to be recognised not just in the Member State of origin, but also in other Member States.

3 The Definition and Significant Characteristics of the 'Authentic Instrument'

In the relations between EU Member States, the term "authentic instrument" was used for the first time in the Brussels Convention from September 27, 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters. According to art. 50 of this Convention, a document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Contracting State shall, in another Contracting State, be declared enforceable there, on application made in accordance with the procedures provided in the Convention. The instrument produced must satisfy the conditions necessary to establish its authenticity in the State of origin.

Following an interpellation on the implementation of art. 50 of the Brussels Convention, the Court of Justice of European Communities (currently the European Court of Justice), in its Unibank Decision from June 17 1999, had the opportunity to rule on the applicable criteria for an instrument, in order for that instrument to be treated as an authentic instrument, under the provisions of the Convention, thus providing the first European community definition for an authentic instrument. In this specific case, numerous documents, certifying the receipt of a loan, were signed over to Unibank – a credit institution, based in Denmark. In addition to the debtor, the documents were countersigned by a Unibank officer, in his capacity as a witness of the debtor's signature. The documents explicitly stated that, according to Danish law, they can be used as grounds for enforcement. Since the debtor did not repay his debt, the bank decided to foreclose and, due to the fact that at the moment the debtor had

domicile in Germany, approached the German courts, requesting enforcement of the rights, as described in the documents presented, in accordance with art. 50 of the Brussels Convention. The interpellation, raised before the Court of Justice of European Communities, was whether these loan documents can be used for the procedure, as described under art. 50 of the Convention or, in other words, whether they constitute authentic instruments, according to this text of the Convention. In response, the Court of Justice of European Communities issued a Decision, which lists three conditions, that any instrument must comply with, in order to be considered as an "authentic instrument" under the Convention: 1) the instrument must be drawn up by a public authority; 2) the authentication of the instrument must apply to its content, and not just the signatures; 3) the instrument must be enforceable in the state of origin. While the first two criteria are inherent to all authentic instruments, known to Member States with Romano-Germanic legal systems, the third criterion, listed by the Court, must be treated as mandatory only in view of the specific provision of the Convention, which the Court was requested to rule on, regulating the enforcement of authentic instruments. Provided that enforcement is not necessarily a mandatory characteristic of all authentic instruments, we can assume that, according to European law, an authentic instrument is one that is drawn up by a public authority and the authentication applies to the content of the instrument (Ivanov, 2014).

This **definition for authentic instruments** is also incorporated in Regulation 650/2012, regulating cross-border/international succession matters. For the purposes of the Regulation, art.3 par.1 (i) determines the 'authentic instrument' as a document in a matter of succession which has been formally drawn up or registered as an authentic instrument in a Member State and the authenticity of which:

- relates to the signature and the content of the authentic instrument; and
- has been established by a public authority or other authority empowered for that purpose by the Member State of origin.

From the above definition, we can extrapolate the following **significant characteristics of an authentic instrument,** namely:

1) The document has to be established by a public authority or other authority empowered for that purpose by the Member State of origin.

Therefore, authentic instruments are not instruments, drawn up between private persons only, as well as instruments, drawn up only in the presence of witnesses.

2) The document has to be formally drawn up or registered as an authentic instrument in the Member State of origin – i.e. during the drawing up of the instrument, the respective specific formal procedure must be followed.

3) The authenticity of the document has to relate not only to the signatures but also to its content – the respective public authority, or other authority empowered for that purpose, shall verify the authenticity, not only of the parties signing the instrument, but shall also verify the legality of the transaction, described in it.

Precisely which are the public authorities, empowered to draft authentic instruments, as well as the relevant format and procedure, is determined in accordance with the legislation of each Member State, where the authentic instrument is drafted.

In view of the objectives of Regulation 650, we can add another characteristic, which such instruments must comply with, namely:

4) The document has to be in a matter of succession.

If a given instrument is not related to a matter of succession, even if it is fully compliant with all characteristics of an authentic instrument, its acceptance and enforcement shall not fall under the provisions of Regulation 650, but will rather fall under the provisions of other Regulations, regulating acceptance and enforcement of authentic instruments (whenever within their scope), in accordance with the obligations under international treaties, signed by the Member State of origin, and in accordance with the national legislation in the Member State of enforcement.

4 Which Instruments Fall within the Field of "Succession Matters?"

Regulation 650 defines the term "succession" as "succession to the estate of a deceased person and covers all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession" /art.3, par.1, (a)/

For the purposes of the Regulation 'disposition of property upon death' means a will, a joint will or an agreement as to succession /art.3, par. 1, (d)/.

When is the Regulation applicable, and which fields are excluded from its scope, is defined under art.1, par.1 and par.2, and further clarified in Considerations (9) through (19).

Without listing all possible exceptions, it is worth noting that property rights, interests and assets created or transferred otherwise than by succession, for instance by way of gifts, are excluded from the scope of the Regulation, consequently authentic instruments authentifing such transfers are excluded from the scope of the Regulation as well. /Considerations (14) and art.1, par.2, (g)/

Outside from the scope of the Regulation are also the questions relating to matrimonial property regimes, including marriage settlements as known in some legal systems to the extent that such settlements do not deal with succession matters. /Considerations (12) and art.1, par.2, (d)/

In cases when a given instrument is compliant with the definition for an "authentic instrument," in accordance with art. 3, par.1, (i), the **Regulation provides rules, guaranteeing its circulation, namely – its acceptance and enforceability in a Member State, which is different from the Member State of origin.** In this case, we are not just talking about recognition and acceptance of the authenticity of a given instrument, without any respect to its legal effects, but for recognition and acceptance of the fundamental legal effects and consequences of the authentic instrument in the Member State of enforcement, which are precisely the strengthened evidentiary and enforcement effects (Requejo, 2013).

5 Confidence in the Origin of the Authentic Instrument

In order for an authentic instrument to invoke these fundamental legal effects in a Member State, different from the Member State of origin, the first and foremost prerequisite is the **confidence and trust in its origin.** While in the state of origin authentic instruments are treated as trustworthy by default, this is not the case when such instruments are presented in other states. Traditionally, the procedure for verification of the authenticity of instruments is the legalisation procedure, which can be defined broadly as a formal procedure, aimed at verifying and authenticating the signature of the person drawing up the instrument, his official capacity, as well as the authenticity of the seal, placed on the instrument. As a general rule, the legalisation procedure is applied towards all instruments, issued in a given state and intended for use in another state – civil and marital status certificates, court

decisions, administrative acts, instruments, requiring certification of the signatures by a Notary, real estate title deeds (Notary Acts), etc., unless there is an exemption of the legalisation requirement, in accordance with international or European treaties (multilateral conventions, bilateral treaties or Regulations). According to the Hague Convention from 5 October 1961, applicable in all EU Member States, the legalisation procedure is substituted by the alleviated Apostille procedure. Many Member States have signed bilateral agreements, which eliminate any legalisation requirements, including the Apostille.

As an expression of the trust between the Member States, motivating the introduction of the Regulation, art.74 of Regulation 650/2012 stipulates that "no legalisation or other similar formality shall be required in respect of documents issued in a Member State in the context of the Regulation," i.e. such documents can be used in a Member State, different of the Member State of origin, without the need to follow a legalisation, apostille, or any other formal procedure.

6 Accepting the Evidentiary Effects of Authentic Instruments

The provisions of the Regulation imply not only that the Member States must trust the origins of authentic instruments, drawn up in other Member States, but that they must also accept the legal consequences of such instruments – their evidentiary and enforceability effects.

As a general rule, the evidentiary effects of authentic instruments result from the circumstance that they are accepted as unconditional evidence to the facts and statements, expressed in the instrument, as well as for the actions, performed by the drafter of the instrument. The authority, before which the authentic instrument is presented, is bound by its evidentiary effects and does not have the right to refuse/reject what the instrument certifies. In order to refute the evidentiary effects, the instrument must be successfully contested/challenged, following a specific procedure (Frimston, 2012).

Despite this general rule, the evidentiary effects of authentic instruments differ among different states, while some states are even completely unfamiliar with authentic instruments and do not treat them as having any special evidentiary effects.

The essence of **accepting the evidentiary effects of authentic instruments** is stipulated under art. 59, par.1 of the Regulation: "An authentic instrument established in a Member State shall have the same evidentiary effects in another Member State as it has in the Member State of origin, or the most comparable effects, provided that this is not manifestly contrary to public policy (ordre public) in the Member State concerned."

In order to facilitate the establishment of the evidentiary effects of any given authentic instrument, in accordance with the legislation of the Member State of origin, art59, par.2 the Regulation, stipulates that a person, wishing to use an authentic instrument in another Member State can request from the authority, drawing the authentic instrument in the Member State of origin, to complete a **special form**, describing what are the evidentiary effects of the authentic instrument in the Member State of origin. The form must be completed in accordance with the procedure under art.81, par.2 of the Regulation.

The form is not a mandatory attribute to the authentic instrument, and is issued (completed) separately, whenever requested by the interested person. Once such a request is deposited, the authority, issuing the authentic instrument is obliged to complete such a form.

The presence of such a form is not a condition for acceptance or non-acceptance of the instrument. The form is only provided to facilitate state authorities in the Member State of enforcement and, consequently, the person using the instrument. In the case when an authentic instrument is not accompanied by such a form, the authorities of the Member State of enforcement must become acquainted with the legislation of the Member State of origin, using all possible means, including forms of judicial cooperation and, in cases of Notaries – through the European Notarial Network (Ivanov, 2014).

Acceptance and recognition of the evidentiary effects of authentic instruments is directly related not just with the confidence in their origin, but also with their content. Any **challenge** relating to the authenticity of an authentic instrument (art.59, par.2), or relating to the legal acts or legal relationships recorded in an authentic instrument (art.59, par.3) shall prevent the authentic instrument to produce its evidentiary effects in the Member State of enforcement, as regards to the matter being challenged, as long as the challenge is pending before the competent court.

The Regulation also deals with cases when **incompatible authentic instruments** are presented. According to Considerations (66) of the Regulation "should an authority, in the application of this Regulation, be presented with two incompatible authentic instruments, it should assess the question as to which authentic instrument, if any, should be given priority, taking into account the circumstances of the particular case." Where it is not clear from those circumstances which authentic instrument, if any, should be given priority, the question should be determined by the competent courts (Goodchild, 2014).

The acceptance of the **enforceability effects of authentic instruments** is stipulated under art. 60 of the Regulation: "An authentic instrument which is enforceable in the Member State of origin shall be declared enforceable in another Member State on the application of any interested party in accordance with the procedure provided for in Articles 45 to 58" (art.60, par.1)

Consequently, in order for an authentic instrument from one Member State to be enforceable in other Member State, this instrument:

- has to be enforceable in the Member State of origin;
- its enforceability in the Member State of enforcement has to be admitted through a special procedure of exequatur – issuance of a declaration of enforceability.

7. The Procedure for Issuance of a Declaration of Enforceability

This procedure is stipulated under art.45 – 58 of the Regulation and is significantly alleviated. According to it, the respective competent authority of the Member State of enforcement shall verify only whether the instrument presented qualifies as an authentic instrument, in accordance with the definition of the Regulation, and whether the instrument is enforceable in the Member State of origin. At this stage, compliance with public policy (ordre public) shall not be checked. Verification of compliance of the instrument enforcement with the public policy in the Member State of enforcement is conducted only in cases when the decision on the application for a declaration of enforceability is appealed, whereas the court where the appeal is filed, shall refuse or revoke the declaration of enforceability, only if the enforcement of the authentic instrument is *manifestly contrary* to public policy (*ordre public*). (Ivanov, 2014)

The application for a declaration of enforceability shall be submitted to the court or competent authority of the Member State of enforcement. Each Member State has the obligation to communicate to the Commission which is the competent authority.

The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

The application procedure shall be governed by the law of the Member State of enforcement.

The application shall be accompanied by: a) a copy of the authentic instrument which satisfies the conditions necessary to establish its authenticity; and b) the attestation issued by the authority of the Member State of origin which established the authentic instrument

The attestation shall be issued by the authority which established the authentic instrument on the application of any interested party, using the form established in accordance with the advisory procedure referred to in Article 81(2). If the attestation is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production

If the court or competent authority so requires, a translation of the documents shall be produced.

The authentic instrument shall be declared enforceable immediately on completion of the above mentioned formalities without any review as to the potential public policy (ordre public) issue. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant and shall be served on the party against whom enforcement is sought, accompanied by the authentic instrument.

An appeal against the declaration of enforceability shall be lodged within 30 days of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be 60 days and shall run from the date of service, either on him in person or at his residence.

The appeal shall be reviewed by the respective court, indicated by the Member State of enforcement, following the rules of competitive procedure.

The court with which an appeal is lodged shall refuse or revoke a declaration of enforceability only if enforcement of the authentic instrument is manifestly contrary to public policy (public order) in the Member State of enforcement.

8. Is it Possible that an Authentic Instrument within the Scope of the Regulation, Issued by One Member State, to be in the Respective Registers (Property Register and/or other) of another Member State?

On the one hand, any recording in a register of rights in immovable or movable property, including the legal requirements for such recording, and the effects of recording or failing to record such rights in a register are excluded from the scope of the Regulation – art.1, par.2 (l). On the other, in order to avoid duplication of documents, the registration authorities should accept such documents drawn up in another Member State by the competent authorities whose circulation is provided for by the Regulation. In particular, the European Certificate of Succession, issued under this Regulation should

constitute a valid document for the recording of succession property in a register of a Member State – Consideration (18) and art.69, par.5

The rules, established by the Regulation, on the acceptance and enforcement of authentic instruments among Member States, of authentic instruments issued by a another Member State, are a demonstration of the trust between the Member States and the trust in the authorities, who have been empowered with the competence to draw up such instruments. They are one step ahead in the establishment of a unified Europe, without borders, where citizens can plan their personal and professional life easier, including when planning issues, related to succession, and to execute their rights within the European Union with continuously diminishing restrictions.

Concurrently, and in view of protecting the legal security in the Union, these new rules result in a greater responsibility for the implementing authorities. Acceptance of instruments, issued by other Member States, in the absence of any legalisation procedures, acceptance of the evidentiary and enforcement effects of such instruments, implies knowledge and recognition of foreign legislation, foreign authorities, foreign forms, etc. With the rules, introduces by the Regulation, we could claim that the "burden of proof" has been reversed – i.e. it is not the citizen who has to prove the veracity and legal effects of the instrument presented by him/her and issued in another Member State, but it is the authority, where such instrument is presented, that is obliged to be aware, or get duly informed, using its own means, about the existing circumstances. This implies strengthening the forms of cooperation between the respective competent authorities of the Member States, establishment of secure and expedient mechanisms for verification of documents presented, and provision of information about their legal effects.

It is precisely for that reason, that the European Notarial Network, created by the notaries from the European Union will gain increasing importance, and its development must be our main priority (Ivanov, 2014).

The rules, established by the Regulation, on the acceptance and enforcement among Member States of authentic instruments, issued by another Member State, are a demonstration of the trust between the Member States and the trust in the authorities, who have been empowered with the competence to create such instruments.

These new rules result in a greater responsibility for the implementing authorities.

There is a necessity of strengthened forms of cooperation between the respective competent authorities in the Member States, establishment of secure and expedient mechanisms for verification of documents presented, and provision of information about their legal effects.

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Limits of Evidence within EU

Monica Pocora[1]

Abstract: The issue of admissibility of evidence has been regulated only very scarcely in the EU. Judicial cooperation in criminal matters has been embracing the increasing number of instruments, covering plethora of aspects, however, the field of admissibility of evidence remains almost untouched. Can the Area of Freedom, Security and Justice be called the Common Evidence Area? From the national perspective, the issue of admissibility of evidence is still subject to divergent solutions in the Member States, concerning the common law and continental law systems, i.e. the right of access to a lawyer. Thus, the paper aims to take into account the tendencies of legal rule in matter of admissibility of evidence, the dynamic of evidence movement within EU area.

Keywords: EPPO; testimony; prejudice; admissibility; gathering

1. Mutual Recognition

When the principle of mutual recognition concerns different types of decisions, rendered on all stages of the proceedings, the legal gap in the field of admissibility of evidence gives rise to concern insofar as no principles are established with regard to their transfer between the Member States. This has provoked commentaries about a possibility of "free movement of evidence" whereby evidence gathered could circulate without barriers between the Member States. In an extreme case, an obligation to recognize all evidence gathered abroad could lead to a situation of forum-shopping, i.e. evidence would be collected a country where most liberal evidential rules are applied and then transferred to another one where it would need to be recognized.

The issue of admissibility of evidence is subject to divergent solutions in the Member States. The two opposite models may be attributed common law and continental law systems. The common law system is attached to a fairly strict system of admissibility of evidence. This is often linked to the fact that non-professionals sitting in a jury remain key actors in the judicial process, hence the need to provide them with a clear framework for their decision through introduction of a set of rules on admissibility of evidence and, thus, avoid a distortion of justice which set a clearer framework for the decision of the jury. The specificities of the common law system include limitations in hearsay evidence; limitations in testimonies of anonymous witnesses, limitations in scope of persons entitled to refuse to testify (not all closest persons are protected); specific position of accused persons (who testifies under oath unlike in continental law systems where no legal consequences are attached to

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them lying), wide scope of plea bargaining (transactions) which impacts on the entire evidence gathering process.

In the Continental law system, the limitations in the use of evidence are only few. In some countries it is hardly possible to formally restrict admissibility of evidence in the court. One example of the divergent approaches in this field may be the Directive 2013/48/EU on the right of access to a lawyer (1). The initial proposal of the Commission linked strict evidential consequences with the prior non-respect of the right of access to a lawyer. According to the proposal "*Member States shall ensure that statements made by the suspect or accused person or evidence obtained in breach of his right to a lawyer or in cases where a derogation to this right was authorised in accordance with Article 8, may not be used at any stage of the procedure as evidence against him, unless the use of such evidence would not prejudice the rights of the defence*." This proposal met with a determined opposition of some Member States who considered that such limitations would adversely impact on the independence of the Court which should enjoy of freedom of assessment of evidence.

Two models of cross-border gathering of evidence have been established in the EU. The first system covering nearly all types of evidence is contained in the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union. The second one is covered by some mutual recognition instruments, however, its material scope is very limited. Namely, it concerns only freezing of evidence based on Council Framework Decision 2003/577/JHA (2). It is apt note that a more ambitious attempt to legislate on other evidential measures failed, since the framework decision 2008/978/JHA on the European evidence warrant (3) has been implemented by only 3 Member States (Denmark, Finland). This instrument is considered obsolete; the instruments contain only fragmentary rules on the manner of evidence gathering which poses a risk of evidence being considered inadmissible or of a reduced probative value.

Under MLA 2000 Convention, the *forum regit actum* principle has been established. Under this principle:

Art. 4.1. *Where mutual assistance is afforded, the requested MS shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention and provided that such formalities and procedures are not contrary to the fundamental principles of law in the requested Member State*.

Additionally, in line with Article 4.3, *If the request cannot, or cannot fully, be executed in accordance with the requirements set by the requesting MS, the authorities of the requested MS shall promptly inform the authorities of the requesting MS and indicate the conditions under which it might be possible to execute the request. The authorities of the requesting and the requested MS may subsequently agree on further action to be taken concerning the request*.

2. Forum Regit Actum

The *forum regit actum* principle does not, obviously, solve the problem of evidence collected through so-called spontaneous exchange of information. It results from this procedure that one state has no impact on the manner of gathering evidence, since it is spontaneously exchanged. It may happen that it will not be automatically used as evidence but only as information about evidence. It may also require further authentication in the forum state.

One of the key challenges encountered in the course of international judicial assistance is a principle of direct examination of evidence by a judge. This principle is, by nature, put at risk in the

circumstances of the geographical distance of the location of evidence. One way to remedy this difficulty is to organize a videoconference. Using this technology is on occasions suggested by the ECHR as a way to bypass the shortcomings of traditional legal assistance. However, this avenue has its legal limits. Certain states do not allow for this form of evidence gathering with regard to accused persons.

The issue of admissibility of evidence may also be raised in one of the novel frameworks for evidence gathering, that is joint investigation teams. Since this issue will be, here again, governed by the national law of the Member State where the court proceedings take place, it is very essential to examine this question in the phase of drafting the agreement before any operational activities have been undertaken by the JIT. This is also expressly provided by the JIT model agreement (7) according to which the parties entrust the leader or a member (s) of the JIT with the task of giving advice on the obtaining of evidence.

The new signals of possible activity of the European Union appeared with the publication in 2009 of the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility. This paper provided more questions i.e. if common standards should be adopted, which would envisage?, are preferred the adoption of general standards applied to all types of evidence or more specific standards accommodated to the different types of evidence?

The Treaty of Lisbon provided for an explicit legal basis in this field, namely Art. 82.2. of the Treaty on Functioning of the European Union:

"Art. 82.2. To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.

The instruments referred to above cover legal assistance between judicial authorities. It may be often the case that the information comes from non-judicial authorities. One should scrutinize such information with particular attention before using it as evidence, as it might have not necessarily be subject to adequate procedural safeguards in the course of its collection, since the administrative/customs authorities are not subject to as strict standards as judicial authorities in criminal proceedings.

3. European Public Prosecutor Office

A novelty in the area of admissibility of evidence is offered by the proposal of the establishment of the European Public Prosecutor's Office (EPPO) (4) made by the Commission in line with Article 86 of the Treaty on Functioning of the European Union with the aim of prosecution of offences against financial interests of the EU. As opposed to traditional "horizontal" methods of cooperation, the proposal introduces a "vertical" model where the EPPO could carry out the pre-trial proceedings and make a binding decision on which jurisdiction should carry on with the judicial phase of the process. This puts the problem of admissibility of evidence in a completely different perspective. It sets up a list of investigative measures which the EPPO should have the power to request or to order. Member States shall ensure that the measures referred to in par. 1 may be used in the investigations and prosecutions conducted by the European Public Prosecutor's Office. The evidence collected in accordance with such rules shall be admitted in the trial without any validation or similar legal process

even if the national law of the Member State where the court is located provides for different rules on the collection or presentation of such evidence. Once the evidence is admitted, the competence of national courts to assess freely the evidence presented by the European Public Prosecutor's Office at trial shall not be affected.

4. Study Cases

Case Rantsev v. Cyprus and Russia (no. 25965/04)

From the perspective of the ECHR, does the state of nationality of the victim of crime has an obligation to initiate its own criminal proceedings?

What obligation is incumbent on the member states concerning evidence? Does the state where the evidence is located have an obligation to secure it in the absence of the legal assistance request from the investigating state?

An possible Romanian answer is according to Art. 35 (1) "Each Contracting Party shall institute, at the request of the other Contracting Party, in accordance with and subject to the provisions of its own law, criminal proceedings against its own citizens who are alleged to have committed an offence in the territory of the other Contracting Party".

On the other hand, Latvia may identify some provisions in matter of mutual legal assistance "the requested Party shall execute in the manner provided for by its law any letters rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring evidence or transmitting articles to be produced in evidence, records or documents". Also, it was found the taking of evidence from litigants, accused persons, defendants, witnesses and experts as well as recognition and enforcement of judgments in civil matters, institution of criminal prosecutions and extradition of offenders.

5. Conclusions

The issue of admissibility of evidence rises up usually in national contexts. It takes into account difference in legal systems referred to above and it is able to look at this issue from the more general perspective of fundamental rights (5). Some guidelines should be primarily taken into account: Admissibility of evidence is primarily a matter for regulation by national law; the Court's task under the Convention is to ascertain whether the proceedings as a whole, including the way in which evidence was taken; all the evidence must be produced at a public hearing, in the presence of the accused, with a view to adversarial argument. Authorities should take positive steps, in particular to enable the accused to examine or have examined witnesses against him. Using modern technologies, such as videoconference, should be considered. In the event of a particular geographic obstacle, the authorities should take measures which sufficiently compensated for the limitations of the applicant's rights.

6. Acknowledgements

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The Electronic Evidence in Trial Proceedings

Monica Pocora[1]

Abstract: This paper will consider theoretical and practical issues which arise in trial proceedings, throughout the virtual presence of persons involved. The EU Convention of 2000 provide the legal base for the use of video conference. In most jurisdictions, all forms of evidence is admissible, subject to rules relating to the exclusion of evidence because of improper actions or because the inclusion of the evidence would be unfair to the defendant. There is a difference between the admissibility of the evidence and laying the correct foundations before the evidence can be admitted.

Keywords: digital; admissibility; probative value; jurisdiction

1. The Admissibility of Electronic Evidence

Electronic evidence is not new: for instance, in the UK, Professor Colin Tapper wrote *Computers and the law* in 1973 and *Computer law* in 1978, and Alistair Kelman wrote *The computer in court: a guide to computer evidence for lawyers and computing professionals* in 1982. Although the discussion of the technical issues relating to electronic evidence was relatively slight in the early days, nevertheless electronic evidence (initially called computer evidence) has been adduced into legal proceedings for at least 40 years, if not 50 years. For this reason, the topic should not be anything new.

Investigators and prosecutors across the world have begun to deal with the identification, gathering, preservation and validation of digital evidence, including the chain of custody and ensuring that the evidence is transported and stored in such a way as not to alter or destroy the evidence. It is also necessary to analyze the evidence by using appropriate tools, and to provide a report that a judge and members of a jury (if a case is tried by a jury or a combination of judge and jury) understand.

Two important practical issues that must be addressed properly to ensure the evidence cannot be criticized by the defense are (i) the importance of gathering *all relevant evidence* – his includes physical items such as a keyboard for fingerprint and DNA samples and the mouse, because most mice now include advanced memory functions that track and record what it does, and (ii) to photograph the scene before removing any items, and video the actions of investigators if they are required to recover evidence from a device that is switched on.

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In most jurisdictions, all forms of evidence is admissible, subject to rules relating to the exclusion of evidence because of improper actions or because the inclusion of the evidence would be unfair to the defendant. There is a difference between the admissibility of the evidence and laying the correct foundations before the evidence can be admitted.

This point is illustrated by considering the jurisdiction of England and Wales. The provisions of section 117 of the Criminal Justice Act 2003 provide for the introduction of documents created in the course of a trade, business, profession or other occupation. The provisions of section 117 do not remove the requirement that the evidential foundations have to establish before the evidence can be admitted. Apparently, defense lawyers in England and Wales regularly agree to the inclusion of electronic evidence under this section. It seems that prosecutors are aware of the position, but defense lawyers seem not, in general, to appreciate this very important distinction.

2. Hearing by Videoconference

Article10: "If a person is in one Member State's territory and has to be heard as a witness or expert by the judicial authorities of another Member State, the latter may, where it is not desirable or possible for the person to be heard to appear in its territory in person, request that the hearing take place by videoconference, as provided for in paragraphs 2 to 8.

The requested Member State shall agree to the hearing by videoconference provided that the use of the videoconference is not contrary to fundamental principles of its law and on condition that it has the technical means to carry out the hearing. If the requested Member State has no access to the technical means for videoconferencing, such means may be made available to it by the requesting Member State by mutual agreement.

Requests for a hearing by videoconference shall contain, in addition to the information referred to in Article 14 of the European Mutual Assistance Convention and Article 37 of the Benelux Treaty, the reason why it is not desirable or possible for the witness or expert to attend in person, the name of the judicial authority and of the persons who will be conducting the hearing.

The judicial authority of the requested Member State shall summon the person concerned to appear in accordance with the forms laid down by its law.

3. The Role of Digital Evidence Specialists

The name given to an 'expert' witness is digital evidence specialist. This is because nobody can be an 'expert' in all aspects of digital evidence, because the field is so vast. At best, a digital evidence specialist can be well informed about a number of significant issues relating to electronic evidence, but not everything. It is important to that the digital evidence specialist will not have a comprehensive knowledge of every aspect of electronic evidence. Also, the specialist must not be seen to be partisan to either party – in most jurisdictions, the 'expert' witness is required to be neutral, regardless of which party pays them, and owes a duty to the court, no to either party.

The findings, and any conclusions made by the digital evidence specialist, are very important, and will be set out in a report. Whether prepared for criminal or civil proceedings, the report should include a range of information that is pertinent to the case, including, but not limited to: notes prepared during the examination phase of the investigation; details about the way in which the investigation was conducted; details about the chain of custody; the validity of the procedures used and details of what

was discovered. The report needs to reflect how the examination was conducted and what data were recovered, and essential to any report will be the conclusions reached by the specialist. Where an opinion is offered, the opinion should set out the basis of the evidence. Clarity of thought, language and analysis are essential criteria for any such report.

4. Obtaining Evidence from other Jurisdictions

There are wide variations between what happens in practice and how judges in different jurisdictions deal with obtaining evidence form other jurisdictions. In discussing this topic, consideration will mainly focus on the response by judges and organizations in the United States of America, which illustrates the nature of some of the problems that might be necessary to consider by means of an international convention or treaty.

In criminal matters, attempts are made to acquire evidence and obtain the cooperation of potential witnesses by agreement, to such an extent that the Crown Prosecution Service in the UK has a liaison officer in Washington expressly to facilitate the exchange of evidence and witnesses. The Global Prosecutors E-Crime Network was partly set up to develop a co-ordinated approach for dealing with electronic crime. More formal provisions include multilateral conventions (such as the 1959 European Convention on Mutual Assistance in Criminal Matters, and the Convention on Mutual Assistance in Criminal Matters between Member States of the European Union of 29th May 2000 (which supplements the 1959 convention), bilateral treaties between States (such as the 1994 Treaty Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters), other arrangements such as the Harare Scheme (currently being updated), that is relevant to Commonwealth countries, which is a voluntary Scheme Relating to Mutual Assistance in Criminal Matters, and memoranda of understandings. However, it is not always the case that an organization is willing to cooperate with the prosecuting authorities, as in the prosecution of Yahoo! in Belgium for refusing to provide e-mail correspondence to the Belgian investigating authorities in a case involving credit card fraud.

In civil matters, it is probably correct to infer that evidence and witness statements are generally obtained for inclusion in civil proceedings by agreement. However, the main international mechanism for the obtaining and taking of evidence is the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, which entered into force on 7 October 1972. Unfortunately, the obtaining of evidence by means of a Letter of Request can be time consuming. In addition, the Convention is not necessarily considered to be mandatory by every signatory, as expressed by the United States Supreme Court in *Société Nationale Industrielle Aérospatiale v. U.S. District Court for the Southern District of Iowa*, echoing the comments of Keenan, DJ in *Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Company*, in which he observed, at 28, that the United States did not intend to abandon the practice of extraterritorial discovery when agreeing to comply with the Hague Convention, and indicated that the Hague procedures were neither exclusive or mandatory. In the European Union, Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters applies to all the Member States of the EU with the exception of Denmark (article 22), which has not participated in the Regulation, and is therefore not bound by it nor subject to its application. The Regulation provides for direct contact between the courts in the Member States. There is a standardized request form that is included in the annex to the Regulation.

It has to be noted that witnesses out with the jurisdiction cannot be compelled or required to attend and give evidence before the courts of another Member State. They may be requested to do so and a summons may be served directly to them. This can cause significant difficulty for the adjudication of the trial. If a crucial witness declines to attend to give evidence it may result in the accused being acquitted of the charge, in particular in common law jurisdictions. The public interest will not have been met.

It also requires to be noted that a fair trial must be secured even where the witness gives evidence by video conference. The national authorities in the requesting state must make it clear that the accused is agreeable to the use of video conference and that under the law of the requesting state the use of video conference is sufficient to ensure a fair trial compatible with article 6 of the European Convention on Human Rights is secured.

If the witness is to give oral evidence and if this has an impact on the ability of the court or jury to determine the witnesses credibility or reliability, is the presentation of the evidence best secured by video conference. Does the witness require to be shown evidence in the case and if so, how is that to be achieved? How is the fundamental principle of procedure to be achieved?

There is also an implied presumption the witness will attend and give evidence, as he requesting authority requires to explain why the witness will not attend. The practical issues which arise at the hearing include an interpreter but also that the requested authority be present. It ensures that the witness receives both the protection of national law when a witness gives evidence but also ensures that of the witness declines to give evidence or becomes difficult in the process.

Whether under national law the accused can give evidence by video conference. It may be possible and is permissible under the convention. The next step would be if the accused gives evidence from another state and is convicted. How is to be sentenced and how will, if sentenced to a period of imprisonment, be returned to serve that sentence.

5. Conclusions

The virtual presence in trial proceedings can be effective. However, it must be considered within the terms of national law rules on evidence. It requires careful consideration of theoretical and practical issues such as trial strategy, cost and the overriding need to secure a fair trial in the public interest. Video conference permits the witness to give evidence without travelling and giving evidence in a legal system with which they are unfamiliar.

Courts have to be physically adapted to allow the presentation of electronic evidence; otherwise it costs a great deal of money to print every electronic document on to paper for the proceedings.

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The Order of Protection in the Romanian Legal System

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Abstract: The phenomenon of domestic violence, quite common in the countries of Eastern Europe, including Romania, can be perceived as a consequence of shortcomings in the education of person, or a faulty education. The aims of current study is to present and analyze the legal instruments designed in the area of civil law due to combat and prevent domestic violence, with a special regard to the protective order governed by the law No. 217/ 2003, as amended and republished. Legal provisions are analyzed with regarded to the person who may apply for order of protection, the conditions for the admissibility of the petition for the issuance of the protective order, the measures which may be imposed by an protection order, the duration of these measures, the conditions for revocation of the protective order etc. The study reveals the practical application of analyzed legal provisions, by referring to the decisions given by Romania courts in cases involving the "protective order". Finally are exposed the advantages and shortcomings of normative framework already existing, as well as the effectiveness of the legal provisions in practice.

Keywords: violence; danger; family; protective order

1. Introduction

In Romanian legal system, the regulatory framework on preventing and combating domestic violence is represented by Law no. 217/ 2003[3].

Even if legislator pursued to establish measures for prompt and efficient protection of victims of domestic violence, the practice has revealed that provisions of Law no. 217/2003, in large part, doubles the provisions of the Criminal Code from 1968.

Specifically, Art. 1 para. 2 of Law no. 217/2003, before the amendment and republication, stipulate that *"the State is acting to prevent and combat domestic violence, according to the provisions of Article 175, 176, 179, 183, 189 – 191, 193, 194, 198, 202, 205, 206, 211, 305 -307, 309, 314 – 316, 318 and other alike of the Criminal Code, Law no. 705/ 2001 on the national system of social assistance and other legal provisions on the same matter, as well as the provisions of the present law".* Also, Art. 26 para. 1 of the same Law, established that *"in the course of criminal proceedings or during the trial in front of the Court, at the request of the victim or by inquest of office, wherever there*

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[3] Law no. 217/ 2003 was published in the "Official Gazette of Romania", No. 367 of the 29th May 2003 and republished in the "Official Gazette of Romania", part I, No. 365 of the 30th May 2012.

is evidence or reasonable indications that a family member has committed a violent act injurious to the physical or mental suffering to another member, may order on the provisional basis, one of the measures provided for in Art. 113 and 114 of the Criminal Code, as well as the prohibition to return to family home". We do specify that measure of prohibition to return to family home was, as well, regulated by Art. 181 of the Criminal Code from 1968[1].

Therefore, the provisions of Law no. 217/2003, before the amendment, offered to victims of domestic violence tools which were already covered by Criminal Code of 1968.

Indeed, according to Art. 26 para. 1 of Law no. 217/2003, unlike Art. 118 of the previous Criminal Code, the measures of prohibition to return to the family home didn't depend on existence of *"conviction to prison punishment at least a year for flicks or any other acts of violence causing physical or mental suffering perpetrated upon the members of the family".* In other words, the victim wasn't forced to wait for the finalization of trial and for a judgment of conviction, being able to request imposition of this measure previously. Even if apparently was created an additional tool to protect the victim its readiness remained questionable, because, according to Art. 26 of Law no. 217/ 2003, the prohibition of return to the family home, could be ordered by the Court only provisionally and only during the criminal proceedings or the trial, obvious whenever there were serious indications that a family member has committed a violent act injurious to the physical or mental suffering to another member.

Therefore, from the date of enforcement referral to the criminal investigation bodies till finalization of criminal proceedings, or depend on the case, from the date of filing an application to the Court till setting up a hearing there was a period when the victim was outside of any regulated protective measures. Or, the period which we referred to, usually, is not a short one. Furthermore, the victim didn't have the legal opportunity to file a petition to the Court with the request to prohibit the offender to return to the family home. The victim had to file a criminal complaint, to await the beginning of criminal proceedings and only from this point could file a petition requesting the taking of the measures of prohibition to return to the family home.

The doctrine has noticed that it was urgently necessary to create a complex tool that can be used to remove the danger created by exposure to aggressive treatments. In fact, it was about a way of removing the threat that the victim was exposed to, and which can generate situations of committing serious crimes even against victim's life. In other words, by reference to practical needs, it was necessary to supplement the legal framework by creating, alongside the existing protective instruments, of a preventive tool with immediate effect to the danger that victims of such violence are exposed.

Therefore, deficiencies raised by doctrine and practice, which obstruct a preventive and effective protection of victims, have determinate the substantial amendment of Law no. 217/2003 by Law no. 25/2012.[2]

The amendments brought by the Law no. 25/2012, relates to indication of the principles governing the protection and promotion of the interest of domestic violence victims; expansion of coverage of "domestic violence" concept, so that it will correspond with the defining standards imposed by

[1] Law No. 29/ 1963 on the Code of Criminal Procedure was repealed by Art. 108 of Law no. 255/ 2013 for the implementation of Law no. 135/ 2010 on the Code of Criminal Procedure and on modification and completion of some legislative acts containing provisions of Criminal Procedure (published in the "Official Gazette of Romania" part I, No. 515 of the 14th August 2013).

[2] Law no. 25/2012 was published in the "Official Gazette of Romania" part I No. 156 of 13th March 2012.

international legal instruments[1]; expanding the number of interrelation situations that are covered by the concept of "family member", in relation to the regulatory field etc.[2] (Gorunescu, 2012).

The highlights of the amendments brought by Law no.25/ 2012 consist in creating an instrument of protection of family violence victims called "protective order".

Thus, although in Romanian legal system there was a normative act in the field of preventing and combating domestic violence since 2003, placing the protective order in the context of this act lasted 9 years. Moreover, it was determined by a dramatic event.

So, doctrine shows that the modifications promulgated on March 2012 of the Law no. 217/2003 were the result of a case tends to become well known, namely the shooting at "Perla" Hairdresser in Bucharest. (Vladila, 2013) In this case, a woman noticed the police in many times regarding the possibility that her husband is trying to murder her, because they were separated and he continuously threatened her with physical violence, and the police did nothing. The silence of the police allowed her husband, who has a firearm license, to come at the victim's working place – a hairdresser – and, in broad daylight to fire without discrimination in all the persons who were there, employees and customers. The victim and other persons deceased, while others were seriously injured. (Vladila, 2013)

The protective order is materialized by a judgment issued on an urgent basis that establishes immediate and necessary actions in order to protect the physical and/or mental integrity of the domestic violence victim. (Ghita, 2014)

It should to be mentioned that the protective order, with effect from 12 May 2012, represents a novelty for the Romanian legal system, but in legislation of other States, this tool has already proven its usefulness.[3]

Besides, as we shown already, the absence of this legal instrument from Romanian legislative landscape has been keenly felt by the victims of domestic violence. This is also confirmed by the results of a National Study on the implementation of the protective order[4], according to which, during the period 12 May 2012 – 28 January 2013, were filed petition for protective orders in front of 123 Romanian courts from 176 existing and the total in the country, were recorded 1009 of such requests.

2. Holders of Petition for Protective Order

We reiterate that the order of protection is a measure which is available to the victim of domestic violence. Therefore, the holder of the application for the issuance of such order is the victim herself. The application may be submitted by the victim personally or through a legal representative.

Alternatively, the application may be field on behalf of the victim, also by the Prosecutor, the representative of the competent authority, at the level of administrative territorial unit, with powers in

[1] In this sense are eloquent the provisions of the Council of Europe Convention on the prevention and combating of violence against women and domestic violence.
[2] http://www.juridice.ro/209698/ordinul-de-protectie-in-legislatia-romaneasca.html.
[3] Mention that in the European Union was adopted the Directive 2011/99/ EU of the European Parliament and of the Council of 13th December 2011 on the European Protection Order. According to Art.21 of Directive the Member State are required to transpose its provisions into national law no later than 11th January 2015.
[4] The national Study regarding the implementation of the protection order – Law 25 of 2012 (Law 217/ 2003 republished for preventing and combating domestic violence) for the period of 12th May 2012 – 28th January 2013, funded by the Open Society Foundation, the data collected by the Association for Freedom and Gender Equality, the Curricular development and Gender Studies FILIA, Romanian Group for Human Rights, available on http://www.fundatiasensiblu.ro/wp-content/uploads/2013/08/Studiu-monitorizare-ordine-de-protectie-2013.pdf.

the field of protection the victims of domestic violence; the representative of social service's providers in the field of preventing and combating domestic violence, accredited under the law, with the consent of the victim (Art. 25 para.1. of Law no. 217/ 2003)[1].

Application for order of protection shall be made according to the request form provided for in the annex to the Law no. 217/ 2003 and is exempt from judicial stamp duty. Also, upon request, the petitioner for protective order may be provided with assistance or representation by lawyer.

We believe that these legislative measures are well disposed towards victims of domestic violence, thus avoiding situations in which an application would not be introduced because the victim does not have specialized training in order to file such a request or because the victim doesn't have financial resources to pay the stamp duty. Furthermore, the victim has the possibility to request to be assisted or represented by a lawyer, regardless of the income carried out by the victim[2]. For the same reason there is regulated the opportunity for other person or authorities to formulate the request in the name of the victim. Through this measure, the legislator aimed to avoid a situation in which an application would not be introduced because the victim's physical or psychological condition doesn't allow her/him to initiate such a process. (Gorunescu, 2012)

We mention that if petitioner for protective order may be provided with assistance or representation by lawyer only upon request, legal assistance of the person against whom the order is sought is mandatory. We appreciate that this legislative choice aims to prevent abuses of law consisting of exposure to a measure, in order to limit the exercise of rights, under a protective order a family member who is not in fact an aggressor. It is possible that in such situations is wished even a psychological aggression against a family member, through false accusations of violence. (Gorunescu, 2012)

In cases where the application for protection order has been filed in the name of the victim by one of the person mentioned in Art. 25 para. 3 of Law no. 217/2003, the victim may renounce the trial in condition of Art. 406 of Law no. 134/2010 on the Code of Civil Procedure[3]. More specifically, the renunciation can be made at any stage, verbally in court or by written request.

Also, the victim can renounce to the trial when she personally filed the petition for protective order. Even if Law no. 217/2003 doesn't stipulate expressly this situation, the practice of the Romanian courts shows that in case of renunciation the judge will take note of the expression of will and will pronounce a final judgment of disinvestment[4].

[1] References to the texts of Law no. 217/2003 will be made considering the amended and republished form.

[2] In the Romanian legal system there is a normative act, under which the litigants may ask for public judicial aid in the form of free legal assistance, or representation by a lawyer appointed or elected, due protection a right or legitimate interest, or to prevent a dispute, called assistance by a lawyer. In this sense are provisions of Art.6 letter a) of Government Emergency Ordinance no. 51/ 2008 on the legal aid in the civil matter (published in "Official Gazette of Romania" part I, no. 327 of 25 April 2008.) This form of public judicial aid, as well as others regulated in Art. 6, can be provided, only to the people whose average monthly income per family member in the last two months prior to the formulation of the application, is below the level of 500 lei. Therefore, in the absence of explicit provision, we appreciate that a victim of domestic violence who request protection order can request to be assisted or represented by a lawyer, regardless her/his income. In other word the victim of domestic violence can ask for public aid even if her/his income is higher than those covered by Government Emergency Ordinance no.51/ 2008. This situation regulated by Law no. 217/ 2003 represent an exception from the common regulation in public aid matter, i.e. Government Emergency Ordinance no. 51/ 2008.

[3] Law no. 134/ 2010 on the Code of Civil Procedure, republished in "Official Gazette of Romania" part I. No. 545 of 3rd August 2012.

[4] City Court, Targu Mures, Civil Section, Final Judgment (disinvestment) No. 6311/ 04.12.2013, pronounced in Case no. 13596/320/2013.

According to the Study on the implementation of protective order in Romania, in 2012 – 2013 period, the petitions for protective order have been withdrawn at a rate of 10,80% (of which 10,39% withdrawn by women victim and 0,51% withdrawn by men victims).

According to the same Study, between petitions for protective order filed by women and man, prevalence of woman is very high, relative 94%.

3. The Conditions for the Admissibility of the Petition for Protective Order

The provisions of Art. 23 of Law no. 217/ 2003 require the following conditions for the admissibility of the petition for protective order:

a) Existence of an application for the protection order;

We reiterate that the application may be field personally by the victim of family violence, by his/her representative or one of the persons referred to in Art. 25 para. 3 of Law no. 217/ 2003.

b) Existence of a danger to life, liberty, physical or mental integrity of domestic violence victim.

c) State of danger should derive from an act of violence.

According to Art. 3 of Law no. 217/ 2003 "domestic violence" means any deliberate physical or verbal action or inaction, except for actions of self-defense or defense, committed by a family member against another member of the same family that causes injury or physical, psychological, sexual, emotional suffering, including threats of such acts, coercion or arbitrary deprivation of freedom. The family violence means as well the hindering of the woman to exercise her fundamental rights and liberties.

Besides the fact that Law no. 217/ 2003 define the expression "domestic violence" pass the review the forms of domestic violence, explaining their significance.

Thus, according to Art. 4 of Law no. 217/ 2003, domestic violence can occur under the following forms: verbal violence; psychological violence; physical violence; sexual violence; economic violence; social violence or spiritual violence.

d) the act of violence has to be committed by a family member.

The term "family member" is defined in Art. 5 of Law no. 217/2003 and it has a special and extensively meaning unlike the meaning this term has in civil and even criminal law.

Thus, within the meaning of Law no. 217/ 2003, in the category of "family member", includes:

- ascendants and descendants, brothers and sisters, their children, as well as those made through adoption, according to the law, such as relatives;
- the husband/wife and/or ex-husband/ex-wife;
- persons who have established similar relations to those between spouses or between parents and children, if they are living together;
- guardian or other person exerting, de *facto* or de *jure*, the rights in the name of the child;
- legal representative or other person who take care of the person with mental illness, intellectual disability or physical handicap, except those who perform these as their professional duties.

e) protective order may be required for the elimination of the state of danger.

According to Art. 24 of Law no. 217/ 2003, measures ordered through protective order shall be determined by the judge, without be able to exceed the period of 6 months from the date of issuing the order.

Therefore, the maximum period for which may be issued an order of protection is 6 months.

If the judgment on protective order does not set the duration of ordered measures, they will take effect for a period of 6 months from the date of issuing the order.

Romanian jurisprudence reveals a heightened attention and concern toward victims of domestic violence, which is why most of the times the order of protection is issued for a maximum period of 6 months[1].

Obviously, considering the legislative provisions previously cited, along with other doctrinaires, we appreciate that the protection order has a provisional character. With all this, the victim has the possibility to request the issuance of a new protective order, if there are indications that in the absence of protective measures, the life, the physical or mental integrity or freedom would be put in danger (Art. 33 of Law no. 217/ 2003).

The moment when the victim may request a new order of protection is questionable considering the expression used by legislator in the content of Art. 33, i.e. "on expiry of protection measures". The expression may be read in the sense that a new protective order can't be requested before the previous order didn't expire or a new protective order can't be requested until the day on which the previous order expires. Such an interpretation would leave the victim without protection from the moment of filling the petition for new protective order, including whether it would be filled in the day when previous order expires, till the moment of trial and issuing the new order. Indeed, according to Art. 27 para. 1 of Law no. 217/ 2003, the judgment on protection order is issuing on urgent basis but even so from the moment of registration and up to the moment of solving the application there is a period of time, even if theoretically should be a short one, it can be fatal for protected values through this institution, i.e., the life, physical and/or mental integrity or person's freedom.

We hope that these considerations are underlying the existing judicial practice in the sense of acceptance and solving the petition for new protection order before the expiry of the previous one[2].

4. The Content of Protective Order

The provisions of Art. 23 of Law no. 217/ 2003 allow to judge, in order to eliminate the danger, to issue a protective order, which will impose, provisionally, one or more of the following measures – obligations or prohibitions:

- temporary evacuation of aggressor from the family home, regardless if she/he is the owner;
- reintegration of the victim and, depend on the case, of children in the family home;

[1] City Court, Targu Mures, Civil Section, Judgment no. 5760/16.07.2014 pronounced in Case no. 8720/320/2014; *idem* Judgment no. 409/23.01.2014; *idem*, Judgment no. 3194/23.04.2014 pronounced in Case 4343/320/2014.

[2] For example, can be mentioned the Judgment no. 5760/16.07.2014, pronounced by City Court, Targu Mures. In this case, the victim of domestic violence filed at 2nd of July 2014 a petition for protective order although the previous protective order issued by Judgment no. 409/23.01.2014 should expire only on 23rd of July 2014. However, the Court upheld the application and issued a new protective order through Judgment no. 5760 pronounced at 16th of July 2014 (before the expiry of previous order).

- limitation of the aggressor's rights to use only on a part of the common home where it can be shared in such a way that the abuser does not come into contact with the victim;
- ordering the aggressor to maintain a minimal distance from the victim, children or other relatives or from the residence, working place or school of the protected person;
- interdiction for the aggressor to move in certain places of deferred areas that the protected person attend occasionally or visit regularly;
- prohibit any form of contacting the victim, including by telephone, by correspondence or any other way;
- ordering the aggressor to hand over the police any held weapons.
- entrusting minors or establishing their residence elsewhere than the residence where they suffered or witnessed domestic violence;
- ordering the aggressor to pay the rent or household expenses for the temporary residence where the victim, minor children or other family members reside or are about to reside due to the impossibility of remaining in the family home;
- ordering the aggressor to undergo psychological counseling, psychotherapy or recommending taking control measures, the treatment of some forms of care, particularly for the purpose of detoxification.

Also, according to Art. 35 of Law no. 217/2003, if Court, during the issuing the protective order, ascertains the existence of one of the situations that require the establishment of a special protection measures for child, will refer to the local public authority with duties relating to child protection. These measures are regulated by Art. 59 of Law no. 272/2004 on the protection and promotion of the right of the child, republished[1]. Specifically, the special child protection measures are: a) placement; b) emergency placement; c) specialized supervision.

5. The Procedure for the Issue and Bringing into force the Order of Protection

According to the Art. 27 para. 1 of Law no. 217/2003, petition for protective order is analyzed in a closed-door hearing (Council Room), the Prosecutor's participation being mandatory.

Instead, according to the national Study on the implementation the protective order, to which we already have referred, only 23% of the processes concerning issuance of a protective order are analyzed in the closed-door hearing (Council Room). This phenomenon revealed by the jurisprudence materializes, on the one hand, a disregard of legal provisions, and on the other hand, an exposure of the direct and collateral victims to a public contempt.

The procedure to issue the protection orders should be performed with celerity and, in particular, should not be admissible evidences that requires a long time for being bringing and presenting in the court.

As result from the practice of the Romanian courts, the following evidences are approved: the documentary evidences, the interrogation of the defendant and the witnesses, who are usually brought by the victim of domestic violence and listened by the judge at the first fixed hearing. Thus, Romanian courts, considering the urgent character, attempt to judge the petition with celerity. Indeed, in cases where it is not performed the quotation procedure of the defendant, the Court, with a view to respect the rights of defense will postpone the trial and fix a new court date. In this last case, the hearing

[1] Law no. 272/ 2004 was published in "Official Gazette of Romania" part I. No.557 from 23th June 2004 and republished in "Official Gazette of Romania" part I. No. 159 from 5 March 2014.

should be rescheduled for a short time, and when the petitioner knows and informs the Court about the defendant's telephone number, he will be informed about the new court date through the phone, as well, the court reporter drawing up a "telephonic notification"[1].

In the case of special urgency (by title of example, mention situations where risks to the integrity or life of the victim of aggression is imminent) the Court may issue an order of protection on the same day, ruling out on the basis of the application and documents submitted, without the conclusions of the parties.

In the Court session, the Prosecutor has the obligation to inform the person requesting the protective order about the legal provision concerning protection of victims of crime.

The giving of judgment may be delayed but no more than 24 hours, and the motivation of the order is made not later than 48 hours from the moment of giving.

The judgment on protective order can be appealed within 3 days from its issuance if the parties were summoned or from the communication if the parties were not summoned.

Once issued, the order is enforceable and should be immediately communicated to Romanian Police structures in whose territorial limits the victim and aggressor's home is. The police have the duty to supervise the manner in which the judgment is respected and to seize the criminal authorities in case of avoiding the execution.

In cases where the person against whom the order was issued, is invading the provided protection measures, the victim or the police may refer to the criminal authorities for the prosecution of non-abidance by court decision crime, being sanctioned by imprisonment from one month to one year, for this penalty the conditional suspension not being possible (according to Art. 23-35 of the Law no. 217/2003 amended).

6. Revocation of Protective Order or Replacement of the Protective Measure

According to the Art. 34 para. 1 of Law no. 217/ 2003 "the person against whom was issued a protective measure through an order of protection for a maximum period may request the revocation of order or replacement of the measure".

Per a contrario, revocation of the protective order or replacement of the measure cannot be requested if were not issued for a maximum period, respectively 6 months.

In the content of the Art. 34 para. 2 of Law no. 27/2003 are listed the required condition, for revocation of the protective order. Specifically: a) the aggressor has complied the prohibition or obligations; b) the aggressor has followed psychological counseling, psychotherapy, addiction treatment or any other form of counseling or therapy that has been fixed in or to comply with safety measures, if such measures has been taken according to the law; c) if there is reasonable evidence that the offender no longer represent a real threat for the victim of violence or for her/his family. To these conditions explicitly regulated, there is one more regulated implicitly by the same Art. 34 para. 1 of Law no. 217/ 2003, i.e. protective order was issued or a maximum period, respectively 6 months.

The application of revocation is settle only after the parties and police who applied the order which revocation is requested were quoted.

[1] City Court, Targu Mures, Civil Section, Court resolution from 10th July 2014. Specifically, through this resolution Court postpone the trial, in order to carry out the procedure for summoning the defendant, including the telephonic notification.

7. Conclusions

The domestic violence is a phenomenon quite frequently, which manifests itself in various forms even in the most advanced contemporary societies.

Reduction of the phenomenon is extremely difficult, because of presence of two elements that characterize the family life and the rapports which it presume: the secrecy that surround and protect the privacy of the family's and couple's and the traditional acceptance on the one side of unequal roles of family members, and on the other side of the exercise of authority in the family through violence of any sort[1].

In this context, we respect the legislator's efforts and demarches towards prevention and combating domestic violence, resulting in amendments to Law no. 217/2003 by Law no. 52/2012. Although it can be perfected, just like any normative act, Law no. 52/2012 represents an important step forward in the fight against this undesirable phenomenon.

Given the importance of regulated social relations, the complexity and magnitude of domestic violence consequences, we appreciate that it requires a heightened attention and concern for victims. In this regard by *lege ferenda* we suggest the amendment of Art. 27 of Law no. 217/2003 in the sense that legal assistance to become mandatory for the person requesting the issuance of protective order, as well, and not just for the person against whom the order is sought. Indeed, it is now actually consecrated the right of the victim to request legal assistance, but it is possible that the victim may not have knowledge of this right or may omit to exercise it, possible under the commotions caused by acts of violence. Alternatively, the mentioned legal provisions could be modified in the sense of establish the obligation to inform the victim, at the first hearing, about the right to receive legal aid. The latest solution could be criticized because if the victim would exercise his/her right it would be necessary to assign an advocate, arrangement that involves a hearing postpone. For these reasons we appreciate that the first solution proposed is more effective. Specifically, at the time of filling the application, will be assigned an advocate who would be able to get in touch with the victim or inverted, in order to advise the victim, at least relative to evidences that should be administrated. In such conditions, at the first hearing the victim would present all evidences in support of his/her request and the chances to solve the petition for protective order at a single term would increase considerably.

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[1] The National Study regarding the implementation of the protection Order – Law no. 25 from 2012.

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Conflicts of Jurisdiction in Criminal Proceedings

Mihail Silviu Pocora[1]

Abstract: This paper will consider the practical settlement of conflicts of jurisdiction both in relation to the forum for prosecution and transfer of proceedings. The corollary of free movement of people is free movement of judgments, sentences and related powers of investigation and prosecution. Cross border crime requires to be addressed by equipping law enforcement and prosecution authorities with mechanisms to ensure the public interest in the investigation and prosecution of crime is met. The starting point for any consideration is the place where the criminal conduct took place. Sometimes the crime is such that criminal jurisdiction will be fixed - such as theft of property, crimes of violence - where others have an impact or criminal conduct in more than one jurisdiction - drug importation, major transnational drug dealing, human trafficking, terrorism.

Keywords: offences; investigations; legislature; trial

1. Introduction

In the latter types of criminal conduct consideration has to be given to how the relevant law enforcement and prosecution authorities liaise with each other to determine which will take on responsibility for the investigation and prosecution of the crime.

If the conduct becomes known at a sufficiently early stage the relevant authorities could seek to establish a joint investigation team. These teams being together the relevant players from each jurisdiction - law enforcement, prosecution, investigating judge, computer analysts. These teams, in the appropriate case can be highly effective.

The more traditional route is to liaise either directly with each other or to liaise through Europol. Parallel investigations, where each jurisdiction continues its own inquiry while keeping in touch with the other jurisdiction and sharing intelligence and outcomes can also be highly effective. It is not every case that sees all the criminal conduct being prosecuted in one jurisdiction. There can be very good strategic reasons why certain parts of a wider actor criminal conduct would be prosecuted in one jurisdiction with other elements prosecuted in another jurisdiction.

What is essential is flexibility and awareness of mechanism and frameworks to enable best use of those to ensure the best outcome, which should not be where the conviction is most easily achieved nor where the toughest penalty is imposed but where the public interest is best served having regard to

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a range of factors such as location of witnesses, evidence, accused -especially where the person is in custody- and if conviction achieved where the person can best be rehabilitated having regard to the convicted person's article 8 family rights.

2. Settlement of Jurisdiction

The settlement of jurisdiction in cases where there is early engagement will then inform the future course of the investigation and the mechanisms that can be deployed. For example, once law enforcement of one jurisdiction has responsibility for the investigation, they can then seek to recover evidence from the other by letter of request.

The issue of evidence both it's recovery but as importantly it's use in proceedings is a vital consideration. It should be at the forefront of the prosecutors mind before an decision is taken to seek the transfer of proceedings. The prosecutor needs to be aware of the mechanisms of recovery of evidence in one state and how evidence recovered by those measures can be introduced into evidence in proceedings in their state. This is a particularly difficult issue for common law states.

Member States who are signatories to the Council of Europe Convention on Transfer of Proceedings 1972 can formally transfer the case to another jurisdiction. The mechanism provides "Any Contracting State having competence under its own law to prosecute an offence may, for the purposes of applying this Convention, waive or desist from proceedings against a suspected person who is being or will be prosecuted for the same offence by another Contracting State. Having regard to Article 21, paragraph 2, any such decision to waive or to desist from proceedings shall be provisional pending a final decision in the other Contracting State.

The Framework Decision on Settlement of Conflicts of Jurisdiction 2009/948/JHA aims to encourage where there are parallel investigations: Direct communication between national authorities, to determine jurisdiction, with a view to reducing the impact of any *ne bis in idem* principle

As the framework decision provides at Article 1.1: "where the same person is subject to parallel criminal proceedings in different Member States in respect of the same facts, which might lead to the final disposal of the proceedings in two or more Member States thereby constituting an infringement of the principle of 'ne bis in idem'. However the decision recognizes that no Member State's national authorities are obliged to relinquish prosecution.

The considerations that national authorities are encouraged to consider in determining jurisdiction are those contained in the Guidelines which were published in the Eurojust Annual Report 2003.

It is envisaged that "When a competent authority of a Member State has reasonable grounds to believe that parallel proceedings are being conducted in another Member State, it shall contact the competent authority of that other Member State to confirm the existence of such parallel proceedings, with a view to initiating direct consultations as provided for in Article 10"

The competent authority is the judicial authority. If the authorities do not know who they ought to contact, the decision encourages contact to be made through the European Judicial Network.

The authorities should exchange sufficient information to ensure they are satisfied parallel investigations exist and if so, then enter into direct discussion about which jurisdiction will undertake the investigation and prosecution of the case.

The decision provides that this framework is supplementary to the Eurojust decision and the new council decision on Eurojust should also be considered.

In addition, Article 7.2 of the Eurojust decision provides the college of Eurojust may issue a non binding opinion where national authorities of Member States cannot agree on a resolution of a conflict of jurisdiction. Eurojust provided guidance on the relevant criteria it would apply in reaching a decision.

The decision provides at Article 13.6 that Member States authorities must provide the national member at Eurojust with information on letters of request which they have issued to two or more jurisdictions in the range of cases referred.

This provision should enable the national members to raise awareness and make aware other national desks of the existence of the enquiry and to consider whether they, through Eurojust, can offer greater coordination in cases which clearly relate to serious cross border offences. What can the national members through Eurojust offer? In addition to this provision, article 13.7 places an obligation on national authorities to make national members aware of "cases where conflicts of jurisdiction have arisen or are likely to arise."

Article 13 EU Mutual Assistance Convention 2000 provides the legal base for the establishment of joint investigation teams. Article 13 provides "By mutual agreement, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team. The composition of the team shall be set out in the agreement."

A joint investigation team may, in particular, be set up where:

(a) a Member State's investigations into criminal offences require difficult and demanding investigations having links with other Member States;

(b) a number of Member States are conducting investigations into criminal offences in which the circumstances of the case necessitate coordinated, concerted action in the Member States involved.

A request for the setting up of a joint investigation team may be made by any of the Member States concerned. The team shall be set up in one of the Member States in which the investigations are expected to be carried out.

These teams can be highly effective. The secretariat for Joint Investigation Teams was recently established in Hague.

Article 16.1 Framework Decision on the European Arrest Warrant 2002/584/JHA provides guidance to executing authorities where there is competition between a request for extradition based upon an EAW and from a third state. Article 16.1 provides the relevant factors as being: Relative seriousness of the offences, dates of issue of the requests, execution of sentence v sought for trial.

3. Practical Case

P. is a national of country A. Country A has jurisdiction to prosecute its own nationals who commit crime aboard. It operates the principle of legality. P. lives in country B but travels frequently to country A. P. is believed to be involved in the cross border shipment of significant amounts of drugs

between country A and country B. The police in country B have recovered some drugs from F. a known criminal associate of P.

The police in country A have also recovered equipment for the division and packaging of drugs when they searched premises. They find evidence in the premises that links P. to there unlawful use.

The police in both country A and country B have approached their respective prosecutors to seek guidance on how to proceed.

Consequently, P. has been seen in country C with a know drug dealer. The police arrest the drug dealer but during the operation, they find P. in the premises and when he is searched he is found in possession of three mobile phones and a key. The key is found to be for premises where the police find 50 kg of cocaine. P. is arrested. The prosecutor in country C wishes to prosecute P. However, evidence recovered in the premises shows the cocaine was imported from country A.

On being interviewed by the police, P. discloses that he has a bank account in country D which has €3 m. The police believe some of this money, if not all of it, represents the proceeds of crime.

Following issues arising from the practical case: Is there a conflict in jurisdiction?, How could the prosecutors in each jurisdiction find out about the criminality and state of investigation in the other jurisdiction?, How could they discuss their respective cases with each other?, Is there a role for the European Judicial Network?, Is there a role at this stage for Eurojust? If so, how would that be initiated?, Should the prosecution authorities discuss their cases with each other?, Should evidence be recovered from any country for use in another?

4. Conclusion

It can be seen there are a number of mechanism which seek to prevent conflicts of jurisdiction but that where that issue arises either through investigation measures or extradition, these issues can be resolved through cooperation.

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The Relationship between the Employment Contract and other Civil Contracts

Răzvan Radu Popescu[1]

Abstract: The employment relationship is a contractual one and as such must have all the basic elements of an enforceable contract to make it legally binding. In strict contractual terms, the offer is made by the employer and formally accepted by the employee. Once the acceptance has taken place, there is a legally binding agreement and an action will lie against the party who breaches that agreement, even though it may only just have come into existence. An employment contract, however, is unlike most other contracts. Although the parties will have negotiated the main terms, we shall see that a large number of terms will be implied into the agreement from all sorts of different sources and will not have been individually negotiated by the parties at all. This is what makes an employment contract so different from other contracts. We think this article is an important step in the disclosure of the problem eraised by these two concepts.

Keywords: civil contract; mediation; volunteer; solidarity agreement

A. The relationship between the individual employment contract and the service provision civil contract

Both in the specialty literature[2] and, especially, in practice, occurs the question related to the possibility to still conclude civil contracts for the provision of certain activities, in the conditions in which the present Civil Code no longer refers to the service provision civil contract, as the old Code did in art.1470 para.1 and art.1413.

Still, we consider that it continues to be possible to conclude service provision civil contracts, for certain activities, especially with occasional character and excluding the subordination relationship between the provider and the beneficiary of the work, on the grounds of the regulations in civil law (and not based on the Labour Code), relying on the following arguments:

- the civil contract is one of the basic institutions of civil law, representing the common root for other types of contracts;

- the current Civil Code allows the existence of unnamed contracts (art.1168), and then, the listing of certain types of contracts is not exhaustive (art.1171-1177 and art.1650-2278);

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[2] See (Țiclea, 2014, pp. 356-358)

- also the Civil Code in art.1277 states: *the contract concluded for undetermined period can be unilaterally denounced by either party, with the observance of a reasonable prior notice term; any contrary clause or the stipulation of a provision in exchange for denouncing the contract is considered to not be written;*

- there continues to exist a series of normative acts that establish the provision of work on the basis of civil agreements, respectively:

o art.10 para.3 of Accounting Law no. 82/1991[1] specifies – accounting can be organized and managed on the basis of service provision civil contracts, concluded with authorized individuals or legal entities;

o Law no. 51/1995 for the organizing and exercising the profession of attorney[2]establishes the possibility that in the individual cabinets, as well as in the professional civil societies, collaborating attorneys are able to perform their activity on the grounds of collaboration civil contracts (art.5 para.2 and 5);

o Art.14 para.2 of Law no. 69/2000 of physical education and sports[3] establishes the fact that the athlete must conclude with the sports structure, in written form, an individual employment contract or a civil agreement, in the conditions of the Civil Code;

o Art.12 of Law no. 195/2000 regarding the establishment and organizing of the military clergy[4] stipulates the fact that in order to cover religious assistance needs in the structures of the armed forces there can be employed clergymen from the cult units, on the basis of service provision civil agreements;

o Art.12 para.3 of Government Ordinance no. 21/2007 regarding the public institutions of shows and concerts[5] establishes that, in order to execute artistic productions, these institutions can use technical and administrative staff remunerated on the basis of service provision civil agreements, according to the dispositions in the Civil Code.

o Art.8 para 1 and 2 of Government Expedite Ordinance no. 9/2001 regarding certain measures in the field of culture and art, cults, cinematography and copyright[6] establishes that the members of the National Commission for Historical Monuments, of the National Commission for Museums and Collections, of the National Archeology Commission, of the Council of the National Cultural Fund, of the Consultative College of the National Centre for Cinematography, as well as of other specialty commissions established attached to the Culture Ministry, have the position of collaborator and can perform their activity by concluding civil agreements, in the conditions of the law, these agreements being concluded for the term for which the members are appointed to the specialty commissions, but not more than one year, with the possibility to extend them;

o Art.4 of Government Decision no. 34/1999 regarding the establishment of the Romanian Language Institute[7] stipulates that the members of the institute's coordination council will be paid on the basis of service provision civil agreements;

[1] Republished in the Official Gazette no. 454 of 18 June 2008, with the subsequent modifications;
[2] Republished in the Official Gazette no. 98 of 7 February 2011, with the subsequent modifications;
[3] Published in the Official Gazette no. 200 of 9 May 2000, with the subsequent modifications;
[4] Published in the Official Gazette no. 561 of 13 November 2000;
[5] Published in the Official Gazette no. 82 of 2 February 2007, with the subsequent modifications;
[6] Published in the Official Gazette no. 35 of 19 January 2001, with the subsequent modifications;
[7] Published in the Official Gazette no. 30 of 27 January 1999, with the subsequent modifications (including Government Decision no. 1411/2009, Published in the Official Gazette no. 830 of 3 December 2009).

- On the basis of Law no. 8/1996 regarding copyright and connected rights[1] - all authors.

In the specialty literature[2], there was expressed the opinion according to which "it is possible, with personal title and not only for certain professions/functions indicated in special laws, to conclude a service provision civil agreement instead of an individual employment contract, even though such a regulation is no longer legally established, expressly, as an exception from the rule of employment only on the grounds of an individual employment contract or on the basis of another labour legal relation".

In practice, there is a series of similarities, but there are also differences between the individual employment contract and the service provision civil agreement.

The similarities are the following:

- both contracts are bilateral, respectively employee – employer or provider– beneficiary;
- both contracts presuppose the performance of an activity (labour), which represents the object of the contract;
- the labour is performed by an individual, called either employee or provider;
- labour is remunerated, in both cases, by the employer, respectively beneficiary;
- in all cases, the employee/provider puts his work capacity to the disposal of the employer/beneficiary;
- the income tax is withheld and transferred for both types of contracts.

The differences are the following:

- only the individual employment contract confers the capacity of employee to the person providing the work, with all its consequences: only that person will benefit of a wage, while the provider will benefit of an indemnity (remuneration), of work seniority and will be in a subordination relationship with respect to his employer, while in the case of the service provision civil agreement the two parties are on equal positions;
- the employee's liability is disciplinary or patrimonial, while the service provider's liability is civil;
- the social security contributions, except the health contribution, are usually owed only for individual employment contracts.

In practice, it was noticed that in very many situations, the employers prefer to conclude service provision civil contracts or copyright assignment contracts (art. 39 of Law no. 8/1996), on the one hand, because in this way they will not be obliged to ensure the social protection conferred to an employee through the individual employment contract, on the other hand, due to the advantages of a fiscal nature that a civil contract entails.

Indeed, the income tax will be withheld and transferred for any type of contract (civil or employment), but the social security contributions, except the health contribution, are usually paid only in case of the individual employment contract. Still, according to the fiscal regulations, there is a possibility that, in the situation when the fiscal or labour inspection authorities establish that a service provision civil contract or a copyright assignment contract disguises, in reality, a labour legal relation, the activity being provided regularly, being a matter of successive, remunerated performances, the contract will be re-qualified as an individual employment contract.

[1] Published in the Official Gazette no. 60 of 26 March 1996, with the subsequent modifications (including Law no. 255/2013 Published in the Official Gazette no. 515 of 14 August 2013).
[2] See (Beligrădeanu, 2013, p. 249)

B. The relation between the individual employment contract and the volunteering contract

The basis of the matter is represented by Law no. 195/2001 which establishes the possibility for the interested persons to conclude a volunteering contract[1].

According to art. 2 of Law no. 195/2001, volunteering is the public interest activity performed out of one's own initiative, by any individual, to the benefit of others, without receiving in return a material counter-performance; the public interest activity can be performed in the following fields: social assistance and services, human rights protection, medico-sanitary, cultural, artistic, educative, teaching, scientific, humanitarian, religious, philanthropic, sportive, environmental protection, social and communitarian etc.

The principles at the basis of volunteering are listed in art. 3 of Law no. 19/2001, respectively:

- participation as volunteer, on the basis of freely expressed consent;
- exclusion of any material compensation from the beneficiary;
- participation to the volunteering activities is done on the basis of equal chances, without any kind of discrimination;

Also, any volunteer activity performed isolated, rarely, for reasons of family, friendship or good neighbor spirit does not make the object of this regulation.

We must take into account a very important aspect of the volunteering contract, such as it cannot be concluded for the purpose of avoiding the conclusion of an individual employment contract or of a service provision civil agreement or of any other type of onerous contract (in this case, the volunteering contract falls under the provisions of absolute nullity).

According to art. 9 of Law no. 195/2001, the volunteer has, on the one hand, the following rights:

- to perform the activity according to his/her availability and capacity;

- to have ensured by the host organization of the activity the legal labour protection conditions; any damage suffered by the volunteer during the running of the volunteering activity is fully incurred by the host organization, if it was not determined by the volunteer's fault;

- the issuance by the host organization of the nominal certificate which recognizes the performance of the volunteering activity, as well as the experience gained;

- depending on the agreement between the host organization and the volunteer, it may be agreed that, in the conditions agreed in the contract, the host organization may reimburse the expenses incurred for the performance of the activity.

At the same time, he/she has, on the other hand, a series of obligations, respectively:

- to fulfil the duties received from the host organization;

- to keep the confidentiality of the information he/she has access to during the volunteering activity;

- to attend the training courses organized, initiated or proposed by the host organization for a better performance of the activity;

- to be liable for the moral or material damages caused to the host organization during the volunteering activity, due to his/her fault (art. 10).

[1] See (Naubauer, 2007, pp. 118-124)

Also, the liability for not executing or for the improper execution of the volunteering contract will be incurred on the basis of the provisions of the Civil Code, while the unilateral contract termination is possible, by either party, and will be done only in written form, with the indication of the reasons. The prior notice term is 30 days (art. 16).

Between the individual employment contract and the volunteering contract there are a series of similarities and, especially, differences, which we shall indicate hereinafter.

Similarities:

- both types of contract are named;
- both contracts are bilateral,
- both contracts are *intuitu personae;*
- the employee, respectively the volunteer, performs a certain activity (performs a labour) in favour of an employer/beneficary;
- it is noticed the fact that both the employee is subordinated to the employer within the labour relation and the volunteers is subordinated to the management of the legal entity with which he/she concluded the contract (art. 9);
- the labour is performed within a work schedule;
- in both contracts must be observed the labour security and health regulations, in order to avoid work accidents and professional illnesses;
- even though it is not expressly regulated, the volunteer will benefit of a meal break, as any other employee within the organization.

The main differences between the two contracts are the following[1]:

- while the individual employment contract is an onerous contract, the volunteering contract is a free-title contract;
- for the work provided, the volunteer does not benefit of seniority on the job, social security rights, rest leave etc.;
- liability in case of the volunteering contract is based on the Civil Code rules, while liability in case of the individual employment contract is based on the Labour Code.

C. The relation between the individual employment contract and the mandate contract[2]

According to Government Expedite Ordinance no. 82/2007 for the modification and completion of Law no. 31/1990 regarding trading companies and to other relevant normative acts[3], it was established *by derogation from the provisions of art. 56 of Law no. 53/2003, the Labour Code, as modified and completed, the employment contracts of the administrators/directors, concluded for the fulfillment of the mandate of administrator/director prior to the entry into effect of this expedite ordinance, end of full right on the date of entering into effect of the expedite ordinance or, in case the mandate was accepted subsequently to the entering into effect of this ordinance, from the date of accepting the mandate" (art. V).*

Thus, the company administrators and directors, the directors of the formerly state-owned companies, of the national companies, as well as of other economic operators perform their activity on the basis of the mandate contract. According to art. 137^1 para. 3 of Law no. 31/1990, it is expressly stated that *throughout the fulfillment of the mandate, the administrators cannot conclude*

[1] See (Țiclea, 2014, p. 360).
[2] See (Ciochină, 2012, pp. 238-253).
[3] Published in the Official Gazette no. 446 of 29 June 2007.

an individual employment contract with the company. In the contrary case, that individual employment contract will fall under absolute nullity[1].

Between the individual employment contract and the mandate contract there are a series of similarities and differences. Thus, the similarities refer to:

- both contracts presuppose the performance of certain work for a beneficiary (employer);
- the work is provided with the observance of a work schedule;
- both contracts are with onerous character, presupposing either the payment of a salary, in case of the individual employment contract, or the payment of a remuneration, in case of the mandate contract;
- the work performed represents seniority on the job and contribution time to the social security system.

The differences are the following:

- while the individual employment contract is the result of the agreement of will between the employee and the employer, the mandate contract has as basis an agreement between the administrator/director and the general assembly/board of directors of the economic operator;
- the individual employment contract presupposes, in all cases, a subordination relation between the parties, the employee being the subordinate of his/her employer, while within the mandate contract the parties are, formally, on equal positions, the administrator/director having the liberty to act as he/she deems fit, in order to fulfill the mandate;
- the individual employment contract is usually concluded for undetermined time, the mandate contract is concluded for a determined period – 4 years;
- the individual employment contract may end in the cases strictly regulated by the law, while the mandate contract may be terminated by unilateral revocation by the organization or by the resignation of the administrator/director, without the need to motivate his/her decision.

D. The relation between the individual employment contract and the solidarity contract

The solidarity contract is regulated through Law no. 116/2002 regarding the prevention and combating of social marginalization[2].

The parties to this contract are:

- on the one hand, the National Agency for the Labour Force Occupation;
- on the other hand, the youngsters with ages between 16 and 25, in situations of difficulty and confronted with the risk of professional exclusion (art. 5);

The object of the solidarity contract is represented by the integration in labour of the youngsters and the facilitation of their access to a work place with an employer approved by the agency.

Thus, on the one hand, the labour force occupation territorial agency provides professional counseling services and identifies, respectively, places the beneficiary in a job according to his/her professional

[1] See (Țiclea, 2014, p. 352)
[2] Published in the Official Gazette no. 193 of 21 March 2002, modified through Law no. 250/2013, Published in the Official Gazette no. 457 of 24 July 2013.

training, and, on the other hand, the beneficiary has the obligation to attend the professional counseling services and to accept the agency's job offers.

According to art. 6 para.2 of Law no. 116/2002, the contract term is determined, minimum 1 year, maximum 2 years.

The main effect of the solidarity contract is the fact that the employer, individual or legal entity, will conclude with the respective youngster an individual employment contract for determined time, equal to the duration of the solidarity contract. On the basis of the agreement concluded with the territorial agency, the respective employer will receive monthly the basic salary set on the date of employing the youngster, but no more than 75% of the net average salary in the economy, communicated by the National Statistics Institute. If on the date of the end of the solidarity contract the employer wishes to keep the youngster, he/she/it will be able to employ him/her, on the basis of an individual employment contract for undetermined time and will benefit, on the basis of the same agreement, of the monthly reimbursement of an amount, at the level of 50% of the unemployment aid that the youngster would have received if he/she would have been dismissed on that date. This amount will be granted to the employer for a period of maximum 2 years, until the employee reaches the age of 25 (art. 8).

In the specialty literature the question appeared with respect to the legal nature of the solidarity contract. In a first opinion[1], it was considered that it would be a **social security contract**. In another opinion[2], it is claimed that this type of contract "should be called differently, namely **employment contract for determined time** concluded between the insertion employer and the respective youngster". In a third perspective[3], this contract was considered to be a "*sui-genesis* contract, regulated by social security law, which presents a series of traits pertaining to the service provision civil contract".

From our point of view, the solidarity contract is a **contract specific to the social security law**, since it is neither an individual employment contract of a special type special, the parties not being in a subordination relation, nor a service provision civil contract because it does not presuppose, in itself, the payment of an amount of money.

E. The relation between the individual employment contract and the management contract

- **The management contract in case of culture public institutions**

The basis of the matter is represented by Government Expedite ordinance no. 189/2008 regarding the management of culture public institutions[4], approved through Law no. 269/2009[5].

According to art. 2 letter b, by manager is understood *the individual who won the management competition and concluded a management contract with the public authority; he/she is not a public servant, is not employed with an individual employment contract and has no status of public authority function.*

Even though the lawmaker chose to show, expressly, that this type of contract is not an employment contract, hence it is not subjected to labour legislation, in reality, it has all composing elements of an individual employment contract concluded for determined time.

- **The management contract in case of sanitary public units**

[1] See (Țop, 2002, pp. 47-48)
[2] See (Ținca, 2004, p. 126)
[3] See (Țiclea, 2014, p. 363*)*
[4] Published in the Official Gazette no. 817 of 5 December 2008, with the subsequent modifications;
[5] Published in the Official Gazette no. 413 of 14 July 2009;

The basis of the matter is represented by Law no. 95/2006 regarding the reform in the field of health[1]. According to it, the managers, individuals or legal entities, conclude management contracts with the Ministry of Health for a period of maximum 3 years, with the possibility to extend for a period of 3 months, maximum twice.

Conclusion

Throughout the entire duration of the management contract the individual employment contracts, both in case of managers and in case of the members of the board of directors, who are employed within those sanitary units, are suspended.

Still, the medical specialty staff that occupies a management position will be able to perform freely the medical activity, on the basis of the management contract.

Even though, in case of this type of management contract, the lawmaker targeted to remove it from the area of the labour law, in reality, this is a special type of individual employment contract, specific elements being found in its content, respectively:

- the salary, including bonuses, additions, as well as the date on which the salary will be paid;
- the work schedule; including the possibility of changing it, in the conditions of the applicable collective employment contract;
- overtime;
- the rest leave;
- observance of labour security and health;
- the right to professional training;
- the right to equal chances and treatment;
- the fidelity obligation.

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Science of Law in Context of Globalization

Emilian Ciongaru[1]

Abstract: The concept of globalization must not only know and known but rather understand as be a very used term which can be attributed many meanings. Through this term can understand the development of global financial markets, increased of transnational corporations and their growing dominance of national economies. Globalization can be said to represent a phenomenon that extends communication channels between states and communities, and has effect that the internal legal order of a state, part of the European Union is expanding that to a whole new concept, the world legal order. Science of law, among all disciplines, is the most affected by this process of continue unification of the world because science of law continuously should be updated, so they can cover as many of the new aspects of contemporary social life because permanently were being born new areas and new domains of law new methods and strategies of application or the techniques of regulation so that to can be reached in case many of those which were fiction in the past, at present become an acquis.

Keywords: law; justice; science of law; globalization; legal order

1 Introduction

Marking the borders is not the role of a untouchable space of territory, the state becomes, inevitably, part of a whole, of the globalized world and its territory having the meaning guided by logic of flows in all areas (Zygmunt, 1999, p. 85): the capitals, the goods, the informations, the cultures, the persons. All these flows represents both vectors of power, for those who know how to generate them, master them and give them meaning, as well as destabilizing factors, only if they are seen as fatality. Thus in the last years increased mobility of law because the application of law no more requires adjustment certain misunderstandings between neighbors but also the organization of movement of capital, of goods, of information, of persons between countries and between continents default. The concept of globalization of law arises from of the necessity existence of some procedures which to have as purpose safety change these flows and therefore prevention of potential risks arising from these lawsuits. (Craiovan, 2010, pp. 281-282)

Supranational entities were created which have become more and more powerful and which are autonomous from the states which finance them and along the years, have acquired supranational character. These entities without its own flag, such as IMF, World Bank, have exercised an important

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influence in the birth and formation of the national rights, in a special way in the post communist states (Losano, 2005, p. 72). The opinions of expert (Besteliu, 2000, pp. 1-5) was claimed that political organization of a new the international society, transposition of international level of organizing states as federations and the foreshadowing a possible the world state or the world government, stay as a based to the appearance and development of international organizations.

2 Globalization - the Essential Features

At global level existence of some concerns about the independence of the judiciary and the status of those abilities to realize the law, has at least two significant explanations.

In the first place is about the phenomenon of globalization that determines amongst others and convergence of the juridical systems creation some spaces and common legal instruments to continental and regional level enhance institutions cooperation which necessarily involves a specific approximation of the concepts on the judicial independence immovability of judges and their role in a democracy state.

In the second place it may be established that in the all state exists the tendency of the political factor and in main of the executive organizations to try in various ways, directly or less directly to influence the judiciary power, especially through the mechanisms of nomination and promoting of magistrates thus influencing the in a negative way the general principles of law and, moreover, prejudicing the state of law.

Globalization of judicial function to can be grouped into two features of activities of magistrates: the first would be their position to the political power and a second would be constraints imposed by activity of judgment (Allard & Garapon, 2010, p. 113).

Fundamental principles of the legal order, which integrates fairness, loyalty, access to justice, the right to defense, equality of arms, etc., are the rules that make up a new universal model of resolving of disputes in which are developed specific rules of different matters: civil, criminal, administrative, commercial, etc.

From conceptual point of view, *the legal order* should not be confused with the legal order, these being distinctive, as the sphere and content. Thus, the legal order implies more or less visible manifestation of the state as political organization of society implies permanent activation of institutional resources for the exercise of coercion, both in the private sector as well as in the public sector of activities of the person and always implies sending to the legal order, the existence what conditions being of legal order. Report between the law order and the legal order is not of a perfect two-way, but assumes a certain position of determination from part of legal order.

The general principles of law mirror the system of law at a certain moment, as they represent the foundation of the legal system, which ensures the unity, homogeneity, coherence and capacity of the whole social system. The existence of the general principles of law is undeniable. (Niemesch, 2015)

In course of history, juridical science has had and the reverse evolution than that of the world, from the universal juridical science, it has become the national science, from general science at the particular science (Constantinesco, 1997, p.18). The main reason is that law is divided between two contradictory trends, namely: the globalization, the integration of planetary more and more pronounced, sovereign state and its autonomy, which circumscribing the life of peoples and the third trend is that the law represents formula type of the world organization.

3 Globalization of Law

However, the law orders will never be able exist outside of the world where we live. Situation in which a law order is completely separate from the other is illusory, no matter how big it the political barriers, social or military, there will always be minimum interference between different law orders.

At present it can not make management of a company in an autonomous manner, separate from other states and nations. Almost any a phenomenon of any nature can not be completely isolated and controlled strictly in accordance with the national limit. International cooperation, intergovernmental or supranational organizations, the multiculturalism and multilingualism have become definitions of the contemporary political life.

Most problems that people associated with globalization, including the penetration market of values in those areas where they are not belong traditionally, can be attributed to these phenomenas. You might also talk about the globalization of information and of culture, about the spread of television, of the Internet and other forms of communication and about the increased mobility of marketing ideas. (Soros, 2002, p. 23)

Phenomenon of globalization can be defined as to be a set of structures and economic, social, technological, political, legal and cultural processes which results of the changing nature of production, consumption and commerce of the goods. There have been continuous and occurring massive change in the global economy in a way that it can be considered that globalization is a result of creating a global marketplace.

Globalization has and its disadvantages in the sense that it decreases safety in all indicators, globalization of local and regional chronic phenomena, globalization of major organized crime (trafficking of weapons, trafficking of drugs, trafficking of persons), radicalization of ethnic and of religious fanaticism, of terrorism.

In the cultural plan, the globalization fragments cultures in *subcultures*: rap music, homosexuality, subculture old age, of football fans etc., or cultures of *niche*, which not provides the integration solutions for individuals who compose them.

The negative aspects are multiple and for that globalization is uncontrolled, unlead, not governed process. Events uncontrolled by political, the economic globalization goes, for example, to economic chaos and to ecological devastation in many parts of the world. Globalization may influence and democracy (Stiglitz, 2005, p. 53) in the sense that it is possible to replace dictatorship of national elites with the dictatorship of international finance. Alarming, are for example, the phenomena of fragmentation and weakening of social cohesion, of regionalism, on the large areas of the globe. Practically, by globalization, have witnessed a deterioration of income distribution, financial and economic crises are multiplied, with large effects on social and political life, including the danger of the disintegration of the states.

At global level, existence of some preoccupations what relate to the independence of the judicial power but also the status of those ability to realize the law, have at least two significant explanations.

First, the reference is to the phenomenon of globalization, which determine, among other things, and a certain convergence of judicial systems, creating some areas and common legal instruments at the continental and regional level, leads to the intensification of institutional cooperation, a fact that

involved in the necessarily mode and a specific approach of concepts regarding an independent of justice and therefore irremovability of judges and their role in a democracy state.

Second, it may be establish as in all states exists the tendency of the political factor and in main of the executive organisms of to try, in various ways, direct or less direct, to influence the judiciary power especially through the mechanisms of the nomination and of promoting of the magistrates thus influencing in a negative way the general principles of law and, moreover, prejudicing the state of law. In this context the political power is structured in three dimensions: the dimension of national law, the dimension of international law and the dimension of global practices, this type of power being called *soft power*.

By it specific object science of law obtains, now, a very special importance which is determine of needed of research of state and of law in perspective globalization. It is increasingly evident that the state and the law is no longer depicts in the same values as ten or twenty years ago. The regional organization is considered as an intermediate level which leading to the globalization and are based on transfer, deliberately and voluntarily, of sovereignty to supranational institutions. In this context exist today in the world dozens of associations of regional states, associations that differ between them through the intensity of cooperation or the level of institutionalization. In these circumstances, the science of law transcends borders and rules of organization of a particular nation state can be useful elsewhere and those from other elsewhere may be useful to a particular state.

The newborn legal institutions can not traverse with ease various contexts, which needs to be attention inoculation in the social and legal conscience that will adopt them, somewhat contrary to what the mistakenly suggest the idea of legal transplantation, namely the fact that the institution which it moved will remain same, will maintain the same function, just that they all will happen in the new legal system, wherefrom and the existence of a extremely limited options area, which pushes to the sets out just two possible solutions: rejection or integration.

Principle of the complementarity of legal norms functions as a very effective mechanism in the evaluation of the capacity of legal systems at global level in in order to find the best possible solutions to resolve the legal problems which may occur at the globaly level (judging of the crimes which is against humanity, human trafficking, drug trafficking, piracy), Mircea Malita said (Malita, 1998, p. 128): „the globality does not ensure the internal order and application of justice. States are called upon to resolve the new challenges : trafficking of arms, money laundering, corruption, terrorism, drugs". Recourse to transplanting jurisprudence of other states in order to argumentation based on the effectiveness of applied and applicable legal norms going to create a unique and common judicial space by creating some unified legal proceedings may be exemplify in this sense, *the european arrest warrant*.

Opening an international judicial space by assimilating of some specific legal norms permit speeding up the course of International Justice but and placement of weaker states under the domination of more powerful states.

Globalization of law it is at the prezent in an expanded field of maneuver in which the national strategies are in their environment having as a finality to ensure the *legal order*. The influence of international rules of law in the national law systems is not only a result of the classical channels, as a multitude of unofficial groups, belonging to certain non-governmental organizations, or even the multinational companies and especially the increasing trust that the citizens put in the international rule of law, contribute together to the development of the role that the international and the European rule of law has, by influencing the national law systems (Magureanu, 2010, p. 70).

In this sense *the legal order* is a term synonymous with the normative order. Ruling the fact that any state represents a law order, such an attribute is, however, relative, because, under certain socio-political determination, the legal order can be overturned, replaced, sometimes brutally, with another law order, without the state to terminate its existence as a political organization of particular society, that more it can be appreciated the involution stage which the would place the State in question as a result of change its order of law, understood this order as a *public order*.

The legal order is no more than normative stratum which legitimizes the legal order, a formal legitimization, because the legal rules on which operates as a unitary block, the legal order are produced in accordance with a way procedures stipulated by the norm supposed to be fundamental. As such, the legal order can be sudden and changed in violent mode on way of the factual social actions, be they called military insurrection, revolution, counter revolution, or civil war. As the new law order / public order to may be required and consolidate in exercise of its substance is necessary to establish a set of primary norms that will ensure, in terms of validity, the production of same norms of procedure which, in their turn, have ability to impose a fundamental norm based on which to establish in the substance and *in actu* the new *order of law*.

Globalization of law and of justice, leads to the birth of a global procedural law which is imposed, on the one part, it is of need to establish and maintain a social peace at global level, just of need to establish and maintaining a social peace at the global world and, on the other part, of a certain attraction between the legal cultures as well as trying to ameliorate the differences between legal systems. The main motivation of this latter aspect is that, at basis of different national systems of law are common and global principles of justice. Being under the influence of some international documents, regional or international and of the transnational/regional courts, these principles prevail over the national legal cultures representing a certain return to the origin, a *jus commune*. This pillar will be the foundation of building a judicial global system accompanied by a legal community. At such a conclusion may be reached with relative ease, observing increased field of judicial cooperation between States to the last half century: transplant of legal instruments and institutions which been and have take place, the international rogatory commissions established, the continuous training and the exchange of experience among specialists in law of different interested countries, the establishment of common bases of jurisprudence order to be able analyze and to give the best solutions in the common problems that appear, creating the international courts and, more recently, the appearance same European institutions of law as well the European Arrest Warrant and direct recognition of foreign judgments.

4 Conclusions

Creating a world law it is imposed precisely of the need to establish or maintain global peace but and of rapprochement between legal cultures and attempting to reduce the major differences between existing legal systems considering that these systems are built on common principles of law and justice. Globalization of law, will result the phenomenon of transfer of law, a phenomenon that can lead, by extension, to use any legal rule can be useful to a particular global issues. Globalization of law also opened a new horizon of sovereign states which are called to evaluate the value and the place in the group of nations in terms of influence and independence. Efficiency, effectiveness and validity of law but also its application in rational and convincing mode, are principles which prevail over independence and dignity every national law. The permanent evaluation of legal systems between them and transfer of norms that they are useful in common and global cases leading to a strong link

between the general and the particular and law globalized in this manner will be materialized only in the particular cases where it is asked to intervene and can discuss about the global reasoning of the judges who become mains interpreters of the transplant norms depending on the needs.

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The Main Principles of the Criminal Trial in the New Procedural Regulation and their Importance in Practice

Constantin Tănase[1]

Abstract: The fundamental principles of the criminal trial, like those specific to a particular phase or institution of the criminal trial, represent the basic "pillars" of the activities performed by the judicial organisms for the acknowledgment of the crimes and the prosecution of the guilty. A fair trial finalized in due time with the respect of the procedural warranties cannot happen outside this support frame and guideline. The New Code of Criminal Procedure opted for the express regulation of these principles asserting that it is the safest way to implement them in the practical activity. The new principles, together with the classical principles, whose validity has been confirmed by a prolonged experience, enhance the professionalism of the judicial organs to reduce the duration of the trials, consolidating the respect and trust in the act of justice.

Keywords: criminal trial; fundamental principles; practical importance of the principles

1. Introduction

The most general rules based on which the structure ad performance of the criminal trial are regulated represent the fundamental principles of the criminal trial. They ensure the fulfilment of the criminal trial purpose so that it is righteous and the solving of the cases is made in due time. Some leading rules of the criminal trial can refer only to one institution of the criminal trial (for example: the principle of free interpretation of the evidence) or to a phase of the trial (for example: the publicity of the judicial debates- refers only to the trial phase), others direct all the institutions and stages of the criminal trial and are considered thus fundamental principles. *The fundamental principles of the criminal trial* have been defined as being those *guidelines rules that determine all the institutions of the criminal trial in all its stages.* (Theodoru, p. 68). Some authors consider that the fundamental principles of the criminal trial aim directly at the *purpose of the trial* and establish the ground rules of its development (Dongoroz, 1975, p. 29). In the presentation of the motives in Law no. 135/2010 on the Criminal Procedure Code[2] the fundamental principles of the criminal trial are identified with *the general rules present in the legislations of the European Union member states, which are the base of the modern criminal trial, rules whose validity and efficiency have been verified by the judicial practice and jurisprudence of the European Court Of Human Rights.* They represent *the pillars* of those dispositions that oblige the judicial organs to perform independent and impartial justice, meant to ensure the confidence in the act of justice.

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[2] Published on the web site of the Chamber of Deputies – http//www.cdep.ro/proiecte/2009/400/10/2/em412.pdf.

2. The System of the Criminal Trial Principles

In theory, the study of the fundamental principles and general rules that determine the structure and the course of the criminal trial led to the necessity of arranging them in a logical order, determined by their power and contribution for the fulfilment of the purpose of the criminal trial, especially because the Romanian codes did not contain such a system. The Codes prior to the one in 1968 (Criminal Procedure Codes in 1864 and 1936) did not contain dispositions related to the principles or basic rules of the criminal trial. The code of criminal procedure in 1968 contained in Title I of the General Part, titled *The ground rules and actions in the criminal trial"* Chapter I *Purpose and ground rules of the criminal trial* which, in article 2-8 provisioned these rules with value of fundamental principles (legality and official character, finding the truth, guarantee of freedom, respect for human dignity, innocence presumption etc.). Some authors have expressed the idea of eliminating, from a future code of criminal procedure, the ground rules or the principles of the criminal trial, arguing that a code does not have to contain concepts, definitions, principles but only norms that regulate the procedural activity of the criminal trial (Theodoru, 2007, p. 69).

The new code of criminal procedure, in force since February 1st 2014, contains these principles in Title I of the General Part entitled *"The principles and limitations of the application of the criminal procedural law".* The exposure of the motivations justifies the express regulation of the fundamental principles of the criminal code by the fact that a fair criminal trial in due time cannot be guaranteed without being based on the pillars of new principles which, together with the classical ones, oblige the judicial organs to perform a criminal independent and impartial law, capable to institute in the public opinion the respect and trust in the judicial acts.

Although the fundamental principles of the criminal trial are included in the texts of the Criminal Procedure Code, the doctrine assumes the role of organising, explaining and clarifying them so that their application is made accordingly.

The French doctrine for example has organised the principles of the criminal trial by dividing them in three categories: principles of framing comprising the legality, judicial authority, guarantee of the citizen liberties, principle of proportionality; references to the human rights and fundamental liberties, which comprises the benefit of the doubt, right to defence, equality of the parties, respect of human dignity; weapon equality, celerity and access of the victims to criminal justice represent a third category with reference to the course of the trial.

The Romanian doctrine was shaped according to the opinion according to which the fundamental principles of the criminal trial aim at three important sides of the process:

a) *the structural- institutional side* referring to the judicial authorities involved in the criminal trial and their attributions;

b) *the development side*- the principles in this category aim at the fulfilment of the purpose of the criminal trial;

c) *the guarantee of the respect of the human rights and fundamental liberties within the criminal trial.*

In the category of the principles that aim *at the structural- institutional side* can be included principles such as:

- exclusive attribution of the judicial authorities to apply punishments and other measures provisioned in the criminal law for control exertion over their legality and substantiality;

- separation of the procedural- criminal functions

- free access to justice in the criminal trial.

In the category of principles that act upon the course of the criminal trial are comprised:

- the legality of the criminal trial;
- the official character of the criminal trial;
- finding the truth;
- the active role of the judicial authorities;
- equality before the law and judicial institutions;
- guarantee of the right to defence;
- the development of the trial in official language.

The principles that *ensure the respect of the human rights and fundamental liberties refer to:*

- guarantee of the individual liberties and safety of the person;
- the benefit of the doubt;
- the respect of human dignity;
- the intangibility of the residence and secrecy of correspondence etc.

Another opinion expressed in the Romanian doctrine regarding the framing of the principles of the criminal trial is that according to which they can be classified in two categories, namely: *principles regarding the entire criminal trial* and *principles related to a phase of the criminal trial or certain institutions of the criminal trial* (for example: institution of evidence, probatory means and proof, procedural measures etc). The principles of the first category are regulated in Title I of the General Part of the Criminal Procedure Code entitled *The principles and limitations of the application of the criminal procedural law.* The ones in the second category are inserted in the texts regarding the stages of the criminal trial or the institutions that govern it (for example: the principle of locality on administrating the evidence, exclusion of the evidence obtained illegally, confidentiality of prosecution, orality, publicity of the trial etc.).

3. Fundamental Principles of the Criminal Trial

Subsequently, the principles regarding the entire criminal trial meaning the general principles, the other principles or rules will be analysed together with the institution they refer to.

Legality of the criminal trial

Article 2 of the Criminal Procedure Code states that the criminal trial takes place according to the dispositions provisioned by law. This legal provision consecrating the principle of legality expresses the requirement that the criminal trial takes place in the conditions prescribed by law. This disposition of the Code of criminal procedure is sustained by article 1, paragraph (5) in the Romanian Constitution according to which the supremacy of laws is mandatory.

The principle of legality imposes that the criminal trial is performed only by the judicial authorities instituted by law and according to the competences provisioned by the legal norms. Also, the judicial authorities, the parties and the other participants at the criminal trial have to act only under the conditions and in the procedural limits proscribed by law. The judicial authorities have to respect the

procedural rights of the parties and procedural subjects and ensure their exertion in respect for the criminal law and civil law.

For the consolidation of the legality *procedural guarantees* have been instituted, such as: invalidity of the procedural acts performed with the break of the general dispositions of the law, sanctioned with annulment, decay of the institution of judicial control etc.

Separation of the judicial functions

Article 3 in the Criminal Procedure Code states that within the criminal trial, the following judicial functions are exerted:

- *criminal prosecution function;*
- *disposition over the rights and fundamental liberties of humans in the stage of the prosecution;*
- *the verification of the legality and prosecution or lack of prosecution and*
- *trial function.*

In the course of the criminal trial, the exertion of the judicial function is incompatible with the exertion of another judicial function (article 3, paragraph (2) Criminal Procedure Code). From this rule, the law admits the exception of compatibility for the function of legality check of prosecution or non-prosecution with the trial function.

The criminal prosecution function represents the gathering of necessary evidence in order to establish if there is ground for prosecution. The gathering of evidence is made by the prosecutor and by the criminal prosecution organs.

The acts and measurements that restrain the fundamental rights and liberties of the individual are disposed during the criminal prosecution by the judge who has attributions in this sector, respectively the rights and liberties judge.

The legality of the prosecution as well as the evidence on which it is based is analysed by the preliminary judge. The latter also decides on the legality of the solutions for non-prosecution decided by the prosecutor, according to the law.

Finally the forth judicial function which is the trial is performed by the courts in panels, according to the legal dispositions.

The benefit of the doubt

According to the dispositions of article 4 in the Criminal Procedure code that consecrates this fundamental principle, any individual is considered innocent until the establishment of the guilt by a definitive criminal decision. Also, the law states that after the administration of the entire probatory, any doubt in the conviction of the judicial organs is interpreted in the favour of the suspect or the accused. The phrasing of the text results in the fact that the benefit of the doubt is directly correlated with the administration of the evidence in the criminal trial. Article 99, paragraph 2 in the Criminal procedure code states that, in the virtue of this principle, the suspect or accused is not obliged to prove his innocence and has the right to not contribute to his own prosecution.

The literature has formulated an opinion according to which the benefit of the doubt has multiple functions, namely:

a) guarantees the protection of the individuals participating in the criminal trial against the arbitrary and criminal liability; underlines the idea that nobody will be criminal prosecuted and sanctioned in a discretionary manner;

b) represents the grounds for all the procedural guarantees and ensures the equality of weapons;

c) ensures the finding of the truth and correct clarification of the circumstances of the facts so that the guilt is established with certainty.

Finding the truth

This principle imposes the judicial organs the obligation to ensure, based on evidence, finding the truth regarding the facts and circumstances that form the object of the cause as well as regarding the suspect or accused. To the same effect, the organs of prosecution have the obligation to gather and administrate evidence both in favour and against the suspect or accused. The rejection or non-registration in bad faith of the evidence in favour of the suspect or accused is sanctioned according to the law (article 5 Criminal procedure code).

Finding the truth regarding the facts or circumstances of the cause implies the assertion of the existence or inexistence of the fact for which the prosecution was triggered, the clear establishment of the circumstances that characterises the facts (time, place, mode and means of the actions, purpose, nature and extension of the prejudice etc.) and other aspects that influence the criminal procedure. Finding the truth regarding the individual suspected or accused means the certainty of the guilt, knowledge of the priors of the accused, of ant nature (criminal, medical, professional) that can have significance in asserting the gravity of the facts, the dangerous character of the individual but also the individualisation of the sanction. Also, finding the truth involves a complete relation between the situation and facts and the conclusions of the judicial organs regarding the facts.

In the criminal trial, the truth must be found only within the frame consecrated by law, meaning only under the conditions provisioned by law, more exactly – according to the principle of legality. There are cases strictly determined by law in which the principle of finding the truth is limited, such as the case of non-inclusion of the prior complaint when the law conditions the start of the prosecution according to its formulation or in case of reconciliation of the parties.

The guarantee of finding the truth in the criminal trial is made mainly through the active role of the judicial organs, through the right of the parties to formulate requests, memoires, submit evidence and request the verification of the loiality of the already administrated evidence.

Ne bis in idem

It is a restatement and a consecration of the Roman law principle *Non bis de eadem re sit action* or *non bis in idem* which states that one cannot prosecute twice for the same cause (Hanga, 1998, p. 79-81). Article 6 Criminal Procedure code states that no individual can be prosecuted or on trial for a crime when that individual received a definitive judicial decision regarding the same action, even if under a different legal analysis. As regulated in the legal text, their principle represents a consequence of another principle, respectively the authority of the judged action. It represents an obstacle before the restatement of the criminal law conflict solved previously, even under a different judicial categorization (Antoniu, Volonciu, & Zaharia, 1988, p. 35).

Obligation to set in motion and exert the criminal prosecution

When a crime is committed, it results in the right for punishment of the criminals. To that end, the judicial organs are obliged to perform procedural activities every time a crime has been committed.

Article 7, paragraph 1 Criminal procedure code provisions the obligation of the prosecutor to set in motion and exert the prosecution on its own motion when there is evidence resulting in the commitment of a crime and there is no legal cause for prevention. Therefore, in principle, the criminal trial starts on own motion without the necessity of fulfilling other conditions, reason for which this principle is also known in the doctrine as the official character of the criminal trial. The application of the principle of obligation to exert the criminal action makes the termination of the criminal trial to be made through the definitive decision of the cause or by the intervention of circumstance that, according to the law, are bale to prevent the exertion of the criminal prosecution. The obligation excludes, as a general rule, the possibility for the parties to stop the criminal trial, this termination being the exclusive attribute of the judicial organs.

According to the Romanian criminal procedural norms, the principle of obligation to set in motion and exertion of the criminal prosecution has certain exceptions.

One exception would considers the cases and conditions expressly provisioned by the law when the prosecutor can renounce to the exertion of the prosecution if, in relation to the elements of the cause, there is no public interest in accomplishing its object.

Another exception considers the crimes for which the law imposes the formulation of a prior complaint as a condition to set the criminal prosecution into motion (for example assault or other violence – article 193, Criminal code). In these cases the prosecutor will set the prosecution into motion after the complaint was submitted.

Finally, a third exception refers to the situations in which, in order for the prosecution to be set in motion, the law imposes the necessity to obtain authorisations or intimations of the competent authorities or the fulfilment of another condition imposed by the law (for example for the crimes of unjustified absence, desertion, breach of consignment, leave of position or command and insubordination, provisioned in article 413- 417 Criminal Code).

Given the above mentioned, the literature contains the idea that in relation to the principle of official character of the criminal trial, the criminal causes ca be classified in three categories:

- public accusation causes in which the principle is applied integrally;

- private accusation causes in which the criminal action is set into motion or is terminated by the will of the victim;

- public - private accusation causes in which there are elements that belong to the categories mentioned above; in the current legislation, these causes are extremely rare.

The exertion ex officio of the criminal prosecution in the cases and conditions provisioned by law present a significant importance for the law order in a well organised democratic society.

The equitable character and reasonable due time of the criminal trial

In the performance of the criminal prosecution and trial, the judicial organs are obliged to fulfil the procedural guarantees and rights of the parties and subjects, so that the facts representing the crimes are determined fully and in time, no innocent individual is criminally prosecuted and any individual who committed a crime is punished according to the law, in due time (article 8 Criminal procedure code).

The economy of the quoted text results in the fact that the judicial organs are obliged to act efficiently in order to solve the criminal cause with the respect of all the rights of the parties and procedural

subjects and in compliance with the rules provisioned by law. The principle of due time or efficiency of the criminal trial was characterised n doctrine as being a *sine qua non* condition of the efficiency and optimization of the entire judicial activity (coordinated by Dongoroz, 1975, p. 62).

The respect of this principle entails the following aspects:

- promptitude in performing the judicial activity;
- quality in performing the procedural acts;
- simplification performing the procedural acts;
- efficiency in accomplishing the procedural purpose and all the tasks related to the judicial organs.

The performance of the criminal trial in due time has as objective the timely determination of the facts representing the crimes, the correct and complete determination of the circumstances of committing the crimes so that no innocent individual has to know the rigors of the criminal law and, at the same time, no guilty person will be unpunished. The efficiency or rapidity, or te due time are not a purpose themselves, but a way to prevent the crimes by closing into the moment of criminal liability generating a significant impact on the human communities and, at the same time, a discouragement for the criminals.

The right to freedom and safety

The personal freedom is a social value of extreme importance. Article 23 in the Romanian Constitution states that freedom and safety of the individual is intangible. The search, detention or arrest of an individual is not allowed unless in the cases and following the procedure provisioned by law. Regarding the efficiency of these constitutional provisions, article 9 of the Criminal procedure code states that during a criminal trial, the right of every individual to freedom and safety is guaranteed. Any restrictive measure is disposed exceptionally and only in the cases and conditions provisioned by law.

Any arrested individual has the right to be informed in the shortest period of time and in a known language over the motives for the arrest and has the right to dispute the arrest measure. When a restrictive measure has been illegal applied, the competent judicial authorities have the obligation to dispose the annulment of the measure and, where necessary, the release of the detained or arrested.

Any person towards which a freedom restrictive measure was illegally imposed during a criminal trial has the right to compensation for the damage, under the conditions and cases provisioned by law.

The guarantees for the freedom and safety of the individuals can be classified in the following more significant aspects:

- the general cases and circumstances of preventive measures are strictly forbidden by law so that no individual can have his freedom restricted except for the situations in which it is according to the law;
- the preventive measures can be disposed mainly by the magistrate and only in certain situations, provisioned by law, by the prosecution authority;
- the duration of the preventive measures is limited and can be prolonged only certain conditions provisioned by law;
- the confinement during the criminal trial can be made only according to certain procedures limited by procedural forms;

- the maintenance of the preventive measures is eliminated when the grounds that justify them have disappeared or when the grounds have changed.

The right to defence

The consequence of exerting the criminal actions against an individual is represented by the criminal liability and application of a punishment. This leads to the general interest that to this judicial treatment would be submitted only those guilty individuals and only according to the gravity of their actions. The right to defence is included in article 24 of the Constitution and guaranteed as such. During the criminal trial, the parties have the right to be assisted by a lawyer, chosen or publicly appointed. The modern legislations consecrate the right to defence definitively rejecting the archaic mentality that minimized the necessity of defence, starting from the erroneous assertion that: either the accused is not guilty therefore he doesn't need defence or he is guilty then the defence is useless.

According to the constitutional text, article 10 in the Criminal procedure code states that the parties and main procedural subjects have the right to defend themselves or be assisted by a lawyer. The guarantee of this right is materialised by legal dispositions according to which the parties, procedural subjects and lawyer have the right to benefit from the time and necessary conditions to prepare the defence.

Also, the subject has the right to be informed immediately and listened in relation to the action for which the prosecution is began and its judicial framing. At the same time, the accused has the right to be informed immediately regarding the prosecution against him and the judicial framing. Before being heard, the suspect and accused have to be informed that they have the right to make no statement. Also, the judicial organs have the obligation to ensure the complete and effective exertion of the right to defence of the parties and the main procedural subjects during the entire criminal trial. The right to defence has to be exerted in good fit, according to the purpose for which it has been recognised by the law.

The guarantee of the right to defence is correlated to the principle of equality of all citizens in front of the law and generally, in justice. In turn, equality in front of the law, the equality in front of the law is determined by the level of the social economic conditions for the existence and reclamation of the political sector. Even since the last decades of the 19th century and the first half of the 20th century, the theoreticians of the criminal procedural law have signalled negative effects in the criminal trial, of economic and social inequalities. Thus, Rene Garraud şi Pierre Garraud (quoted by Volonciu, 1987, p. 71) asserted that the existence of te lawyer "profits more to the rich accused who can pay an experimented lawyer". In the Romanian doctrine, Ion Tanoviceanu wrote: "Currently, the poor is defenceless in the correctional affairs and weakly defended by a public appointed lawyer in criminal matters. When a lawyer will be introduced to the instruction judge, the inequality would begin from the instruction between the defence of the rich, which would be very factitious and the defence of the poor which would be a requisition defence".

The right to defence is not reduced only to the assistance, consultancy and representation, although it represents the important components of them.

The right to defence, according to the legal dispositions is manifested under other aspects such as:

a) the parties have the right to defend their own legal interests. This is translated into the obligation of the judicial organs to bring to the knowledge of the parties the accusation, into the right of the accused not to make statements, into the rights of the parties to submit evidence, formulate requests and memoires, to be heard, give explanations, make conclusions.

b) the judicial organs are obliged to take into consideration all the aspects that are in favour of the party, this resulting from their active role which is manifested independently from the position of the parties.

For the finding of the truth and criminal liability only of the guilty individuals, the judicial organs have to administrate the evidence coming to the defence of the accused, irrespective of his attitude.

c) the parties have the right to judicial assistance. The guidance and help of the parties by a professionally qualified person enhances the possibilities to respect the legal rights and interests of the parties in the criminal trial. The Criminal procedure code provisioned the obligation for defence by a lawyer, these dispositions being themselves a proof of the guarantees ensured by the right to defence.

The legal regulation of the principle of the right to defence results in its following features:

a) the right to defence is guaranteed during the entire criminal process;

b) the right to defence is guaranteed to all the parties and procedural subjects;

c) the right to defence is manifested in many ways such as – the organisation and functioning of the instances (appeal, recourse etc.) which ensures the judicial control; the obligation of the judicial organs to gather evidence both in the favour as well as against the accused; obligation to summon all the parties, judicial assistance, the right of the accused to be heard, to ask questions to the other accused and witnesses, to request the administration of evidence etc.

The respect of the human dignity and private life

The intimate, family and private life, intangibility of residence and secrecy of correspondence are guaranteed by the Romanian Constitution through articles 26, 27 and 28. Expressing these provisions f the fundamental law, the Criminal procedure code consecrates in article 11 the principle of respecting human dignity and private life. According to these dispositions, any individual who is involved in prosecution or trial has to be treated with the respect of human dignity. The respect of private life, intangibility of residence and secrecy of the correspondence are guaranteed. The restraint of exerting these rights is admitted only in the conditions of the law and if this is necessary in a democratic society. The necessity of the restraint in exerting these rights is determined by the protection of national security, order, public health and moral, citizen's rights and liberties. Also, the restraint can be determined, under the conditions of the law, by the process of prosecution, by the prevention of consequences of natural disaster, calamity or extremely serious events.

The measure of restraint in exerting the right to dignity and privacy has to be proportional with the situation that determined it, to be applied in non-discriminatory manner and without bringing prejudice to the rights guaranteed by law.

Official language and right to interpret

Article 13 of the Constitution provisions that in Romania the official language is Romanian. In consequence, the criminal trial takes place in Romanian language, which means that the documents specific for the prosecution and trial are redacted in Romanian language. This principle is stated in article 12 of the Criminal procedure code. According to this text, the Romanian citizens belonging to the national minorities have the right to express themselves in their natural language, the procedural documents being drafted in Romanian language.

The parties and procedural subjects who do not know or speak Romanian are given the possibility, free of charge to use an interpreter to understand the documents of the file as well as to express

conclusions in court. In the cases in which the judicial assistance is mandatory, the suspect or accused has the possibility to communicate, through an interpreter, with the lawyer for the preparation of the hearing, make an appeal or any other request related to the solving the cause.

In the judicial procedures, authorised interpreters are used, according to the law. This category includes the licensed translators and interpreters, according to the law.

These rules can be fulfilled in practice by organisational measures within the institutions with the authority to prosecute or judge, consisting in using public servants or magistrates who speak languages spoken by certain communities, such as the German or Hungarian ones. Thus, eloquent in this case was the motivation of a decision of the Supreme court: "from the documents of the case results that the prosecutors as well as the members of the judging panel spoke Hungarian and were able to communicate with the accused, the civil part and their defenders and witnesses, whose natural language is Hungarian. Thus, the use of an interpreter was considered to be groundless and the judicial organs had the possibility to communicate in Romanian and Hungarian with the parties and the other participants to the trial". (Supreme Court, criminal section dec. no. 1713/1980, R.R.D., no. 6/1981, p. 84). These dispositions are applicable also in the cases in which the texts included in the files of the cause and which are presented in court are redacted in another language than Romanian.[1]

4. Conclusions

Although some opinions have been expressed in the literature according to which the fundamental principles of the criminal trial would not fit in the Criminal procedure code, their authors have considered opportune to expressly regulate them in the body of the law. In adopting this type of concepts prevailed the interest to ensure a fair trial, which is finalised in due time so that the performance of criminal justice is independent and impartial. For the accomplishment of this desideratum it was necessary the regulation of the fundamental principles of the criminal trial. New principles have been formulated that, together with the classical ones, whose validity has been confirmed by a long practice, lead to the elimination of the cases on inefficiency, lack of celerity, guaranteeing the protection of the fundamental right and liberties.

Among the new principles, the separation of the judicial functions in the criminal trial has the purpose of substantially improving the act of justice. The repartition of some attributions and competencies for each judicial function will enhance the quality of the procedural acts, the measures imposed during the trial, considerably reducing the possibilities for errors or abuse. Among the old principles, some have been reconsidered, such as the obligation to put into motion and exertion of the criminal action. Thus, this obligation has been softened according to the subsidiary rule of opportunity according to which, in some cases as well as in some conditions provisioned by law the prosecutor can renounce to the exertion of the criminal actions. This new vision has the purpose to avoid long trials in minor causes in which the public interest does not exist.

The undertakings of the authors of the Criminal procedure code regarding the principles of the criminal trial have been directed towards the enhancement of the professionalism of the judicial organs, reduction of the duration of the criminal trials and guarantee of the rights of the parties.

[1] Supreme Court, criminal sector dec. no. 924/1970, R.R.D., no. 7/1970, p. 165-166.

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The EU's Decision Making Process Changes in the Constitutive Treaties

Andrei Calapod[1], Ani Matei[2]

Abstract: Since the beginning of its existence in the form of communities, the European Union's decision making process underwent constant evolution. There were continuous adjustments that transformed a pure intergovernmental process into one having rather federal features. Based on the hypothesis that changes have occurred at the decision level in regards to the actors, procedures, influence and ways of taking decisions in order for the new realities, needs and will at the European level to be properly addressed, this paper aims to present the reforms performed through the adoption of new treaties and the modification of the existing ones. The reality is that in order for the European dream and integration to go on and also for further development of the European Union, finally becoming an entity far beyond the founders expectations, decision makers had to constantly and carefully adapt the decision making process. The purpose of this paper will be achieved by conducting a research based on the qualitative method, analyzing the related researches on this topic and the consolidated versions of the treaties. Thus, we will finally validate our research hypothesis that there was an evolution in what the EU's decision making process and decision procedures are concerned.

Keywords: European Union; decisions; procedures; evolution; adjustment

1. Introduction

This work presents the EU's decision making process changes which have happened through the enactment of the constitutive treaties and through their modifications in time.

It has been a long, complex and interesting process, a 60 years period of changes and continuous adaptations of the decision making process to the new realities. As a result, we can speak now about an entity, the European Union, completely different than the original communities and having competences and attributions beyond the greatest expectations and projections of the founders.

Unlike the early period, when the main target was the joint management of the coal and steel resources in order to avoid a new war in Europe, we can see now an economic, political and monetary entity and an integration of the member states on all the three levels.

The growth in the member states number, the wish but also the need for a deeper integration, have determined the evolution of the decision making process from intergovernmentalism to one driven by the supranational institutions and seemingly having the features of a federal decision making.

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In order to offer a detailed view on the decision making process changes, we will structure the paper over four parts. The first one will be dedicated to the birth of the European communities, where we'll address the Treaties of Paris, Rome and Brussels. The second part will highlight the first major reforms of the decision making process, reforms performed through the Single European Act and the Treaty of Maastricht. The third part will be dedicated to the European Union's development and the introduction of new reforms, using here the provisions of the Amsterdam and Nice treaties. We'll continue then with the European decision making process consolidation through the Constitutional Treaty and the Treaty of Lisbon.

2. The Birth of the European Communities - Treaties of Paris, Rome and Brussels

The first of the European communities was the European Coal and Steel Community, established in 1951 through the adoption of the Treaty of Paris by six countries: Germany, France, Italy, Netherlands, Luxembourg and Belgium.

The main objectives of this treaty, written down in the Article 3, were the permanent resource supply for the countries, equal access to the production sources, low level of prices, the increase of the production and the improvement of working conditions. The goal was to create a common market, common objectives and common institutions having immediate and effective powers (Bărbulescu, 2008, p. 42).

In order to fulfill all the objectives set in the treaty, a number of four supranational institutions were established.

The High Authority was the institution having the main management and decision powers. It consisted in 9 members appointed by the member states governments through a joint decision. From a decisional making point of view, it was supposed to issue decisions and recommendations with the majority of its members (Article 14 of the Treaty).

As the liability of this institution was also to be addressed, a second institution was created, the Assembly, representing the interests of the member states. It consisted in 78 members appointed by the national parliaments and it did not have any legislative power but only supervision and control powers.

The third institution was an intergovernmental one, the Council of Ministers, whose attribution was to unanimously determine the priorities in what the resource use and allocation are concerned (Zlătescu, 2008, p.40).

Finally, the forth institution set by the treaty, was the Court of Justice, whose main role was the supervision of the law and treaty provisions abidance.

The European integration continued with the adoption of the Rome Treaties in 1956 through which it was established the European Economic Community (EEC) and the European Community of Atomic Energy (EURATOM).

The main purposes of the EEC Treaty were the establishment of a common market based on four freedoms (free movement of goods, capital, services and people) and a common policy. The other treaty's main purpose (EURATOM) was to increase the standard of living, this time by setting down the necessary conditions for a fast development of the nuclear industry.

For each of the two communities, the decision makers established a Commission similar to the High Authority, and a Council of Ministers. Moreover they decided on a common Parliamentary Assembly and a common Court of Justice for them and the Coal and Steel Community. Each Commission was entrusted with initiative and control powers while each Council of Ministers had a pure legislative role this time.

The Treaty of Rome introduced a new decision procedure, the consultation one, this way having the Parliamentary Assembly involved for the first time in the decision making process through 22 articles

in the TEEC and 11 in the EURATOM Treaty (Matei, 2009, p. 63). Thus, it was mandatory for the Council to ask for the Parliament opinion for those decisions supposed to be regulated this way, but there was no need of also keeping this opinion in the final decision. Within this procedure, the Parliamentary Assembly was supposed to get the absolute majority of the votes cast (Art. 141 of TEEC), while the Council was supposed to meet a qualified majority (Art. 148 of TEEC).

Due to all these new institutions and new decisional realities, the decision making process per se became too complex and complicated. The decisions were taken and enforced separately for each of the communities. Moreover, there were eight institutions at the European level, representing the same member states and having similar attributions.

Things were to be changed after the adoption of the Brussels Treaty in 1967, which set a common institutional system for the 3 communities: one Commission, one Council of Ministers, one Parliamentary Assembly and one Court of Justice.

It's worth mentioning that the European construction faced a very difficult moment that could've represented the end of the story in 1965, when France decided to leave its chairs in the Council, not taking part to decisions anymore and blocking this way the decision making process for 9 months. This moment was called "The empty chair crisis". France was reluctant about the qualified majority system introduced by the Treaty of Rome and wanted to keep also the unanimity, at least for those decisions considered to be very important for the member states.

The decision makers finally agreed on taking the decisions by unanimity (intergovernmental strategy) also in those areas where they were supposed to be taken through a qualified majority, according to the Treaty of Rome. Member states were practically allowed to veto any decision this way.

Due to the so called "Luxembourg Compromise", the unanimity was the decision procedure used for a period of more than 20 years.

3. The First Major Reforms of the European Decision Making Process

After the three enlargements of the communities (1973 - 3 states, 1981 – one state and 1986 – 2 states) which practically doubled the member states number, the decision making process was a bit on the edge if we consider the difficulty in getting the unanimous vote, when deciding in the Council. Therefore, the decision makers reached an agreement so that a new treaty, the Single European Act, was adopted in 1985 and entered into force one year later, in 1986.

This treaty had a significant importance in the EU's history. It was practically the start of a long process of reforms that radically transformed the European communities.

It was the moment when the decision makers introduced the brand new cooperation procedure, which gave the possibility of taking decisions with a qualified majority within the Council and enhanced the European Parliament's influence over this institution. We are pointing here the second reading mechanism and the possibility that the Parliament had to reject with an absolute majority a decision taken by the Council, forcing it to vote with unanimity. As a general rule though, the Council was acting through the qualified majority, having this way the unanimity set by the Luxembourg Compromise replaced.

Moreover, the treaty also introduced the assent procedure (Articles 8, 9, 237 and 238 of the Treaty). This is a one lecture procedure, within which the Parliament consent is needed before any decision in the areas of association agreements or accession, to be enacted by the Council.

The treaty also enhanced the community powers in what the social policy is concerned and introduced new competences such as the technological research and development (Art 130F) or economic and social cohesion. It also introduced the environmental policy among the ones already regulated by the European law. All these new competences enhanced the Parliament's powers, as it was involved in the

decision making process for them either through the consultation procedure or through the cooperation one.

Another important change is that the European Commission was entrusted with the exclusive right of initiative and with enhanced executive powers, under the Council supervision.

The most important reform of all though, is the vote using the qualified majority within the Council for most of the decisions related to the common market.

Short after the moment when the Single European Act entered into force, the decision makers adopted the Treaty of Maastricht. This was a real step forward in what the European construction is concerned. From that point on, the community was not only seen as an economic one but also as a monetary and political community. It was the moment when anyone met a newly born: the European Union.

The treaty modified the European Coal and Steal Treaty, the EEC Treaty, which became the European Community Treaty (TEC) and also the EURATOM.

The most important thing though is the establishment of the European Union, an entity built on three pillars: the European Communities, the European Security and Defense Policy and Justice and Internal Affairs. This structure represents let's say a compromise between those who wanted a deeper integration and the intergovernmentalists.

The most important reform in what the decision making process is concerned, was the introduction of the co-decision procedure, which allowed the Parliament to veto Council's decisions. The number of areas where the Parliament had a direct involvement was further increased. Therefore, the co-decision brought a plus of legitimacy for the decision making process, as the Parliament, the only institution whose members are directly elected by the citizens, got the possibility to amend Commission's proposals and to co-decide together with the Council.

The co-decision procedure written down in the Article 189b of the TEC, extended the cooperation procedure from a number of two readings to three. The Parliament got the veto right if after the second reading, the conciliation and the third reading, the two decision makers had not reached an agreement (Matei, 2009, p.92). The two procedures are also very different. Besides the increase in number of readings, within the co-decision procedure, the Council is no longer able to reject the amendments introduced by the Parliament, if they have the European Commission's agreement. It can ask though for a conciliation committee consisting in all its members and an equal number of members appointed by the Parliament, for further discussions on the amendments. Moreover, in case that the conciliation committee is not able to reach an agreement, the Council can reinforce its first common position which is to become law if the Parliament does not reject it with the absolute majority of its members.

Another important thing to be mentioned here is that the co-decision is significantly different than the consultation procedure. Unlike the later, where the Commission is the main pawn along with the Council, the Commission has a weaker position within the co-decision, as its proposal can get amended by both, the Parliament and the Council and moreover the two co-decision makers can reach an agreement on the decision without its consent.

On the other hand, it's also worth mentioning that the Treaty of Maastricht also increased the areas where the cooperation procedure was to be applicable, thus of course also increasing the number of areas where the qualified majority was to be applicable. Moreover, it increased the number of domains where the consultation and the assent procedures were needed.

The four existing procedures at that point, were applicable for the first pillar, the other two being regulated with unanimity within the Council or through the member states agreement.

Although the Treaty of Maastricht performed the most important reform since the creation of the European Economic Community, this was not enough.

4. European Union's Development and the Adoption of New Reforms

Having 15 additional member states, plus the 5 German lands and knowing that new accessions are going to happen in the near future, the EU was still having issues, so the Treaty of Maastricht was already a bit outdated soon after its adoption. Therefore, the decision makers took the decision of adopting a new treaty to modify it. This was signed on 2nd of October 1997 in Amsterdam and entered into force two years later.

The treaty of Amsterdam continued the decision making reform. Very important were the changes over the co-decision procedure, which was simplified and extended and the decrease in the number of procedures from 4 to 3: co-decision, the assent procedure and the consultation one. The cooperation procedure was technically removed, as it was only applied from that moment on to 4 articles related to the Economic and Monetary Union. (Matei, 2009, p. 103)

The treaty doubled the areas where the co-decision was to be applied and simplified it through the new possibility of being ended right after the first reading in case of an agreement reached between the Council and the Parliament, by removing the possibility of an unilateral action for the Council right after the second reading, in case of a disagreement between it and the Parliament and by allowing the direct interrelation between the two co-decision makers (Bărbulescu, 2008, p. 377).

The Treaty of Maastricht allowed the Council to extend the decision making process with the third reading, in case of a disagreement, except for the case where the Parliament rejected the decision with an absolute majority of the vote casts, a thing unlikely to happen. The Treaty of Amsterdam gave the possibility of ending the procedure after the second reading instead, in case of a disagreement between the two institutions. The Parliament got more powers this way, a wise decision if we consider the fact that it had the power of setting the final form of a decision. (Arnull & Wincot, 2002, pp. 36-37)

The conclusion here is that the Parliament is the winner after this round of reforms as well. The decision making procedures were simplified and their number was decreased. The co-decision was applicable in all the areas regulated using the qualified majority within the Council. There were still areas of no action for the Parliament though, such as the agricultural, fisheries and commercial policies or the Economic and Monetary Union. Same for the newly areas of community regulation, belonging to the third pillar such as immigration, asylum, border pass or judicial and administrative cooperation.

The European Security and Defense Policy was still an area of intergovernmental regulation, but starting with that moment, the decision makers also had the possibility of taking decision through a qualified majority in few cases.

Maybe the most important reform from a simplification point of view is that, starting with the Treaty of Amsterdam a group of member states had the possibility to issue laws, applicable only for them. This was written down in the Title VIa, Articles 43, 44 and 45 of the Treaty. Any state had the possibility of using the so called "emergency brake" to block the initiative, in this case the Council being the one who could decide through a qualified majority if the European Council was to decide on that specific matter, unanimously. Moreover, it is important to mention that the so called "consolidated cooperation" was not applicable within the second EU's pillar (Article 23, TEU).

Just as the Treaty of Maastricht did, this one also left a lot of areas to still be addressed. Two examples here are the structure of the European institutions, which could not have properly acted in case of a bigger number of member states and the high number of areas which were still to be regulated using the unanimity.

These issues were partially addressed in the Treaty of Nice that entered into force in 2003.

Its purpose was to include those provisions that could guarantee a proper framework for the European Union in case of a number of 30 member states.

The Parliament's powers were further enhanced by the increase in areas were the co-decision was to be applicable. Moreover the structure was to be changed in the coming term of office: 732 members with a maximum of 99 members for Germany and a minimum of 5 members for Malta.

In what the Council is concerned, the changes were mainly related to the qualified majority. The number of areas of applicability was increased and it was modified in the sense that from that moment on, a triple majority was needed in order to pass a decision: one for the states - 55%, one for the population - 62% and one for the number of the votes cast - 255 from a total of 345.

In regards to the European Commission, starting with 1st of January 2005, each member state was entitled to one member (Article 4 (1) of the Protocol on the extension). Same for the Court of Justice. Each member state had the right of appointing one judge (Article 221 of TEC).

Finally, the Economic and Social Council and the Committee of the Regions were to include 350 members each (Articles 258 and 263 of TEC).

Another important reform was the one related to the consolidated cooperation. The veto power was removed and a minimum number of 8 member states was set in order to proceed. Moreover, the decision makers were allowed to establish a cooperation also within the second EU pillar (written down in the Article 27b of TEU), except for the defense area (Zlătescu & Demetrescu, 2005, p. 196).

5. The European Decision Making Process Consolidation

In 2001, the decision makers initiated an extensive public debate aiming to revise all the treaties and to finally come up with a constitution for the future of Europe (European Council from Laecken). The aim was to simplify the complex political and legislative system.

Therefore, on 29th of October 2004, the heads of states and governments and the ministers of foreign affairs of the 25 member states, signed the Treaty establishing a Constitution for Europe, in Rome.

If it had entered into force, it would have introduced important changes related to the decision making process and not only. Unfortunately for this act though, Netherlands and France rejected it.

Due to the new enlargements in 2004 and 2007 with 12 new member states, it was clear that many of the previous treaties' provisions were to be changed. Therefore, on 13th of December 2007, the Treaty of Lisbon was adopted. It entered into force two years later, on 1st of December 2009.

This treaty can be seen as a compromise solution. It is based on the Constitutional Treaty provisions meaning that it respects the will of those countries which ratified it but also removed few provisions due to the Netherlands and France's requests. It basically included 95% of the reforms and new instruments set in the constitution. In this process, the decision makers used the "veil strategy", hiding under a veil (the one of the classic treaties) the fundamental elements of a constitution so that the reform to be perceived as new and so the new treaty to be ratified by the national parliaments, avoiding the referendums this way. (Luzarraga, & Llorente, 2011, pp. 29-30)

We must assert that this treaty significantly changed the decision making process.

Its provisions increased the number of areas for the co-decision procedure (so called the ordinary procedure now) to 85, from 44 in the Treaty of Nice. Moreover, the Parliament practically got equal powers with the Council, most of the decisions being now adopted using the ordinary procedure.

There were only 2 legislative procedures left: the ordinary one, which consists in a joint decision of the Parliament and Council and the special procedure, which consists in the adoption of a regulation by the Parliament, having the Council's assistance or by the Council having the Parliament's assistance. Within the first one, the Council decides with a qualified majority, while within the later, it decides in unanimity, after the Parliament consultation or consent. Having all this said, we can assert that the whole three decisional procedures were kept, but in a different form.

There were also important changes in what the institutional structure is concerned.

The seats in the Parliament were set to 751, including the president, with a minimum number of 6 members for Cyprus, Luxembourg, Malta and Estonia and a maximum number of 96 members for Germany.

The European Council became an institution per se, having a president appointed for 2.5 years.

In regards to the Council of the European Union, the most important was the reform of the qualified majority. The triple one, established by the Treaty of Nice, was replaced with a double one, starting with 2014: the majority of the states – 55% and the majority of the population - 65%. Moreover, in case that the Council is not deciding on a proposal coming from the Commission or from the High Representative, the double majority means 72 % of the member states, totalizing 65% of the EU's population.

In regards to the European Commission, the Article 17 of the treaty, states that starting with 1st of November 2014, the number of commissioners will represent 2/3 of the member states number, including the president and the High Representative.

Now, speaking about the decision making process stated in the Treaty of Lisbon, we can assert that it is a complicated and a complex one, a process where the decision makers need to sometimes make compromises.

The European Commission's proposal, is the result of extensive consultations of the national experts, international organizations and non-governmental organizations.

Once it is adopted and sent to the Parliament and Council, the process is different, depending on the procedure that is to be followed.

The ordinary procedure is the most complex and can last for many years due to the fact that no deadlines are set for the first reading. The procedure can have, one, two or three readings, having specific and strict rules. They can be avoided though and I am pointing here the informal trilogs between the Commission, Parliament and Council before the conciliation procedure. These are actually the meetings where the decisions are agreed upon. They can also exist during the first and second reading between the Parliament and Council members or between members belonging to all the three institution so they can agree on the amendments to be introduced and that can be accepted by both decision makers.

Another key point here is the role that the Commission has in the sense that it can change the vote rules within the Council. If it doesn't amends the proposal in accordance with the Parliament's position in the first and second reading, the Council can only adopt the proposal in the form that the Parliament wants, using the unanimity. Therefore there are also exceptions from the qualified majority.

In regards to the special procedure, we must say that it is a shorter and easier one. In this case, the institution that adopts the act, either the Council or the Parliament, only waits for the other's assent or opinion. The Council acts here unanimously, with the possibility of a "pasarela clause", which means that the European Council can authorize it to use the qualified majority instead of the unanimity or the ordinary procedure instead of the special one.

There are also some other ways of taking decisions at the European level.

The External Affairs and Defense policy is still an intergovernmental area, where the two decision makers are the European Council and the Council of the European Union, acting unanimously at the proposal of the member states and the High Representative this time, instead of the European Commission. The "pasarela clause" is also applicable here.

Another thing that worth mentioning is the fact that 9 member states can establish a consolidated cooperation, being able to enact decisions applicable only for them and without the other member states participation. The same decisional procedures explained above are applicable here, but only between the participants.

We will not end before mentioning the fact that there are three member states, United Kingdom, Ireland and Denmark that have some derogations from the Treaty of Lisbon's provisions in the sense that they are not part of the decision making process related to asylum, immigration, cross border checks, judicial civil and criminal cooperation and police cooperation. Therefore, such decisions are not applicable to them, unless they want.

6. Conclusion

The European communities and then the European Union went through a continuous process of adapting the decision making process to new realities. There were gradual reforms determined by the need of conciliating the member states interests and the need of avoiding some blocks that could've been the end of the European construction.

We saw how the qualified majority gained more and more importance against the unanimity and how the decision making process became more and more federal rather than intergovernmental.

We also saw how the Parliament gained more and more powers against the Council, moving from an institution without any legislative attributions at the beginning, to one, I dare say, being the most important decision maker, according to the Lisbon provisions. These can easily be seen in the difference between the way of taking decisions in the past and now, for the same matter. To have an example here, in 2000 for a decision regulating the sexual abuse and sexual exploitation of kids, the decision makers used the consultation procedure, where the Council was the main pawn, having the privilege of enacting the law just in the form it wished and not considering the Parliament opinion. After the Treaty of Lisbon entered into force, for the same matter, the ordinary legislative procedure was used, wherein the Parliament is equal to the Council or has even more powers than it, in certain circumstances. In all cases, if the law is not adopted in the form the Parliament wishes, it is adopted in the form set following the negotiations and the compromises between the two co-decision makers.

This legitimates the whole decisional process, considering the fact that the Parliament is the only institution whose members are directly elected by the EU's citizens.

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***Treaty of Paris, Treaties of Rome, Single European Act, Treaty of Maastricht, Treaty of Amsterdam, Treaty of Nice, Treaty Establishing a Constitution for the Europe and Treaty of Lisbon - consolidated versions.

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Recognition and Enforcement of Judgments Passed in the Third Countries on Criminal Law Sanctions of Deprivation of Liberty

Ion Rusu[1]

Abstract: In the present work it is examined one of the most important institutions of international judicial cooperation in criminal matters, namely the recognition and enforcement of a judgment passed by a competent judicial authority of a State, which is not part of the European Union. The examination takes into consideration the duration and scope of the recognition procedure and the conditions for recognition and enforcement, as they are provided in the Romanian law, recently amended. The work can be useful for judicial bodies with responsibilities in this area, and for academics. The innovations consist in examining this institution, and the way in which it has increased its importance in the international judicial cooperation in criminal matters. The paper continues further studies in this area, which will be complete by reediting the master course of international judicial cooperation in criminal matters, by the end of this year.

Keywords: crime; punishment; conditions for recognition and enforcement

1. Introduction

Since the second half of the 19th century, with the proliferation of transnational crime, some European countries have acknowledged the need to seek new methods and cooperation procedures leading to the reduction of this phenomenon, together with identifying and holding liability certain categories of people who evade the execution of punishment by fleeing in the territories of other states.

In this context, as time goes on, besides extradition (identified as being the first form of international judicial cooperation in criminal matters) they have gradually emerged also other such forms, which have contributed greatly to preventing and combating crime of this kind.

A review of the evolution of these forms of cooperation shows evidence that they have known an unprecedented growth, starting with the second half of last century.

This was due to the increased crime of all kinds and especially certain types of extremely serious crimes such as terrorism, trafficking in weapons, ammunition, explosives or radioactive substances, trafficking in women and children, etc.

At the same time, the organized crime groups have expanded their criminal actions in several countries or even continents, using increasingly sophisticated methods and procedures, causing great difficulties to the judicial authorities in discovering and proving criminal activities.

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Against this background, the most important problem that arose before the European countries and beyond was the recognition and enforcement of judgments of judicial bodies passed in a State, by the judicial authorities of another state, requested in this regard.

Although initially there were and still are at this point, some restraints in recognizing such a judgment, gradually since 2000 the recognition and enforcement of these types of judicial decisions have become a major concern of the states with recognized democratic regimes.

Conscious of the importance of this cooperation forms with third countries (other than members of the European Union) Romania has improved its legislation, adopting a series of amendments and supplements to the special law (Law no. 302/2004 on international judicial cooperation in criminal matters).

In this paper we will examine the main changes and additions brought to the special law, with direct reference to the recognition and enforcement of judgments passed in third countries concerning criminal law penalties of deprivation of liberty.

2. Measures Prior to the Notification of the Competent Court

In order to initiate the procedure for recognition and enforcement of a deprivation of liberty judgment, it is necessary that the Romanian judicial authorities have the following information transmitted by the State in which the convicted person performs the applied criminal law sanction:

- the used name, nickname, alias only in the case of their knowledge, also the gender, nationality, identity card number or passport number, date and place of birth, photograph, last known address or residence, the languages that the person understands;
- the information about family, social or professional connections, that he has in Romania;
- the total duration of the sentence, the starting date of the execution, the date on which the penalty would be deemed as served, the served period, if applicable, the number of days to be deducted from the total penalty due to the effects of amnesty or previously granted pardon;
- Information on parole or early parole, if applicable;
- A copy, certified as appropriate, of the criminal ordinance or judgment given in the first trial and, if appropriate, in exercising the appeal ways;
- the applicable legal provisions;
- besides the case where the sentenced person is in Romania, the declaration of the convicted person compared to the application of execution in a prison or in a medical unit in Romania of the sentence imposed by the issuing State;
- where appropriate, any expertize, report or other medical documents attesting the physical and mental state of the convicted person, the treatment undergone by him in the territory of the issuing State and any recommendations for further treatment in Romania and, in the case where the convicted is a minor, the copy of the social inquiry report;
- information on the possibility of exercising by the sentenced person, after his transfer, of an extraordinary appeal against the conviction judgment;
- in the case of judgments given in absentia, in the case where the convicted person is in the territory of the issuing State, the information on a person's right to exercise an appeal, which has as effect the reexamination of the proceedings in his presence.

All the information transmitted by the issuing State, are transmitted to the Ministry of Justice, through its specialized directorate, office attached to the court of appeal in the jurisdiction to which the convicted person resides, in order to notify the competent court of appeal.

After receiving the file case the prosecutor will verify if:

- the enforcement of the foreign judgment in Romania would be contrary to the principle of non bis in idem;
- the convicted person is prosecuted in Romania for the same offenses for which the foreign judgment was rendered;
- the convicted person is prosecuted in Romania for offenses other than those for which the foreign judgment was rendered;
- is incident any of the reasons for refusal provided for by law (there are considered the mandatory reasons imposing non-recognition and non-execution of the foreign judgment, which we will examine later);
- the convicted person benefits from the effects of the specialty rule; these provisions shall apply only if so specified in the applicable treaty in relation to the issuing State or it is in accordance with the reserve or declaration given by the issuing State to a multilateral treaty, accepted by Romania, the transfer is conditioned by the compliance with the specialty rule [article 134 paragraph (2) of Law no. 302/2004].

If, by the notification of the court, the issuing State demand or the request of the convicted person to transfer in Romania is withdrawn, the prosecutor classifies the case and returns the file to the specialized directorate of the Ministry of Justice.

3. The Duration and the Object of Recognition Procedure

Within 10 days from filing the case to court, the president of the court of the elected judge shall set a date for trial, the duration of the recognition judicial procedure of the foreign judgment is of 60 days.

The court will hear such case in the preliminary chamber with a panel of one judge, with the mandatory participation of the prosecutor.

The object of recognition procedure of foreign judgment has a double valence, respectively:

- checking the conditions provided by law (mentioned above) and if they match, the foreign judgment will have legal effect in the Romanian territory;
- transfer of the convicted person to a prison or medical facility in Romania.

Other provisions relating to pecuniary penalties, the security measures or legal expenses and any other provision of the foreign judgment, other than those relating to execution of the sentence of life imprisonment or imprisonment or custodial measure not subject to recognition procedure, unless expressly requested by the issuing State. In this situation (when the issuing state requests it), the court will rule also on the recognition and enforcement of these provisions.

If the person has been convicted of several offenses, the verification of the conditions is achieved for each offense; when these conditions are fulfilled only for certain offenses, the court may order partial recognition of the foreign judgment; in such a situation, before taking the decision, the Romanian court may consult the issuing State through the specialized directorate of the Ministry of Justice.

If, before the final case, the issuing State withdraws the application, the court rejects it as being unsubstantiated.

After examining the foreign judgment and verification of the works attached to the file, the court will decide one of the following solutions:

1. Establishes by sentence, the recognition and enforcement of the sentence imposed by the foreign court.
2. Establishes by sentence, the refusal of recognition demand and enforcement of foreign judgment in Romania.
3. If the court finds that the nature or duration of the penalty imposed by the foreign court does not correspond to the nature and duration of the punishment provided by the Romanian law for similar offenses, the Romanian court will:
   - adapt, by the sentence, the sentence of deprivation of liberty, imposed by the foreign court (as required by the Romanian law), or when the adaptation is not possible,
   - establish and implement, through a sentence, the penalty for the committed offense.

In the recent Romanian doctrine, adapting the criminal sanction in such circumstances has been identified as its re-individualization, motivated by the fact that the court of the issuing State has achieved a first individualization, and this has been resubmitted to a new individualization (by the Romanian court), according to the Romanian law (Rusu, 2011, pp. 552-572).

The Romanian court will adapt the sentence imposed by the foreign court, where:

- in terms of its nature it does not match the name or the regime with the sanctions regulated by the Romanian law;
- its duration exceeds, where appropriate, the maximum limit of the punishment provided by the Romanian criminal law for the same offense or the general maximum limit of the imprisonment sentence under the criminal Romanian law or when the duration of the resulted penalty applied in the case of competitive offenses exceeds the total penalties established for concurrent offenses or general maximum limit of the imprisonment sentence allowed by the Romanian criminal law. In this case, the adaptation is to reduce the sentence to the maximum limit permitted by the Romanian criminal law for competitive offenses.

The penalty established by the Romanian court, under the circumstances mentioned above, must correspond as far as possible, in terms of nature or duration, with the one used in the issuing State, and it shall not aggravate the situation of the sentenced person. The sentence applied in the issuing State cannot be changed in a pecuniary penalty.

In the second case (when the court determines and applies the punishment, by sentence), the establishment and application of the punishment for the committed offense, the court is bound by the finding of facts, conditions and circumstances in which they were committed, so as reflected explicitly or implicitly in the foreign judgment, also:

- it will not change a custodial sentence into a pecuniary penalty;
- it shall deduct fully from the sentence applied to the executed period by the convicted person in the issuing State;
- it will not aggravate the situation of the sentenced person and it will not be bound by the minimum limit of the penalty provided for in the Romanian criminal law for the committed offense.

The provisions referred to above shall not be applied when the treaty applicable in relation to the issuing state excludes the conversion of conviction or if the issuing State expressly stated that the

transfer will be given only if the Romanian state will execute either the sentence imposed by the foreign court, either the penalty applied by the Romanian court, according to the above.

The sentence passed by the court under the situation of re-individualization of punishment will be prepared within 5 days of the ruling, and it will be transmitted to the specialized directorate of the Ministry of Justice in order to communicate to the convicted person. The sentence may be appealed within 10 days, by the prosecutor, ex officio or at the request of the Minister of Justice, and also by the convicted person. For the prosecutor, the period runs from the ruling, and for the convicted person from communicating the copy of the notice. The file will be submitted to the court of appeal within three days, and the appeal will be judged in 10 days, in closed session without summoning the convicted person; the prosecutor's presence is mandatory.

The enforcement of the sentence is achieved according to the provisions of the Code of Criminal Procedure. The final decision and a copy of the warrant of execution of the sentence of life imprisonment or imprisonment, as appropriate, it shall be communicated to the specialized directorate of the Ministry of Justice.

In the situation where, after issuing the warrant of execution of the sentence of life imprisonment or imprisonment, the issuing State:

- informs that the transfer cannot take place, the Romanian court orders the cancelation of the warrant execution of imprisonment or life imprisonment. In this situation, the sentence of recognition of the foreign criminal judgment is enforceable only in terms of post-release recidivism, unless the transfer is no longer possible because of granting amnesty or due to the fact that it was later established that the person was not guilty of the offense or as a result of the death of the convicted person in the issuing State;
- transmits a new judgment for the enforcement of another sentence, the provisions of the Code of Criminal Procedure relating to the legal dispute to execution, that are not contrary to the special law, it shall apply accordingly.

In the legal practice there may be situations where, after transferring the convicted person, the issuing State would transmit a new judgment for the execution of another sentence, in which case the recognition procedure should be the same.

If the Romanian court refused to recognize the foreign judgment, the request of the convicted person or the issuing State may be reexamined, only if there are new elements.

4. Optional and Mandatory Conditions for the Recognition and Enforcement of a Foreign Judgment

In the recent Romanian doctrine it was argued that for the recognition and enforcement in Romania of a final judgment passed in a third country (the third is everyone else who is not part of the EU) there are required a series of optional or mandatory conditions. (Boroi & Rusu, 2008, pp. 350-355)

These two distinct categories of conditions are provided in the Romanian law and also in the bilateral or regional agreements concluded by Romania or in the EU legislation (Boroi, Rusu & Balan-Rusu, 2008, pp. 136-152).

Accordingly, we will proceed in examining separately the compulsory and optional conditions that the court should consider when sentencing.

4.1. Optional Conditions for Recognition and Enforcement

In addition to the previously discussed conditions for recognition and enforcement of a judgment given in a third State, the Romanian court will verify the following conditions:

- the judgment is final and enforceable;
- the offense for which the penalty would have been applied, in the case where it had been committed an offense on the Romanian territory; if the penalty was imposed for several offenses, the verification of this condition is achieved for each offense separately;
- the convicted person has consented to the execution of the sentence in Romania, unless after the execution of the sentence, the person would be expelled in Romania. Regarding the consent, in relation to age and physical or mental condition of the convicted the person, it may be given by his representative;
- it is not incident any of the grounds for non-execution and non-recognition provided by the Romanian law; in the case where the court finds that it is incident one of the cases of non-recognition and non-execution, it may rule the recognition only if there is the conviction that the execution of the sentence in Romania would significantly contribute to the social reintegration of the sentenced person;
- the execution in Romania of the sentence of life imprisonment or imprisonment or custodial measure is likely to facilitate the social reintegration of the sentenced person.

Identifying these conditions as being optional and not mandatory, it follows from the way the Romanian legislator stated, i.e. *the foreign judgment may be recognized* [article 136, paragraph (1) of the Special Law].

From the interpretation of the legal provisions it results that the Romanian court may decide the recognition and enforcement of such a judgment, even if the mentioned above conditions are not met. It is important to note is that these conditions must be examined in relation to each case because in the judicial practice there may be specific features of one case or another.

Consequently, even if these conditions are met, the Romanian court may refuse the recognition and enforcement of such judgment passed in a third State.

4.2. Mandatory Conditions of Non-recognition and Non-execution

Unlike the optional conditions that allow the Romanian court to adopt a decision for recognition and enforcement, or conversely, non-recognition and non-execution of a foreign judgment, the prerequisites require the Romanian court the non-recognition and the non-execution of such a decision. (Rusu & Balan-Rusu, 2013, pp. 83-94)

On the basis of international legal instruments to which Romania is a party, and those of the special law, the foreign judgment shall not be recognized and enforced by the Romanian competent court in the following cases:

1. Recognition and enforcement in Romania of the foreign judgment would be contrary to the fundamental principles of the legal system of the Romanian state [article 136, paragraph (2), letter a) of Law no. 302/2004].

We note that the wording used by the Romanian legislator is general, without a specific reference to those principles, as in the Romanian law there are not well established such principles (we are

referring to the expression used by the legislator, *the fundamental principles of the legal system of the Romanian state*).

However, we consider that the Romanian legislator took into account both the fundamental principles set out in the Constitution and the fundamental principles of criminal law and Romanian criminal proceedings.

2. The judgment concerns a political offense or an offense connected to a political offense or a military offense that is not an offense of common law [article 136, paragraph (2), letter b) of Law no. 302/2004].

The identification of this condition requires, inter alia, studying the law of the issuing State, the provision of the Romanian law being as current as possible, seen in the light of scientific progress of criminal law and criminal procedure throughout the world.

3. The penalty was imposed for reasons of race, religion, gender, nationality, political or ideological opinions or membership to a particular social group [article 136, paragraph (2), letter c) of Law no. 302/2004].

This provision was necessary given the different laws of other world's states, whose democratic regimes are questionable, beings often judged as dictatorship regimes. No problem arises when it comes to European states and other countries of the world with recognized democratic regimes.

4. The person has been finally convicted in Romania for the same crimes. If the foreign judgment has been given for other offenses, the court may order partial recognition of it, if the other conditions are met [article 136, paragraph (2), letter d) of Law no. 302/2004].

The provision required under the principle of *non bis in idem*, a unanimous principle recognized both in the European law and the laws of some states with recognized democratic regimes.

5. The person has been convicted in another state for the same crimes, and the foreign judgment passed in this state has been previously recognized in Romania [article 136, paragraph (2), letter e) of Law no. 302/2004].

6. The convicted person enjoys criminal jurisdiction immunity in Romania [article 136, paragraph (2), letter f) of Law no. 302/2004].

7. The penalty was imposed on a person who is not criminally liable under the Romanian law [article 136, paragraph (2), letter g) of Law no. 302/2004].

This condition is consistent with the Romanian law, meaning that the Romanian judicial authorities may not recognize and enforce a judgment which concerns primarily a person who is not criminally liable; this applies to justifiable and the non-imputable causes referred to mainly in articles 18-31 of the Criminal Code; there will also be considered other causes, such as those provided in article 152-159 of the Criminal Code.

8. The penalty consists of a measure of psychiatric or medical assistance that cannot be ensured in Romania or, where appropriate, it provides a medical or therapeutic treatment that cannot be supervised in Romania, in accordance with the national legal or healthcare system [article 136, paragraph (2), letter h) of Law no. 302/2004].

9. The convicted person has left Romania, and he has established the domicile in another state, and its links with the Romanian state are not significant [article 136, paragraph (2), letter i) of Law no. 302/2004].

10. The convicted person has committed a serious crime, likely to alarm the society, or has had close relations with members of a criminal organization likely to make questionable his social reintegration in Romania [article 136, paragraph (2), letter j) of Law no. 302/2004].

This condition is not mentioned in the international legal instruments, but its adoption was imposed amid new mutations occurred in the structure of transnational organized crime, terrorism in particular.

11. There are objective indications that the judgment was given in breach of fundamental rights and freedoms, notably the sentence has been imposed to punish the convicted person on grounds of gender, race, religion, ethnic origin, nationality, language, political beliefs or sexual orientation, and the convicted person had no opportunity to challenge these circumstances at the European Court of Human Rights or other international bodies [article 136, paragraph (2), letter j) of Law no. 302/2004].

Besides these grounds for non-recognition, the Romanian courts, depending on the particularities of each case, may refuse the recognition and enforcement of foreign judgment in the following cases:

- the person is investigated in Romania for the same offense for which he was convicted abroad. In the case where the judgment was given for other offenses, the court may order its partial recognition, if the other conditions are met [article 136, paragraph (3), letter a) of Law no. 302/2004];
- when the issuing State has refused an application under article 134, paragraph (1) of the special law.

If the person is investigated in Romania for the same offense for which he was convicted in the third state, instead of refusing recognition, the court may order either the recognition of the foreign judgment or the suspension of the cause by taking a decision in the criminal proceedings under the investigation of the Romanian judicial authorities.

Foreign judgment shall not be recognized or, if recognized, would not be enforced when, according to the Romanian criminal law, the amnesty, pardoning, decriminalization of the offense intervene, and any other cases provided by the law.

5. Conclusions

The evolution of the crime at global crime level, especially the cross-border ones coordinated by the organized crime networks, has required the adoption of an effective legal framework which would allow effective prevention and combating crime of this kind. The main problem that caused different reactions of world states was that of recognition and enforcement of a judgment established in another State, a problem which in time was largely solved. Romania, by adopting special domestic law, and through the active participation to the complex activity of international judicial cooperation in criminal matters was limited to signing international legal instruments, has shown that is actively involved in the global effort oriented in this direction. Amid European orientations in the field, Romania has adopted a series of specific provisions in relation to the recognition and enforcement of judgments emanating from another state (which is not part of the European Union); the provisions of this law from this point of view are more restrictive. The general conclusion that emerges is that the current regulation of this form of international judicial cooperation in criminal matters from the Romanian state law is current, being desirable for other countries in the world to regulate this institution, in the manner, which it should give mutual confidence in the decisions emanating from the judicial authority of another State. Undoubtedly, depending on the political regime at the head of each state of the world, there will always be some reserves, which are always justified when the political regime of that State

is subject to certain criticisms regarding the rights and freedoms of the citizens to the standards recognized by the UN.

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Mediation in Medical Malpractice - Realities and Prospects

Alexandru Boroi[1], Gina Negruţ[2], Marian Şerban Petrescu[3]

Abstract: Medical professional liability is the result of specific breaches of the medical profession, which are contained in Law 95/2006 on health reform. Beyond the motivation of blaming medical personnel activity, there are many other aspects that may give rise to controversy in terms of medical ethics, from the informed consent of the patient and to the need for reaching criminal responsibility and compensation in cases of medical malpractice.

Keywords: medical profession; medical malpractice; medical practice guidelines; clinical audit; mediation

1. General Considerations on Public Health Insurance

Universal Declaration of Human Rights proclaims in article 3 "that every human being has the right to life, liberty and security of person" and the International Covenant on Civil and Political Rights has established in article 6 point 1 that "the right to life is inherent in the human person. This right shall be protected by law so that no one may be deprived of his life in an arbitrary manner". Also, in the article 25 paragraph 1 of the Universal Declaration of Human Rights, enshrined the right of every man to "a level of living adequate for the health and welfare of him and his family, including food, clothing, housing, medical care and necessary social services, having in the same time the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood as a result of circumstances beyond his control".

This is consecrated by the provisions of article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (known as Title simplified by the European Convention on Human Rights and the Convention EC), which provides that "the right to life shall be protected by law", thus constituting a guarantee of compliance the fundamental right to life of every person.

From the content of the right to life enshrined in the aforementioned provisions, it appears the negative primary obligation of signatory States to this Convention, to not affect this right by its agents that is not to cause death to a person, except as specified situations in the second paragraph of the text

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(Bîrsan, 2010). At the same time, from the provisions of that article, we find positive obligation imposed by state authorities that must take practical measures to be taken to protect the right to life of every individual, which resulted in the need to protect the right to life in public health because the holder of the right to file in an individual, in fact, only human person.

In this respect, the European Court of Human Rights held that positive obligations imposed to signatory states also apply to public health. This implies certain obligations for public authorities to adopt provisions to regulate public and private hospitals activity in order to protect the lives of sick persons, as well as the obligation of establishment of an effective and independent judiciary system to establish the causes of death of a person and making it possible, if the criminal liability of health professionals (Bîrsan, 2010). However, the Court held that if the undermining of life is not voluntary, the positive obligation arising from article 2 of the Convention does not necessarily imply in all cases recourse to criminal proceedings, as if proving the existence of medical negligence, the judiciary must give to interested persons an appeal before the civil courts, alone or with criminal courts with which to be able to establish medical liability, and also to obtain compensations, not being excluded any disciplinary measures to be taken against those who committed acts of medical negligence (Bîrsan, 2010).

In accordance with article 2 of the Convention are part of the provisions of article 34 of the Constitution, which enshrined the right to health; the state is obliged to take measures to ensure hygiene and public health (Bădescu & Andruş & Năstase, 2008). The method of practical application of these provisions shall be governed by the provisions of article 34 paragraph 2, which stipulates that "organization of healthcare and social security system for sickness, accidents, maternity and recovery, control the exercise of medical professions and paramedical activities, and other measures to protect physical and mental health of the person are established by law".

Under the provisions of article 374 of Law no. 95/2006 on healthcare reform, published in the Official Gazette no. 372, April 28th 2006, the medical profession is mainly aimed at ensuring health, preventing illness, promotion, maintenance and recovery of individual and community health. To achieve this end, throughout the profession exercise, the doctor must prove availability, reliability, commitment and respect for the human being so that decisions of a medical nature that it will take into account the interests and rights of the patient, medical principles generally accepted, non-discrimination between patients, respect for human dignity, the principles of medical ethics and deontology, patient health care and public health, which otherwise noted also by the provisions of article 1 of the Code of Ethics of Physicians of Romania, published in the Official Gazette no. 298 of May 7th 2012.

There may however be some incompatibility in the medical profession, by reason of the employee or the collaborator of units of production or distribution of pharmaceuticals or medical supplies, and if the physical or mental health of doctor is inadequate to medical practice. There are also some cases the doctor may be declared unworthy to exercise the medical profession, where he was sentenced for committing intentional crimes against humanity or a life in circumstances related to the exercise of the medical profession and for which has not intervened the rehabilitation, and if the punishment for the interdiction to practice the profession, on the period established by judicial or disciplinary decision.

Exercise of the medical profession is performed in accordance with article 370 of the Act on Health Reform, by individuals holding a formal qualification in medicine, represented by medical degree awarded by a medical or pharmaceutical higher education institution accredited in Romania; specialist certificate issued by the Ministry of Public Health; diploma, certificate or other title in medicine

awarded in accordance with the norms of the European Union by the member states of the European Union, the states being member of the European Economic Area or the Swiss Confederation; diploma, certificate or other title in medicine acquired in a third country and recognized by a Member State of the European Union or belonging to the European Economic Area or to the Swiss Confederation, or the equivalent in Romania.

2. The Concept of Malpractice in light of the Provisions of Law No. 95/2006 on Health Reform

In carrying out its work, the doctor is in a medical legal report, volitional, governed by the legal standard care in which participants are manifested as holders of rights and obligations by which exercise is performed the end of the legal norm, the doctor being able to establish legal relations with individuals, represented by doctors, patients, nurses, as well as legal persons represented by hospitals, clinics, Home insurance or Medical College.

The medical profession is exercised based on the Certificate of Membership of the College of Physicians in Romania, dentist profession is exercised based on the Certificate of Membership issued by the College of Dentists, and the pharmacist, based on the Certificate of Membership of the College of Pharmacists, which are approved annually based on the liability insurance for *mistakes in the professional activity*, i.e. various cases of *malpractice*, which can engage with civil liability of medical personnel and of medical products and services provider, healthcare and pharmaceuticals regulated by the provisions contained in Title XV of Law no. 95/2006 on healthcare reform, and a disciplinary liability, and in some cases even their criminal liability.

In this sense, by provisions of article 642 paragraph 1 letter b of Law no. 95/2006, the legislator establishes a definition of *malpractice*, as being the professional error committed in the practice of medicine or medical-pharmaceutical, tortious the patient, involving civil liability of medical staff (which include the doctor, dentist, pharmacist, nurses and midwives providing care) and the provider of medical products and services, health and pharmaceuticals.

As regards the doctrine and practice of medicine, they are constant in the appreciation and request of the following *conditions for the existence of malpractice cases*, i.e. it is about the existence of an professional obligation of the healthcare provider in the doctor-patient relationship; existence of *a certain standard of medical practice*, to be observed, depending on the specialty and level of expertise and experience of the doctor; breach of professional duty by the healthcare provider, its failure to fulfill its flawed; production of patient injury; the existence of a causal link, such as cause and effect, between the breach of the medical professional obligation and the damage caused to the patient (Simion, 2010). In support of these allegations, we mention that in health care, medical personnel has the obligation to apply therapeutic standards, establishment by practice guidelines in the specialty, nationally approved, or, failing that, applying the standards recognized by the medical community of respective specialty.

In medical procedures application, in accordance with these standards, assessment of health risk will be always made from the perspective of the rights and correlative obligations of the physician and patients, the doctor having the right to be informed by the patient about symptoms, evolution and specific reactions to the treatment given, but on the other hand, the doctor has also the right to terminate or refuse the continuation of the medical treatment.

In Romania, for the performance of his duties with regard to setting standards of quality of care, Medical College of Romania has initiated a program of developing national guidelines for diagnosis and treatment, resulted in the emergence in 1999 of the first volume of these guidelines.

Based on this experience and continuous consultation of committees of scientific experts in the field, it came to creating a uniform methodology of developing clinical practice guidelines, these presenting the steps that need to follow the doctor in the investigation and drug administration, meanwhile constituting an efficient health care system, which should regulate how are treated the patients, but also a means by which to control the spending of financial resources allocated to health. These documents were made by experts from the committees of the Ministry of Health following the European models underlying the development of therapeutic protocols.

These, however, must be translated into some application protocols specific to each category of hospital as guides contain general information on the diagnosis and treatment of various diseases, while the protocols are the ones that really clarify the situation in detail. We can say, however, actually, that the Ministry of Health does not verify if these guidelines are complied with and if hospitals have specific protocols for diagnostic, medical procedures, treatment, in Romania still not existing a verification and monitoring mechanism of the care in hospitals. Consequently, deviations are not found, neither sanctioned, but when there is a prior complaint from a patient, in which case is reviewed by the Medical College Malpractice Commission and not by the Ministry of Health, so most of the abuses do not fall into medical error and is therefore likely that any statements complained to not be always punished.

The next important step, however, for the activity of verifying compliance of duties of doctors will be setting up Clinical Audit, concept that in Romania is still not used, but it works in other countries and is considered an audit of medical practice, but from the perspective of the clinician.

Clinical audit would be an institution under the Ministry of Health that will have as attributions just the verification of compliance of best practice guidelines and protocols of medical practice, especially since the medical activities always involve a legitimate risk, consciously accepted and therefore justified, if it satisfies the following conditions: saves from greater danger with a lower risk accepted; the danger is real, actual and imminent and unavoidable fact; good value at risk is less than the damage that might have occurred (Scripcaru & Terbancea, 1999). Moreover, American medical practice in hospitals reminds about establishment in public and private health units of some *risk management* departments performing specific activities that include primarily to identify potential hazards associated with the activity of health professionals, followed by the implementation of measures required to eliminate or at least mitigate risks related to them, and in the event of disputes in court, all these departments make reports for registration of all circumstances in which the injury occurred to a patient (Walston-Dunham, 2006).

3. Negotiated Justice in Cases of Medical Malpractice

In carrying out medical activities, in terms of medical malpractice definition provided in article 642 of Law no. 95/2006, we understand that the act or omission that violates the doctor's professional duty that must follow and in virtue of the social role it holds, must be committed to the shape of guilt fault in one of its modalities (imprudence, negligence, unprepared, easiness), but may be situations where the physician acts intentionally or when may retain the shape of guilt of praeterintention.

Moreover, the commission of an act of malpractice is not only the premise of civil or disciplinary liability of the doctor, as apparent from the wording of article 642, but may result in criminal liability for the commission thereof of the following types of crime (according to Law no. 286/2009 on the Criminal Code, published in the Official Gazette no. 510 of July 24th 2009: murder (article 188), causing or aiding suicide (article 191), involuntary manslaughter (article 192), hitting or other violence (article 193), injury (article 194), bodily injury causing death (article 195), negligent injury (article 196), termination of pregnancy (article 201), fetal injury (article 202), in which situation, criminal liability of a doctor for committing one of these offenses will be made through criminal proceedings in a criminal trial. If injury to the patient is the result of a crime, criminal proceedings with the right to be born a civil right of action in order to repair the prejudice (Lorincz, 2015) in accordance with article 1381 paragraph 1 of Law no. 287/2009 on the Civil Code, published in the Official Gazette no. 511 of July 24th 2009, which provides that "any injury entitles to reparation".

In this case, if it were to relate to the above, it follows that in terms of the essential requirements concerning civil liability, are asked to be met the following conditions: to have committed an offense under the criminal law, the act to be committed with guilt required by law to be able to held criminal liability of the doctor, to exist an injury and to be a causal link between the wrongful act and the damage. In these circumstances it is necessary that the interested party to prove that there is a professional duty at a level of standard of therapeutic practice and this professional obligation unduly was not performed or was performed inadequately provided in standard therapeutic medical practice guidelines, creating in this way a patient injury, between professional breach and the damage there is a cause-effect link (Simion, 2010). By adopting the provisions of Law no. 135/2010 on the Criminal Procedure Code (published in the Official Gazette no. 486 of July 15th 2010), were introduced separately in article 23 the provisions according to which "in the criminal proceedings on civil claims, the defendant, the civil party and civilly responsible party may enter into a transaction or mediation agreement, according to law".

Currently, Western statistics show that most often disputes arising from injury to patients as a result of medical malpractice cases do not always get to court, with opinion lately that leans towards solving their non-contentious. In this respect, the European doctrine raises both conciliation and mediation or arbitration as alternative ways of resolving conflicts arising from inadequate provision of medical services (Moreno & Hernandez Gil & Hernandez Gil, 2002). In this respect, conflict mediation agreement has emerged as a more acceptable solution and to implement than a sentence imposed, the very existence of expression "consensual justice" or "negotiation" as the institution of criminal law meaning at first sight a paradox, if we consider the traditional format of criminal law that does not allow discussions, concessions or compromises (Pradel, 1988).

In Romania, was adopted the Law no. 192/2006 on mediation and organization of mediator published in the Official Gazette no. 441 of May 22nd 2006 profession, law transposing at an issue that was required to be introduced by laws, following the international trend of using alternative methods of dispute resolution outside the state judicial system by procedure conducted by a third party, neutral, in which situation the mediation is an important component, being regulated in wording of articles 67-70, which contain specific provisions on mediation in criminal cases (Beligrădeanu, 2006). The provisions of article 1 point 13 of Law no. 115/2012 amending and supplementing Law no. 192/2006 on mediation and the organization of mediator, published in the Official Gazette no. 462 on July 09th 2012, profession were introduced the provisions of article 601 where at the letter d it is disposed on the need for "the parties in the conflict to prove participation in briefings on the benefits of mediation, where professional liability way be undertaken for malpractice cases, whether by special laws is not

provided another procedure", currently on medical malpractice cases, with no provisions in Law no. 95/2006 to regulate the use of "negotiated justice" as mediation to resolve amicably a medical malpractice cases notified by patients or their relatives.

In order to regulate a procedure to resolve amicably malpractice cases there have been numerous proposals, among which Law Project on medical malpractice in 2005, which, in chapter 6 was containing provisions relating to the "conciliation procedure of malpractice cases" and in 2014, Law Project to amend the provisions of Title XV on Civil liability of medical personnel and provider of medical products and services, healthcare and pharmaceuticals, where the contents of Chapter VII was containing provisions on the "procedure for amicable settlement of incidents of malpractice".

The idea of inserting a preliminary procedure in which to be able to meet and negotiate physician, medical facility, the insurer and the patient is a good idea that would benefit all stakeholders if desired shortening cumbersome procedures involved solving cases to be decided, but the provisions are still incomplete, and may give rise to comments. First we specify that the procedure was not differentiated by gravity of malpractice cases encountered in practice, that makes no distinction between cases of malpractice that cause the patient's death and of those that cause body injuries because, according to article 673 of the Project, even if involuntary manslaughter occurs by fault of the patient, the parties may negotiate criminal responsibility for crimes against life, which if it were to relate to article 681 paragraph 2 of the project would lead to *"the extinction of legal liability of the doctor or health care provider, regardless of its nature, if the offense was committed by malpractice negligence", in which situation a question may arise as to remove criminal liability of the doctor or health care provider".*

In fact, the amicable settlement procedure was intended to be of short term, short deadlines being provided, and also a simplification and accessibility of the procedure in care provider so that any person who considers injured by an act of malpractice to can submit a cover injury application to the healthcare provider and they are expected within 15 days of receipt of the request to collect all documents and records relating to the provision of healthcare, conformity of duplicates and draw up a declaration of integrity in relation to the data held and will notify the applicant and co-insurance company with which he and the medical staff have concluded a civil malpractice insurance. In this situation, evaluating and establishing professional error would be made by medical experts appointed by the parties under the mutual agreement procedure (the injured party, the insured and the insurer). The experts will prepare a report within 30 days on the case, report that will be communicated simultaneously to all parties and the insurance company will be obliged within 15 days to decide and notify the parties the cover of the injury. For the negotiation of the amount of the injury, in accordance with article 680 of the Project, parties may contact a mediator according to Law no. 192/2006.

The procedure can however give rise to abuses, the law does not limit the number of time or medical expertise to which the patient is required to submit, not specifying which institutions will be able to perform these examinations (only forensic institutions - in this moment, the only evidence useful, relevant and conclusive is the forensic expertise prepared in accordance with the Order 1134/2000 - or to other units, including the hospital where works the doctor accused of malpractice) (Murariu & Iepure, 2014). Nor is stated in the text of the law who bears the expense of such expertise and patient's travel costs, if he can move, not provided any sanctions, if not respected procedural deadlines provided in the text of the Project.

4. Conclusion

Although the Amendment Project of the Law 95/2006 does not give significant improvement to patients-victims of medical malpractice, however, these provisions attempt to comply with legal rules governing the liability of healthcare professionals and the healthcare provider, healthcare and pharmaceuticals. However, at one year from the aforementioned legislative proposal, the situation of the patients-victims of medical malpractice is resolved as before, as a result of the aforementioned provisions remained only in the early stage of the project, without being part integral of the law. On the other hand, despite the balancing efforts made by European legislation to promote quasi procedures, we believe that it will not be refused to the parties involved in a case of medical malpractice, the right to waive the conflict settlement in court as long as the law allows, and this is backed up by the will of those directly affected.

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Prolegomena of Human Rights.
Historical Roots and Globalization

Ana-Alina Dumitrache-Ionescu[1]

Abstract: The paper Prolegomena of Human Rights. Historical Roots and Globalization analyses the complexity of the history of human rights which revolve around an incessant struggle for the awareness of the value of the human being. It is the history which defends the man, the human being, regarded individually or collectively, who was subjected in the course of time to some atrocities and abuses, confronting itself with exploitation, discrimination, oppression, slavery, torture and even extermination. Moreover, the historical evolution of human rights knows halting places in which the concepts of human rights are accompanied by ambiguity, by different meanings for different people and vary in accordance with the context. By way of resemblance, the problem of human rights in the context of globalization which transforms human rights into rights of the global citizen, rights which acquire new dimensions and significances imposed by the economic, politic and social changes specific of globalization is approached in this paper. The global vision of the new human rights involves both the opportunity to have a say when they are infringed for example, when they are subjected to torture or terror, and where human rights abuses are carried out by the people, for example, trafficking in human beings. (Ritzer, & Dean, 2015, p. 115)

Keywords: human rights; historical roots; Globalization Era

1. General Aspects about the Historical Evolution of Human Rights

With a likeness to laws, rights must not be regarded as unchangeable organizations pertaining to different legislations or institutions but rather as dynamical and historical institutions modeled and influenced by economic, political and social processes. (Ibhawoh, 2007, p. 17)

The complexity of the history of human rights revolves around a continuous fight for the awareness of the value of the human being, a struggle that has lasted for centuries, cultures and different spaces from Asia all the way up to Europe and from the Middle East all the way up to America and Africa. It is the history which defends the man, the human being, regarded individually or collectively, a human being who has been subjected in the course of time to some atrocities and abuses, confronting itself with the exploitation, discrimination, oppression, slavery, torture and even extermination.

By way of resemblance, the historical evolution of human rights knows halting places in which the concepts of human rights are accompanied by ambiguity, by different meanings for different people and they vary in accordance with the context.

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The forces of historical change in the benefit of human rights are varied, including different visions, different actions, religious beliefs, philosophical, technological patterns of thought, wars and worldwide atrocities which dazzled profoundly the human conscience. The responsibility of human beings towards humans was broached upon by all religions of the world. Christianity was a powerful promoter of the idea that people must live in peace, justice and compassion.

The role of religions in defending human rights was outlined by the establishment of some visions and normative standards in the form of some moral codes with regard to the dignity of human beings and the way in which they must be treated.

By developing these moral imperatives, the visions of religions sustained the development of an essential concept for the rights of human beings: the responsibility of human beings to act for the well-being of others. Moreover, religions created a bridge of connection between rights and obligations. (Lauren, 2013, pp. 6-9)

Explaining the multitude of cultural, economic, social factors which contributed to the building of a complex history of human rights, we acquiesce the fact that it has never been balanced, precise, but it was characterized as well as by profound changes in different stages as by continuity. (Forsythe, 2009, pp. 393 – 394)

2. Religions of the World and Human Rights

Although, there have been expressed many controversial opinions in what regards the historical origins of human rights, the authors of the Universal Declaration of Human Rights and representatives of the UNESCO members[1] averred the fact that modern understanding of human rights is influenced by religious humanism and primeval traditions. (Isay, 2008, p. 18)

Religious traditions are an authentic spring of the first significant philosophical conceptions with regard to human rights, playing an essential role in propagating humanistic outlooks. (Puşcă, & Puşcă, 2004, p. 10)

The value and dignity of human beings, their consanguinity, kindness, compassion towards others and the way of treating other people as they wish to be treated are values defended by all great religions of the world, starting from the primitive forms of religious beliefs, despite significant differences among them.

The sacredness of life, charity and correctness towards others are values met in the sacred writings of Hinduism, well over 3000 years before our times. (Vedas, Upanishads).

The scriptures of Judaism underline humanity, laws, ethical behavior, freedom from oppression and social justice.

The teachings of Buddhism, whose founder is Siddartha Guatama, remind us about human equality, the value of each human being and the necessity that those who adhere to this belief should be benevolent and should manifest compassion towards all human beings. (Forsythe, 2009, p. 394)

The Revelations of Mohamed from the 7th century mention the duty of those who believe in Islam to be correct, clement and to manifest compassion towards the vulnerable ones.

[1] United Nations Organization for Education, Science and Culture. It has 195 members and 8 associated states.

Some authors consider Islam to be a pioneer in acknowledging human rights, in protecting them and in their application, thus human rights were declared and acknowledged by Islam fourteen centuries ago. Rights acknowledged by Islam are: dignity, protection of war prisoners, the right to a fair trial, the right to equality, the right to faith, the right to individual freedom etc. (Muhammad, 2012, pp. 6-7)

The Life and teachings of Jesus, The Worthy Samarit from the New Testament and from the Bible, underline the responsibilities of Christian people to love others as they love themselves.

Christian religion has ennobled the concept of human fraternity and the concept of equality between all people facing the divinity up to the level of a principle. In their reciprocal relationships, people must be tolerant and they must abide by the right of others to live in accordance with their own habits, in the spirit of understanding and complete respect. (Bolintineanu, & Năstase, 1995, p. 91)

Although the practice of certain religions to counteract hostile beliefs has transformed in many cases in intolerance towards human beings who were accused of committing certain heresies, the contribution of religions to the further development of human rights by the establishment of some traditions and the manifestation of principles starting from divine revelation, which has known in different historical stages different interpretations is irrefragable.

3. Philosophical and Moral Conceptions about Human Rights

The ethical values of the moral and political philosophy, derived out of human reason and profane studies, represent other important sources of the historical evolution of human rights, starting from the principle according to which people hold certain rights just because they are human beings.

In ancient China one of the earliest contributions to the development of the concept of human rights was identified. The founder of the monist school of moral philosophy, Mo Tze, has made reference to the universal obligation of all comprehensive respect of other human beings anywhere in the world. (Forsythe, 2009, p. 395)

His ideas were shared also by the philosophers Kong Qiu and Confucius, according to which, all people share naturally a certain humanity which they possess as a value or moral force. Each man has the duty not to hurt others. (Forsythe, 2009, p. 395)

In ancient India, the philosopher Kautilya, the author of the book The Artha Shastra, underlined the fact that the individual value of each human being bestows upon him a series of inherent rights which must be abided by inclusively by laws.

The concepts of natural rights and of natural law appear delineated by philosophers of ancient Rome and Greece.

Protagoras from Abdera underlined the idea that the man is the measure all things and that natural and social phenomena revolve around the man.

Following in the footsteps of his teacher Socrates, Platon wrote the paper the Republic: a universal law of nature with eternal standards or the moral justice is the elements of a naturally unchanged order which is paramount to the interests of a certain state; the conduct of humans towards others must be in harmony with this law.

Aristotle, the disciple of Platon, in his work the Politics has contended with the fact that human nature and virtue can be perfected if people treat others not necessarily in accordance to laws but in ways established only by their nature. According to Aristotle, the man is social by his nature and the family

is the first step of association of human beings; the association of more families leads to the creation of villages and cities, the union of more villages and cities give birth to the state; any association is established in the benefit of an indistinct good. (Puşcă, & Puşcă, 2004, p. 8)

It is noteworthy of being remarked the fact that there are three principles of law mentioned by the judicial adviser Ulpian: to lead an honest life; not to blight what belongs to another and to attribute to each what belongs to him (*Juris praecepta sunt haec: ni'oneste vivere, alterum non laedere, suum cuique tribuere).* (Puşcă, & Puşcă, 2004, p. 8)

Marcus Tullius Cicero, in his papers About laws and About duty, contends the fact that natural law, with its obligations to abide by a certain standard of justice was valid for all nations from all times, which brings all people together and imposes the universal responsibility to abide by the inherent value of each person. (Forsythe, 2009, p. 395)

4. The Judicial Evolution of Human Rights

The gradual decline of feudal absolutism has opened the way of free markets of capitalism, defending the concept of being free from economic slavery.

Thus, the foreshadowing of some documents which espouse human rights is being favored.

At 15th June 1215, *Ioan Fără de Ţară/Ioan without Country* signs the first European document of protection of the human being, Magna Charta Libertatum, known under the denomination of Chart of Liberties or the First English Constitution. At pct. 39 of this document its is mentioned: No free man shall be carried away, imprisoned or disseized of or brought outside the law or blasted in any way and we will not go or send after him outside of a fair judgment of his siblings or according to the law. (Danziger, & Gillingham, 2003, p. 283)

We observe from the interpretation of this text the protection of the rights of human beings to live, the right to freedom, the right to an equitable process and the free access to justice etc.

The period of Renaissance has played a very important role for the evolution of the concept of human rights, this concept being endowed with new valences starting from the human conscience. Consequently, the freedom in the face of censorship, the interdiction of intolerance, the freedom of expression and individual freedom represented new connotations of this concept.

Christine De Pizan, in her work *Cartea Oraşului Doamnelor/The Book of the Ladies' Town* (1405), has had the courage to underline the inclusion of women in each broaching upon natural rights and natural law.

Hugo Grotius, the father of international modern law, Dutch diplomat and judicial, terrified by the abuses of 17th century, wrote in his paper On the right to war and peace (1625) that: Natural law is derivable from God and the nature attributes to human beings certain rights naturally irrespective of religion or civil statute.

The Petition of Rights, a document elaborated in the year 1628 by king Sir Edward Coke, followed by the leaders of the American revolution, John Adams and Patrick Henry. The Petition of Rights represented an answer of King Sir Edward Coke to the serious attacks exercised by Charles I on the liberties of Englishmen. According to this document, the King has no authority to imprison a person arbitrarily and he must honor the rights of the English people.

Among the rights acknowledged to the English people, this document refers to the interdiction of imprisonments and detainments on the short term without a legal accusation; the interdiction of imprisonments and detainments on the long term for want of a process; the interdiction of credits and taxes forced without the accord of the Parliament; the interdiction of the stationing of soldiers in the houses of citizens on time of peace. (Patterson, 2004, pp. 36-37)

In the year 1679, The House of Commons of the English Parliament adopted Habeas Corpus Act, a law which decreed the communication of legal grounds for arresting a person in at most a few days from the intake of a measurement , whereas on the contrary the person must be freed. Consequently, by means of this document the respect of the inviolability of the person as well as the rights of the arrested person was foreseen. (Patterson, 2004, pp. 36-38)

The Bill Of Rights, the British law adopted in 1689 which reconfirmed the traditional British liberties: the power of the Parliament to elaborate laws and to approve taxes, the freedom of expression, the interdiction of inhuman or degrading punishments. (Censer, 2004, pp. 35- 37)

In his works, A Letter about Tolerance and the Second Treaty about Governing, the philosopher John Lock underlined the rights of human beings and the obligation of the government to abide by them. All human beings have certain natural rights long before any government or any civil society existed. These rights include: the life, the liberty and the right to property. People created governments in order to protect these natural rights and are condign to oppose resistance in case they are trespassed. (Forsythe, 2009, p. 397)

These ideas have been betaken, modeled and developed by the great thinkers of the Enlightenment (the 17th century): Francis Hutcheson – *Scurtă introducere în filosofia morală*/*Brief introduction to moral philosophy;* Jean – Jaques Burlamaqui - *Principiile dreptului natural*/*Principles of natural law* (1747); Montesquieu – *Spiritul legilor/Spirit of the Laws* (1748); Adam Smith – *Teoria sentimentelor Morale/Theory of Moral Sentiments* (1759); Jean Jaque Rousseau – *Contractul social/The Social Contract* (1748); Voltaire – *Tratat despre Toleranță/Treaty on Tolerance* (1763) etc. (Forsythe, 2009, p. 397)

The pinnacle of the contribution of the Enlightenment to the historical development of human rights was reached by means of the revolutions from the second half of the 18th century: the American revolution (1775- 1783) and the French revolution from 1789.

The Declaration of independence of SUA (1776), remarkable international document drafted from the theories of natural law of John Locke and Montesquieu, stems from an obvious truth*: people were created equal and endowed with inalienable rights,* reaffirming a series of rights: the right to life, the right to freedom, the pursuit of happiness, rights which governments must protect and promote.. (Fomerand, 2014, pp. 203- 204)

Another valuable precursor of the Universal Declaration of Human Rights is the Declaration of the Citizen and Human Rights of the British colonies, adopted in 1789. This unique document, more comprehensive than any library and more powerful than the armies of Napoleon, (Acton, L., apud Forsythe, 2009, p. 398) served on an ulterior basis as a preamble to the Constitution of France in 1791.

It establishes the principles of the French revolution as well as the fundamental rights of French citizens: all people are born free and equal in rights.

The Declaration provides the warranty of the rights to freedom, property, security and resistance to oppression from French citizens. Moreover, the conditions of this document foresee the freedom of speech, religion and equality in the face of law.

The fulminatory echo and the speedy progress in the field of human rights of the two revolutions especially with regards to the universality and the equality of natural rights has not managed to inhibit the trespassing of the rights of certain categories of people: women, servants, slaves, children, who were stuck outside the sphere of protection of certain rights.

The unprecedented amplitude of the phenomenon of slavery and of slave commerce has determined the British Parliament to react by adopting in 1807 the Act for the Abolition of the Slave Commerce and the USA Congress Act of interdiction of the Slave Commerce.

5. Human Rights in Globalization Era

Cultural, social and economic globalization plays an extremely important role in the reconfiguration of the international conception on human rights. Although there is no consensus regarding the last round of globalization, the end of the Second World War is considered to be a starting point. Thus, the historical trajectory of globalization in close connection with human rights, is projected starting with the year 1945 by the creation of the United Nations Organization, the first institution of global governance which, starting from the ideal of maintaining peace and security in the world has known a spectacular evolution whereas the promotion of human rights becomes one of its major objectives. (Howard-Hassman, 2010, pp. 9-11)

After The Second War, international Community adopted many documents in the matter of human rights: The Chart of the United Nations[1], The Universal Declaration of Human Rights[2], The International Covenant on Civil and Political Rights[3], The International Covenant on Economic, Social and Cultural Rights, The European Convention of Human Rights[4].

The process of globalization of human rights takes amplitude in the 20th century. The issuance of China from its own economic isolation, its transformation into one of the most powerful participants at world economy and the fall of the communist regime in Europe (1989 – Germania, 1991 – Russia) marks the debut of the integration of market economies in the universal system of global economic governance.

Overwhelmingly, the approach of globalization in specialized studies is concentrated on the economic dimension of this interaction process and integration between people, companies and governments pertaining to different nations of the world, a process which was led by international commerce and investments and assisted by the technology of information. (Bhagwan, 2009, pp. 1049- 1053)

Economic globalization integrates the national economies in the international economy by means of commerce, direct foreign investments, capital fluxes on a short term, international fluxes of work force and fluxes of technologies etc.

There are definitions of globalization which comprise not only economic aspects but also social and political aspects of this process or set of processes which imply a transformation in the special organization of social relationships and of transaction generating fluxes and interactive transnational and interregional networks and power. (Held, 1999, p. 483 apud Howard-Hassman, 2010, p. 9)

[1] Signed at San Francisco, 26th June, 1945, came into force on 24th October, 1945.
[2] Adopted at 10th December 1948 by General Assembly of UN, Resolution no. 217 A III
[3] Into force from 23rd of March 1976, Ratified by Romania through the Decree no. 212/ 1974.
[4] Adopted in 1950. Amended by the 15 additional Protocols. Ratified by Romania through the Law no. 30/ 1994 (Official Monitor no 135 of 31 May, 1994).

The majority of critics brought to the negative effects of globalization on human rights revolve around its economic dimension. It has been considered that globalization has created a void between poor and rich societies. (Ishay, 2008, p. 13) The ebullience of the action of globalization over poverty produces directly some repercussions on the need of people to enjoy the exercise of economic rights and indirectly those of civil and political rights.

On the other side of the barricade there are the advocators of the positive effects of globalization over redefining human rights. The Third World characterized by the expansion of the world market, the development of international commerce, the development of the technology of information which renders possible the rapid exchange of ideas, experiences, practices between different people from different corners of the world has managed to delineate new rights and new freedoms of global citizens.

Human rights have been classified, after the criterion of historical evolution into three generations: rights of the first generation (civil and political rights - the right to life; the interdiction of torture and of inhuman and degrading punishments; interdiction of arrest or detainment in an arbitrary way; the right to freedom of thought, freedom of conscience and of religion; the right to freedom of speech; the right to a peaceful meeting; the right to take part in public matters, to vote and to be elected), rights belonging to the second generation (economic, cultural and social rights) - the right to social security, the right to work, the right to free choice of work, the right to equitable and satisfactory conditions of work, the right to protection against unemployment, the right to an equitable retribution which would ensure the man and his family an existence in accordance with human dignity and completed at need by other means of social protection; the right to a level of living which would ensure his health and welfare and that of his family; the right to learning; the right to take part in the cultural life of the collectivity etc.) and rights belonging to the third generation (rights of solidarity - the right to political, economic, social and cultural determination; the right to economic and social determination; the right to participate and to benefit from the common patrimony of humankind; the right to peace, the right to a healthy environment, the right to natural resources etc.).

Subsequently, the concept of human rights has migrated in the course of history from those civil and political rights (the first generation), it has developed by means of the economic, social and cultural rights (the second generation) and is accomplished by means of the rights pertaining to the third generation.

The right to a healthy environment, the right to a sustainable development, the right to an asylum, the right to enjoy the patrimony of the community are only a few examples of new rights acknowledged to the members of the globalized human family of the 21st century. We may consider this extension of the gamut of human rights one of the positive effects of globalization.

6. Conclusions

Explaining the multitude of cultural, economic and social factors which contributed to the building of a complex history of human rights, we realize the fact that it was never balanced, precise, being characterized as well as by profound changes in different stages as by continuity.

We ascertain, as a result of this study, the gradual progress of human rights, which, in the course of their historical evolution, from the Antiquity and up to the 21st century, have acquired different valences by gradually setting apart from their natural and theological roots, thus becoming the subject of profane approaches and afterwards of the dynamics of the powerful changes of globalization.

Regardless of the source of human rights: human nature; legal regulations; social reality or politics of a particular nation, in a given period of time, the fact is that we are witnessing, amid globalization, to a continuous process of reinvention of the concept of human rights, defending the new rights into the agenda of the international community.

Promotion and protection of these new global rights is an important matter because they are essential to any human beings that is contemporary with the new technologies, the international flow of information, the development of accelerated international trade etc. that is contemporary with the new technologies, the international flow of information, expedited development of international trade.

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Aspects of UN Activities on the International Protection of Women's Rights

Jana Maftei[1]

Abstract: Human rights and their protection represent the regulation object of a major part of all the legal rules encompassing the international public law. The Members' efforts to protect women's rights and to promote gender equality have resulted in the adoption of important documents, fundamental to all mankind. In the light of these international regulations, States have assumed obligations and they have created mechanisms to achieve them. Through the analytical approach we have highlighted the activities of the United Nations and international bodies for protecting women's rights and gender equality in all sectors of public and private life. In preparing this article we used as research methods the analysis of problems generated by the subject in question with reference to the doctrinal views expressed in the Treaties and specialized articles, documentary research, interpretation of legal norms in the field.

Keywords: Universal Declaration of Human Rights; Convention on the Elimination of all Forms of Discrimination against Women; the Beijing Declaration and Platform for Action; International Women's Day

1. Introduction

Year 2015 is a time of balance and reflection concerning the assertion of women's rights as it marks 20 years since the Fourth World Conference regarding Women of the UN, held in Beijing in 1995, on which occasion there were established by the participating States a set of objectives to be met for the effective achievement of women's rights and equality of chances between women and men, commitments contained in the *Beijing Declaration* and *Action Plan in Beijing*.

Much of the history of states reflects a clear imbalance between women's rights and the rights of men, and the condition of women in society has generated pros and cons of the feminists and conservative, and sometimes heated disputes, protests, riots. The role and place of women in society of the 18th century, for example, in relation to man (which is referential) was explained by Jean Jacques Rousseau, who legitimized the sexual dichotomy and patriarchal hierarchy men / women as being simple, natural (Rousseau, 1754).

The realities of international society shows that, although important steps were made concerning the protection of women's rights and the fulfillment of gender equality goals, the states must intensify the efforts to eliminate the idea of inferiority of woman towards the man, of stereotypes regarding the

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women's role in society and family, for the exclusion of any distinction based on gender and to ensure the exercise by women of all human rights and fundamental freedoms in all areas (political, economic, social, cultural, etc.).

By drawing attention to the fact that today's society fails to use 50% of its human capacity (statistical data showing that the number of women is even slightly higher than men), famous businessman Warren Buffett said in an interview in Fortune Magazine that "*we've seen what we can be accomplished when we use 50 percent of our human capacity. If you visualize what 100 percent can do, you'll join me as an unbridled optimist about America's future*." *Apud* (Weisenthal, 2013) If we were to translate this picture at global level, we can calculate how much the humanity loses by maintaining a deficit of women's participation in the economic decision-making, a low level of education among women and still a lower status compared to men.

Not to exhaust the subject, we have tried to highlight in the following aspects of the UN activity on the protection of women's rights and gender equality.

2. The UN Activities for Women Protection

2.1. The UN Documents

The international community has registered a marking evolution in terms of protection of women's rights and a series of documents recommend/obliges states to take a series of measures to protect women's rights and gender equality in all sectors of public and private life.

The international legal valence of the protection of women's rights results from the documents adopted within the international legal order by the states. The United Nations created the conditions, since its creation, to establish global standards for the protection of women's rights. The UN Charter[1], adopted in 1945, reaffirms in its Preamble the belief of the State Parties in "equal rights of men and women" and article 1, paragraph 3 of the same document states that one of the purposes of the UN is to promote and encourage the respect for human rights and fundamental freedoms for everyone, without distinction as to race, **gender**, language or religion. The principle of non-discrimination and equality between women and men is reiterated in article 8: "The United Nations will not impose any restriction to the participation ***on equal terms of men and women*** at any position within its principal and subsidiary organs." By article 13 it established the task of the UN General Assembly the initiation activity of studies and to make recommendations on the implementation of human rights and fundamental freedoms for everyone, without distinction as to race, gender, language or religion. Article 55 of the Charter states that the UN promotion of universal and effective respect for human rights and fundamental freedoms for everyone, without distinction as to race, gender, language or religion is able to create the stability and well-being conditions, necessary for peaceful and friendly relations between nations.

The 1948 remains in the history of the United Nations as the year in which it was adopted and proclaimed by the General Assembly the ***Universal Declaration of Human Rights***[2], which includes (as recommendation value) rules relating to the Status of Women. In 1966, the UN General Assembly adopted two covenants on Human Rights: International Covenant on Economic, Social and Cultural Rights and The International Covenant on Civil and Political Rights, which have conferred compulsoriness to the legal force of the provisions of the Universal Declaration of Human Rights.

[1] The Charter of the United Nations, http://www.un.org/en/documents/charter/.
[2] The Universal Declaration of Human Rights, http://www.un.org/en/documents/udhr/.

But the first treaty adopted under the auspices of the UN, which confirms the legal status of women in society, is ***the Convention on the Political Rights of Women***[1], adopted by the General Assembly on 20 December 1952 and entered into force on 7 July 1954. The Document on universal value, this international convention lists the following women's rights: the right to vote in all elections on equal terms with men, without any discrimination; the eligibility of women on equal terms with men in all elected public bodies, constituted under the national law without discrimination; the same rights as men, on equal terms, to hold any public office and to exercise all public functions established by the national law without discrimination (art. 1 and 3). To the political rights of women stated in this agreement there have been added those established by the two pacts adopted in 1966. The extent to which states have managed to transfer at national level the fulfillment of the desideratum regarding the political rights of women can easily be observed in the table where we presented below, as example, the situation in early 2012 on the number of women (in percentage) within the national parliaments.

Table 1. World Ranking Women in Parliament for Select Countries[2]

Rank	Countries	%Women
1.	Rwanda	56.3
2.	Andorra	50
3.	Cuba	54.2
4.	Sweden	44.7
10.	Iceland	39.7
16.	Belgium	38
21.	Germany	32.9
40.	Canada	24.8
61.	Bulgaria	20.8
64.	Republic of Moldavia	19.8
69.	France	18.9
78.	USA	16.8
91.	Russian Federation	13.6
103	Romania	11.2
135	Lebanon	3.1
143	Quatar	0.0

On 7 November 1967 the UN General Assembly adopted the *Declaration on the Elimination of Discrimination against Women*[3]. As stated in the Preamble, the need to adopt this document stems from the fact that, despite the provisions of the UN Charter, the Universal Declaration of Human Rights and other international documents, the equal rights of women continues to be the subject of numerous discriminations. In the 11 articles there are proclaimed rules with the value of principles in the matter. In the first article, for example, it is appreciated that discrimination against women is unjust and it constitutes an infringement of human dignity, and in the following two articles it requires the abolition of laws, customs, regulations and practices which constitute a discrimination against women and the adoption of appropriate legal measures to ensure the equal rights of men and women, to educate public opinion in order to eliminate the idea of inferiority of women.

The Declaration on the Elimination of Discrimination against Women was an important step in the International regulatory process through a reference document, fundamental for the protection of women rights, ***Convention on the Elimination of All Forms of Discrimination against Women***

[1] The Convention on the Political Rights of Women, https://treaties.un.org/doc/Treaties/1954/07/19540707%2000-40%20AM/Ch_XVI_1p.pdf.
[2] IPU, Women in Politics. Situation on 1 January 2012, http://www.ipu.org/pdf/publications/wmnmap12_en.pdf.
[3] Proclaimed by the General Assembly, Resolution 2263 (XXII), A/RES/22/2263, 7 November 1967.

(CEDAW)[1] which was adopted on December 18, 1979[2], opened for signature on 1 March 1980 and entered into force on 3 September 1981, at 30 days after "*the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession*", as established by Article 27, paragraph 1 of the Convention. Although the number of signatory states was of 99 and at the tenth anniversary of the States Parties was around 100, the importance of the subject has made this Convention to be ratified until today to 188.[3]

The importance of this Convention lies also in the fact that it covered the first definition of the term discrimination against women: "*...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field*." In its 30 articles, organized into six parts, CEDAW extends states liability also for violations from the private sphere, article 2, point f, obliging the States Parties to take all appropriate measures to eliminate the discrimination against women, organization or enterprise which ever it would be. The articles contained in Parts II, III and IV identify areas in which states must act to ensure the equality between women and men not only legally, but also practically: the exercise of civil and political rights, rights in the social, cultural, economic domain, equality before the law in terms of legal capacity and marriage.

Many of the States Parties have formulated reservation to the Convention, unwilling to assume all the obligations. Romania has ratified the Convention stating that it does not consider itself bound by the provisions of article 29, paragraph 1, a reservation which decided to withdraw from April 2, 1997 by a notification that the Romanian government has sent it to the Secretary General.[4]

Articles 17-22 regulate the establishment and activity of the Committee to eliminate the discrimination against women in order to assess the progress of the countries in the implementation of the presented Convention, in reports to indicating "factors and difficulties affecting the extent to which the obligations provided for in this Convention are fulfilled".

In 1999 it was adopted the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women by Resolution A / RES / 54/4 of 6 October, opened for signature on 10 December 1999 and entered into force on 22 December 2000 and it has 105 States Parties[5]. Unlike CEDAW, article 17 of the Protocol states that reservations are not admitted. In the 21 articles, the Protocol adds to the competence of the Committed the reception and analysis of complaints by or on behalf of individuals or groups of individuals under the jurisdiction of a State Party, which claims that they are victims of a violation of any of the rights established in the Convention by that State Party. So, for this protective mechanism to be put into operation, communication to the Committee must regard a State Party to both the Convention and the Protocol. Article 4 of the Protocol also requires that:

[1]The Convention on the Elimination of All Forms of Discrimination against Women http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx

[2] Resolution 34/180, Official Records of the General Assembly of the United Nations, Thirty-fourth Session, Supplement No. 46 (A/34/46), p. 193. Romania signed the Convention on 4 September 1980 and ratified by Decree 342 of 26 November 1981 published in the Official Monitor of Romania, Part I, no. 94 of 28 November 1981.

[3] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#EndDec.

[4] United Nations, Treaty *Series*, vol. 1259, p. 437.

[5] Romania has ratified The Protocol by Law no. 283/2003, published in Official Monitor of Romania, Part I, no. 477 of 4 July 2003.

- the person or group of persons have been victims of the infringement of one or more of the rights set out in the Convention;
- the state belonging to the person or group of individuals filing the complaint to be party to the Convention and to the Protocol, optional;
- to have exhausted all ways of settlement of the case in its national law; The Committee shall declare a communication inadmissible, if the same matter has already been examined by the Committee or it has been or is being examined under another international procedure of investigation or settlement;
- the complaint will be accepted if in the State concerned there are still not provided legal ways in which women can go to court;

The UN General Assembly adopted on 20 December 1993 by Resolution A/RES/48/104[1], ***Declaration on the Elimination of all forms of violence against women***, the document describes the following facts as forms of violence against women, in public and private life, and hence human rights violations:

- *"physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;*
- *physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;*
- *physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs".* (article 2)

A year later it was recorded another step forward, The United Nations Commission on Human Rights inaugurating the position of Special Rapporteur on violence against women in resolution 1994/45, adopted on 4 March[2], whose mandate includes activities such as: requesting and receiving information on violence against women, its causes and consequences from Governments, specialized agencies, other special rapporteurs responsible for various human rights issues, intergovernmental and nongovernmental organizations; recommending measures, ways and means to eliminate all forms of violence against women and its causes; collaboration with the Commission on the Status of Women and other bodies in order to integrate the human rights of women and a gender perspective into their work etc.

In 2013, the mandate of the Special Rapporteur was renewed by Resolution 23/25[3], adopted by the Human Rights Council: "20. *Welcomes the work of the Special Rapporteur on violence against women, its causes and consequences and of the Special Representative of the Secretary-General on Sexual Violence in Conflict, and takes note with appreciation of the report of the Special Rapporteur on State responsibility for eliminating violence against women*." Ms. Rashida Manjoo[4] who occupies the position of UN Special Rapporteur on violence against women in 2009, considered that, although the two regional instruments, the Council of Europe Convention on preventing and combating violence against women and domestic violence and the Inter-American Convention on the Prevention,

[1] http://www.un.org/documents/ga/res/48/a48r104.htm.
[2] http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx.
[3] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/150/98/PDF/G1315098.pdf?OpenElement.
[4] http://www.unwomen.org/en/news/stories/2012/11/needed-specific-international-legally-binding-instrument-on-violence-against-women.

Punishment and eradication of violence against women, establish a set of normative standards in this matter, it is time for the adoption of an international convention by UN on violence against women, a comprehensive document to reaffirm the existing commitments of States, but also to impose clear, decisive measures.

2.2. Bodies and Mechanisms Created to Protect and Guarantee the Rights of Women

Commission on the Status of Women

By the resolution 11 (II) of the UN Economic and Social Council of 21 June 1946[1] it was created the main intergovernmental body with competence in promoting women's rights and gender equality, the Commission for Women's status, a functional commission of the Council.

The Commission is composed of representatives of 45 member states of the United Nations, elected by the Economic and Social Council on the basis of equitable geographical distribution criterion (13 members from Africa, 11 from Asia, 9 from Latin America and the Caribbean, 8 from Western European and other countries and 4 from the Eastern Europe[2]) and it has responsibilities in relation to the conduct of studies, preparing reports on the development of women's rights in the political, economic, social and educational domain, formulation of recommendations to the *Economic and Social Council* on issues as a matter of emergency in this area, the drafting of international conventions projects in its field of activity.[3]

The Commission for Women's activities contributes though its activity to the establishment of global standards on women's rights and promoting gender equality.

The Commission adopts multi-annual working programs and priorities aiming at eliminating and preventing all forms of violence against women and girls, the access and participation of women and girls to education, training, science and technology, including for promoting equal access to full employment and a decent work, reviewing the implementation of the Beijing Declaration and Platform for Action, etc.

Also the Commission for Women has organized several World Conference on Women, in Mexico City – 1975, in Copenhagen – 1980, in Nairobi - 1985. In the year when the UN celebrated 50 years since its creation, it was held in the Beijing the Fourth World Conference on Women, in which states have adopted the Beijing Declaration and Platform for Action[4], signed by 189 governments, which set a very important goal, the achievement of the equilibrium 50-50 gender balance, in all spheres of society. The Report of the General Secretary of the UN, on the analysis and evaluation of the implementation of the Beijing Declaration and Platform for Action, which brings together the complex image of progress from the 20 years in the 12 areas of major concern, points out, however, that the pace implementation of the Platform for Action was unacceptably slow and it is imperative for it to be accelerated. The report highlights five priority areas: transforming discriminatory social norms and gender stereotypes, macroeconomic policy reorientation for achieving gender equality and sustainable development, ensuring women's participation in decision-making process fully and equally and at all levels, the increase of investment in gender equality significantly, strengthening the accountability in matters of gender equality and achievement of human rights. (UN Secretary-General, 2015)

[1] www.un.org/womenwatch/daw/csw/pdf/CSW_founding_resolution_1946.pdf.
[2] Membership of the Commission on the Status of Women, http://www.unwomen.org/~/media/headquarters/attachments/sections/csw/59/csw59_membership%20pdf.ashx.
[3] http://www.un.org/womenwatch/daw/csw/csw58/CSW58_Membership.pdf.
[4] http://www.unesco.org/education/information/nfsunesco/pdf/BEIJIN_E.PDF.

Committee on the Elimination of Discrimination against Women

Based on the regulations, it was established CEDAW Committee on the Elimination of Discrimination against Women to implement the Convention. Article 17 of the CEDAW establishes the number of experts in the Committee's structure: 18 at the time of entering into force of the Convention and 23 after the ratification or accession of 35 states.[1] They are nominated and elected by secret vote by the Member States on the basis of equitable geographical distribution and keeping in mind the "*representation of the different forms of civilization and of the main legal systems*" for a term of 4 years.[2]

According to article 20, The Committee shall normally meet for a period of 2 weeks each year, to examine reports of countries on the situation of women's rights. Article 20, paragraph 1 was amended by Denmark, Iceland, Finland, Norway and Sweden and the Secretary-General, as depositary, notified the States Parties on this amendment in December 1994. The five Nordic countries, UN members, propose replacing the words *normally meet for a period of not more than two weeks annually in order…*" with "*meet annually for a period necessary*"[3]. Although the States Parties to the Convention decided to amend Article 20, paragraph (1) of the Convention and adopted the amendment to the eighth meeting of the General Assembly (22 May 1995), by resolution 50/202, it has not yet entered into force, as it has not been yet fulfilled the condition laid down by section 3 of the amendment which states that it will enter into force when it was accepted by a two-thirds majority of States Parties.

In accordance with article 21 of CEDAW, the Committee shall submit an annual report, through the Economic and Social Council, the UN General Assembly on its activities and it may make suggestions and general recommendations[4] on any issue of states affecting women, based on the examination of reports and information received from States Parties. In the 1992 session, for example, the Committee adopted the general recommendation 19[5], which required the state to include in national reports of statistics on the incidence of violence against women, as well as information on the provision of services for victims and reviewing the legislative measures and policies to protect women against violence. By 2013, the Committee made 29 general recommendations.

UN Women

By Resolution adopted by the General Assembly on 2 July 2010, A/RES/64/289[6], it was established a special entity, UN Women, the United Nations Entity for Gender Equality and the Empowerment of Women whose main objective is to accelerate the gap between the genders. The creation of UN Women is the result of reforms in the UN and the concentration of activity of four entities within the most important international organizations:

- Division for the Advancement of Women (DAW);

[1] Membership of the Committee on the Elimination of Discrimination against Women, http://www2.ohchr.org/english/bodies/cedaw/membership.htm.
[2] Romania was represented in the Committee on the Elimination of Discrimination against Women by Victoria Popescu Sandru, in the period 1 January 2003-31 December 2006. http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAWListMembersNew.pdf.
[3] https://treaties.un.org/doc/Publication/CN/1994/CN.373.1994-Eng.pdf.
[4] http://www2.ohchr.org/english/bodies/cedaw/comments.htm.
[5] General Recommendation No. 19 (11th session, 1992), http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom9.
[6] http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/64/289&Lang=E.

- International Research and Training Institute for the Advancement of Women (INSTRAW);
- Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI);
- United Nations Development Fund for Women (UNIFEM).

The attributions of the UN Women relate to: supporting the inter-governmental bodies, in formulating their policies, standards and global rules; supporting the Member States in applying these standards; leadership and coordination of the activity of the entire UN system in the field of gender equality.

UN Women Executive Director Phumzile Mlambo-Ngcuka said dramatically in her message for International Women's Day 2015 that, unfortunately, no country has achieved equality and, although they have taken significant steps, the changes are not enough, humanity is still far from full equality between men and women. The encouragement at the end of this message: "*Empower women, empower humanity"* (Phumzile Mlambo-Ngcuka, 2015), which was actually this year's theme for the celebration of International Women's Day draws attention to the entire international community on the importance of gender equality and on the fact that building a better world for women is to build a better world for us all.

3. Conclusions

The UN has been involved since its creation in various activities for the promotion and protection of women's rights, it has created organizations and programs for improving its condition. One of the ambitious projects of the UN, equality of chances, gender equality implies profound changes in the relationship between people, the mentality and social behavior of state policies (Hurubeanu 2011, p. 69) and even special, differentiated treatment through positive discrimination leading to equivalent results (Hurubeanu, 2011, p. 62).

The UN permanent concern in this direction was transposed in promoting actions to attract the attention of governments on the importance and necessity of recognizing the role of women in society, the adoption of basic documents for the protection of women's rights, such as the Convention on the Political Rights of Women or the Convention on the Elimination of All Forms of Discrimination against Women, which lead states in taking measures to ensure real conditions for making changes in this area, the creation of bodies such as the Commission on the Status of Women supporting states and managing progress in the fulfillment of this objective.

The UN initiatives such as the proclamation of the International Year of Women (1975) and the UN Decade for Women (1976-1985), the celebration of the International Women's Day were added to the sustained efforts to accomplish the major desideratum of gender equity and equality.

Mankind must place women's rights and gender equality into the center of all efforts and development concerns, for economic growth, to ensure respect for human rights. The eradication of poverty among women, ensuring a quality education for girls, eliminating barriers in terms of women's involvement in politics, business, occupying leadership positions are just some of the ways in which we can make a reality the elimination of gender imbalance. Christine Lagarde reduced metaphorically these paths to 3Ls: their ***learning***, their ***labor***, and their ***leadership*** (Lagarde, 2014)**.** Otherwise, as the UN Secretary Ban Ki-moon strongly affirmed, *the world will never realize 100 per cent of its goals if 50 per cent of its people cannot realize their full potential."* (Ban Ki-moon, 2015)

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Some Aspects of Citizenship from the Perspective of International Law

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Abstract: One of the constitutive components of the state is the population. The population of the state represents the total physical entities linked to a State through citizenship, whether residing in the territory of that State or it is in other states. The international regulations and cooperation between states in solving problems on population refer to domains and legal institutions such as: dual citizenship, statelessness, the legal status of foreigners, the right to asylum, extradition, diplomatic protection, human rights, etc. There are relevant for the public international law the issues relating to the conditions under which the legal status of citizens of a state is recognized and it can be enforced against other states, the exercise compatibility of those competences with international law rules. In this paper we have examined issues related to the fundamental right of citizenship in the light of international documents, rules on acquiring citizenship and citizenship conflicts. In preparing the paper we used as research methods the analysis of the problems generated by the mentioned subject with reference to the doctrinal views expressed in the Treaties and specialized papers, desk research, interpretation of legal norms in the field.

Keywords: Universal Declaration of Human Rights; European convention on nationality; Convention on the reduction of statelessness; conflicts of citizenship

1. Introduction

According to the doctrine of classical orientation, three constituents are necessary for a state to exist: a territory, a population and a government (Savenco, 2006, p. 171), and citizenship is a matter of defining the national identity, the nation being equivalent to the people who formed the foundation of national states, the issue of citizenship is an essential attribute of states, the international law having little to say on the matter. Ernest Gellner explained the formation of nations "…*An advanced culture is reflected throughout the society, it defines it and it needs to be supported by the state organization. This is the secret of nationalism*." (Gellner, 1997, p. 34) In his work *Considerations on Representative Government",* John Stuart Mill stated that "*A portion of mankind may be said to constitute a nationality, 'if they are united among themselves by common sympathies which do not exist between them and any others, which make them co-operate more willingly than with other peoples, to be under the same government, and desire that it should be government by themselves, or a portion of themselves, exclusively."* (Macartney, 1934, p. 5) Similarly, Karl W. Deutsch believes that at the origin of the modern nation there is the link between people (Deutsch, 1966, p. 105).

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The "population" element is mentioned both in Article 1 of Montevideo Convention of 1933[1]: "*The state as a person of international law should possess the following qualifications: a) a permanent* ***population****; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.*" (s.n.) (Department of International Law)

More recently, in Opinion No. 1 of The **Arbitration Commission of the Conference on Yugoslavia** in November 1991, the state is defined as "*a community which consists of a territory and a population subject to an organized political authority; that such a state is characterized by sovereignty*". (Pellet, 1992, p. 182)

Genoveva Vrabie defines the population in close relation to the concept of citizenship, stating that it represents that constituent element of the state which includes all individuals linked by a State through citizenship, "whether living in its territory or they are in other states." (Vrabie, 1995, p. 127)

Expanding globalization phenomenon and the erosion of space continuity, identity, nationality (Spiro, 2011, p. 694) determined for certain issues related to population no longer be solved entirely by its own law of a State, some of which required cooperation into an international framework created by bilateral or multilateral treaties, given the complexity of the problems on population and the impact that they have on the relations between states. (Maftei, 2010, p. 98)

Thus the legal domains and institutions such as: dual citizenship, statelessness, the legal regime of foreigners, asylum, extradition, diplomatic protection, human rights, etc. (Moca & Duţu, 2008, p. 203) were carefully analyzed by states that have proposed legal solutions by international regulations.

In terms of citizenship, there are relevant for the international law the issues arising from the conditions in which the legal status of citizens or aliens of a State is recognized and it cannot be applied to other states or international bodies, and also the exercise compatibility of those powers with the norms of international law. (Miga-Beşteliu, 2005, p. 128)

2. The Right to Citizenship in International Regulations

Citizenship can be defined as the permanent and effective political and legal relation between a physical entity and a certain state that generates rights and obligations for the citizen and the State concerned (Bolintineanu, Nastase & Aurescu, 2000, p. 74) This relationship means that a person belongs to a particular state.

T.H. Marshall identifies three elements of citizenship: civil, political and social. The first issue, according to the author, concerns the rights necessary for individual freedom. The policy element grants the right to the individual for participating in the exercise of political power as a member of a body invested with political authority or as an elector. The third element includes the right to life standard, the right to education, right to health. (Marshall, 2009, pp. 148-149)

The International Court of Justice stated in its judgment that "*According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of*

[1] This treaty was signed at the International Conference of American States in Montevideo, Uruguay on December 26, 1933. It entered into force on December 26, 1934.

an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State." (The International Court of Justice, p. 23)

The rules on how to obtain and lose citizenship, the legal content of citizenship, the effects are determined by the laws of each state, regulating citizenship is an exclusive attribute of states, regarding the mentioned issues.

The enforceability issues of citizenship of a State towards other States, the fact that State under this bond the state extends its sovereignty over a person who has citizenship of the country outside its borders (Andronovici 1996, p. 166), the protection of social groups determined international cooperation in this field and the adoption of common rules with conventional bilateral or multilateral character, meant to remove the deviations caused by inconsistencies between national laws of states.

The reference document, of fundamental importance for international law, *the Universal Declaration of Human Rights* of 1948, refers to citizenship in article 15 in two prescriptions, a positive and a negative one:

1. *Everyone has the right to a nationality.*
2. *No one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality.*[1]

The International Covenant on Civil and Political Rights recognizes the right of every child to citizenship: "Every child has the right to acquire a nationality." (article 24, paragraph 3)[2]

Similarly, the Convention on the Rights of the Child guarantees the right of every child to acquire a nationality by article 7, paragraph 1: "The child shall be registered immediately after birth and shall have the right from birth to a name, *the right to acquire a nationality"*[3].

Another important document, with regional value, adopted within the Council of Europe states that "*Each State shall determine under its own law who are its nationals*". This provision is complemented by another rule, which aims at achieving the enforceability of citizenship conferred by the state to an individual: "*This law shall be accepted by other States in so far as it is consistent with applicable international conventions, customary international law and the principles of law generally recognized with regard to nationality."* (Article. 4, The European Convention on Nationality, 1997)[4]

3. Acquiring Nationality

The legal institution of citizenship belongs to the constitutional law as the enacted rules are an edict of the state, under its sovereignty. (Deleanu, 1976, p. 30)

A) In the comparative law there were recorded the following methods of acquiring nationality:

a) the acquisition as a result of birth;

[1] The *Universal Declaration of Human Rights* was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 General Assembly resolution 217 A (III).
[2] International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49, http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx.
[3] Convention on the Rights of the Child , Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49, http://www.ohchr.org/en/professionalinterest/pages/crc.aspx.
[4] The European Convention on Nationality was adopted on 6 November 1997 and entered into force on 1 March 2000, http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?CL=ENG&NT=166.

b) acquiring citizenship as a result of an individual legal act issued by the competent authority.

a) The doctrine of international law in the field of acquiring citizenship by birth supports its applying from one of the following two principles *jus sanguinis and jus soli.*

Jus sanguinis principle requires the acquisition by the child of his parents' citizenship regardless of his birthplace. This principle follows from the principle of nationality and by its application it shall be ensured the unity of the state and its inhabitants, the citizenship being transmitted from parents to child, even if he was born in another country, thus the child becoming a member of the community to which they belonged and its ascendants.[1]

According to the principle of jus soli, the child acquires the citizenship of the State in which he is born, regardless of the nationality of his parents. This principle gives the State the power to grant citizenship to individuals who are born on its territory. By the notion of territory we must understand both the soil, subsoil, air space, internal waters, territorial waters, and vessels or aircraft under its flag (Jădăneaț, 2009, p. 113).

Two international documents expressly stated the exception of applying this principle in the field of diplomatic and consular relations. Thus, the Optional Protocols concerning Acquisition of Nationality, 1961 and 1963 provide, similarly, that members of the mission and members of the consular post not being nationals of the receiving State, and members of their families forming part of their household, shall not, solely by the operation of the law of the receiving State, acquire the nationality of that State.

b) As a result of a single legal act issued by the competent authority, acquiring citizenship can also be performed by one of the following ways:

- marriage between two persons who have different nationalities;
- by adoption, the child may acquire citizenship of the adopter, if he had not had another nationality or citizenship of a foreign state;
- the recovery or reintegration, it can return to the old citizenship if the former citizen repatriates or if a married woman had lost citizenship obtained through marriage to a foreigner, and later divorced;
- the effect of prolonged stay in the territory of another State than their own;
- as an option, in the case of transfer of territory from one state to another, where people living in the transferred territory, they have the right to choose to keep their citizenship and to obtain citizenship of the new state.

The acquisition of nationality as a result of marriage between persons of different nationalities, traditionally regards only the woman, who automatically acquires the citizenship of the husband. Although we may think that the rule exists in a certain period of development of states, it is still implemented in the Islamic area. Promoting within the international society the principle of equality of the two sexes, and the conclusion of the Convention on the Nationality of Married Women[2] have excluded the loss of citizenship by the wife, expressly stating in Article 1 that "*each Contracting State agrees that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife"*.

[1] Romania applies the Jus sanguinis principle in terms of acquisition of citizenship based on origin, article 5, Law no. 21/1991 (published 2010), of the Romanian citizenship, republished in the Official Monitor no. 576 of 13/08/2010.

[2] The Convention was opened for signature pursuant to resolution 1040 (XI)1 adopted by the General Assembly of the United Nations on 29 January 1957. It entered into force 11 August 1958 by the exchange of the said letters, in accordance with article 6.

The adoption institution produces effects regarding the adopted child's citizenship. As a result of adoption the child loses any blood relation with his relatives and he creates new relationships between the adopted child and adopters. If the child does not have citizenship or a nationality other than that of the adopters, he will acquire the nationality of the latter.

Reacquisition of citizenship is obtained only upon request and it regards the former citizens whose citizenship has been revoked unwillingly, for imputable reasons. The Romanian legislation provides in this regard that "*persons who have acquired Romanian citizenship by birth or adoption and who lost it for imputable reasons or that it was revoked the nationality without their will, as their descendants up to the third degree, upon request, can regain it or it may be granted the Romanian citizenship with the possibility of keeping foreign citizenship and establishing domicile in Romania or maintaining it abroad"* (article 11 of Law no. 21/1991). This applies, for example, to citizens of Republic of Moldova (to which Romania recognized the independence), following the consideration that its territory was Romanian territory occupied by the Molotov-Ribbentrop Pact of 1939. The rules regarding the recovery of citizenship applies also to married woman who have lost citizenship obtained through marriage to a foreigner, being forced to abandon the original citizenship, and later on she divorces.

Another way of acquiring citizenship of a state recognized by international law is acquiring citizenship as a result of a prolonged stay in the territory of a State other than their own. Of course that each state is sovereign in terms of the conditions and procedures for granting citizenship upon request, in the referred case. States may impose requirements such as: knowing the language, history and geography knowledge, the existence of domicile on its territory, reaching a certain period, etc.

The Romanian citizenship acquisition is conditional by the requirements of article 8, paragraph 1 of Law no. 21 of 1991, republished:

(1) The Romanian citizenship can be granted, upon request, to a person without citizenship or alien, if the person meets the following conditions:

a) he was born and lives in Romania at the date of the demand, or, if he was not born in this land, he lives legally on the Romanian territory for at least 8 years or, in the case of being married and living with a Romanian citizen for at least 5 years of marriage;

b) he proves by his behavior, actions and attitude, loyalty to the Romanian state, he does not take or support actions against legal order or national security and he declares that in the past he has not taken any such action;

c) he has 18 years old;

d) he has insured in Romania the legal means for a decent life, under the conditions established by the law on the aliens' regime;

e) he is known with good conduct and he has not been convicted in the country or abroad for a crime that makes him unworthy of being a Romanian citizen;

f) he knows the Romanian language and the basic notions of Romanian culture and civilization, to the sufficient extent for integrating into society;

g) he knows the Romanian Constitution and the national anthem.

Acquisition of nationality after birth may be conditioned by applying the principle of citizenship effectiveness. The International Court of Justice has defined the effectiveness of citizenship according

to the Nottembohm case: *According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties*."[1] As a result, while recognizing the sovereign right of the state in relation to the citizenship granting, the Nottembohm case gives states the opportunity to raise unenforceability in that there is no close relationship between the state and the citizen. The European Convention on Nationality of 1997 refers to the rule of citizenship effectiveness in article 18, paragraph 2, letter a) stating that the decision on the granting or retention of nationality in cases of State succession, each State Party shall take into account in particular the existence of a genuine and effective link between the person and the corresponding state.

Changing boundaries of states as a result of scrapping or transfer of territory from one state to another can lead to problems concerning the nationality of individuals. State succession can sometimes cause loss of citizenship to certain individuals, because they acquire the status of stateless persons. Of course, under the sovereignty of both states' interests and those of individuals there are regulated national laws and in compliance with international standards in this area. It is necessary in the case of succession, the States concerned shall take all appropriate measures to prevent statelessness situation. (Filipovici, 2010, pp. 34-36)

It is important to mention the work of the International Law Commission, which adopted the draft articles on nationality of natural persons in relation to the succession of States. Although these requirements are not mandatory, the UN General Assembly recommended for the States to take them into account, when they have to solve problems caused by the effects of State succession on individuals in matters of citizenship. According to article 1 of this document: *Every individual who, on the date of the succession of States, had the nationality of the predecessor State, irrespective of the mode of acquisition of that nationality, has the right to the nationality of at least one of the States concerned, in accordance with the present draft articles.*"[2]

4. Conflicts of Nationality

The differences in legal treatment between countries in terms of citizenship (principles, modes of acquisition and loss of nationality) generate the so-called "conflicts of nationality". In this category there are included: multiple nationality and statelessness.

The Hague Convention of 1930 on conflicts of nationality provides that each state has the right to determine by law who are its nationals, and the state law must be upheld by other states, "*under the conditions where they are in agreement with the international conventions, with international customs and the principles of general law recognized with regard to nationality*" (article 1 of the Convention).

The multiple nationality constitutes the legal status of a person holding two states' nationalities at the same time (or more) (positive conflict of nationality) (Selejan-Guţan & Craciunean, 2008, p. 91)

This situation may occur when:

a) a child is born in a State applying the territorial principle (*lex loci*) of parents citizens of a state applying the *jus sanguinis* principle;

[1] International Court of Justice Reports of Judgments, Advisory Opinions and Orders, Nottebohm Case (Liechtenstein *2).* Guatemala) Second Phase Judgment of April 6th, 1955, p.23, http://www.icj-cij.org/docket/files/18/2674.pdf.
[2] International Law Commission, *Draft Articles on Nationality of Natural Persons in relation to the Succession of States, with commentaries*, 1999, http://www.un.org/law/ilc/.

b) in the case of adoption by a foreigner, if the State of whose nationality the adopted child is does not consent the renunciation of citizenship, and the state of the child's adopter grants its nationality automatically, according to the law;

c) in the case of marriage to an alien, if according to his country's legislation, the woman does not lose her citizenship by marriage, and according to the laws of the State of the husband, the wife will automatically acquire his nationality;

d) in the case where a person acquires the citizenship of another state, without having renounced the nationality of origin.

Statelessness is when some people have no nationality or lose their citizenship without becoming citizens of another State, as a result of the inconsistencies of the national laws (negative conflict of nationality). It has no definition in the international legal instruments relating to stateless persons.

Stateless term is defined in article 1 of the Convention relating to the Status of Stateless Persons in the following wording: "*a person that no state considers being a national by applying its law*". There are not included in this category:

- persons receiving protection and assistance from organs or agencies of the United Nations other than the High Commissioner for Refugees, as long as they will benefit from this protection;
- persons considered by the competent authorities of the country where these people have established residence as having the same rights and obligations as the citizens of this country;
- individuals against whom there are reasonable grounds to believe that they have committed a crime against peace, a war crime or a crime against humanity, as defined by the international legal instruments relating to these crimes, that they have committed a serious crime of common law, outside their country of residence before being admitted into the country, that were guilty of agitation against the purposes and principles of the United Nations. (Muraru, Tanasescu, Iancu, Deaconu, & Cuc, 2003, p. 17)

To prevent and reduce the number of such cases, the states have adopted several documents in this matter:

- Convention on the reduction of cases of multiple nationality and on military obligations in cases of multiple nationality (Strasbourg, 6 May 1963);
- Convention relating to the Status of Stateless Persons of 1954[1];
- Convention on the Reduction of Statelessness of 1961[2];
- European Convention on Nationality, adopted in 6.11. 1997[3].

The mentioned documents recognize the right of every person to citizenship and they establish rules such as:

- States Parties have an obligation not to withdraw citizenship to any person, if by this action it would be created the stateless situation;

[1] Romania joined the Convention on the Status of Stateless Persons, adopted in New York on 28 September 1954 by Law no. 362 of 13 December 2005 published in the Official Monitor of Romania, Part I, no. 1146 of 19 December 2005.
[2] Romania joined the Convention on the Reduction of Statelessness by Law no. 361/2005, published in Official Monitor no. 1156 of 20/12/2005.
[3] Romania has ratified the Convention by Law no. 396 of 14 June 2002 published in the Official Monitor of Romania, Part I, no. 490 of 9 July 2002.

- Children born of parents without citizenship shall acquire the citizenship of the State in which the birth occurred;
- A child born of unknown parents and whose place of birth is not known, he is considered as being born in the State in which the child was found;
- Loss of any form of citizenship cannot have effect unless the person acquires another nationality;
- Any treaty under which a transfer of territory must regulate the citizenship of the inhabitants of the transferred territory;
- Every stateless person has duties towards the country in which he lives, obeying its laws and measures to maintain public order;
- States should apply the same regime to all stateless persons, without discrimination on race, religion or country of origin;
- Stateless persons shall enjoy the same regime as nationals regarding freedom of religion and religious education of their children;
- Stateless persons must be granted the regime applied by the country to foreigners.

5. Conclusions

Citizenship can be described therefore under two ways: status and role. The status (legal and political) that the citizenship incumbents is reflected, on the one hand, in all civil, political and social rights that the state guarantees to its citizens and on the other hand the obligations of the citizen towards the state. The social role of citizenship confers identity to the individual, as part of community to which he belongs and he participates to the public life and he exercises his citizenship status. Although the state is sovereign regarding important aspects of citizenship, having exclusive jurisdiction in the regulation domain of methods of acquiring and losing citizenship, rights and obligations of the citizens, the public international law intervenes in this matter from the perspective of international relations established between states, on the recognition and enforceability of the legal status of citizens, but also the compatibility of national rules with the provisions of international legal instruments relating to the right to citizenship as a fundamental human right. Reporting the citizenship to state currently supports the challenges of regionalization and globalization, which involves the transfer of sovereignty attributes to supranational bodies, therefore restricting state authority, and replacing the idea of physical border, which defines the geographic area of a state with the extinction of territoriality as a sine-qua-non element of the existence of the State. Given that sovereignty, territoriality and the state power increasingly erode and we witness the creation of what Marshall McLuhan called *the global village* (McLuhan, 1964, p. 93), citizenship appears to us, at least from the perspective of public international law as a dynamic concept, having to continually adapt to contemporary realities.

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Some Aspects of International Children Abduction - Theoretical and Practical Approach from the Perspective of the European Law and Judicial Practice

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Abstract: Everyday life revealed even in the media by presenting cases of international abduction of minors, on the one hand, and on the other hand, the existence of cases increasingly complex from the national/ EU practice, to which we should add the insufficient analysis in the doctrine of the topic in representing some evidence to support the elaboration of this paper. Through its international and / or European regulations (Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, which is supplemented by Regulation (EC) no. 2201/2003 of 27 November 2003 concerning jurisdiction, the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility, (prevailing the latter) and national ones (Law no. 63/2014 amending and supplementing Law no. 369/2004 on the application of the Convention on the Civil Aspects of International Child Abduction which Romania adhered to by the Law no. 100/199), the legislator sought to ensure the prompt return of children abducted in the Member State of origin, the objective being the same: discouraging underage child abduction by a parent or by third parties, usually relatives and, in case of committing an act of international abduction of minors, ensuring the best interests of the child through the cooperation of the competent authorities in the field. The structure includes sections that address theoretical issues (e.g. the notion of international abduction of minors, regulations, procedure for solving the request, the competent authorities) and practical aspects, without neglecting the interpretation given by the Court of Justice of the European Union of some texts from the Regulation.

Keywords: return of the child; the child's residence; jurisdiction; exequatur; the EU Court of Justice

1. The Regulations

Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction was ratified by all Member States of the European Union, including Romania and it shall apply in cases of child abduction between Member States. The provisions of the Hague Convention of 1980 are supplemented by the *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility*[2], so that the provisions of the Regulation prevails over the Convention in the

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[2] Published in OJ L 338, 23.12.2003, p. 1. The Regulation applies to all Member States of the European Union, except Denmark, from March 1, 2005 (except articles 67-70, which entered into force on 1 August 2004). It is known in the specialized literature as "Brussels II bis Regulation". On this regulation, see Ioana Burduf, Ulrike Frauenberger, Maria

subjects covered by the Regulation. Regarding Romania, the last legislative act on this matter is Law no 63/2014 amending and supplementing Law no. 369/2004 on the application of the Convention on the Civil Aspects of International Child Abduction to which Romania adhered by the Law no. 100/1992.[1]

Whether it is national or European/international legislator, its purpose is the same, namely: discouraging underage child abduction by a parent or by third parties, usually relatives, and, in the case of committing an international act of a minor's abduction, it is regarded the best interest of the child by the cooperation of the competent authorities in the field. By establishing the rules of law it is intended that, in the case of international child abduction, it is ensured the prompt return of the abducted child in the Member State of origin.

Also, the Court of Justice of the European Union and the European Court of Human Rights have established a set of principles in their jurisprudence regarding the international child abduction primarily taking into account the best interests of the child.

The theme of this material takes into account the conditions in which the kidnapped child's return in the Member State of origin, when a child is taken by one parent, divorced or separated from each other, in the State of his habitual residence.

2. The Concept of International Child Abduction. The Concept of Habitual Residence of the Child

The term "international child abduction", under the civil aspect and applying only to minors under the age of 16, on which a judgment or administrative decision or an agreement concluded under the law of a contracting State (e.g. notarial agreement or a mediation agreement) and of custody, rights to visitation or home setting is defined by article 3 of the Hague Convention of 1980 as follows: "*The removal or retention of a child is considered illicit in the following cases:*

a) it is in breach of rights of custody attributed to a person, institution or body acting either separately or jointly, by the law of the state where the child will have his habitual residence immediately before his removal or retention and

b) at the time of removal or not returning this right was actually exercised, either jointly or alone taking action or it would have been so exercised, if such circumstances would not have occurred".

The same issue is established in the provisions of art. 2, point 11 of the Regulation No. 2201/2003 which defines the term "wrongful removal or retention of a child", as for the child's removal or retention in the case where:

"A) there has been a breach of rights of custody acquired by a court, by a provision established by the law or / a current agreement having legal effect under the law of the Member State, where the child is habitually resident immediately before the removal or retention and

Kaller, katalin Markovits, Viviana Onaca, Flavius George Păncescu, Walter Rechberger, Camelia Tobă, *Cooperarea judiciară în materie civilă și comercială, Manual/ Judicial cooperation in civil and commercial matters, Manual*, pp. 140-158, address available at http://www.just.ro/Portals/0/CooperareJudiciara/Doc%201_Manual%20Civil.pdf; (Buglea, 2013, pp. 222-225)

[1] Published in the Official Monitor of Romania, Part I, no. 352 of 05.13.2014, under which Law no. 369/2004 was republished in the Official Monitor of Romania, Part I, no. 468 of 25 June 2014.

b) for the custody to be actually exercised, alone or jointly, at the time of removal or retention, or it would have been so exercised, if the events have not occurred. Custody shall be considered as being exercised jointly when one of the holders of parental responsibility may not, pursuant to a judgment or by the operation of law, decide on the child's place of residence, without the consent of the other holder of parental responsibility."

Regarding the concept of "*habitual residence of the child*", it corresponds to the place which reflects a certain degree of integration by the child in a family and social environment, the national court having the mission to establish where is this child's habitual residence, taking into account all relevant circumstances of the case.

The rule of habitual residence of the child is provided by **article 10 of Regulation no. 2201/2003**, governing jurisdiction **for travel or unlawful detention of a child**, meaning that the courts of the Member State where the child is habitually resident immediately before the cross-border abduction, *it retains jurisdiction* until the child has acquired a habitual residence into another Member State and additional conditions are met, namely:

- any person, institution or other body having rights of custody has acquiesced in the removal or retention of the child; or
- the child has resided in that Member State for at least one year after the person, institution or other body entrusted with the child had known or should have known the place where the child was, until the child has adapted to his new environment and until it was fulfilled at least one of the conditions expressly provided.

3. On Returning the Abducted Child

A court of a Member State called upon based on article 13 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, with a request for returning a child, who has been wrongfully removed or retained in a Member State, other than the Member State in which the child was habitually resident, immediately before his illicit removal or retention, applying the rules of this Convention, complemented by article 11 of Regulation no. 2201/2003, may decide, after a trial conducted by the fastest method prescribed by the *lex fori*, not exceeding six weeks[1], from the moment it was applied, either the solution of the immediate return of the child or the solution of child's retention.

The courts of the Member States have not always been able to meet this deadline. However, it is clear, as confirmed by experts, that six-week period, where it needs to pass a judgment, is essential to send a signal on the importance of ensuring a rapid return of the child.

In the latter case, the non-return of the child, article 11, paragraph 6-7 of the Regulation No 2201/2003 provides for a special procedure, according to which this judgment, together with relevant documents shall be submitted either directly or through the central authorities of the two Member States court of origin (the Member State in which the child was abducted), for the latter, after administering the evidence and hearing the parties and the child, if necessary, to decide finally whether or not the child's return will occur. Only if the judgment is to return the child, it is directly recognized and enforceable

[1] Experts have found that the courts of the Member States have not always been able to meet this deadline of six weeks in order to pass a judgment. Or, to meet this deadline is a signal of the importance of ensuring a rapid return of the child. See Report COM (2014) 225 final of the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of this Regulation, available at file///C:/Users/HP/Downloads/1_RO_ACT_part1_v2.pdf.

in the requested Member State without the need for exequatur procedure. In this way, the rule is the suppression of exequatur for a judgment of a court from a Member State of origin, deciding the return of the child.

4. The Proceedings before the Court of Origin

In the proceedings before the court of origin, after the court from another Member State where the child is, has passed a judgment of non-returning the child, we make the following clarifications:

The court of origin should receive the documents from the court of the requested State within one month of the judgment of non-returning the child, under article 13 of the Hague Convention of 1980. When examining the case, **the court of origin** must notify the parties in accordance with article 11, paragraph 7 of the Regulation, information on the file and invites them to express their position within 3 months from the date of notification of acceptance or otherwise, so that the court of origin would examine the case.

Depending on the procedural attitude of the parties, there are two solutions for the court of origin:

- a decision to close the file, if the requested information is not received;
- the case is judged, if at least a party submits the requested information. In that case, the court of origin shall ensure that all parties have an opportunity to be heard (especially the child, unless it is considered inappropriate in relation to the age and maturity of the child), that there are considered the reasons for the judgment of non-return and there are assessed the evidence on which this decision was taken on the basis of article 13 of the Hague Convention of 1980. Finally, the solutions of the court of origin may be:
  a. *a judgment of non-return of the child*, in which case the process will be closed. The competence to decide on the merits of the case is thus transferred to the courts of the Member State where the child **was removed**.
  b. *a decision to return the child*, in which case the Regulation provides that this decision, as the decision on visiting rights is directly recognized and enforceable in other Member States, under the condition of providing a *certificate on the return of the child* (article 42, paragraph 1), certifying the compliance with the *procedural rules set out in article 42, paragraph 2 of the Regulation*.

5. Legal Effects of Issuing the Certificate on Returning the Child

After hearing the parties and the child, appreciation of the administrative evidence, the court of origin passes, where appropriate, the decision of returning the child, after it becomes enforceable, issuing the certificate. It was wanted by the declaring the enforceable judgment to prevent the dilatory appeals, promoting that unduly delay the return of the child's judgment. So, after the deadline expiry for lodging an appeal, the court may, on the right conferred by the Regulation and notwithstanding the provisions of the national law, that the judgment is enforceable.

The certificate on the returning the child produces two legal effects: to enforce the judgment in another Member State[1] "it is no longer needed for an exequatur application, the judgment of the court of origin

[1] About the procedure for recognition and enforcement of a judgment, see (Pancescu, 2013, pp. 679-720).

was considered, according to article 42, paragraph (1) of the Regulation, as it was given by a national court of the executing State; it makes impossible to challenge the recognition of the judgment.

In the procedure for enforcing a judgment for the return of the child, it is subject to the national law and the national authorities are called upon to apply the rules that guarantee efficient and rapid execution of judgments under the Regulation, without bringing prejudice to its objectives (e.g. in one case[1], the ECJ held that article 31, paragraph (1) of Regulation no. 2201/2003, insofar as it provides that any person against whom the enforcement is sought, or the child cannot, at this stage of the procedure to present observations, it does not apply to proceedings of refusal of a judgment recognition, made without having previously been introduced a recognition application on the same judgment. In such a situation, the defendant, seeking recognition, may submit comments.

The party who wishes to request the execution of the return of the child's judgment, will provide a copy of the judgment of the court of origin and the certificate of returning the child, the exequatur is eliminated in the case of a judgment for the return of the child (article 45 of the Regulation).

6. Considerations on the European Court of Human Rights

Analyzing the jurisprudence of the European Court of Human Rights related to the cases of returning the abducted child and the means of enforcement of the judgment in the State of origin may retain a series of conclusions, which we note below.

The Brussels Court recommends that each Contracting State to establish appropriate and sufficient legal means to ensure that the positive obligations incumbent upon it under article 8 of the European Convention of Human Rights (for example, cases Maire vs. Portugal on June 26, 2003, paragraph 76 and Ignaccolo-Zenide vs. Romania on January 25, 2000, paragraph 108).

Also, once the authorities of a Contracting State to the 1980 Hague Convention have found that a child has been illegally moved, under the Convention, the Court states that they have a duty to take the necessary and appropriate measures to ensure the return of the child, otherwise, it is violated the right to respect for family life established in article 8 of the European Convention on Human Rights (Case of Iglesias Gil and AUI vs Spain of 29 July 2003, paragraph 62)

Finally, the appropriateness of a measure to be considered by the Court in terms of speed of implementation, since the procedures for attributing parental responsibility, including the execution of the final judgment, need to be addressed urgently, as far as the passage of time can have irremediable consequences for the relationship between the child and parent, of whom the child has been separated (e.g. cases Ignaccolo-Zenide vs Romania on 25 January 2000, paragraph 102 and Maire vs Portugal of 26 June 2003, paragraph 74).

7. Conclusions

The European Court in Luxembourg confirmed through practice, that Regulation no. 2201/2003 aims at preventing child abduction between Member States and without delay the returning of the child in case of kidnapping. In turn, the European Court of Brussels ruled that once it was found that a child has been wrongfully removed, the Member States should endeavor to ensure appropriate and effective

[1] See Case C-195/08.

return of the child and the failure of the efforts represents a violation of the right to family life under article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

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The Universal Declaration of Human Rights

Nicolae Dură[1]

Abstract: The Universal Declaration of Human Rights of 1948 was preceded by several other Declarations in the first half of the twentieth century, beginning with the Declaration of 1929 and ending with the one of 1947. All these Declarations make express reference only to the "Human rights" and not to those of the "individual" or of the "Citizen", as in the Declaration of the French Revolution, in 1789, or in the one of the Bolshevik Revolution, in 1917. Among other things, in our paper, we emphasized that the Universal Declaration of Human Rights remains the first legal international instrument that imposed an unitary and universal conception regarding the human rights and fundamental freedoms, and, ipso facto, of the "Dignitas humana" (dignity of the human person), to which the Treaty establishing a Constitution for Europe (Lisbon, 2007) would make express reference.

Keywords: the principles of the UN Charter; the human person; the European legislation and jurisprudence; legal protection

1. Introduction

In 1929, the International Law Institute (New York) developed and published the "International Declaration of Human Rights". Among other things, this Declaration stipulates that "it is the obligation of every State to recognize the equal right of every individual to life, liberty, property, and to grant to those on its territory full protection of this right without distinction of nationality, sex, race, language or religion" (Art. 1) (Agi & Cassin, 1998, p. 331).

In 1939, the League of Human Rights brought an addition to the text of the Declaration of 1929, and made the specification that "human rights apply without distinction of sex, race, nation, religion or opinion. These inalienable and imprescriptible rights are attached to the human person; they should be respected at all times, in all places and guaranteed against all forms of political and social oppression. The international protection of human rights should be universally organized and secured, so that no state can refuse the exercise of these rights of a single human being living on its territory" (Art. 1) (Agi & Cassin, 1998, p. 333).

The Addendum to the Declaration specified that it stipulated the rights of the "human being" or of the "human person" and their international legal protection, and not the rights of the "individual" or of "citizen", as the text of the 1789 French Declaration did. However, unfortunately, this last phrase emerged as a leitmotif not only in the texts emanating from the Bolshevik Revolution of 1917 or from the constitutional text of the countries which entered into the Soviet camp, but even in some texts

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produced and published by the Council of Europe or by other organizations and EU bodies. Moreover, these texts were also understood tale-quale by some jurists of prestigious law schools in Western Europe (Dură & Mititelu, 2013 a., pp. 130-136).

In 1942, Jacques Maritain – an outstanding Christian philosopher and prominent defender of human rights – also published a "Declaration on Human Rights and Natural Law", where – among others – he said that, among the "rights of the human person", there is also the "right leading to eternal life, according to the path that the consciousness recognized as being drawn by God ... " (Agi & Cassin, 1998, p. 336). Moreover, according to philosopher Jacques Maritain, "the value of the person, his/her liberty, his/her rights depend on the order of sacred things, bearing the imprint of the Father of (human) beings ..." (Riquet, 1981, p. 63).

In 1947, Professor René Cassin, the French representative of the Drafting Committee of the UN Commission on Human Rights, presented to the General Assembly of the United Nations the "Project of the International Declaration of Human Rights". Among other things, in his Project, René Cassin stated that "the individual freedom of conscience, faith and thought is a sacred and absolute right", and that the public or private exercise of the manifestations of religious beliefs "can be subject only to the restrictions imposed by the public interest, morals or by the rights and freedoms of others" (Art. 20) (Agi & Cassin, 1998, Annexe 9, Doc. II, p. 362).

This brief overview of the four Declarations on Human Rights (1929, 1939, 1942 and 1947) reveals therefore that humanity was not concerned with human rights and freedoms only after the human scourge produced after World War II, as erroneously claimed and accredited by the juridical literature. On the contrary, through its exponential representatives and competent bodies, official documents, entitled "Declarations", were drafted; they referred explicitly to the human "being" or "person" and to his/her rights, whose legal protection was imposed, from the very beginning, both by "*Jus divinum*" and "*Jus natural*" (Mititelu, 2012 a., pp. 194-204).

2. The Internationalization of Human Rights

The United Nations Charter[1] - adopted in San Francisco, on 26 June 1945 – reaffirms the faith of the world's peoples in asserting and defending the fundamental human rights, in the dignity and worth of the human person (Art. 1). Moreover, this Charter – under which the "International Court of Justice" was established as a "judicial organ of the United Nations"[2] – set the Organization's objective "to promote and encourage the respect for human rights and fundamental freedoms of all persons without distinction of race, sex, language or religion" (Diaconu, 1995, p. 160).

In order to materialize this goal, in 1947, the Human Rights Commission was established, under article 68 of the UN Charter. This Commission drafted the Universal Declaration of Human Rights, which was the first document establishing a common and universal conception on human rights and freedoms. Indeed, the Universal Declaration on Human Rights[3], adopted and proclaimed by the UN General Assembly, by Resolution 217 A (III) of 10 December 1948, released the phrase "human rights and fundamental freedoms" (Preamble) and, as specified in the Preamble of the European Convention of Human Rights, published in 1950, aimed at "securing the universal and effective recognition and

[1] Published in the Official Gazette on 26 June 1945.
[2] Statute of the International Court of Justice, Art. 1 (http://www.icj-cij.org/documents/?p1=4&p2=2).
[3] For the text of this Declaration, see *The main International human rights instruments to which Romania is party*, vol. I, (Zlătescu et al., 1997, pp. 7-13)

observance of (human) Rights". Moreover, this Declaration is the first international legal instrument that provided that "human rights" should "be protected by the law" (Preamble).

The fact that the internationalization of human rights took place by the "Universal Declaration of Human Rights" is also attested by its title, where we find the adjective "universal" and not that of "international", because – in the view of its authors, i.e. of the persons of the States who were members of UN – the rights and freedoms stipulated in this Declaration do not belong to individuals or citizens (Dură & Mititelu, 2012, pp. 103-127), but to the human being or person, to which express reference is made both in the Roman-Byzantine and in the Byzantine Nomocanon law (C. Mititelu, 2014 b.). The fact that "only the human being" – and not the citizen or the individual invoked by the French and the Bolshevik Revolutions – "has the vocation of universality" (Dură, 2006, p. 131) is also attested by the European legislation and legal doctrine, beginning with the legislation and the jurisprudence developed and published in Justinian's era (527-565) (Mititelu, 2011, pp. 218-231) and ending with the "Treaty establishing a Constitution for Europe" (Dură, 2011 b., pp. 25-48), ratified and published in 2007.

Regarding "The Declaration of the Rights of Man and of the Citizen" – proclaimed by the French National Assembly on 26 August 1789 – it should be noted and remembered that it is not "a first reference" (Dură, 2006, pp. 129-151) to the assertion of human rights and freedoms - as still erroneously stated by some jurists, political scientists, sociologists, philosophers, etc. - and, of course, a "Charter" of these rights and freedoms, but only "a symbol, a sign revealing the relationship between Power and Person, which is the primary political relation" (Marx, 1989, p. 50).

2.1. The Universal Declaration of Human Rights, the main Document containing General Principles and Rules regarding the Human Rights and their Juridical Protection

Regarding the Universal Declaration of Human Rights – universally accepted "as a document containing general principles and rules that give expression to a minimum standard in the field of human rights" (Diaconu, 1995, p. 161) – the representatives of the Governments signatory to the European Convention on Human Rights wanted to specify, "*expressis verbis*", that they took "into account the Universal Declaration of Human Rights", and that they took the "first steps to secure the universal and effective recognition and observance of certain rights stated in the Universal Declaration" (Preamble). It was certainly about the fundamental human rights, whose legal protection was guaranteed by the European Convention.

For the Universal Declaration of Human Rights, "the foundation of freedom, justice and peace in the world" is represented by "the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family", hence the requirement "that human rights should be protected by law... " (Preamble).

The foundation of this legal system would be established in 1950, i.e. two years after the proclamation of the Universal Declaration of Human Rights, namely by the European Convention on Human Rights, which – from then until nowadays – was followed by all European instruments on human rights and fundamental freedoms, culminating in the Treaty of course Nice (Dură & Mititelu, 2013 b., pp. 123-129) (France). All these legal instruments stated and emphasized the general Principles (Dură, 2013, pp. 7-14) of EU law on human rights and their legal protection (Dură, 2010, pp. 153-192).

In the Universal Declaration of Human Rights, on 10 December 1948, the UN General Assembly expressly asked "that every individual and every organ of society (...) shall strive by teaching and

education to promote respect for these rights and freedoms ..” (Preamble). The respect for these human rights and fundamental freedoms is, therefore, promoted only “by teaching and education”.

Aware of this reality, many countries worldwide – including the Romanian State – introduced, in the syllabus of the Faculties of Law, *The legal protection of human rights*, as a subject of study, in order to educate and train the young generation of the academic world in the spirit of the respect and application of these human rights and fundamental freedoms, which have been proclaimed by the United Nations as “their faith” (Preamble of the Universal Declaration of Human Rights).

Postulating that “all human beings (...) should act towards one another in a spirit of brotherhood”, the Declaration stated that they “are born free and equal in dignity and rights” (Art. 1). Moreover, in the Preamble of the Declaration, the UN General Assembly also specifies that “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 person ...” (Preamble).

In exercising these fundamental rights, “every” human being is entitled to them, “without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”(Art. 2 § 1). Moreover, the same Declaration specified that, in the exercise of these rights, “no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs ...” (Art. 2).

Article 3 of the Declaration states that “everyone has the right to life, liberty and security of person”. Therefore, the right to life is the first right of the human being. However, it should be accompanied by the right to liberty and security. Therefore, the Declaration further states that “no one shall be held in slavery or servitude” (Art. 4), or “be subjected to torture or to cruel, inhuman or degrading treatment or punishment” (Art. 5). Moreover, the EU legislation expressly reaffirmed these interdictions (Mititelu, 2012 b., pp. 70-77).

Article 7 provides that “all are equal before the law and are entitled without any discrimination to equal protection of the law” and that “all are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination”.

Against the acts violating the fundamental human rights “granted by the constitution or by law”, Article 8 provides that “everyone has the right to an effective remedy by the competent national tribunals”.

Within the same legal protection of human rights there also fall the following articles which either prohibit “to arbitrary arrest, detention or exile” (Art. 9) or which provide for the presumption of innocence (cf. Art. 11).

By interdicting the “arbitrary interference with a human person’s privacy, family, home or correspondence”, and by prohibiting any “attacks upon his honor and reputation”, the Declaration expressly provides that “everyone has the right to the protection of the law against such interference or attacks” (Art. 12).

The same Declaration stipulates that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State” (Art. 16, 3). It also states that “men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family” (Art. 16, 1). The same Declaration also provided for concrete measures for the protection of the family, which remains, indeed, one of the old legal European institutions (Mititelu, 2014 a., pp. 240-264).

Article 25 states that "the mother and the child are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection" (Art. 25, 2). Also, each family member "has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control" (Art. 25 § 1).

Other fundamental rights stated by the Declaration, rights which any "human being" should enjoy, are "the right to own property" (Art. 17); "the right to freedom of thought, conscience and religion" (Art. 18); "the right to freedom of opinion and expression" (Art. 19); "the right to freedom of peaceful assembly and association" (Art. 20); "the right to take part in the government of his country, directly or through freely chosen representatives" (Art. 21); "the right to social security" (Art. 22); "the right to work, to free choice of employment ..." (Art. 23); "the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay" (Art. 24); "the right to education" (Art. 26), which also implies the right to religious education (Dură & Mititelu, 2014, pp. 141-152); "the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" (Art. 27) etc.

Therefore, we note, that, according to the principle enunciated by the Universal Declaration of Human Rights, everyone has "moral and material interests", for which is otherwise entitled both by "Jus divinum" and "Jus naturale" and by "Jus positivum" of the World Nations, which assure also their legal protection. However, unfortunately, the legislations of some EU countries do not always make express reference to the "moral interests", much less to those arising from the works that have eminently a sacred or religious content, hence, the obligation of their jurists to not ignore or circumvent the principles enunciated by this Declaration - which have actually the force of "Jus cogens" - regarding this kind of interest of the human being.

The same Declaration states that "higher education shall be equally accessible to all on the basis of merit" (Art. 26 § 1) and that "education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms". However, the educational process "shall promote understanding, tolerance and friendship among all nations, racial or religious groups ..." (Art. 26 § 2).

The Universal Declaration of Human Rights finally provides that "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society" (Art. 29 § 2).

We should also emphasize and note that, the text of this first international instrument, which has the force of "*Jus cogens*", also states that, in a "democratic society", in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law, under two realities: a) "solely for the purpose of securing due recognition and respect for the rights and freedoms of others", so that "*alterum non laedere*" (Ulpianus), i.e. not to prejudice your peer, and b) for the purpose of "meeting the just requirements of morality, public order and the general welfare".

Another aspect that the informed reader may notice is that the text of this "Declaration" makes express reference to "Morals", i.e. to the "Moral law" (Dură, 2011 a., pp. 158-173), not to the "Ethics", as the Legislations from 1947-1989 and even some papers in the contemporary literature did, hence the

obvious need to use, in the text of laws, the notion of "Morals" and not the one of "Ethics", which, semantically, philosophically and legally, does not refer to the same reality.

2.2 The Principles enunciated by the text of the Universal Declaration, reaffirmed obviously by all the International and European Instruments concerning the Human Rights

The provisions of principles enunciated by the Universal Declaration were reaffirmed by all – International and European – main instruments on various aspects of Human Rights (coord. Zlătescu et al., 1997, vol. I). For example, on 9 December 1948, the UN General Assembly adopted the *Convention on the Prevention and Punishment of the Crime of Genocide*. On 4 November 1950, the member States of the Council of Europe signed the *European Convention on the Protection of Human Rights and Fundamental Freedoms*, which entered into force in 1953. It was followed by an impressive number of Additional Protocols, such as *Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, signed in Strasbourg in 1984, regarding the abolition of the death penalty (Zlătescu et al., 1997, vol. I, pp. 72-75). On 7 September 1956, in Geneva, the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* was signed. On 7 March 1965, the *International Convention for the Elimination of All Forms of Racial Discrimination* was adopted. Then, by Resolution 2200 (XX) of 16 December 1966, the UN General Assembly adopted the *International Covenant on Civil and Political Rights*, which entered into force on 23 March 1976; on 30 November 1973, the *International Convention on the Suppression and Punishment of the Crime of Apartheid* was adopted.

We remember also the fact that the *Final Act* of the Conference on Security and Cooperation in Europe, signed in Helsinki, on 1 August 1975, provided for – among others – the obligation of States to take action in the field of human rights and fundamental freedoms, in accordance with the principles of the UN Charter and the Universal Declaration of human rights.

On 10 December 1984, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* was adopted. In its turn, the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (which entered into force on 1 February 1989) was adopted on 26 November 1987. Romania has ratified this Convention by Law no. 80 of 30 September 1994, published in the Official Gazette no. 285 of 7 October 1994. In January 1989, *the Final Document of the General European Meeting* was adopted; among other things, it provided for eliminating and preventing the discrimination against persons or communities on the grounds of religion or religious belief. In addition, of course, the examples could continue with the Treaty of Nice (2000) and the Treaty of Lisbon (2007), where the human rights and freedoms were affirmed in the same spirit of the provisions and principles enunciated by the Universal Declaration of Human Rights, that remains the first legal international instrument which imposed a unitary and universal conception regarding the human rights and fundamental freedoms, and, *ipso facto*, regarding "*Dignitas Humana*" (dignity of the human person), to which the Treaty establishing a Constitution for Europe (Lisbon, 2007) would make express reference.

3. Instead of Conclusions

After the adoption and proclamation of the Universal Declaration of Human Rights, on 10 December 1948, the UN General Assembly called upon all Member countries to publicize the text of the Declaration and "to cause it to be disseminated, displayed, read and expounded principally in schools

and other educational institutions, without distinction based on the political status of countries or territories"[1]. Or, it is well-known that in the Soviet geopolitical space – including, therefore, in our country – this recommendation was not applied. Therefore, its reading and comment remained only a "*pium desiderium*" (a pious wish) for many Romanian schools and educational institutions[2], hence the obligation of the responsible authorities to take note of this unfortunate reality and to act under the Recommendation of the UN General Assembly of 1948, because only "by teaching and education" we can really develop "the respect for human rights and freedoms ..." (Preamble of the Universal Declaration of Human Rights).

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The European Convention on Human Rights

Cătălina Mititelu[1]

Abstract: Since 1950 - when it was ratified – the European Convention on Human Rights has had a decisive impact on the legislation, jurisprudence and judicial practice of the signatory States of its text. A true "Charter" of Human Rights, the Convention - which was revised and amended by additional Protocols – enounced not only the human rights and fundamental freedoms, but also provided the framework of their legal protection, which laid the foundation of a new era in the history of human rights. Among others, our paper emphasizes also the fact that the European Convention on Human Rights sets not only the general principles of the EU law, principles that have the force of "Jus cogens" for all EU states in the field of human rights and fundamental freedoms, but also it guarantee them a proper legal protection. Since this reality was not yet fully noticed and analyzed in the juridical literature, we believe that, by emphasizing it, we bring a real contribution to a better understanding and to a better capitalization of the first "Charter" of European Human Rights.

Keywords: European Union; rights and freedoms; legal protection

1. Introduction

"The European Convention on Human Rights" – which was drafted by the Council of Europe and ratified by the representatives of governments-member, in Rome, on 4 November 1950 – would become, across time, "one of the most important and effective international instruments for the protection of human rights in the world" (Bîrsan, 2005, p. V). Moreover, as Professor Jean-Paul Costa – former Vice-President of the European Court of Human Rights – noticed, the Convention exercises "a profound influence on the legislation, jurisprudence and legal practice" of the States that ratified it. Additionally, it actually involves "a supranational judicial mechanism" (Bîrsan, 2005, p. V), hence the obligation of these States to affirm and respect the human rights and fundamental freedoms proclaimed by the force of "*Jus cogens*".

The Convention had been ratified "with more than forty years before the entry into force of Protocol 11, which profoundly changed the institutional mechanism of protection by abolishing the European Commission of Human Rights. This led to the transformation of the European Court of Human Rights into a permanent and unique jurisdiction, eliminating the judicial role of the Committee of Ministers of the Council of Europe" (Bîrsan, 2005, p. VI).

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Although Romania ratified the Convention 44 years after its publication, i.e. by Law no. 30 of 18 May 1994, published in the Official Gazette no. 135 of 31 May 1994, however, "in 1998", when "the first decision of the (European) Court against Romania" was given, in the Romanian juridical environment we could still speak of "ignorance de la Convention" (ignorance of the Convention), and, *ipso facto*, of "an obstacle to the effective exercise of the rights and freedoms that it protects; ... ", hence his justified conclusion that we have to be acquainted with "the rules in order to properly use them ..." (Bîrsan, 2005, p. VII).

2. The Preamble of Convention

The Preamble to the Convention reveals that "The Governments signatory hereto, being members of the Council of Europe", took into account primarily the fact that the Universal Declaration of Human Rights – proclaimed by the United Nations General Assembly on 10 December 1948 – aimed at "securing the universal and effective recognition and observance of the Rights therein declared". However, only by this European Convention, there were taken "the first steps for the collective enforcement of certain rights stated in the Universal Declaration".

Thus, according to the testimony left by the Governments party to the Convention, the first measures for the legal protection of human rights and fundamental freedoms – set by the Universal Declaration of Human Rights, proclaimed in 1948 – were taken in 1950.

In the same Preamble, it was stated that "the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms". According to the statement of the Governments party to this Convention, this was "the very foundation of justice", based "on a truly democratic political regime" and "on a common understanding and mutual respect of human rights as they arise".

In other words, without knowing and respecting these human rights there can be no "Justice", i.e. "Righteousness" (Dură, 2011, pp. 158-173), nor "a truly democratic political regime" that would truly serve "*ad utilitatem publicum*" (the common good) .

According to the Preamble to the Convention, "the aim of the Council of Europe is the achievement of greater unity between its members and that one of the methods by which that aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms, ..., which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights ...".

The establishment of the European Union, and, *ipso facto*, the integration of Member States, is therefore conditioned – primarily – by the affirmation and protection of human rights and fundamental freedoms (Dură, 2010 p. 153-192), on whose foundation one can build justice and peace in the world, and whose guarantee can be proved only by a truly democratic political regime. The effective materialization of these fundamental freedoms and, implicitly, of their protection, depends therefore on the existence of such a political regime, which should exist as such in all Member States of the European Union. Certainly, only such a "truly democratic" regime is based on a common understanding of human fundamental freedoms, able to give expression and affirmation to the full legal protection of the supreme values of life and human dignity. On the other hand, "maintaining" or

keeping these human values are based only on "the mutual respect of human rights", ensuring their legal protection.

2.1 The Rights and Freedoms Provided by the Convention and their Legal Protection

Among the rights and freedoms provided by the Convention, we mention: "everyone's right to life" (Art. 2); "the right to liberty and security" (Art. 5); "the right to a fair trial" (Art. 6); "the right to respect for private and family life, home and correspondence" (Art. 8); "the right to freedom of thought, conscience and religion" (Art. 9); "the right to freedom of expression" (Art. 10); "the right to found a family" (Art. 12) etc.

Regarding the legal protection of human rights, "the European Convention on Human Rights" makes express references. For example, Article 6 – which provides for the right of every person to a fair trial by an independent and impartial tribunal – states that it will be involved "in the determination of his civil rights and obligations or of any criminal charge against him". Therefore, this article reveals that not only the rights but also the obligations of civil nature may be violated, and that the role of a Court lies primarily in deciding on the merits of any criminal charge directed against any human being; hence the obligation of legal bodies to make an informed assessment of the issue, and "*sine ira et studio"* of any form of accusation, including any denunciation, no matter who made it. Of course, this is the only way to respect the "*dignitas humana* (Dură, 2006 a., pp. 86-128) (human dignity) of every human being, to which the Treaty establishing a Constitution for Europe (Lisbon, 2007), i.e. the European Constitution, makes express reference.

The same article (six) – of the European Convention – provides that, "where the interests ... or the protection of the private life of the parties so require", "the press and public may be excluded from all or part of the trial" (Art. 6 § 1). This measure – which aims at "the protection of private life" – is, however, taken "in the interests of morals, public order or national security in a democratic society" (Art. 6 § 1).

By protecting morals, public order and national security, the human being is also protected, not only in order to enjoy the full and free exercise of his/her fundamental rights (Dură, & Mititelu, 2012, pp. 103-127), but also in order to enjoy the right to respect for his/her human dignity.

In accordance with the Convention, the person charged with an offense also enjoys legal protection as he/she "shall be presumed innocent until proved guilty according to law" (Art. 6 § 2). The presumption of innocence is therefore a fundamental human right by virtue of which every human person should be considered innocent until proven guilty by a final court decision. As such, the verdict received by the person accused of an offence, verdict given by certain journalists from the Romanian media, is entirely contrary to the European Convention, whose provisions (Dură, & Mititelu, 2014 a.) have the value of an EU constitutional text, hence the evidently necessity that "constitutionalization process of the EU member states" (Mititelu, 2013, pp. 122-127) has to be urgently materialized.

The special rights provided by the Convention are also in the spirit of the protection of the person accused of an offense, and namely: a) "the right to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him"; b) the right "to have adequate time and facilities for the preparation of his defense"; c) the right "to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require"; d) the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his

behalf under the same conditions as witnesses against him"; e) the right "to have the free assistance of an interpreter if he cannot understand or speak the language used in court" (Art. 6 § 3).

With regard to the trial and punishment of persons, the Convention also provides that "no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law". Moreover, article 7 specifies that "nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed".

In the spirit of the same Convention, the interference of a public authority in the exercise of everyone's right to respect for his private and family life, his home and his correspondence, is not allowed "except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" (Art. 8).

The European Convention on Human Rights has therefore in view both to protect individual and collective (i.e. those of our peers) rights and freedoms. Moreover, we cannot speak of the protection of our rights and freedoms without considering and protecting the rights and freedoms of others, regardless of sex, race, color, language, religion, national or social origin, political opinions etc.

The restriction of our own rights and freedoms is therefore subject to the protection of the rights and freedoms of others. Therefore, in order to protect the rights and freedoms of others, the Convention provides for restriction measures regarding the human freedom to manifest one's religion or religious beliefs. These measures are considered by the Convention as "necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" (Art. 9).

As for the syntagme, "public Morals", it should be noted and remarked the fact that this one it is not the same – in its content and in its form of manifestation – with the syntagme "public Ethics". Therefore, the two syntagmes should not be perceived as identical ones in their content, or equivalent from semantic point of view, as are still doing some jurists of our days because of their ideological or philosophical convictions, hence the persistence of erroneous perceptions regarding the relationship between Law and Morals (Dură, 2003, pp. 15-24).

It should also be noted that the limitation of certain fundamental human rights - as, for example, the right to Religion (Dură & Mititelu, 2014 b., pp. 831-838) and its manifestation through a religious denomination – should occur only if the conditions set out in the text of Article 9 of the European Convention are met, because any abuse or violation of these rights is punished by the European Court (Dură & Mititelu, 2014 c., pp. 141-152).

The exercise of the freedom "to hold opinions" and of the freedom "to receive and impart information and ideas without interference by public authority and regardless of frontiers" can also be subject "to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary" (Art. 10).

Legal restrictions – which aim at "national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others" – are also provided in connection to the exercise of the right "to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests" (Art. 11). The same article of the Convention states that they are not prohibited as "restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State" (Art. 11).

In the European Convention, the legal protection of human rights is expressly emphasized in Article 13, which provides that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity". As such, everyone has the right to address a national court when even persons acting in an official capacity (army, police, state administration, etc.) have violated their rights. Furthermore, Article 18 states that "the restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed".

The same Convention provides that no one can interpret its articles in order to justify "for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and 14 15 freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention" (Art. 17).

Under Article 17 of the Convention, the "abuse of rights" is therefore forbidden, and, as such, even the "Court does not have the *ratione materiae* jurisdiction to examinize the complaints brought by persons acting in order to cancel the rights recognized by the Convention to other persons" (Chiriţă, 2008, p. 641). In other words, any form of abusive exercise of human rights should be sanctioned, including those who use the Convention – in terms of guaranteeing and protecting human rights – in order to achieve their purpose by harming the public order of States, hence the otherwise known phrase: "pas de liberté pour les liberticides" (no freedom for the murderers of freedom).

In order to ensure the protection of human rights, the Governments parties to the Convention, members of the Council of Europe, established a European Commission of Human Rights and the European Court of Human Rights (Art. 19). This Convention stipulates that the members of the Commission "shall be of high moral character and must either possess the qualifications required for appointment to high judicial office" and, *ipso facto*, be "people recognized for their competence in the field of national or international law" (Art. 21§ 3).

The same conditions are otherwise provided for the members of the Court, which "shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence" (Art. 21 § 1).

Therefore, a "*sine qua non*" condition for electing the members of the Commission and of the Court and for the recognizing their competence in the field of national and international law is "the moral character"; therefore, the European legislator considers it mandatory for all who wish to become their members. However, those members are also required that, in solving the case, "to be guided by respect for human rights, as recognized in the present Convention" (Art. 28, b).

2.2 The Additional Protocols of the European Convention of Human Rights

The text of the European Convention – a true "Charter" of human rights – was revised and supplemented by additional Protocols (Chiriță, 2008, pp. 766-873), where the Governments parties, members of the Council of Europe, expressed their determination to take "step to ensure the collective enforcement of certain rights and freedoms other than those already included in Section 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4th November 1950" (Preamble to Protocol 1, amended by Protocol 11, which has entered into force on 1 November 1998). Nevertheless, what are those rights and freedoms, "other" than those already included in the text of the Convention?

Among other things, Protocol 1 to the Convention provides that "every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law" (Article 1), and that "no one shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, will respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions" (Art. 2).

Therefore, it is noteworthy that Protocol 1 emphasizes that everyone has the right to property and training, and that parents have the right to ensure their children an education according to their own religious and philosophical convictions. However, unfortunately, the landscape of the Romanian society easily reveals that some politicians, jurists, sociologists, political scientists, journalists etc. will not acknowledge the parents' right to educate their children according to their religious beliefs, philosophical convictions (Dură, 2005, pp. 19-35) etc., hence – willingly or unwillingly – the ignorance of the rules of international and European law and of national law, regarding this "*jus cogens*".

Protocol 4[1] - which recognizes certain rights and freedoms, "other" than those that appear in the Convention and in Protocol 1 to the Convention – provides that "no one shall be deprived of his liberty merely on the ground of inability to fulfill a contractual obligation" (Art. 1); that "no one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national" (Art. 3 § 1); and that "no one shall be deprived of the right to enter the territory of the State of which he is a national" (Art. 3 § 2).

By Protocol 6 – amended by Protocol 11, which entered into force on 1 November 1998 – the "death penalty" was abolished. In accordance with the provisions of this Protocol, "no one shall be condemned to such penalty or executed" (Art. 1). However, article 2 provides that "a State may make provision in its law for the death penalty in respect of acts committed in time of war or of imminent threat of war; such penalty shall be applied only in the instances laid down in the law and in accordance with its provisions. The State shall communicate to the Secretary General of the Council of Europe the relevant provisions of that law" (Art. 2).

In order to ensure the individual and collective guarantee of certain rights and freedoms set out in the Convention for the Protection (Safeguarding) of Human Rights and Fundamental Freedoms (Rome, 4 November 1950), Protocol 7 – concluded at Strasbourg on 22 November 1984, and amended by Protocol 11, which entered into force on 1 November 1998 – reaffirmed and broadened the scope of the legal protection of human rights for vulnerable persons (Mititelu, 2012, pp. 70-77). For example,

[1] This Protocol, as amended by Protocol 11, came into force on 1 November 1998.

Article 1 of Protocol 7 allows the expulsion of "an alien lawfully resident in the territory of a State, but this one "shall not be expelled therefrom except in pursuance of a decision reached in accordance with law ...". Moreover, the alien lawfully resident shall not be expelled before the exercise of certain rights, namely: a) "to submit reasons against his expulsion; b) to have his case reviewed, and c) to be represented for these purposes before the competent authority or a person or persons designated by that authority". Finally, his expulsion before the exercise of these rights is permissible only when "such expulsion is necessary in the interests of public order or is grounded on reasons of national security" (Art. 1).

The same Protocol (no. 7) provides that "everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal" (Art. 2). Furthermore, the person who has suffered punishment as a result of a conviction, produced by "a miscarriage of justice (...) shall be compensated according to the law or the practice of the State concerned, unless it is proved that the nondisclosure of the unknown fact in time is wholly or partly attributable to him" (Art. 3). Article 5 of the Protocol (7) provides that "spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution". The same article stated, however, that states are free to take "such measures as are necessary in the interests of the children". Therefore, through this article, the Member States of the Council of Europe wanted to ensure the guarantee of equal rights and responsibilities of spouses and the legal protection of children. Moreover, Articles 3 and 5 of the United Nations Convention on the Rights of the Child – which came into force on 2 September 1990 – stated and reiterated the provisions of this Protocol.

One of the main Additional Protocols is Protocol 11, which was signed in Strasbourg, on 11 May 1994. This Protocol brought a real reorganization of the control machinery established by the European Convention on Human Rights and Fundamental Freedoms. Wishing to maintain and strengthen the effectiveness of the protection of "the human rights and fundamental freedoms in the Convention", the member States of the Council of Europe have established – under Protocol 11, which entered into force on 1 November 1998 – the European Court of Human Rights. The Decision establishing this body was taken on the basis of Resolution 1 adopted at the European Ministerial Conference on Human Rights held in Vienna on 11-20 March 1985, of Recommendation 1194 (1992) adopted by the Parliamentary Assembly of the Council of Europe on 6 October 1992, and of the decision on the reform of the Convention control mechanism, decision taken by the Heads of State and Government - members of the Council of Europe, in the Vienna Declaration of 9 October 1993.

In accordance with Article 21 of Protocol 11, the judges – members of that Court - "shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurisconsults of recognized competence". The judges of the European Court of Human Rights are therefore only those persons showing "high moral character" – to their peers – and "recognized competence" in legal knowledge and legal practice.

The Member States of the Council of Europe, "having regard to the fundamental principle according to which all persons are equal before the law and are entitled to the equal protection of the law, reaffirmed their decision to take further steps to promote the equality of all persons through the collective enforcement of a general prohibition of discrimination by means of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950 ..." (Preamble to Protocol 12).

In accordance with Article 1 of Protocol 12, additional to the Convention, "the exercise of any right set forth by law shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status" (Art. 1). The same article provides that no one shall be discriminated against "by a public authority" on any of the reasons mentioned above. The exercise of rights and fundamental freedoms implies thus the obligation of prohibiting any form of discrimination or privileges from public authorities (Dură, 2006 b., pp. 491-510). No human being can be discriminated against based on race, color, language, religion, political opinions, ethnic identity, wealth etc.

On 1 November 1998, the Rules of the European Court of Human Rights (under Protocol 11) were published. The European Court has its seat in Strasbourg, which is also the headquarters of the Council of Europe. Among other things, these Rules provide that "before taking up office, each elected judge shall, at the first sitting of the plenary Court at which the judge is present or, in case of need, before the President of the Court, take the following oath ..." (Art. 3 § 1). On this occasion, the judge solemnly swear or says that he/she will perform his/her duties "as a judge honorably, independently and impartially and that I will keep secret all deliberations".

A judge can therefore exercise his/her functions only when he/she does it "with honor, independence and impartiality", and, *ipso facto*, when keeping "secret all deliberations". On the other hand, by respecting and implementing these conditions – necessary for the exercise of a judge's functions – the protection of human rights and fundamental freedoms is implicitly ensured and guaranteed.

The incompatibilities provided by these Rules on the judges of the European Court of Human Rights can also be considered as a guarantee of human rights. For example, judges "shall not during their term of office engage in any political or administrative activity or any professional activity which is incompatible with their independence or impartiality ..." (Art. 4).

Some provisions of the European Agreement relating to Persons participating in Proceedings of the European Court of Human Rights, which was signed in Strasbourg, on 5 March 1996, may also be seen as a legal protection of human rights. Among other things, this Agreement provides that that persons participating in the proceedings commenced by the Court "shall have immunity from legal process in respect of oral or written statements made, or documents or other evidence submitted by them before or to the Court" (Art. 2 § 1) .

The same European Agreement provides that the Member States of the Council of Europe – contracting parties to this agreement – should not "hinder the free movement and travel, for the purpose of attending and returning from proceedings before the Court ..." (Art. 4 § 1, a). This free movement and travel can be forbidden only "in accordance with the law and necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" (Art. 4 § 1, b). Therefore, the restrictions imposed by law on free movement and travel aim at protecting the health and morals of the respective society, prerequisites for asserting human rights and fundamental freedoms.

On 3 May 2002, in Vilnius, Protocol 13 was adopted, which provided for the obligation of the Member States of the Council of Europe to abolish the death penalty "in all circumstances", and, as such, the "exemptions" (Art. 15 of the Convention) and "reserves" (Art. 57 of the Convention) were banned.

In 2004, another Additional Protocol to the European Convention on Human Rights was signed, and, according to the opinions of some jurists, by this Protocol it was intended to "improve the current control system for the respect of the rights recognized by the Treaty"; it was also aimed at ensuring "the acceleration of the enforcement of Court decisions and at creating the conditions which allow the EU to accede to the Convention" (Chiriţă, 2008, p. 862). Hence the conclusion that – at that time – the EU Member States had not created yet "the conditions" for joining the Convention, process which indeed involved both the application of the Convention on human rights and fundamental freedoms and the assurance of their legal protection.

2.3. From the Convention of Human Rights to the Treaty of Lisbon. A New Era in the History of Human Rights

The Treaty of Lisbon, signed on 17 December 2007, also stated that "the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms" (Art. 6, paragraph 2), and that "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law" (Art. 6, paragraph 3).

We can therefore notice that the EU states joined officially the "European Convention on Human Rights" only in 2007, i.e. 57 years after its proclamation. It should also be emphasized and noted that the EU law consists of two elements, namely, the constitutional Traditions of the Member States and the Human Rights guaranteed by the European Convention. The general principles of EU law on human rights were indeed first mentioned in the text of the European Convention, i.e. in 1950.

The Treaty of Lisbon also emphasized that, regarding the human rights and fundamental freedoms, the "European Convention on Human Rights" was the first text that set out the general principles of EU law (Dură, 2013, pp. 7-14). Moreover, it has the force of "*jus cogens*" for all Member States. Additionally, by this Treaty it was reiterated that, regarding the human rights and fundamental freedoms, the Convention of 1950 remains the constitutional "Charter" of the EU, hence the obligation of all the citizens of Member States to know, respect and apply its provisions, whose principles actually give consistency and expression to the content of EU law. In fact, by asserting and reiterating the basic principles set out in the Universal Declaration of Human Rights, the European Convention stipulated not only for the human rights and for fundamental freedoms, but also for their legal protection, which laid the foundations of a new era in the history of Human Rights.

3. Conclusions

Although the text of the European Convention on Human Rights has been examined, commented and explained over the last six decades, the informed reader may find that some of its aspects and facets still remain to be investigated and reviewed; moreover, these issues should be read, perceived and updated taking into account the times in which we live. In addressing the subject of our paper, we had in view precisely these realities. Therefore, within our paper, we also emphasized several issues that have not been studied yet in the literature. This was due to the fact that, in analyzing and assessing the text of the European Convention of Human Rights, we resorted to the means and instruments of the method for inter and multidisciplinary research, hence its "*sui generis*" nature, which is actually filling a gap in the Romanian legal literature. Finally, we would like to underline that, when analyzing and

assessing the Convention, we always took into account the assertions of the jurisprudential doctrine of the European Court of Human Rights, which remains a valuable source of EU law.

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Law for Asylum in Albania and Some EU Regulations on Asylum Issues

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Abstract: This paper aims at treating from a general point of view the Albanian legislation on asylum, and to see the level of approximation with EU legislation in this field, as the asylum has become a controversial topic because of increasing demands for asylum from citizens of nonmembers states of the European Union. Because of a relatively new law in Albania, discussions on this topic are scarce. The method used for this paper is analyzing the current legal provisions on the issue of asylum in the Republic of Albania, the main regulations of asylum issue in the European Union, in order to see the level of approximation and compliance of legal rules in Albania with international standards on asylum. As a relatively new law, the law on asylum has a partial approximation with EU directives and is in line with the standards enshrined in the Geneva Convention, to which the Republic of Albania has acceded. Of course, this paper does not treat this issue in an exhaustive way, but provides only a general overview of the level of approximation of Albanian legislation with European Union regulations on asylum.

Keywords: Asylum; EU Directives; Legal provisions; Geneva Convention

1. Origin of Asylum

The origin of asylum comes from the ancient antiquity. Long before the Western democracies defined who is a refugee and established international organizations to assist people fleeing persecution, various religions as well as ancient rulers offered asylum in accordance with their set of norms and beliefs[3]. (Ezra, 2014, p. 57)

Perhaps the earliest mention of the term "refugee" occurs in the Old Testament, in the first book of Moses, referring to a person who escaped from a war and sought shelter from Abraham. (Ezra, 2014, p. 57)

With time, the concept was further developed to include those who killed another by mistake. Thus, for example, in the fourth book of Moses, God commanded Joshua to build three cities of refuge to allow people guilty of unintentional manslaughter to flee from the blood avenger. (Ezra, 2014, p. 57)

Another way to acquire asylum was to reside in the temple at Jerusalem, as it was forbidden to remove by force any person under the protection of the deity. Unlike the word "refugee", which meant that the

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[3] http://edoc.ub.uni-muenchen.de/2680/1/Ezra_Esther.pdf, Accessed date 14.02.2014.

person concerned ought to be protected, exile had a negative meaning, suggesting a divine intervention for dealing with inappropriate behavior.

From a religious standpoint, it was God's way of punishing the Israelites who "betrayed" his way by following other customs. (Ezra, 2014, p. 57)

In Albania, although asylum was not a term known directly by the norms of Albanian customary law, it was known by the Albanian society of that period of time. Such a phenomenon was mainly known due to penalties given to the perpetrators of various damages in case of commission of certain offenses such as theft, murder, crimes against property etc. Expulsion of a person from its territory of residence, was known as a primitive form of committing criminal acts. Studying it in light of current knowledge from resources, the term asylum in ancient Rome was not defined by legislation and was not described by roman jurisprudence[1]. (Mossakowski, 2004-6, p. 1)

The Latin term *asylum* is believed to come from the Greek word*ἄσυλοια* or*ἄσυλον* which means a safe place. After a process of the evaluation of this term, it meant a sacred place, place of shelter. In ancient Rome the term asylum had a specific legal meaning. (Mossakowski, 2004-6, p. 1)

Historically, refugees were recognised on the basis that they formed part of groups deprived of protection from their own state. Until the 20th century this was a matter of individual action on the part of nation states. Two well-known historical examples are French Huguenots finding shelter in England and English Catholics finding shelter in France from religiously-based persecution in their respective States during the 16th and 17th centuries. (Mackey & Barnes, 2013, par. 38)

In the second half of the 19th century, with the emergence of national movements in Italy, Ireland, Poland and Germany, the definition of asylum shifted from the religious sphere to the political one. The expression most commonly used was 'exile'. Among the *Romantic Exiles*, as E. H. Carr rightly observed143, one may find distinguished historical figures, such as Karl Marx, Giuseppe Mazzini, Michael Bakunin and Alexander Herzen. Switzerland, France, and Britain expressed great sympathy and support towards these political activists and served as the main host countries. (Ezra, 2014, p. 57)

The Universal Declaration of Human Rights, of December 10, 1948, Article 14, states: "Everyone has the right to seek and to enjoy in other countries asylum from persecution. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations"[2].

Among the main goals, dealing with policies on asylum and that serve for strengthening the capabilities of the Albanian state to ensure implementation of the obligations and commitments towards the European Union relating to the functioning of all components of the asylum system is the correct application of international legal principle recognized by customary international law of non-refoulement and other rights of asylum seekers and refugees by law enforcement agencies, as well as treating equally third-country nationals legally residing in the territory of Albania[3].

[1] Furthermore: http://pomoerium.eu/pomoer/pomoer5/mossakowski2.pdf, Accessed date 14.02.2014.

[2]Explanatory Report of draftlaw "On asylum in the Republic of Albania", pg.1. Furthermore: http://www.parlament.al/web/PROJEKTLLIGJI_P_R_AZILIN_N_REPUBLIK_N_E_SHQIP_RIS_17270_1.php [Accessed date: 13.02.2015]

[3]Explanatory Report of draftlaw "On asylum in the Republic of Albania", pg.6. Furthermore: http://www.parlament.al/web/PROJEKTLLIGJI_P_R_AZILIN_N_REPUBLIK_N_E_SHQIP_RIS_17270_1.php [Accessed date: 13.02.2015]

2. EU Directives on Asylum

2.1 The Common European System of Asylum

Asylum is granted to people fleeing persecution or serious harm in their own country and therefore in need of international protection. Asylum is a fundamental right; granting it is an international obligation. This obligation was first recognized in the 1951 Geneva Convention on the protection of refugees. In the EU, an area of open borders and freedom of movement, countries share the same fundamental values and States need to have a joint approach to guarantee high standards of protection for refugees. Procedures must at the same time be fair and effective throughout the EU and impervious to abuse. With this in mind, the EU States have committed to establishing a Common European Asylum System[1].

Asylum flows are not constant, nor are they evenly distributed across the EU. They have, for example, varied from a peak of 425 000 applications for EU-27 States in 2001 down to under 200 000 in 2006. In 2012, there were 335,895[2].

According to the Common European Asylum System, asylum must not be a lottery. EU Member States have a shared responsibility to welcome asylum seekers in a dignified manner, ensuring they are treated fairly and that their case is examined to uniform standards so that, no matter where an applicant applies, the outcome will be similar[3].

Between 1999 and 2005, several legislative measures harmonizing common minimum standards for asylum were adopted. In 2001, the Temporary Protection Directive allowed for a common EU response to a mass influx of displaced persons unable to return to their country of origin. The Family Reunification Directive also applied to refugees[4].

After the completion of the first phase, a period of reflection was necessary to determine the direction in which the CEAS should develop. A 2007 Green Paper was the basis for a large public consultation. The responses, together with the results of an evaluation of how existing instruments were implemented, were the basis for the European Commission's Policy Plan on Asylum, presented in June 2008. As stated in the Policy Plan, three pillars underpin the development of the CEAS: bringing more harmonization to standards of protection by further aligning the EU States' asylum legislation; effective and well-supported practical cooperation; increased solidarity and sense of responsibility among EU States, and between the EU and non-EU countries[5].

New EU rules have now been agreed, setting out common high standards and stronger co-operation to ensure that asylum seekers are treated equally in an open and fair system – wherever they apply[6].

2.2 Directive 2011/95/EU

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011, is a Directive on standards for the qualifications of citizens of countries nonmember states of the EU, or stateless persons as beneficiaries of international protection, for a uniform status for refugees or persons eligible for subsidiary protection.

[1] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm
[2] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm
[3] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm
[4] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm
[5] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm
[6] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm

The Qualification Directive establishes common grounds to grant international protection. Its provisions also foresee a series of rights on protection from *refoulement*, residence permits, travel documents, access to employment, access to education, social welfare, healthcare, access to accommodation, access to integration facilities, as well as specific provisions for children and vulnerable persons. The minimum standards in the previous Directive were to a certain extent vague, which maintained divergences in national asylum legislation and practices. The chances of a person to be granted international protection could vary tremendously depending on the Member State processing the asylum application[1].

The new Qualification Directive will contribute to improve the quality of the decision-making and ensure that people fleeing persecution, wars and torture are treated fairly, in a uniform manner. It clarifies the grounds for granting international protection and leads to more robust determinations, thus improving the efficiency of the asylum process and prevention of fraud, and ensures coherence with the European court's judgments[2].

The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account[3]:all relevant facts as they relate to the country of origin at the time of taking a decision on the application, including laws and regulations of the country of origin and the manner in which they are applied;

- the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm;
- the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm;
- whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether those activities would expose the applicant to persecution or serious harm if returned to that country;
- whether the applicant could reasonably be expected to avail himself or herself of the protection of another country where he or she could assert citizenship.

The Direcitve provides in Article 5 that a well-founded fear of being persecuted or a real risk of suffering serious harm may be based on events which have taken place since the applicant left the country of origin.

A well-founded fear of being persecuted or a real risk of suffering serious harm may be based on activities which the applicant has engaged in since he or she left the country of origin, in particular where it is established that the activities relied upon constitute the expression and continuation of convictions or orientations held in the country of origin.

Without prejudice to the Geneva Convention, Member States may determine that an applicant who files a subsequent application shall not normally be granted refugee status if the risk of persecution is

[1] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/refugee-status/index_en.htm
[2] http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/refugee-status/index_en.htm
[3]Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011, Article 4.http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011L0095 [Accessed date: 7.02.2015]

based on circumstances which the applicant has created by his or her own decision since leaving the country of origin[1].

In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva Convention, an act must[2]:

♦ be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or

♦ be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

Acts of persecution as qualified in paragraph 1 can, inter alia, take the form of[3]:

♦ acts of physical or mental violence, including acts of sexual violence;

♦ legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;

♦ prosecution or punishment which is disproportionate or discriminatory;

♦ denial of judicial redress resulting in a disproportionate or discriminatory punishment;

♦ prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2);

♦ acts of a gender-specific or child-specific nature

It is very important to mention Article 10 of the Directive, which sanctiones the reasons for persecution taken into account while considering a request for granting asylum.

The Directive sanctions that Member States shall take the following elements into account when assessing the reasons for persecution[4]:

❖ the concept of race shall, in particular, include considerations of colour, descent, or membership of a particular ethnic group;

❖ the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief;

❖ the concept of nationality shall not be confined to citizenship or lack thereof but shall, in particular, include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State;

❖ a group shall be considered to form a particular social group where in particular:

[1]Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011, Article 5.http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011L0095 [Accessed date: 7.02.2015]
[2]Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011, Article 9/1.http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011L0095 [Accessed date: 7.02.2015]
[3]Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011, Article 9/2.http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011L0095 [Accessed date: 7.02.2015]
[4]Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011, Article 10.http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32011L0095 [Accessed date: 7.02.2015].

- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and

- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group;

❖ the concept of political opinion shall, in particular, include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

This Directive brought a significant improvement in the harmonization of EU law with the standards of international human rights and legal obligations of refugees and the case law of the European Court of Human Rights. However, depending on its interpretation and application of the Directive may allow for gaps in the protection of applicants and beneficiaries of international protection. Therefore, the obligation arises for member states to use their power to adopt more favorable standard under Article 3 of the Directive, in line with the continuous evolution of international and European jurisprudence and law on asylum.

As we see above, the Directive is very detailed in its predictions, avoiding subjective interpretations of its provisions, a basic principle for the quality of legislation and enabling uniformity of treatment of asylum issues in all European Union member states.

3. Albanian Law on Asylum

Article 40 of the Albanian Constitutions sanctions that foreigners have the right of asylum in the Republic of Albania according to the law. This is the general principle sanctioned in the Constitution, referring to the specific regulations made by law.

Beside this principle sanctioned in Albanian Constitutions for the right of foreigners to asylum in the Republic of Albania, as sanctioned by law, the Republic of Albania adhered to the Convention "On the Status of Refugees", signed in Geneva on 28.07.1951, and the protocol "On the Status of Refugees", signed in New York on 31.1.1967[1].

Albania has also ratified the agreement between the Government of the Republic of Albania and the High Commissioner for Refugees of the United Nations, through the law No.7833, dated 22.06.1994[2].

Albania has ratified the 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness, accepting some international and regional instruments on human rights, which are also important to the protection the refugees. Through these acts, Albania

[1]Decree of the President of the Republic No.200, dated 06.03.1992 "On the accession of the Republic of Albania in the" Convention on the Status of Refugees and the "Protocol on the Status of Refugees".
[2] Law, No.7833, date of act: 22.06.1994, Date of approval: 06.07.1994, Official Journal No.8, Page:391 www.ligjet.org

is listed next to those countries, promoting and spreading the values of humanity and becoming part of international conventions, such as the Geneva Convention of 1951 and the New York Protocol on asylum creating an effective system of asylum[1].

Article 80, of the Stabilization and Association Agreement states that Albania and the European Union will cooperate in the field of visas, border control, asylum and migration and will establish a framework for cooperation, including at regional level, in those fields, taking into account and making full use of other existing initiatives in this area as appropriate. Cooperation in the above matters will be based on mutual consultations and close coordination between the parties and shall include technical and administrative assistance for:

- Exchange of information on legislation and practices;
- Drafting legislation;
- Increasing the efficiency of the institutions;
- Training of staff;
- The security of travel documents and detection of false documents;
- Border management.

Cooperation focuses in particular:

✓ in the field of asylum on the implementation of domestic legislation to meet the standards of the Geneva Convention of 1951 and the New York Protocol of 1967 to provide in this way respecting the principle of non-return of the individual in that country that poses threat to his life, as well as other rights of asylum seekers and refugees;

✓ in the field of legal migration, on admission rules and rights and status of persons admitted. Regarding migration, the Parties agree to fair treatment of nationals of other countries who are legally resident in their territories and to promote integration policies aimed at making the rights and obligations comparable to those of own citizens[2].

Whereas Article 81 of the Stabilization and Association Agreement provides that the parties cooperate to prevent and control illegal immigration. For this purpose, the parties, upon request and without further formalities, agree that Albania and Member States:

- will readmit any of their nationals residing illegally in their territories;

- will readmit any third-country nationals and stateless persons residing illegally in their territory and entered the territory of Albania through a Member State or from a Memeber State, or has entered the territory of a Member State via Albania, or from Albania.

Member States of the European Union and Albania have an obligation under the SAA to provide their nationals with appropriate identity documents and shall extend to them the administrative facilities for this purpose. Specific procedures for the purpose of readmission of nationals, third country nationals and stateless persons are defined in the Agreement between the European Community and Albania on the readmission of persons residing without authorization, signed on 14 April 2005. Albania has agreed to end readmission agreements with countries of the Stabilisation and Association process and undertakes to take all necessary measures to ensure the flexible and rapid implementation of all

[1]Explanatory Report of draftlaw "On asylum in the Republic of Albania", pg.2. Furthermore: http://www.parlament.al/web/PROJEKTLLIGJI_P_R_AZILIN_N_REPUBLIK_N_E_SHQIP_RIS_17270_1.php [Accessed date: 13.02.2015]

[2]Law No. 9590, date 27.07.2006 "On the ratification of the Stabilization and Association Agreement between the Republic of Albania and the European Communities and their Member States", Article 80.

readmission agreements referred to in Article 82 of the SAA. Meanwhile, the agreement also stipulates that the Stabilisation and Association Council will undertake other joint efforts that can be made to prevent and control illegal immigration, including networks of trafficking and illegal migration[1].

3.1 Law no. 121/2014 "On Asylum in the Republic of Albania", as Amended

Law no. 121 / 2014 "On Asylum in the Republic of Albania", as amended[2], was approved on 18/09/2014 and promulgated by Decree no. 8736, dated 08.10.2014 of the President of the Republic of Albania.

This new law repealed law no. 8432, dated 14.12.1998, "On Asylum in the Republic of Albania", as amended, and the law no. 9098, dated 07.03.2003, "On the integration and family reunion of people who have been granted asylum in the Republic of Albania". One of the innovations in this law, is exactly the integration in a harmonized way of both existing laws on asylum, the law No. 8432, dated 14.12.1998, "On Asylum in the Republic of Albania", as amended, and Law No. 9098, dated 03.07.2003, "On the integration and family reunion of people who have been granted asylum in the Republic of Albania", aiming to consolidate and regulate the field of asylum in the Republic of Albania with the latest developments and changes, especially to those dealing with the approval of the Law no.108 / 2013, dated 03.28.2013, "For foreigners". In this way, was enabled having an organic law on asylum[3].

This law aims at consolidating the substantive legal framework in the field of asylum and full alignment of this legislation with the European Union[4].

As defined in Article 2 of the same law, its object is to determine the principles and basic conditions for recognizing and guaranteeing the right of foreign persons or stateless persons to seek international protection; the responsible authorities and their competence in dealing with foreigners and stateless persons seeking international protection; ways of recording and documents, provided for persons seeking asylum and those who have received a form of international protection in the Republic of Albania; refugee status and subsidiary protection status; rights arising from international protection; the right of administrative and judicial appeals[5].

A topic to be treated is the meaning that the Albanian legislation awarded to the term "asylum". The answer for this question is found in Article 3 of Law no. 121/2014, sanctioning asylum as form of international protection that the Republic of Albania grants to refugees. The same provision gives the meaning of the term refugee, as a foreigner or stateless person who, owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality or country of habitual residence and is unable or unwilling to seek the protection of that country or return to that country, as a result of these circumstances, in accordance with the requirements of section 1 (A) of Geneva Convention[6].

[1]Law No. 9590, date 27.07.2006 "On the ratification of the Stabilization and Association Agreement between the Republic of Albania and the European Communities and their Member States", Article 82.
[2]Law, No.121/2014, date of act 18.09.2014, date of approval 18.09.2014, Official Journal; No.158, Page:8113 www.ligjet.org.
[3]Explanatory Report of draftlaw "On asylum in the Republic of Albania", pg. 1. Furthermore: http://www.parlament.al/web/PROJEKTLAWI_P_R_AZILIN_N_REPUBLIK_N_E_SHQIP_RIS_17270_1.php [Accessed date: 13.02.2015]
[4]Ibid.
[5]Law, No.121/2014, Article 2.
[6]Law, No.121/2014, Article 3/d).

Asylum seeker under Albanian law is any foreign or stateless person, who demonstrates in any way that he does not want to return to his country, and any foreigner or stateless person who has filed an application for asylum in Albania, for which is not yet taken a final decision

Article 4 of Law no. 121/2014, in full alignment with Article 40 of the Constitution of the Republic of Albania, stipulates that in the Republic of Albania is granted the right to asylum of a foreigner or stateless person who, owing to well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality or habitual former residence and is unable or unwilling to seek the protection of that country, as a result of these events because of this fear.

The law also stipulates exceptional cases from the right of asylum. Asylum is not guaranteed by Albanian law, to a foreigner for whom there is information about [1]:

a) a committed crime against peace, crimes against humanity or war crimes, a committed terrorist act, as stipulated in the international conventions;

b) the threat of public order and national security of the Republic of Albania, due to the commission of a serious non-political crime outside the territory of the Republic of Albania, before entering as asylum seeker in the Republic of Albania;

c) guilty of acts contrary to the purposes and principles of the United Nations

Asylum is not granted to a foreigner who has equal rights and obligations as other citizens of the Republic of Albania, except cases when the rights and obligations are associated specifically with Albanian citizenship.

The right to asylum is not granted to a foreigner taken under protection or assistance from UN bodies, except when protection is guaranteed by the United Nations High Commissioner for Refugees (UNHCR). But the law also provides that if the protection or assistance has ceased for any reason, to the foreigner is granted asylum if he meets the conditions stipulated in the law[2].

Albanian legislation also sanctions the principle of non-refoulement, by providing that the Republic of Albania recognizes and respects the authorities' obligation not to return, extradite or remove outside its territory persons who have received or requested asylum or other forms of protection for the following cases:

a) in a country where their life or freedom would be threatened on basis of race, religion, nationality, membership in a particular social group or political opinion;

b) in a state where there is reason to believe that an asylum seeker may be at risk to be subjected to torture or to inhuman and degrading punishment or any other treatment provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms, interpreted by the European Court or in treaties / international conventions to which Albania is a party;

c) in a state where there is reason to believe that an asylum seeker may be subject to enforced disappearance;

d) in their country of origin, if foreigners were given a form of protection, in accordance with the provisions of this law;

[1]Law, No.121/2014, Article 5.
[2]Law, No.121/2014, Article 5.

e) in a third country, which may return or send the person to a country specified by the letters "a", "b" and "c", listed above[1].

It should be mentioned that "failure to return" under Article 3 of Law no.121/2014 is the prohibition to expel or return the foreign or stateless person in any manner to the frontiers of territories where his life or freedom is threatened, for reasons of race, religion, nationality, membership in a particular social group or political conviction.

The law also stipulates that the foreigner, whose application for asylum has been refused by the authority responsible for asylum and refugees, is not expelled or sent outside the Republic of Albania before exercising or giving legal opportunities for the exercise of procedural rights and guarantees stipulated by Law, except when the law provides otherwise. The law itself sanctions the right to appeal against a decision of rejection of the application, revocation or non-renewal of the permit to the National Commission on Asylum and Refugees, within 5 days from the date of written notice of the decision. The decision of the National Commission on Asylum and Refugees may be filed in the competent court for the settlement of administrative disagreements, according to the legislation in force[2].

There are only two exceptional cases where the asylum seeker can be refused:

a) when there are reasonable grounds to consider him as a danger to the national security of the Republic of Albania;

b) has been convicted by a final decision for a crime punishable by a minimum of 7 years' of imprisonment, which constitutes a danger to public order and security of the Republic of Albania[3].

4. Conclusions

Regarding to its contents and regulations, the new Albanian law on asylum is a detailed and voluminous law that treats conditions and procedures for granting and withdrawing asylum, subsidiary protection and temporary protection in the Republic of Albania, the rights and obligations of asylum seekers, refugees and persons under temporary and complementary protection, content of refugee status and subsidiary protection, the right to family reunification and determining the conditions for integration of refugees and persons under subsidiary protection in the Republic of Albania[4].

This law is partly approximated with some directives of the European Council:

✓ Council Directive 2001/55 / EC, dated 20 July 2001, " On minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof"[5];

✓ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers[6];

✓ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification[7];

[1]Law, No.121/2014, Article 6.
[2]Law, No. 121/2014, Article 65.
[3]Law, No.121/2014, Article 6.
[4]Law, No.121/2014, Article 1.
[5]CELEX No.32001L005, Official Journal of the European Union, seria L, No.212, 7.8.2001, page 12–23.
[6]CELEX No.32003L0009, Official Journal of the European Union, seria L, No.31, 6.2.2003, page 18–25.
[7]CELEX No.32003L0086, Official Journal of the European Union, seria L, No. 251, 3.10.2003, page 12–18

✓ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status[1];

✓ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted[2].

As a relatively new law, the Albanian law on asylum has a partial approximation with EU directives but it is fully aligned with the standards enshrined in the Geneva Convention, to which the Republic of Albania has acceded.

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The Evolution of European Union Legislative Framework Regarding Public Health

Liliana Lacramioara Pavel [1]

Abstract: In this paper we have approached a very important subject, namely, the public health regulation at European Union level. WE considered useful to analyze this subject starting with health as it is a fundamental resource for both the individual, the community and society as a whole. Starting from the idea that health is the responsibility of both the state and the citizen's right, during the study, we revealed the fundamental role that it plays in the institutional organization of modern public health. I also realized the main documents outlining the evolution of the EU legal framework on public health.

Keywords: fundamental rights; health protection; community sectoral policies

1 Introduction

European funds are and must be considered an instrument to create public and private goods that contribute to the development of society.

No government strategy is known but there are serious difficulties in communication and information concerning all that is related to health and projects in this way, and in this respect and from here results the dilemma if politically the health financing is desired or not and especially if health is a priority or not!

The Budget allocated to Health by the European Union for 2014-2020 is of 2750 billion Euros. As it can be noticed, a generous budget at all if we think that it means 11 cents for every citizen of the Union.

2. Public Health Concept

The term of *public health* is used currently with two meanings. The first refers to the distinction public-private in the health systems. Usually, public health designates a set of resources – public services provided by non-profit public organizations that are free at the moment they are used, ex. Persons who need medical assistance have access to the services desired regardless of their capacity to pay (Vlădescu, 2002, p. 709).

The second meaning, which is also the most used, refers to what a society makes to provide community health, against the individual one involved by clinical medicine. The actions supposed by public health are based on the fact that health is fundamental resource for the individual, for community and for society, altogether.

Most definitions given to *health* emphasize the inseparability condition between individuals and their environment. Thus, health is related to life conditions that for the individual represent a series of physical,

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economic, social, cultural and ecologic conditions. This remark lead to a definition of *health* as being the *state responsibility and the right of citizen*, this approach being at the basis of institutional organization of the modern public health (Rosen, 1993, p. 232).

A public policy is a network of interconnected decisions regarding the choice of objectives, means and resources allocated to reach the objectives in a specific situation (Miroiu, 2001, p. 9). Professor Marius Profiroiu considers that a public policy represents an assembly of measures taken by a legal and responsible authority aiming at improving the living conditions of citizens or conceiving some economic stimulation measures. An aspect highlighted by this author is that the policy drafting process can be regarded both as an analytic process aiming at resolving a problem but also as a political process (Profiroiu & Iorga, 2009, p. 17).

Some elements are considered as essential for the social policies of each state:

- Social legislation – that decides the frame of social policies, responsibilities regarding financing, implementing and evaluating social policies;

- Financing – that assures the necessary resources for programs, projects and social benefits. Indicators as the weight of social expenses in gross domestic product can give us an image of the effort made by every state to finance the social policies;

- Human resources – made by specialists in social policies, social assistance, sociology, pedagogy, economy, etc.

As it is shown in the specialty literature, there are more factors determining the inherent political nature of health (Bambra, Fox, & Samuel, p. 187):

- *Unequal distribution*, some social groups getting more than others;

- *Health determinants* – the social ones, as the incomes and buildings, being susceptible of political interventions and depending on political intervention;

- *Organization* – any action proposed to avert the needs of health needs the commitment of *social machinery* or *the organized efforts of the society;*

- *Human rights* – the right to a proper life standard for health and welfare (UNO, 1948) has to be component of human rights and citizenship;

- *Globalization* – close interaction process of human activity in different domains, including policy, economy, and tridimensional culture: spatial, temporal and cognitive.

The health policy includes the action directions that affect institutions, organizations, services and financial regulations of the health system (Curta, 2008).

The public health policy is determined by a process of consultations, negotiation and research that lead to planning a set of actions establishing a vision upon the planned public health objectives.

In the context of public health, the policy is usually determined by the executive arm of the state. In this context, the *right of public health* cannot be omitted, which consists in legislative documents and court decisions that apply to the interventions in the field of health or to behaviors aiming at health (Martin, 2008, pp. 31-32).

3. The Health Policy at the Level of European Union

In the speech in September 2002, David Byrne, the European commissioner for health and consumer protection made a statement having a special significance: no Europe can exist without a Europe of health (Bryne, 2002).

By launching the concept of *Europe of health*, this statement can be considered as representing the beginning of a new perspective of European Union upon health.

Previous to 2002, the activities of EU in the field of health were developed based on some action plans that were concentrating on specific aspects, as it is the fight against cancer, HIV virus, infectious diseases, diseases caused by pollution, drugs addition, or information and education n what regards health.

Up to now, the European Union has adopted two strategic programs, one for the period 2003-2008 and one for 2008-2013.

The chart of the fundamental rights of European Union stands, along other fundamental rights such as the right to strike, liberty of expression, information and participation, exertion of profession and *the right to health care, social security and social assistance.* For this purpose, at the level of European Union, the coordinating institution for public health is the European Committee by means of General Directorate for health and consumer protection.

3.1. The Evolution of Legislative Framework of European Union Concerning Public Health

The treaty of Rome (1957), the foundation document of the European Economic Community does not provide any concrete reference to health or problems related to health, EEC developing its programs and economic policies without formulating any explicit requirement regarding their consequence upon health.

The treaty of Maastricht (1992) includes the first punctual references to the public health domain, stating, in article 129, the cooperation at community level in order to assure a high level of health for the citizens of the community. This article specified for the first time the need of actions for preventing illness and specifies the fact that protecting health must be an integral part of all the other community sector policies.

The treaty of Amsterdam (1997) reconfirms, in article 152, the need of cooperation and strategic intervention between sectors in all policies and upon all factors with a possible impact upon health, by providing a proper protection level of it. Also this article states that *the action of community in the field of public health shall respect precisely the responsibility of Member States in organizing and supplying health and medical assistance services.*

The specialists that have analyzed this text interpreted it by stating that *precise respect* should be understood as *total forbearance*, although the Treaty has articles legislating the Internal Market and competition, which, even if not explicitly, are connected to public health (Curta, 2008, p. 39).

The treaty of Lisbon replaces the organization treaty of European Community with the one concerning the Functioning of European Union, and article 168 is the one referring to health. EU has a new competence in encouraging the cooperation between the member states in what regards improving the complementarity of health services in the cross-border regions. EU also receives powers in what regards fighting against cross-border threats to health. EU will be also able to take measures to protect public health regarding tobacco and excessive consumption of alcohol, without adopting harmonization measures.

3.2. Community Action Programs in the Field of Public Health

The first community action program in the field of public health 2003-2008 (Adopted by Decision no 1786 of the European Parliament and of the Council on 23rd of September 2002) constituted one of the instruments for implementing the health policy in order to achieve the promotion of cooperation and coordination of member states. This program replaced the eight specific action plans that already existed.

The three primary objectives of this program were represented by:

- Improvement of information and knowledge for developing public health;
- Increase the capacity of coordinated and quick reaction against aggressions at health;
- Promotion of health and illness prevention by including the determinants of health state in all policies and actions.

The second Community action program 2008 – *2013 (adopted by Decision no 1350 of the European Parliament and of the Council on 23rd of October 2007)* is meant to develop the achievements of the previous program of community action in the field of public health by contributing to reaching a high level of physical and mental health and to a better equality in the field of health at the level of the entire Community, by means of some actions directed to improve the health state in a Europe affected by the aging of population, citizen protection against threats to health and promotion of certain dynamic health systems and new technologies.

The first objective, improve the sanitary safety of citizens, includes the protection measures of citizens against transmissible and non-transmissible diseases, those meant to fight against threats to health such as bio-terrorism as well as the aspect of patients safety.

The second objective includes mainly the promotion of a healthy life style, focusing also on equality between sexes when speaking about health, respectively on the sanitary impact of social and environmental factors.

For the third objective that illustrates the continuity of the previous program, the accent is on the exchange of information and good practices regarding health, respectively dissemination of relevant information to the wide public, especially by means of the web portal *EU Health* (http: // ec.europa.en/health-en/index_ro.htm).

In what concerns the contribution of European Union, it is limited by ceilings to maximum 60% of costs for the actions contributing to achieving one objective in the Program or to maximum 80% in cases of exceptional utility.

The total budget allocated to the first community action program in the field of health (2003-2008) was of 353.77 million Euros, and the second program (2008-2013) benefits of the amount of 321.5 million Euros.

4 Conclusions

By the term of *social policy* most often we refer to the activities/actions developed by/ by means of the state (strategies, programs, projects, institutions, actions, legislation) whose purpose is to promote/ influence the welfare of the individual, family or community in a society, as well as the welfare of society in its entirety.

The research domain of public policies represents a border domain between more *classical* disciplines as political science, sociology, social psychology, juridical sciences or economy. The study of public policies is represented by the most recent breach of political science, and in what regards the research techniques and methods, they are borrowed from different social disciplines adapted to instrumentation needs for each and every study (Dascălu, 2011, p. 10).

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The Right to Health Care – National and International Regulations

Alina Mihaela Călin[1]

Abstract: One of the biggest challenges of the contemporary world is the guarantee and protection of fundamental human rights. We cannot talk about the rule of law, of a democratic society where, among the fundamental rights do not include the right to health protection. Based on these considerations, in this paper we have analyzed the importance given to protecting this fundamental right, both nationally and internationally. As a priority we have analyzed the identification of the social state as a prerequisite for achieving this right. Simultaneously, we have conducted a brief analysis of national and international legal provisions on the right to health protection.

Keywords: judicial value; public health; respect for dignity

1. Social State – A Prerequisite for Achieving the Right to Health Care

The right to health care provided in art. 34 in the Constitution of Romania cannot be treated without making the correlation with art. 1 paragraph (3) of our fundamental law, which provides the social character of Romanian state. In the special literature it is shown that the social state, as form of the state of right, is a very ambiguous concept, still promoted by our Constitution as a general principle (Dănișor, 2009, p. 48).

The same author shapes the content of the notion of state of social right, underlining its following characteristics (Dănișor, 2009, pp. 48-50):

a) *Denial of the priority of formal mechanisms,* which supposes exceeding the formal vision not by denying it but simply by incorporating formal mechanisms for safeguarding the rights and liberties in a material vision upon the state of law, which means a determination of the state by the society;

b) *The society determines the state,* which means subordinating the political constitution to the social one, reason for which art.1 paragraph (3) expressly refers to the ideals of the Revolution in December 1989;

c) *The control of the constitution's constitutionality*, consequence of the state of social law, social justice assuring a control of the content of the law by a control of conformity of laws with the social principle and values and a control of constitution's constitutionality;

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d) *The normative autonomy of the state of law* against the interfacial concepts in the modern constitutionalism: power separation, controlled normative hierarchy, guarantee the fundamental rights and liberties, democracy;

e) *Complete the formal vision upon equality,* which supposes that the state of social law should have the mission of assuring equal chances for those in unequal situations and equal access to some social benefits for those suffering from a relevant difference.

In the doctrine of constitutional law it is stated also that the feature of social state of our country results not only from its nature but mainly from its functions (Muraru & Tănăsescu, 2008, p. 10). These authors show that the social state cannot be just a mere business partner, a simple observatory, but a participant that has to interfere, to have initiative and to intervene for achieving the common good. The social state has to protect the weak, underprivileged by destiny and by chance, to support the economic sectors that are in crisis but that are indispensable to promoting a civilized living, to provide functionality of some public protection services and social intervention.

In another opinion, the characteristic of Romanian state of being a *social state* means more a desideratum than a reality (Ionescu, 2003, p. 4), the attribute *social* highlighting especially the role of the state as guarantor of the general social good, of protector of general interest and elementary social needs of the individual disadvantaged by the market economy.

The doctrine and jurisprudence of the Spanish constitutional court considers that the rule of the social state has a big juridical value since it has the significance of a constitutional principle, directly applicable in interpreting any juridical commandment. This principle has consequences in determining the content and significance of individual rights. In fact, the notion opens towards an interpretation less *individualist,* which considers the idea of social equality.

But the importance of the notion of social state resides mainly in the fact that it involves the mandate of a positive action. This obligation to act that shall be materialized by the legislator is consolidated by the *guiding principles of social and economic policy,* dedicated also by the fundamental law. Based on the notion of social state, it is considered that the state has a social responsibility in achieving the social and economic order, which involves the recognition of insufficiency to self-regulate the market and the competition. Thus, the notion of social state allows the justification of regulating economical activities (Lyon-Caen & Champeil-Desplats, 2001, pp. 36-36).

2 The Right to Health Care in Romanian Legislation

Article 34 in our fundamental law, which provides the right to health care, is regulated as the right to study, as a claim-law, mentioning expressly in the constitutional text the general positive obligation for its effective guarantee: taking measures to assure hygiene and public health.

Without being a limitative enumeration, it may be considered that these obligations should include: measures to decrease the mortality of new-born and infant mortality, healthy development of the child, improvement of all aspects related to environment hygiene and of industrial hygiene, prevention and treatment of epidemic, endemic, professional and other diseases as well as the fight against these diseases; create conditions that provide medical services and help to all people in case of sickness.

The constitutional text also imposes the obligation to adopt special laws to organize medical assistance and the social insurance system for sickness, accidents, maternity and recovery, as well as other protection measures for the physical and mental health of the person and also the settlement of the

control of practicing the medical professions and paramedical activities (Lyon-Caen & Champeil-Desplats, 2001, pp. 35-36).

The provisions of fundamental law are detailed in Law no 95/2006 regarding the reform in the field of health, which presents and defines the obligations of the state provisioned in art. 34 in the Constitution.

Thus, the legal principles of public health assistance are in the responsibility of society for public health; focusing on population groups and primary prevention; preoccupation for the determinants of health status, multi-disciplinary and between sectors approach; active partnership with the population and public central and local authorities; taking decisions based on the best scientific evidence existing at that moment; is specific conditions, taking decisions according to the principle of precaution; decentralization of the public health service; the existence of an information and informatics system integrated for the management of public health.

The same law presents also the dispositions regarding the main functions of the public health whose efficiency depends to the highest extent on their implementation, of providing the material application conditions, the law to health care being one of the most costly rights for state but also one of the most important to assure complete development of human personality.

The right to health care cannot be discussed in the absence of the right to a healthy environment, which comes as a natural continuity of constitutional provisions regarding the first, and that reveals completely the right valences of third generation by the modality in which it is dedicated in the Constitution (Constantinescu, 2003, p. 73). The same author shows that the right to a healthy environment is a subjective right, but at the same time, also an obligation for any individual subject of law, our fundamental law making of the protection and improvement of environmental law a real juridical obligation for all subjects of law, individuals, legal entities pr state authorities.

Also, still in correlation to the right of health care, the connection between it and art. 22 in the Constitution cannot be avoided, which regulates the right to life and physical and psychic integrity. Thus, respecting physical integrity obliges both the public activities as well as other all the other subjects of law to the same extent not to damage physical integrity, of a person, under the sanction of applying the legal rigors. The same, the right to psychic integrity is protected and considered as having constitutional value and the interdiction of torture involves, naturally, respecting life and the physical and psychic integrity.

The right to protect health is provided by a series of occidental constitutions: art. 41 in the Constitution of Switzerland, art. 23 paragraph 2 in the Constitution of Belgium, art. 68 in the Constitution of Poland, art. 19 paragraph (3) in the Constitution of Finland, art. 32 in the Constitution of Italy. The right to health is recognized in more than 100 National Constitutions, either explicitly, or implicitly, by stipulating the obligations of the state regarding health.

3 The Right to Health Care at International Level

In France, the right to health care is a complex right that includes the right of access to medical care, the right to continue the treatment, the right of being informed upon the right as a patient. Thus, the extremely detailed legislation led to forming a new branch of right, *the right of public health.*

Whatever the nature of the institution (public or private) in which the patient is treated, his rights are protected by the same legal texts. Thus, the Code of public health, the Code of medical deontology or

the Decree on 14th of January 1974 regarding the functioning rules of hospitals and local hospitals, establish essential rules regarding the patient's conditions in public health units.

At the same time, the Charta of the hospitalized patient (circular from 6th of May 1995) is applicable not only to health public units but also to private units, in the virtue of Ordinance on 24th of April 1996, codified by art. L. 1112-2 in the public health code. Contemporary society is, in fact marked by a demand of an *administrative citizenship* leading to a renewal of the relation between governors and administered ones. The medical sector, both the public and private, do not escape this movement represented by the idyllic triptych of a more transparent administration, closer to the persons being managed and more responsible. In this way, the period of a closed hospital administration refusing the dialogue with the users, not bothering and not losing the time explaining the medical care activities, otherwise said settling the patient to the state of *sub-citizen* (Fraisseix, 2010, pp. 665-672), is no longer tolerated. The legislative, regulatory and jurisprudential evolutions in the last years are written in France, in this dynamics.

4 Conclusions

Thus, it is worth mentioning Title II – *About sanitary democracy*, of the Law on 4th of March 2002 regarding the patients' rights and the quality of health system, which gives the sick person opposable rights to medical body and to health units. Within the important rights list of the patients that it regulates, this law distinguishes, on one side, between individual and collective rights, and on the other side between the rights of the person (non-discrimination in what regards the access to health care, respect of dignity, the right to consider pain, the right to receive the most suitable care, the right to respect private life) and the rights of the user of health services (the right to medical care for the underage that do not wish to inform their parents about their health state, the rights of the persons suffering from psychical disorder, hospitalized of office or upon a request of a third party, commitment of the patient's consent to provide a medical act). Regarding the collective rights of sick persons, the law gives a complete institutional recognition to their users and representatives.

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Judicial Truth

Varvara Licuta Coman[1]

Abstract: All major world encyclopedias define the essence of a phenomenon as being the unification of traits and necessary internal relations, with a relative stability in connection with adjacent phenomena. In this study, we chose to investigate a concept that is the essence of the law, namely, the judicial truth. Starting from the social intent of the law, which is to regulate the social relations, we proposed as a priority objective of this study to highlight the idea that the science of law disregards any subjective human judgment and any values outside the values of true and false. So, in this paper, we analyzed both the concept of truth and the judicial truth. The legal phenomenon is not a specific thing, and its scientific truth is an argumentative construction of the idea of justice, depending on a legal doctrine or another.

Keywords: representation theory; legal consciousness; legal requirements

1. Introduction

The correspondence of knowledge and the object of knowledge represent a defining note of the concept of truth but not the only one (Phylosophy dictionary, 1978, pp. 16-17). This subject has been significantly approached by Hans G. Hershberger (H.G. Herzberger, Harper, & Freeds, 1975, pp. 71-92). In this author's opinion, the dimension of correspondence that stands at the basis of truth has to be supplemented with auxiliary dimensions. The distinction between the assertive content of the sentence translating the idea of correspondence and the suppositional content of the sentence in which the auxiliary conditions of truth would be included, which the author reunites under the name of semantic competence. Among these auxiliary conditions one can list the accomplishment character, avoid self – reference, bivalence etc. In this context, the author builds a semantic endowed with four values: two for correspondence (True and False) and two for bivalence (the unsuccessful truth and unsuccessful false) and brings into discussion some logical systems able to represent properly the complex logical situation that occurs this way (Botezatu, 1981, p. 4).

2. The Notion of Truth

Along with the semantic dimensions of truth, also the importance of reference dimensions of truth introducing the idea of partial correspondence and partial truth, of truth levels are pointed out in the specialty literature, which can be noticed mainly in human sciences (Bunge, 1974, p. 8).

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Another dimension of truth appears in the function of representation. Any theory represents the structure of a group of phenomena. But a closer analysis convinces us that the function of representation is not finished in all cases. Not all the aspects of reality are represented in that theory, more precisely, in those theories. Some theories offer us more complete representations of facts, others are poorer in determinations. And the need of some representation levels appears. The different scientific theories interpreting the same domain of facts differentiate by their representative value. Thus, some theories include redundant constructs that cannot be represented and on the other hand the reality contains orphan entities that are not represented. As M. Bunge observed, rich theories are inclined to multiplying useless formulas and, on the other hand they tend towards the interpretation of all parameters, while superficial theories leave many parameters uninterpreted (Bunge, 1974, p. 22).

The researches upon inexact concepts and vague crowds have drawn the attention that logical objects suppose edging, external zones with inaccurate statute. It was noticed that natural languages currently use numerous specifications through which the affiliation to a class is approximate. It is said this way: a kind of, more or less, approximate, relative, so to say, sooner, strictly speaking, by excellence, often, in one way etc.

The investigations on vague crowds and inexact concepts underline the commandment of relativization of reference. The dimension of reference also involves reference degrees, which do not represent truth degrees but accuracy levels of reference.

Thus, for example, the appellation almost true has a narrower referential margin (higher accuracy level) than the partially true appellation.

The truth relation that establishes between constructs and facts also supposes the existence of an informational content. The truth and falsity refer to the information sent by factual or theoretical sentences. From the information point of view as a dimension of truth, neither the subject's contribution nor the information quantity is interesting. From this perspective, the information is associated to incertitude, namely the reduction of incertitude. Thus, in a given situation, as more alternatives are received, also the incertitude increases and, at the same time, improbability of the sentence. On the contrary, the information increases with the number of excluded possibilities.

Thus, four dimensions of truth appear: correspondence, representation, reference, information. The truth supposes a correspondence relation, a certain conduct between constructs and facts; includes also the representation relation, the structure of facts being somehow expressed in the constructs structure, it still conducts a reference relation, the construct indicating a certain objects; besides this, it involves an information relation, this meaning that the truth bearer is always a certain sentence content. These dimensions are susceptible of more or less and as a result achievement degrees were suggested, namely:

1. Truth levels of Correspondence;
2. Completeness levels of Representation;
3. Accuracy levels of Reference;
4. Certitude levels of Information.

In this perspective, open to amendments, „The truth is the evaluation of the correspondence degree among the multitude of constructs and multitude of objects, correspondence endowed with the representative capacity, with referential strength and information transport " (Botezatu, 1981, p. 47).

3. Judicial Truth

Compared to the logical-semantic concept of truth, the attitude of the individual or of the society may differ. The admission, ignorance, or rejection of truth may occur depending on the needs, interests and aspirations of the individual, of social groups, of society, in a historical time. Uttering the truth can exceed the gnoseological plan and can receive value significance.

For Platon, the Good is a complex, supreme, syncretic value, the Truth stands near Beautiful, and partial content of Good (Platon, 1978, p. 296). In valorization process, appreciations regarding its quality and utility are conferred to the Truth.

Reflecting upon the preconceptions of philosophers, Fr. Nietzsche showed that the will for truth attracts us to all kind of dangerous adventures, that it is that famous credibility about which all philosophers up to now have spoken about with veneration, delaying longtime in front of the problem of origin of this will, until finally they poached completely in front of an even more profound problem. He also said: „I have thought upon the value of this will. Supposing that we want the truth: why not falsehood instead? Or uncertainty? Or even ignorance? – Is the problem of Truth value the one that was presented to us – or it was us those who stepped in front of it? ... To admit that falsehood is a condition of life, means of course opposing yourself dangerously to the usual feeling of values, and a philosophy allowing this courage is placed on it, beyond Good and Evil " (Nietzsche, 1992, pp. 7-10).

The truth as a value is involved in the moral world of the individual, in the rational foundation of action, in the contradictory continuity and discontinuity of social life, in making the individual and society more human.

Far from being a common place or a problem solved completely, the statute of Truth can be compared, as K. Popper wrote, with the one of a mountain peak, which is always or almost always encircled by clouds. The alpinist will never know if he reached the top: not even when on top, he will not be sure if he is on a secondary chine. If he reached the top, it will be much easier to know when he sees that in front of him there is a wall of rock. Knowing the truth is the ideal towards which the man aspires; but what we can know for sure is not that we touched the truth but only – as the alpinist in front of a rock wall – the fact that we have mistaken and that we are in the position of eliminating an error, an essential moment of the knowledge process. As it was appreciated in the specialty literature, the notion of Truth, although present in discussion from the beginning of philosophy is not shown yet as covered by numerous obscurities and perplexities.

Certain acquisitions, controversial problems, researched aspects of the theory of truth as well as its value reverberations can be found specifically in the juridical world. „Knowing right from juridical point of view does not mean only identifying the facts in their substantiality but particularly identifying the significance of facts and the characters of persons who participated to them, including the circumstances in which they were found and manifested and it can be stated that the subjects about truth in the law are the consequence of juridical culture of the person issuing those subjects, and the world that reveals itself to the wise subject is a world of juridical values " (Dobrinescu, 1992, p. 105).

The truth, desirable to be valued for juridical conscience, is the one characterized by a high evaluation level of correspondence, as precise as possible respectively certain – features validated by specific means, standards and juridical institutions being necessary at the same time, which should offer satisfactory solutions to the situations the social life, the complexity of truth raise, with innumerable aspects including also not knowing the truth or error.

Within the complex process of drafting juridical normativity, the correspondence between theoretical approaches contained for the foundation of the new regulatory document and the social aspects plays a significant role contributing to the viability of the new settlement or on the contrary, to a riot of facts against laws (Djuvara, 1930, pp. 118-159).

As all the rules belonging to social discipline, J. Dabin noted, the law is called to be accomplished effectively, its precepts being meant to guide the subjects' conduct. As a result, the law must be applicable, practicable, to correspond to the specific technical conditions that should assure its execution. In the process of building and shaping the rules of conceptual law, the legislator simplifies, schematizes and presumes. This technical deformation is an artifice that allows scientific truth to be put into practice (Craiovan, 1998, pp. 260-270).

A fundamental correlation to attract social facts on juridical field is analyzed under the sign of truth, that between facts and statements expressing the hypothesis of juridical norm, depending on which the legal constructions can be created from stage to stage or can be flawed decisively.

Being involved at the level of juridical norm, as for example in the case of that sanctioning the misleading of a person by presenting as true a false deed, or as false a true deed, or of testimony, at the level of juridical institutions as for example those gravitating around rectifying the legal error being intrinsic to the activities aiming at legal qualification, interpretation of legal standards, judgment of cause, valorization of truth in law is not and cannot be stereotype, without difficulties, infallible.

Investigating even briefly the relation of truth and juridical phenomenon, we notice its variety and specificity, the truth being valued in terms of some juridical exigencies regarding the semantic requirements, accuracy, validation, acceptance or rejection of error, instituting a specific truth – the legal truth, but there are also inedited situations in which the truth is ignored or even defied.

Exemplifying this with some legal norms, by rules-principles or juridical constructions, we mention: rejection of error of law, providing that not knowing or wrong knowledge of the penal law do not cast away the penal character of the deed; The rules-principles included in the perennial fund of juridical knowledge even since the roman law as: *Non enim ex optnionibus stngulorum sed ex comuni usu nomina exaudirii debere* (not from the sense given to words by isolated persons but according to their common use the words in a written document must be understood); *in dubio pro reo* (the doubt is interpreted in favor of the defendant or the indictee); in *dubio pro libertate civium* (the doubt is interpreted in favor of the citizens' freedom); *De his quae non sunt et quae non apparent idem estjudicium* (All which is not proved in the court is presumed as inexistent); *Non videntur qui errant consentire* (Those who are in error cannot be presumed to have given a true consent); *Error communis facis ius !* (Common error makes law!); *Res judicata pro veritate accipitur* (The thing judged is considered to be the expression of truth) ş.a. (Molea, 1992, pp. 20-45).

Finding the truth is charged with specific issues in legal matters. Recalling in this context the psychological issue of judicial testimony and of the witness, the specialty literature analyzes many authorized opinions that *warn* about the difficulties related to the testimonial probation and especially upon infidelity and insincerity issues of testimonies, among which: unintentional errors the witnesses make frequently; hesitations of some witnesses to testify for fear of the consequences they might suffer from the declarations they have made; arranged judicial affairs, transactional justice system (specific to the American penal justice) and the publicity of the hearing; the instructions the lawyers give to witnesses to testify in a certain manner etc. Another research of the same matter concludes that: a testimony completely true is an exception; a sincere witness may be in error; the extent and trustiness of a judicial testimony diminishes proportionate to the age of the facts revealed; the value of

depositions is not proportionate to the number of witnesses and a minority may be right against a powerful majority; as a result, a great number of abnormal and unknown persons are listened as witnesses and deform the truth a sa result of personal troubling and handicaps (Mitrofan, Zdrenghea, & Butoi, 1992, p. 108).

There are cases in which the truth remains hidden, unrevealed, faint, which seem to contradict the main idea of certitude and the law specific evidence. Thus, in case of juridical presumptions, the legislator accepts or even imposes that something exists without the need to prove such a situation. For example, the presumption of knowing the law, the presumption of innocence, the presumption that the father of an innocent child born during a matrimony is the mother's husband etc.

The presumed situation can be true or not. The evidence must be made, when the legislator allows, by the one who contests the presumption, in case of relative presumptions. Not even one evidence is admitted against absolute presumptions. For example, the presumption regarding the authority of the judged thing, therefore the fair solution is presumed in a cause in which all the appeals foreseen by the law were exhausted.

At the same time, evading the truth cannot receive juridical protection. Thus, in case of abuse of law we assist to a contorsion of the correlation between the rights, competencies offered by juridical norms to citizens, state bodies or to other collective subjects of law and certain situations, when prerogatives are not exerted with good faith, breaking the law and Truth spirit, the intention of legislator finalities of juridical norms, the letter of law being used illegally, intentionally, as an instrument to produce unjust consequences, injurious for someone.

Also, juridical truth can be voided of its value content if the result of the fraud to the law – the illegal maneuver made with the purpose of evading the application of juridical standards, which are normally applicable in order to promote some interests illegally, to avoid certain legal consequences that are not convenient, to take advantage of more favorable juridical settlements by different artifices not allowed by the law. This way, for example, in contract, price simulation is a fraud to law, with the purpose of avoiding complete integration of taxes. An example in the matter of international law is recording one vessel under a foreign flag with the purpose of evading certain standards regarding taxes and fraudulent modification of certain circumstances in order to determine the application of the more favorable foreign law etc.

In the case of juridical fiction, a complex procedure of judicial technique, one fact is considered a judicial reality although the latter does not exist. From the perspective of juridical language, juridical fiction calls up the semantic dimension, which aims at the relation between reality and juridical expression but this correspondence is an artifice in the way that the reality pronounced in the law, expressed in the juridical text ... does not exist.

For example, the mobiles fixed on immovables are also considered immovables and they follow the juridical condition of immovables; the baby conceived shall be considered as existent before birth, if it is in it's interest *{infans conceptus);* the buildings of foreign embassies are considered as existing on the territory of the state they represent etc. Referring to the role of juridical fiction, M. Djuvara remarked that the law always works with fictions and it is observed in the evolution of law, that the fiction was one of the most important lever of progress of law. Fiction is a lie and yet the law devotes it. „How, by what miracle?" (Djuvara, 1930, p. 458). And to this question responds the above mentioned author himself when he detects that fiction is „only a helpful mean of the solution to accomplish the ideal of justice" (Djuvara, 1930, p. 458). Regarding the nature of juridical fiction, M. Djuvara comments „But if we think that the entire law is not but an operation of spirit and not a pure

mirror of reality, that it starts from realities but it converts them according to his own nature, when we understand how this scandal specific to law is possible, which is called fiction. This way, the fiction infiltrated normally in the juridical world and it is not foreign of the nature itself of law, as the entire law is a product of our spirit" (Djuvara, 1930, p. 458).

5. Conclusions

We could conclude that the complex and irreductible functionality of the truth in judicial world is expressed, among others, in institution of the connection between «must» and «is» (or has produced), in kneading juridical standard, inducing judicial, orientation and adjustment of juridical actions, its value appreciation, selection of juridical experience in cultivating the juridical dimension of human in achieving sociality and historical progress. At the same time, juridical truth has considerable relationship valences in the value constellation of a historical time, being also a Truth for Freedom, Truth for Justice and Truth for Human Dignity.

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Considerations with Regards to the Subjective Part of the Involuntary Manslaughter

Sandra Gradinaru[1]

Abstract: In the context of the constant growth of the number of cars registered in Romania, allowing the vehicles to access public roads is a major risk for the drivers. The modernization process of the means of transport for the rural areas of the country is highly delayed, so a coexistence between the old means and the current means of transportation results often in serious accidents in which both vehicles and rolleys. In such cases, the issue of guilt rises, guilt which is oftentimes shared both by the automobile driver and the rolley driver. Mostly the drivers of the rolleys are victims, and under these conditions one might ask themselves if the Courts won't incline to establish de plano a common guilt, although the rules of evidence suggest an exclusive guilt on the victim's part.

Keywords: accidents; presence of alcohol; carloads on national roads; violations of the legal provisions

1. Preliminary Considerations

A recent decision of the Court brings forward controversial issues as relating to the felony of manslaughter, as well as the felony of being guilty and connecting the material trait of this felony and the illicit non-action, which leads to the death of the victim.

Thus, by the penal sentence 2251/11/12/2014, the Court of Vaslui condemned the felon F.L. to prison for one year and a half, for manslaughter, as punished and sanctioned by Art.178, Paragraph 2 and 3, Penal Code, and with applying Art.81, Penal Code.

In fact, the event was based on the danger produced by the accused, F.L., who drove drunk and due to the impossibility to adapt the speed to the road conditions, didn't notice in time the carload, neither did he notice the victim, M.I. and the state of danger caused by the victim, who was also driving drunk a carload without any signals, the Court noticing that both the accused and the victim could have prevented the accident from occurring if they respected the legislation.

Against this decision, the accused appealed, and invoked the lack of culpability, but ignored the disrespecting of other rules and regulations on public roads.

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2. Applying the More Favorable Criminal Law

The test case presented above raises various other issues of juridical nature, connected to the subjective part of the involuntary manslaughter felony, mostly when there is also a lack of obedience with regards to driving a vehicle on public roads, without this felony being connected directly to the death of the victim, though.

The serious form as stated by Art.178, paragraph 3, Penal Code 1969 and punished with imprisonment from 5-15 years exists when manslaughter is performed by a driver of a rolley bearing an amount of alcohol which overpasses the legal limit or being drunk.

From the point of view of forensic medicine, the presence of alcohol means being intoxicated with alcohol. As per Art.87, paragraph 1, of the Governmental Order 195/2002, the legal limit of alcohol which draws onto it the legal accusation is of 0,8 g/l of pure alcohol in blood. The drunkenness is different and doesn't necessarily connect to a certain concentration of alcohol in the blood, some persons being highly resistant and some others being highly sensitive to alcohol (Pavaleanu, 2009).

By "drunkenness" we understand the psychological and physical disorder under the influence of the intoxication with alcohol.

The problem of the juridical classification of a person's action, who drove a vehicle on public roads and bore an alcoholic concentration over the limits and provokes the death of another person by accident, was highly debated in specialized literature. Thus, some authors, influenced by the juridical practice, considered that the felony as per Art.178, paragraph 3, Penal Code 1969 has a very complex character, absorbing the incriminating deed as per Art 87 of the Governmental Ordinance 195/2002. Other authors don't share the same opinion, claiming that the incriminated deed couldn't be in any way included in the felony of manslaughter , the two separate deeds occurring possibly only under the same circumstances, but nothing more (Boroi, 2006).

In order to unify the juridical practice existing before the current Penal Code, the Supreme Court decided that driving on public roads a vehicle or a tramway by a person bearing an over-the-limit alcohol amount in the blood and causing the death of a person is a complex felony, as per article 178, paragraph 3, Thesis 1, in which the felony as per article 87, paragraph 1 – Governmental Ordinance 195/2002 is included(Supreme Court, 2000).

Conversely, as per the current Penal Code, if the felony of manslaughter is a felony of its own, the rules which prevail are the ones applied to the felony contexts.

This way, in what regards mitior lex, even in the case of retaining the common guilt of the victim and the accused, art.192, paragraphs 2 and 3 and Art 336 Penal Code are imposed, as well as Art.38, Penal Code, the felony being a connection between manslaughter, punished with 2-7 years of imprisonment and driving a vehicle in a state of drunkenness, punished with 1-5 years of imprisonment. As follows, comparing both the punishment limits and the rules of the context in which the felony was performed, one can state that the Penal Code contains more favorable provisions than the prior regulation, with regards to manslaughter due to a state of drunkenness over the legal limit.

3. Juridical Practice Aspects

We state that in order to give a valid solution we should take into account the actions and lacks of actions of the accused and the victim in whole, so as to establish their guilt in producing the lethal

accident. There are situations in which the deathly accident is over imposed with driving the vehicle under a state of drunkenness, without the accident being thus avoided equitably.

We take into account the fact that when the Court is noticed by means of an indictment in which manslaughter is marked, as performed by a driver who bore an illegal amount of alcohol when the accident occurred, and in case the Court marks that the victim is exclusively guilty, the juridical framework is changed, and the felon be acquitted for manslaughter and convicted for drinking and driving, bearing a quantity of 0.8 g/l alcohol in the blood.

Due to the same reasons there are some other opinions in connection to this matter, as per the Courts and Penal sanctioning bodies.

Thus, in a test-case decision, the Supreme Court (*apud* Udroiu, 2011) decided that "*The guilt of the driver in case of a lethal road accident can be marked only when he breached a regulation with regards to the circulation on public roads and only if between this breach and the death of the victim we can establish a connection. If the accident is the victim's fault, noticing the presence of alcohol in the driver's blood is irrelevant under the conditions of being guilty of manslaughter".*

Also, in other Courts' practices within the country (Bucharest Court of Appeal, 2009), we argued that "*Marking the breach of a legal provision with regards to driving a vehicle on public roads is not enough for being accused of causing the road accident, and thus causing the death of the victim, and so it is necessary to analyze in what way the breaching of legal provisions influenced the accident which caused the death of a person. The accident was caused exclusively by O.C.M., who didn't have the right to drive that kind of vehicle on a national road (therefore, the presence of this type of vehicle wasn't overseen by the accused, P.C.), and drove the carload very close to the edge of the road (thus disabling P.C. from avoiding the carload) and without any signaling systems (which lead to the belated observation of the carload by the accused P.C.). As compared to the things marked in as per Art. 385, point 2, letter d, Penal Code, the Court completely admitted the appeal, annulled totally the penal decision and partially the sentence and separated the sentence applied to the felon P.C. and as per art.11, point 2, letter a) connected to art.10, letter d) Penal Code, disposed acquitting the accused P.C. for committing the felony as per art 178, paragraph 2, Penal Code".*

This way in the practice of the penal Code[1], similar juridical arguments were issued. For instance, the Public Prosecutor's Office of the Court of Iasi concluded that "establishing the fault of a person in performing an action which generates a prejudice is done by means of the norms and regulations which conduct that very activity and which are breached in. Thus, as we stated above, the driver of the carload didn't respect the obligations imposed by the Governmental Ordinance 195/2002 with regards to the conditions under which such vehicle can circulate on public roads at night. Non-considering these obligations generated a state of danger for the other drivers – a state which could be neither avoided, nor anticipated by the driver of the automobile."

In the same way, the Prosecutor's Office of the Court of Roman[2] stated that „By connecting all the evidences results that the victim S.I. entered the road through a spot where there weren't indicators or markings for pedestrians, in a state of drunkennes and without ensuring that he can go through without causing prejudices to the others. As per the above-stated, the deed doesn't constitute as felony, because the driver of the automobile respected the legal provisions with regards to circulating on that type of road but couldn't avoid the accident because the victim breached the provisions in Art.72, Governmental Ordinance 195/2002, this way being exonerated from penal punishment."

[1] GO no. 11/25/2011 din of file 1769/II/2/2011 of the Prosecutor's Office of the Bar of Iasi.
[2] The Resolution of 10/14/2011 of the File 1304/P/2011 of the Prosecutor's Office near Roman.

4. Specialized Literature Aspects

Due to the nature of the felony, establishing with certainty the connection between the cause of action or lack of action of the felon and the death of the victim is highly necessary, this issue being also supported by the Doctrine (Udroiu, 2014).

Also, some authors highlighted that there are situations when additional factors or elements intervene, either prior or simultaneous to the action or lack of action on the felon's behalf, or even later, which interferes and causes a complexness of the causal connection. Because the Penal Law cannot accuse but the person that performs action or lack of action which can be connected to the negative result provided by the incrimination norm, we must draw out of the multitude of contributions which constitute that complexity, that one which bears the title of Cause, being the expression of the dangerous behavior of the felon. In this respect, we should consider the connections generated by actions or lacks of action on various persons' part, even if among these persons we have the victim. Also in the specialized literature, we argued that under the hypothesis in which the exclusive fault of the victim is market as such, we can exclude the penal responsibility of the felon (Basarb, Pasca, 2008), (Loghin, Toader, 1999).

Considerations with regards to the legal norms which regulate the circulation on public roads. Under the conditions in which two criminal expertise reviews compiled by the experts of INEC state that the accused was driving 50 km/h in the countryside, therefore respecting the legal provisions for circulating on this type of road, assuming a higher fault of the victim is concluded as evidence. The conclusions of the expertise reviews aren't mandatory for Court, but neither can they be annulled on no accounts.

Thus, we state that we cannot ignore the conclusions of such reviews which are connected with each other when they conclude that the victim could have avoided the accident if he didn't drive on a road on which the access of the vehicle was prohibitted. These conclusions all the more so true as they are confirmed by objective eyewitnesses such as the drivers who drove right behind the vehicle of the felon.

Another legal aspect in order to establish the fault of the felon is connected strictly to the violations of the legal provisions themselves, provisions which regulate the circulation on public roads. Thus, the major accusation of the victim also stems from the circulation rules ignored by the victim, as compared to those of the felon.

The drivers of carloads don't need any license to drive these types of vehicles on public roads, therefore they don't know the legal depositions which regulate the circulation on public roads like the automobile drivers do. Due to not knowing the rules and regulations for driving these types of vehicles, the drivers of carloads violate constantly the rules, being dangerous both to themselves and to the other drivers.

Oftentimes, the carloads and their drivers aren't equipped as required for night-time driving, as per article 165, paragraph 1 of the Rules of the Governmental Ordinance 195./2002. Also, the drivers violate the provisions of Art 71, paragraph 3 of the Governmental Ordinance 195/2002 according to which the access and driving of the carloads on national roads is prohibitted, as well as on roads at the beginning of which there are signs that say access isn't allowed.

But, in addition to violating the rules of Art.71, GO no.195/2002 and of Art.165, paragraph 1 of the regulations of the Governmental Ordinance 195/2002, the provisions of Art 164 of the Regulation

aren't respected either: "On public roads on which access is permitted, the carloads must be driven as close to the right edge of the road".

Moreover, the provisions of Art.165, paragraph 1, letter i) of the Regulation are violated as well, according to which the drivers of carloads "must not transport objects which overpass the length or width of the vehicle, if the load isn't provided with signals at night or under conditions of low visibility, with a fluorescent device on the back of the carload", as well as the provisions of Art.163, paragraph 2, letter b of the Regulation and of Art.17, paragraphs 1 and 3 which state the mandatory loads for these types of vehicles during night time.

The violation of at least one of the imperative rules stated above accuses the victim of being a felon.

A very significant aspect connected to the above-mentioned issues is the fact that the Police doesn't sanction these types of misbehaviors, because they are considered not to be that serious. In an effort to prevent the road accidents, although one emphasizes the responsibility of the drivers, one doesn't insist on the responsibility of the carload drivers, whom due to the fact that they are considered victims, might be exonerated from juridical responsibility.

Moreover, under these circumstances, the way in which a fault or guilt is established is also important, such as the way in which the accused and the victim might share guilt.

In this respect, we ask ourselves which is the measuring unit for the Court to establish the percentage of guilt shared by both parties. In other words, how can we state that the victim's fault would be 50% and not 60%, or 90% or 100% etc.

5. Conclusions

Causing the death of a person when driving a vehicle on public roads doesn't determine a cause and effect connection between driving the vehicle and causing the death of that person. Moreover, driving on public roads under a state of drunkenness doesn't prove the felon guilty of causing the death of the victim. The result of causing the death of a person after driving in a state of drunkenness must be proved with clear evidence, which must not infer doubt, as per the principle in dubio pro reo.

In fact, a favourable factor for these types of deadly accidents is the fact that the Police doesn't fulfill its duties with regards to road safety on public roads. Thus, the Police allows the access of overloaded vehicles, during night-time and without signaling systems, on national roads which are far from having public lighting, although these vehicles should have been obliged to get out of the road and the drivers be sanctioned for causing danger to all drivers. Under these conditions, we can state that there is a fault on the police's behalf, it being obliged to ensure that the driver can drive his vehicle safely on the road, without any obstancles impossible to anticipate thoroughly. As such, we state that violating the right of the drivers to drive safely on public roads is considered to be one of the causes of such types of lethal accidents.

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Workplace Offences in the Light of the New Criminal Code

Amalia-Mihaela Lazer-Gavrilă[1]

Abstract: From the perspective of current regulations, workplace offences and also the concept of public service require shaping of a shared vision, creating effective structures, but also a rational adoption of a European vision. Also, the personality of a nation is appreciated by the degree of appreciation of its values.

Keywords: indictment; integration; European vision; legal continuity

1 Introduction

Entering into force of the New Criminal Code[2] has led to the revision of some concepts, among which were also workplace offences, the content of which has been modified and completed by regulations provided by special laws. These modifications take over previous approaches; give them weight, suggesting integration in a context of moral and legal standards, adopting a responsible attitude that could build a general environment of rule of law and safety.

There should be imposed some uniform regulations in the field, some criteria that should be implemented by the European Union but without dropping completely legal stand points relevant for the national mentality.

Workplace offences are found in Chapter II, Title V of the New Criminal Code. New offences were introduced aiming to bring solutions to issues of legal practice that is influenced by practice in the states with coherent legislation, shaping a new legal vision in this sense.

2. Workplace Offences in the New Criminal Code

Embezzlement provided by art. 295, refers to "acquiring, using or trafficking by a public servant in his interest or for another person, managed or administered money, securities or other assets". The offence is punished with imprisonment from 2 to 7 months and withdrawal of the right to hold public office, and item (2) provides that attempt is punished.

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[2]Law no. 286/2009, published in the Official Gazette, part I, no. 510/2009, with further changes and adjustments.

In the Old Criminal Code[1], embezzlement was included among the offences against property, the current regulation was included into workplace offences. The same is found in French and Italian Criminal Code.

Abusive behavior is regulated by art. 296 and provides that "use of offensive language against a person by someone while on duty shall be punished with imprisonment from one to six months or a fine". Item (2) provides that "threat or hitting or other violence perpetrated under paragraph. (1) shall be punished with the punishment provided by law for that offense, whose special limits shall be increased by one third."

Abuse of office is according to art. 297 "act of a civil servant who in the exercise of duties, fails to fulfill or improperly fulfills duties and thereby causes damage or an injury to the rights or legitimate interests of a natural or a legal person." The offense is punished with imprisonment from 2 to 7 years and deprivation of the right to hold public office.

According to item (2), "with the same punishment is sanctioned a civil servant, who in the exercise of his duties, impedes the exercise of a right of any person or creates a situation of inferiority based on race, nationality, ethnic origin, language, religion, sex, sexual orientation, political affiliation, wealth, age, disability, non-contagious disease or HIV / AIDS."

Crime brings together content and abuse of office against personal interests, abuse of office against public interests and abuse of office by limiting the rights stipulated in the old regulation.

French Criminal legislation refers to abuses committed by persons holding office and in the Spanish Criminal Code are found "offences against state institutions and separation of powers".

Negligence in office, provided in art. 298 refers to "culpable violation by a public servant of duties, by failure to fulfill it or by flawed fulfillment, if this causes damage or an injury to the rights or legitimate interests of a natural or a legal person". The offence is punished by imprisonment from 3 months to 3 years or a fine.

Misuse of function for sexual purposes, provided by art. 299, refers in item (1) to "an act of civil servant in order to perform or not perform, expedite or delay the performance of an act concerning the duties of his office or in order to do an act contrary to these duties, claims or obtains sexual favors from a person directly or indirectly interested in the effects of that workplace act". The offence is punished by imprisonment from 6 months to 3 years and the withdrawal of the right to hold public office or to practice his profession or work in the exercise of which the offence was committed. According to item (2) "requesting or obtaining sexual favors by a public servant who uses or takes advantage of a position of authority or superiority over the victim, arising from office, shall be punished with imprisonment from 3 months to 2 years or a fine and withdrawal of the right to hold public office or to practice his profession or work in the exercise of which the offence was committed".

The indictment is justified by the fact that the act is likely to affect the performance by a civil of his office duties.

Misuse of office for sexual purposes is a new indictment inspired by the Spanish Criminal Code.

Usurpation of office is regulated by art. 300 and refers to "act of civil servant during his working hours performs an act that is not within his competence if by performing it occurred any of the

[1]Law no. 301/2004, published in the Official Gazette, part I, no. 575/2004, with further changes and adjustments.

consequences provided for in art. 297". The offence is punished by imprisonment from one to five years or a fine.

Similar indictments are found in French and Portuguese legislation. Usurpation of office differs from usurpation of official position, the latter prejudicing the authority of the state. Usurpation of office affects office relationships.

Conflict of interest is according to art. 301 "act of civil servant in the exercise of his duties, has performed an act or participated in making a decision, through which directly or indirectly was obtained a property for himself, a spouse, a relative or up the 2nd degree relative, including another person with whom he had been in a business or work relationships in the last 5 years or from who he has received benefits or benefits of any kind". The offence is punished by imprisonment from one to five years and withdrawal of the right to hold public office. Item (2) mentions that provisions of item (1) do not apply when issuing, approving or endorsing statues.

The regulation is found in the French Criminal Code (art. 432-12) – "an act of a person holding public authority or in charge with a public service mission or of a person holding an elective public role taking, receiving or keeping, directly or indirectly, any share in a company, or in a business or business operation, in which has, at the time of the act, in whole or in part, he plays the role of monitoring, managing, putting into liquidation or paying".

Violation of the secrecy of correspondence is according to art. 302 "opening, theft, destruction or retention, without right of correspondence addressed to another person, and disclosing without having the right the contents thereof, even when it was sent open or it was opened by mistake". The offence is punished by imprisonment from months to one year or a fine. Item (2) refers to "recording without having the right of a conversation or a communication made by telephone or any other electronic means of communication shall be punished with imprisonment from 6 months to 3 years or a fine." Item (3) states that, "if acts provided for by item (1) and item (2) have been committed by a public servant who has the legal duty to keep the professional secret and confidentiality of information to which he has access , the punishment is imprisonment from one to five years and withdrawal of certain rights." Item (4) states that "disclosure, dissemination, presentation or disclosure to another person or to the public, without having the right, the content of intercepted conversations or communications, even if the perpetrator had been informed that this act by mistake or accidentally, shall be punished with imprisonment from 3 months to 2 years or a fine". Item (5) states that, "the act shall not be considered an offence: a) if the perpetrator witnesses the commitment of an offense or contributes to proving its commitment; b) if he witnesses acts of public interest that are important for the community and the disclosure of which could have public benefits higher than the damage caused to the injured person. "Item (6) states that "owning or manufacturing, without having the right, the specific means of interception or recording of communications shall be punished with imprisonment from 3 months to 2 years or a fine."

Disclosure of secret state information is found in art. 303. It provides that "disclosure, without having the right, of state secret information, by the one who knows them due to office duties, if by this are affected the interests of a a legal entity stipulated in art. 176, shall be punished with imprisonment from 2 to 7 years and withdrawal of certain rights". Item (2) refers to "holding, without having the right, outside the official duties of a document containing secret state information that can affect the activity of one of the legal entities stipulated in art. 176". The offence is punished by imprisonment from 3 months to two years and a fine. According to item (3) "a person holding a document containing

state secret information, which may affect the activity of one of the legal entities stipulated in art. 176, shall not be punished if the person immediately hands it over to the issuing body or institution."

The act has some common elements with the disclosure of secrets that endanger national security, such as the material object. The justification for indictment, in the category of office offences is shown by commitment of offence that affects the activity or interests of public legal entities.

Disclosure of secret office or non-public information is included in art. 304. Item (1) stipulates that "disclosure of office secret information or that are not aimed to be published without having the right by the one who gets hold of them due to office duties, if by this are affected the interests or activity of a person, it shall be punished with imprisonment from 3 months to 3 years or a fine.". Par (2) stipulates that "disclosure of office secret information or that are not aimed to be published by the one who gets hold of them, shall be punished by imprisonment from one month to one year or a fine" and according to item (3) if "as a consequence of act provided by items (1) and (2), an offence has been committed against undercover investigator, the protected witness or a person included in the witness protection program, the punishment shall be the imprisonment from 2 to 7 years, and if a crime was committed with intent of offence against the life, the punishment shall be the imprisonment from 5 to 12 years."

The act reunites the content and regulations of the Old Criminal Code regarding the disclosure of economic secret. It is a new indictment in terms of its autonomous regulating nature.

Negligence in keeping information is regulated by art. 305. Item (1) stipulates that "negligence which results in destruction, alteration, loss or theft of a document containing state secret information, as well as negligence of another person, finding out such information shall be punished with imprisonment from 3 months to one year or a fine." And according to item (2) "the same punishment shall be applied for acts provided in art. 303 item (1) and art. 304, if these were intentionally committed".

Illegally obtained funds are according to art. 306 "use or production of documents or false, inaccurate or incomplete information in order to receive approvals or guarantees required for granting obtained funds or guaranteed by public funds, if it results in falsely obtaining these funds. The offence is punished with imprisonment from 2 to 7 years. The attempt is punished according to par (2) of the same article.

Embezzlement of funds regulates the content of art. 307 states in item (1) that "changing the destination of funds or material resources allocated to public authorities or public institutions without complying with legal provisions, shall be punished with imprisonment from one to 5 years". According to item (2) "the same punishment shall be applied to changing without complying with legal provisions the destination of funds from funding obtained or guaranteed by public funds." The attempt shall be punished according to item (3) of the same article.

Corruption and office offences committed by other people are stipulated by art 308 par (1) stating that "provisions of art. 289-292, 295, 297-301 and 304 regarding public servants shall be applied accordingly to acts committed by or in relation with persons that exercise, permanently or temporarily with or without remuneration, a duty of any nature to the benefit of any individual provided by art. 175 item (2) or in case of any legal entity." In this case, the limits of punishments shall be reduced by a third according to item.(2) of the same article.

If acts provided by art. 295, art. 297, art. 298, art. 300, art. 303, art. 304, art. 306 or art. 307 have produced serious consequences, the punishment limits shall be increased by half according to art. 309.

3. Conclusions

The unification of provisions related to workplace abuse against persons, public interests by restricting certain rights results in a simplified application of statutory provisions.

In the context of legal concept universalization, the New Criminal Code restates the national identity by keeping old indictments but it also continues our integration into the structures of the European world by assimilating new elements that are analyzed.

Current history takes the responsibility to validate a harmony between national and universal legislation. Therefore, cultures will cooperate in the European Union, keeping national identity without becoming uniform, modernization and reconfiguration process operating in a traditional system, which remains a fundamental source of law.

Tradition is not equal to the past, there are legal guidelines that offer valuable continuity, remain alive in their exemplarity. In a unifying perspective of the European Union, these traditional values have reverberations in all areas of social life.

4. Acknowledgements

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Recognition and Enforcement of Foreign Judgments in the Case Where a Convicted Person is in Romania

Minodora-Ioana Balan-Rusu[1]

Abstract: The paper analyzes the institution of the recognition and enforcement of foreign judgment, in the case where a convicted person is in Romania, as well as some references to the conditions of Romanian law to be fulfilled in order to have the recognition and enforcement of such a judgment. Also, according to our research it results that the Romanian legislator has not provided the mandatory legal assistance to the person concerned, which is why we have made proposals *de lege ferenda*. The paper may be useful to practitioners in this field, and academics. The innovations consist in examining the institution of the recognition and enforcement of foreign judgment, in the case where a convicted person is in Romania, with the new amendments to the Romanian special law and the wording of the proposals of *de lege ferenda*. The paper continues further studies and research conducted in the field of judicial cooperation in criminal matters, in particular the form of legal assistance in criminal matters in the European Union area.

Keywords: Persons convicted in another state; offense; preventive measures; proposals of *de lege ferenda*

1. Introduction

The recognition and enforcement of a foreign judgment by the competent judicial authorities in Romania is one of the most important forms of international judicial cooperation in criminal matters (Boroi & Rusu, 2008, p. 348).

The importance of this institution results from the fact that, regardless of their content, all other forms of judicial cooperation is achieved between two or more states, based on mutual recognition and trust in judgments adopted at the level of world states.

Moreover, at the level of the European Union states, the recognition and mutual trust in judicial decisions is both a fundamental form of judicial cooperation in criminal matters between the Member States and a fundamental principle in the field of cooperation (Rusu, 2011, pp. 552-555).

This form of judicial cooperation in the recent years has established itself as a direct consequence of increasing the cross-border crime, especially that committed by the organized crime groups and hence the need to prevent and combat it more effectively at regional or global level.

Being aware of the obligations assumed at international level and wishing to participate actively in the overall effort of preventing and combating the crime of this kind, Romania has acted in two main directions.

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Thus, on the one hand it has initiated or it has actively participated in the adoption and signing of international treaties and agreements, and on the other hand it has perfected the internal law, so that it becomes compatible with the laws of other states with democratic regimes recognized in the world.

The institution of recognition and enforcement of foreign judgments, reported to the way of ruling in its relations with the EU Member States, experienced a number of differences, which are generally related to a number of additional conditions required by the Romanian law (Boroi, Rusu & Balan – Rusu, 2012, p. 136).

The evolution of transnational crime on the one hand, the treaties and agreements concluded by Romania, on the other hand, have imposed the amendment of Law no. 302/2004 on international judicial cooperation in criminal matters.

We consider that the latest changes and additions of the legislative act framework by Law no. 300/2013 contribute greatly to the improvement of the institution of recognition and enforcement of judgments emanating from a competent judicial authority of another State.

2. The Documents and Information Transmitted by the Issuing State

In the recognition and enforcement of judgments or orders of foreign criminal judicial bodies, the Romanian authorized bodies will have to receive from the issuing foreign judicial authority the following documents and information:

- the used name, nickname, the used alias only in the case of their knowledge, also the gender, nationality, identity card number or passport number, date and place of birth, photograph, last known address or residence, the languages that the person understands;
- the information about family, social or professional connections, that he has in Romania;
- the total duration of the sentence, the starting date of the execution, the date on which the penalty would be deemed as served, the served period, if applicable, the number of days to be deducted from the total penalty due to the effects of amnesty or previously granted pardon;
- Information on parole or early parole, if applicable;
- A copy, certified as appropriate, of the criminal ordinance or judgment given in the first trial and, if appropriate, in exercising the appeal ways;
- the applicable legal provisions;
- where appropriate, any expertize, report or other medical documents attesting the physical and mental state of the convicted person, the treatment undergone by him in the territory of the issuing State and any recommendations for further treatment in Romania and, in the case where the convicted is a minor, the copy of the social inquiry report;
- information on the possibility of exercising by the sentenced person, after his transfer, of an extraordinary appeal against the conviction judgment;
- in the case of judgments given in absentia, in the case where the convicted person is in the territory of the issuing State, the information on a person's right to exercise an appeal, which has as effect the reexamination of the proceedings in his presence. (article 132 of Law no. 302/2004).

The examination of the information and documents described above leads to the conclusion that they are absolutely necessary for the Romanian state as a state which will recognize and consequently execute the foreign judgment.

At the same time, it can be seen that the documents and information required in this situation are much wider than for recognition and enforcement of a judgment given in a Member State of the European Union motivated by mutual trust, which in the case of a third country it is determined by some delays (justified in fact).

3. The Procedure for Recognition of the Foreign Judgment and for Taking Preventive Measures

After receiving the documents and information provided by the Romanian law, the Ministry of Justice, through its specialized directorate, submits them to the office attached to the court of appeal in whose territorial jurisdiction the convicted person resides or, if he is in detention in the territorial jurisdiction of the place of detention, in order to seize the competent court of appeal.

After receiving the file the designated prosecutor shall verify if:

- the enforcement of the foreign judgment in Romania would be contrary to the principle of non bis in idem;
- the convicted person is prosecuted in Romania for the same offenses for which the foreign judgment was rendered;
- there are considered incident any of the mandatory reasons imposing the non-recognition and non-execution of the foreign judgment, provided for by the Romanian law;
- the convicted person benefits from the effects of the specialty rule;

Doubtless that the verifications required by law require the prosecutor to use other Romanian state institutions, or possibly to some European institutions or with attributions at global level, in which case the prosecutor will request the necessary information from these bodies.

Noting that the necessary documents are complete, the prosecutor notifies the competent court to judge this case.

The court will hear the case in a panel formed by one judge, in the council room, summoning the convicted person, where the presence of the prosecutor is required.

The president of the court or the judge of this court shall specify the period, which shall not be less than 10 days from the date of registration of the case to court, and the duration of these proceedings is of 60 days, starting from the date of registration of the case.

The object of the recognition procedure of the foreign judgment is to verify the conditions stipulated by the Romanian law, namely:

- The judgment is final and enforceable;

- The act for which the penalty would have been applied, in the case where an offense had been committed on the territory of Romania. If the sentence has been imposed for several offenses, the verification of the condition is achieved for each of them;

- There are not incident any of the grounds for non-recognition and non-execution provided by the Romanian law [article 136, paragraph (2) of Law no. 302/2004]; if the court finds the incidence of any of these reasons, it may apply recognition only if there is the certitude that the execution of the sentence in Romania would significantly contribute to the social reintegration of the sentenced person;

- The execution in Romania of the sentence of life imprisonment or imprisonment or custodial measure is likely to facilitate the social reintegration of the sentenced person.

Also, given the specific circumstances of each case, the court may refuse the recognition and enforcement of foreign judgment, if:

- the person is investigated in Romania for the same offense for which he was convicted abroad; in the case where the judgment was passed for other offenses, the court may order its partial recognition, if there are fulfilled other conditions;

- the issuing State has refused the application under article 134, paragraph (1) of Law no. 302/2004.

If the convicted person is under investigation in Romania for the crime for which he was convicted abroad, instead of refusing the recognition, the court may order the recognition of the foreign judgment, or suspend the proceedings until taking a decision in criminal proceedings before the Romanian judicial authorities.

Also, the foreign judgment shall not be recognized or, if recognized, it would not be enforced when, according to the Romanian criminal law, the amnesty has intervened, the decriminalization of the act, and any other cases provided by the law.

In the cases where the above conditions are met, the court will recognize and it will enforce the execution of the foreign judgment.

At the same time, depending on the nature of the punishment and if the conditions provided by Romanian law are met, the court may order the application of a measure of individualization (re-individualization) of the sentence execution.

Regarding the preventive measures, we mention that at the express request of the issuing State to the convicted person it can take one of the requirements of the Romanian Code of Criminal Procedure. This applies to judicial control, the judicial control on bail, house arrest and detention.

For the choice of one of the preventive measures mentioned above it will be taking into account the sentence imposed in the issuing State, the nature of the crime, health, age and criminal record of the person against whom the measure is taken.

The detention on remand may be taken against the convicted person if the offense is committed in one of the categories of the offenses for which it occurs turning in some persons without verification the of double incrimination requirement, under the condition where the maximum penalty provided by the law of the State in question shall be at least three years, and there is one of the following situations:

- The convicted person has fled from the issuing State in order to evade prosecution, trial or execution of sentence and he took refuge in Romania; or
- The sentence imposed by the foreign court or the remainder of the execution is of least one year in prison.

The duration of the preventive measure cannot be longer than 180 days; the preventive measures will cease rightfully:

- at the deadline set by the law or at the expiry date, if the term period was established by the Romanian judiciary authorities;
- when, before a judgment for recognition of the foreign judgment, the duration of the preventive detention or house arrest has reached the duration of imprisonment imposed abroad; and

- in case where preventive detention was decided prior to the request for recognition and enforcement of foreign judgment, when, within 30 days from the date of preventive detention the documents and information required by the Romanian law were not received by the directorate of the Ministry of Justice.

At the same time, the legal status of the convict cannot be aggravated as a result of the duration of the preventive measure of deprivation of liberty imposed by the Romanian judicial body.

The sentence shall be written in 10 days from the decision. An appeal against that judgment may be presented within 10 days, the prosecutor, ex officio or at the request of the Minister of Justice and also the convicted person. For the prosecutor, the term starts from the delivery, and after the delivery for the convicted person or, in the case of not being present at the debates and at the final decision, since the receiving the copy on the device. The file will be submitted to the court of appeal within three days, and the appeal shall be heard within 10 days, in the council room, without summoning the convicted person and the presence of the prosecutor is required.

4. The Notification of the Foreign Judgment and the Appeal of the Convicted Person

In the case where the foreign judgment was rendered in absentia, the prosecutor receiving the file notifies the convicted person on the decision. The notification must contain the following mentions:

- that it was received an execution request of a sentence in Romania;
- it is entitled to challenge the foreign judgment and submit complaint in this regard, if that right is conferred by the regarded state law;
- that the appeal is subject to the jurisdiction of the issuing State;
- the deadline for appeal is 30 days and it begins on the date of receipt of notification;
- the failure to submit the appeal within the period of 30 days has as consequence the consideration that the foreign judgment has been passed in his presence.

If since the expiry of 30 days the person in question has not filed for appeal, the prosecutor notifies the competent court for trial.

If within the period of 30 days the person has filed for appeal, the case prosecutor will order its classification and it will hand back the file to the specialized directorate of the Ministry of Justice and also it will send the complaint and the documents submitted by the sentenced person.

The examination of the above mentioned provision leads to the conclusion that the Romanian legislator taken information from the European law, on the situation regarding the absence of the convicted person from his own trial, in which case, it was established the obligation of the Romanian judicial authorities to facilitate the retrial possibility in the sentencing State.

5. Conclusions

The evolution of transnational crime imposed the improvement of internal laws for the world's states, towards facilitating the recognition and enforcement of judgments passed in another state.

In this context, the Romanian legislator has made a series of changes and additions to the legislative act framework, regulating the case where it is required the necessary recognition and enforcement of a foreign judgment for a person who is in Romania.

The research mentioned legal rules leads to the conclusion that the Romanian legislator has imposed a number of additional conditions in relation to identical situations, but when the decision submitted to recognition and enforcement belongs to the judicial authorities of a Member State of the European Union.

Although these provisions are in line with the European legislation and it contributes greatly to improving the complex business of international judicial cooperation in criminal matters at the level of the world's countries, we consider that the judicial proceedings in these cases must take place with the participation of the lawyer chosen or appointed ex officio of the person concerned.

De lege ferenda, in order to ensure the rights of defense of the convicted person who is in Romania, we propose completing the special law with the mandatory participation of the lawyer in judicial proceedings before the prosecutor and the court of Romania.

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The "Restrictive" Nature of Civil Liability for the Acts of Minors or those under Judicial Interdiction

Mirela Costache[1]

Abstract: In this study we propose a rigorous analysis of article 1372 of the Civil Code, concerning the nature of vicarious tort liability, focusing on the limited situations of implementing those provisions of civil law. Also, we will relate to previous regulation, subjecting the analysis accuracy with which the current legislator has accurately regulated only two of the three phases of the vicarious tort liability, being current until October 2011. The review will only regard the first of the two forms, and namely, the liability for the prejudice caused by the act of a minor or a person under judicial interdiction. From the analysis and interpretation of the three paragraphs of article 1372 we will identify the restrictive nature in applying this form of liability, in the strict interpretation of the described situations.

Keywords: tort; minor; parent; academic staff; student

1. Introduction

Everyone, as subject of civil law enjoys, under the law, the plenitude of its civil subjective rights, with the correlative obligation of not causing harm to his fellow men that would justly indebted to an adequate reparation, attracting the activation of tort liability.

The experience of social life has imposed in civil law matter the diversification of liability hypothesis: the one for his own act and liability for the acts of another person, both cases having as declared purpose protecting the interests of victims and repairing the prejudice (Stătescu, 2009, p. 2). So, the tort can be committed not only in the task of the one causing the prejudice, but also the responsibility of others, the current Civil Code establishing, **increasingly restrictive**, two such forms within the articles 1372-1374 of the Civil Code, compared to the three existing ones, until recently. At first glance, from reading these texts it is easy to perceive that the two forms have **principled and restrictive feature,** from the nature of their writing. It is about the liability for the prejudice caused to another person by the act of a minor or a person under judicial interdiction and principals liability for the infringements caused by the agents, renouncing to the liability of the teachers and artisans for the acts of students and apprentices under their supervision.

Why only on these two situations? We identify in this study the following theoretical trajectory and legislative interpretation:

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- the express silence of the law as to reverse the prior express provisions concerning liability of the teacher (generically speaking) for the student under the supervision, it circumscribes / joins any of the above situations or we interpret it based on the contractual relationship between parent and the establishment where the minor conducts educational activities, a perspective already foreshadowed by the doctrine?
- The legal text (articles 1373 and 1374 of the Civil Code) expressly conditions the two assumptions or by extension, we can identify, through a judicious interpretation, new situations designed to attract the legal incidence and substance of the provisions mentioned above? If not, however it remains the issue of the vicarious liability a constant, although the legal "coat" was renewed? If so, towards what kind of situations of law, tort obviously, can we turn?

We will direct this analysis towards these ideas.

2. The "Restrictive" Nature of this Type of Tort

Unlike criminal law which knows only the principle of personal responsibility for the personal act, the civil law system recognizes the principle of *vicarious liability*.

In that case, the remedy obligation will be determined in the task of other persons, other than the perpetrator. Compared to the three forms that were regulated by the Civil Code of 1864[1], currently the Civil Code establishes only two forms, which provide in the cases expressly provided by law, a person can be required to repair the caused prejudice by the illicit act of another person.

The general and restrictive background at first sight of this liability is established in article 1349 paragraph (3) which states that: "*In cases specifically provided by law, a person is obliged to repair the prejudice caused by another person, by things or animals under his guard and also the ruin of the building."*

The first of these legal situations are based on article 1372 of Civil Code, which establishes a **principle of liability for the prejudice caused by a minor or a person under interdiction**, the task of which, under the law, a contract or a court order was required to also supervise the author of the harmful act. The second form, upon which we will not insist, is ruled by article 1373 of the Civil Code and it establishes **the liability for the infringements committed by the agents**. There is nothing mentioned about the teacher's liability (institutor, craftsman) for the infringements committed by students or apprentices.

It was argued that to be responsible for another person, or otherwise, of not being able / to be hindered by anything to answer on their own behalf, this would mean either the existence of a state of "inequality" or one of "subordination" (Fabre-Magnan, 2007, p. 307).[2] These two issues should not be construed *ad litteram*, as people are equal, have equal rights and the civil law relations are

[1] The first form was governed by the old Civil Code in article 1000, paragraph (2) and (5) of the Civil Code, the parental responsibility for the infringements committed by their children. The second form that of teachers and artisans liability for the damage caused by students and apprentices under their supervision – article 1000, paragraph (4) of the Civil Code, and the last form, the perpetrator's liability for the damage caused by their agents in the entrusted functions was established by article 1000, paragraph (3) of the Civil Code.

[2] For the situation of subordination, the author refers to the principal-agent relationship existing between the principal and the agent.

characterized by the position of legal equality of the parties. We can at most support the view on the status of being under age, which does not confer to the minor nor full capacity, or the discernment for his actions, but it is also characterized by the need to protect his interests, being deprived of legal experience. That period in every man's life is marked by physical and mental immaturity, by social dependency, by the need for material and emotional support. In this context, the role of the family is major, as protective environment, as it becomes responsible for all social ills specific to the juvenile (violence, juvenile delinquency, etc.).

Therefore, the right of parents on the arbitrary will of children is determined by the purpose of keeping within the limits of discipline and to educate them. (Hegel, 1996, pp. 180-181). Connected to the right, where the minor's conduct exceeds the ethical and juridical normative space, it intervenes the obligation of parents' liability for the infringements committed by the minor. It is what the law defined by **parental authority**. Having the value of principle, pursuant to article 483, paragraph (2) of the Civil Code, the parents (and other persons designated by law) "*exercises the parental authority only in the interests of the minor, with due respect for his person, and they associate the child in all decisions relating to him, taking into account the age and the maturity of the child*".

We have achieved this intermezzo to materialize the role of this form of tort liability within the relationship between social (family, parents) and legal. For where the social creates relations, the law defends them and it gives effectiveness, promoting the rights and obligations of individuals and it restores the rule of law.

3. Determining the Persons Liable for the Offense of the Minor or the one placed under Interdiction according to the New Ruling

From the entire approach of this study, we identify reasons that will support the idea that the scope of the persons called upon to respond for the act of the juvenile is restricted in the new regulation, but on the other hand, we are witnessing a diversification of their scope, envisaged by the legislator, supported even by the lack of actual nomination of the academic staff. From this point of view, the doctrinal voices have emanated also critical assertions. As mentioned, not everyone is obliged to repair the damage caused by a third person, for we would have witnessed legislative and jurisprudential chaos. The category of the nominated people being liable is a strict one, expressly established by law or with deep expectation that the current coding would have achieved this in an optimal manner. From the relationship point of view we clearly take into consideration, the connections related to the civil nature, that would entitle the imposition of such liability with derogatory feature, according to some researchers in civil matters, vicarious liability (Eliescu, 1972, p. 249).[1] Its derogatory nature of it presupposes tort liability withheld solely to restricted categories and exhaustively provided by the law, without the possibility of extending it to other people (Vasilescu, 2012, p. 639). From the nature of this / these relations it derives the special character, whose development knows a restrictive parallel path with historical development of the society. We consider here the relationships between parents and their children or between tutor, curator and those in care.

[1] In this regard, Michael Eliescu sustains: the vicarious liability or for the acts of work derogates the liability from common law. The doctrine shared different opinions on this title of derogating liability from common law. Constantin Stătescu (2009, p. 2) speaks of the indirect and complementary nature of this form. Contrary to these views, it was also noted that the expression of indirect liability is totally inadequate, citing the fact that there can be no processing of the act of another person, but only an imposition of the indemnity task. See (Neculaescu, 2006, p. 43)

Until recently, regarding parental responsibility for the damaging acts of their minor children, the matter is in article 1000, paragraph (2) of the Civil Code, containing the following: "*the father and mother after the death of the man are responsible for the damage caused by their minor children living with them."* There were also taken into account the provisions of article, 1000 paragraph (5) *"... are shielded from the shown above liability proving that they could not prevent the occurred harmful event*".

Currently, the Civil Code interferes with the amendments to the law from the desire to reconfigure this institution with a broader foundation, elaborated, expanded to the scope of persons called upon to respond for the minor (but expressly non-nominating the academics from higher education), broadening the scope of persons for which is liable (minor and convict under judicial disability), giving substance also by the updated terminology. From our point of view, this new regulation is likely to be dashed by some detailed comments as we develop the subject.

The text of article 1372 paragraph (1), whose name refers to the marginal type of liability under investigation, i.e. the liability for the acts of minors or those under interdiction, states: "the one who, under the law, a contract or a court order is required to supervise a minor or a person placed under interdiction is responsible for the injury caused by these latter people ". Paragraph (2) of the same article states that "*liability subsists even in the case where the perpetrator, lacking judgment, is not responsible for his own deed*".

As regards paragraph (3), it states that "the person required to supervise is relieved from the liability only if he proves that he could not prevent the harmful event. In the case of parents or where applicable, the legal guardians, the proof shall be deemed only if they prove that the child's act is the result of another act, other than the way they have fulfilled the duties arising from the exercise of parental authority".

These three texts of legislation, plus another, article 1374, paragraph (1) of the Civil Code according to which "parents do not respond if they prove that they have fulfilled the requirements of the person's responsibility, who was obliged to supervise the minor" and paragraph (2): "No other person outside the principal is liable for the prejudicial act committed by the juvenile, who had de quality of agent. However, in the case where the principal is the parent of the minor who committed the wrongful act, the victim has the right to choose the basis of liability."

Compared to the spirit and letter of this new regulation, on first reading we opined that the matter is better organized, but some comments are not only inevitable, but also entitled to be specified. We have noticed the economy of the legal text, and also the elimination of one of the three oldest forms existing until October 2011, at a cursory analysis, the restrictive feature of the liable persons becomes a false assumption. The act generating the liability is consolidated now in the charge of a person who, under the law of contract or judgments has the task of supervising the minor. We are seeing, in fact, *de lege lata*, **a real extension of liability on persons other than** mother and father, schoolmasters and artisans, because the legislator renounced to referring explicitly to the mother, father or parents choosing to regulate indistinctly the liability of everyone involved, on different grounds, to supervise a minor or a person placed under interdiction. Firstly, the text refers explicitly to parents and guardians, but we believe that there were not regarded only these two categories, for the legal text contains generic structures and indefinite "the one who..." or "the one obliged to...".[1]

[1] The regulation of the current Civil Code is a broad generalization and its inspiration (for our subject) is the counterpart model text from the German Civil Code.

In a recent study, an author devoted to this subject for some time, Lacrima Boilă (2012, p. 82) criticizes the structure that begins article 1372 of the Civil Code, on the grounds that it would lead to the idea committing liability only to a physical entity, or, according to the current regulation also an institutional entity can be liable under the same legal basis. The author proposes using examples, the following solution: "parents, guardians, rehabilitation centers, medical and educational institutions, health facilities or any other natural or legal persons under the law..." Such forms, which are intended to be exhaustive, though there are not mentioned the curators, although she marks a generous and judicious idea, the one of improving the text of the law, from our point of view is daunting, exuberant and superfluous.

In search of a (shy) relevant solution, in our view, for differentiating this problem, we consider that, if it requires a reconfiguration of the text of the law, we propose the following solution: "*the person or entity / institution who/which...*"

As such, the indistinct, but broad scope of liable persons, includes teachers, not being *expressis verbis* specified, but to which the text of article 1372 of the Civil Code is incident. The rule laid down in the article establishes that "the person under the law... it obliged to supervise a minor or a person placed under interdiction..." can also be a teacher.[1]

The problems with the current regulation are far from being solved, starting from natural question: who will actually be liable, the teacher, the supervisor... or the school unit? Is there a difference between state and private educational establishments? Will they respond only according to the legal or conventional nature which formed the legal basis of the report? These are questions that the legal texts have not yet given an adequate response. Thus, with parents, the teachers are required to answer for the damage caused by the minors or those placed under judicial interdiction, all based on a legal terms, namely the National Education Law no. 1/2011[2], and not based on the educational contract which the educational institutions are obliged to conclude with the students' parents under the Education Law no. 1/2011.

Even in the absence of an express nomination, the teachers remain responsible and in the legislative current context, they are liable according to the common law. There will be enrolled in this sphere, according to the Law of education also those who have assumed the obligation of supervision, organization and control over students and other categories of minors, over a period of time, the law nominating the teachers of school units (nurseries, kindergartens and day care centers) the teachers of primary schools, secondary, technological and vocational, professional military education, art or sports. There are missing from the law the provisions concerning the auxiliary staff and non-teaching staff, which according to our opinion, cannot be held liable for such liability.

Some doctrinal voices found that despite the constant jurisprudence, the educational institution should be the one responsible in such cases (Motica, 2012, pp. 168-174). In supporting this hypothesis, the author starts from neutral and generic formulation of the legislator no longer distinguishing what kind of entity it may be, at which "can be both an abstract person (natural or legal) to whom the minor or the convict under judicial disability was entrusted. So, the author concludes that "from the point of view of designating the person responsible in the analyzed article there is no impediment in considering that the educational institution itself could be liable." (Motica, 2012, p. 168)

[1] Whatever name we choose to allocate to this category, professors, teachers, educators or according to the old terminology, schoolmasters, we refer to the pre-university teaching staff in public or private education, regardless of academic rank, to which we add other subcategory: sports trainers, supervisors in the homes of students in school camps, etc.
[2] The Law no. 1/2011 of the National Education, updated, was published in the Official Monitor no. 18 of 10 January 2011.

4. Conclusions

On the one hand, the restricted nature is sustained only by the fact that these forms must be interpreted strictly, in that they are the only circumstances when it comes to intervening in the vicarious liability. On the other hand, amongst those to whom there are entrusted the minors or the convict under judicial disability in order to educate and to supervise them there are added in the category also teachers/academic staff, enlarging the liable persons. Engaging the extended liability enunciated by the text of article 1372 can be justified by the nature of relations of the person responsible for the harmful act, being motivated also by the authority which it exercises over it, it materialized by controlling his lifestyle or managing the activities that he performs. It has already been held that the manner of ruling is a unique one (Adam, 2013, p. 355)[1], meaning that, shortly after their implementation, the doctrinal debates have not ceased to refer to the scope and wording itself of this article. The fact is that the role of doctrine in this context will be one as hard to sustain as before, manifesting our desire to reach in the near future to common denominator to the problem, from the legal-doctrinal-jurisprudential point of view.

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[1] The author considers it appropriate that these provisions be interpreted objectively and rationally correlates both with the other laws in force at national and EU treaties and directives.

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The Abolition of Unfair Terms according to EU Legislation

Gina Livioara Goga[1]

Abstract: In the member States of the European Union, Directive. 93/13 / EEC on unfair terms in Europe consumer contracts provides the legal interpretation on unfair terms in consumer contracts with professionals. However, experience and correlating the Romanian national court jurisprudence of other European countries demonstrate that the process of standardization and harmonization of European Union law in this matter supports deficiencies, still absorbing the directive of unfair terms and still giving contrary solutions in the courts. The national legislation, Law no. 193/2000 must be completed since the CJEU case law in the field, so mostly for solving these cases the procedure is cumbersome.

Keywords: unfair terms; contracts; EU legislation

1. Introduction

According to the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts[2], the purpose of this Directive is to approximate the laws, regulations and administrative provisions of the Member States relating to unfair terms in contracts concluded between a seller or supplier and a consumer.

A contractual term shall be regarded as unfair if has not been individually negotiated, which is contrary to the requirement of good faith and when it's causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. That is why a term shall always be regarded as not individually negotiated where it has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

The Romanian Civil Code[3] state that the parties are free to conclude any contracts and determine their contents, but within the limits of law, public order and morals, or if the stipulation of unfair terms in consumer contracts associated idea bad faith, this question can be qualified as unlawful, the penalty is absolute nullity.

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[2] Official Journal L 095, 21/04/1993 P. 0029 – 0034.
[3]Law no 287/2009 on the Civil Code republished in Official Monitor, Part I no. 505 of July 15, 2011.

Following the adoption of law 193/2000[1] transposing the provisions of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, the national legislation of Romania provides that it is not allowed that professionals to stipulate the unfair terms in consumer contracts. The sanction to be applied in the event of a clause as improper it is an absolute nullity.

2. Problem Statement

According to art 4 of the Directive and without prejudice to Article 7, the unfairness of a contractual term shall be considered, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the signing of the contract and to all the other terms of the contract or of another contract on which it is dependent. Appreciation of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplies in exchange, on the other, in so far as these terms are in plain intelligible language.

From this point of view, it can see that it's necessary to fulfill certain prerequisites for benefits both parties. Thus, any contractual benefit must meet both conditions concerning the usefulness of benefit and on its proportionality, ensuring the balance between contractual obligations.

Otherwise, the seller or the supplier, by introducing unfair terms, as defined by law[2], creates an excessive advantage in relations with applicants, exerting an abuse of economic power and this abuse raises a presumption of bad faith of the professional.

The lack of proportionality of benefits in cases of abuse of rights analysis is easily distinguishable, since the disproportion between the damage caused to the seller or the supplier and the benefits of the professional is very evident.

3. The Specific Case of Pre-Contract Type

In typical contracts, bank reserves the right to revise the current interest rate in case of significant change in the money market, communicating the new interest rate to the borrower. Although, when the agreement was signed the plaintiffs agreed to receive a fixed rate, the lender has made assessments on the timing of interest can be changed.

However, this is an unfair term because it was not been negotiated directly with applicants one adhesion contract, according to which content is determined unilaterally by the will of the creditor, the other party limited itself to accepting contract terms. This is the case when they making an agreement binding on the consumer whereas provision of services by the seller or supplier is subject to a condition whose realization depends on his own will alone.

Another situation we encounter in contracts wich allow the trader to obtain money from the consumer, or for non-completion of the contract by the latter, without providing compensation in an amount

[1] Law 193/2000 on unfair terms in contracts concluded between professionals and consumers – Republished pursuant to Art. 80 of Law no. 76/2012 for the implementation of Law no. 134/2010 on the Code of Civil Procedure, published in Official Monitor, Part I, no. 365 of 30 May 2012.

[2] 'Seller or supplier' means any natural or legal person who, in contracts covered by this Directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned (Art. 3, c), the *Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts*.

equivalent existence and for the consumer for non-contract the trader. These provisions are also considered unfair terms, so there are regarded as not individually negotiated, but have been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.

National Court, to the extent that it considers as unfair contractual provisions, will force tha bank to remove the contents of contractual provisions and any reference concerning "any other costs payable" by this name as included understanding the risk commission/fee renamed administration.

As regards the scope of the expressions "in the event of a contingency", the Court will find that they are improperly intoduced in contracts, as the bank does not define the term of adhesion unforeseen, nor specify which cases you can apply that provision. In this case, the unfairness lies in "the trader right to unilaterally change the terms of the contract without a valid reason which is specified in the contract" clause being deemed abusive under article 1, point A of the Annex to Law 193/2000.

National Courts appreciate that are abusive contractual provisions intended to affect the credit agreement on "changes the interpretation of any law or regulations applicable" that may arise from the signing date or later."

However, there are terms which establish borrower's obligation that "within 15 days of the date on which it was notified in writing by the bank "to pay additional amounts", in order to compensate for cost bank increases, or other reimbursements. So, besides the fact that a consumer has to bear own risk (deterioration of the exchange rate, lower income, so on), it is obliged to bear the risk contingency for any changes of interpretation provisions of any law, rule or regulation that may occur from signing or later. Thus, "bank forces the consumer to undergo contractual conditions which had no real opportunity to get acquainted from contract" - clause considered abusive by Law 193/2000, article 1 pt. b).

In this way, the disproportion between the rights and contractual obligations of both parties is evident, which obliges the consumer to pay disproportionately high amounts in case of failure of contractual obligations by it compared to the losses incurred by the trader" (art. 1 point I of the Annex to the Law).

4. Referring Cases to the Court of Justice

As there are still many issues related to the interpretation of Law no. 193/2000, given how Member States transposes according to specific national legal traditions and their economic realities, most national courts have suspended pending cases and referred questions to the Court of Justice. Although the ruling upon the interpretation or validity of EU law is the Court of Justice of the EU, which is the court 's task to draw the appropriate conclusions from the Court's response, removing the application of the national rule in question, if there is necessary.

Interlocutory reference procedure is a mechanism to ensure the unity of interpretation and application of EU law. That procedure constitutes an essential means to impose national jurisdictions correct application of EU law, allowing not only the EUCJ to clarify the meaning of particular provisions meanings, but to impose certain obligations to the judge, such as that of remove existing provisions contrary to law or obligation to provide compensation for damage due to failure by the Romanian State obligations imposed by the EU.

In this regard, frequently asked questions included the following aspects:

For example, in Pannon GSM Zrt cause. Erzsébet against Sustikné Győrfi, Judgment of the Court (Fourth Chamber) of 4 June 2009[1], the ECJ held that "Article 6 (1) of Directive 93/13 / EEC of 5 April 1993 on unfair terms in contracts consumers must be interpreted as meaning that an unfair contract term is not binding on the consumer and that it is unnecessary in this regard, that the consumer has previously successfully challenged such a term. National court to examine ex officio the unfairness of a contractual term where it has available legal and factual elements necessary for that purpose. When you consider that such a clause is unfair, the court did not apply, unless the consumer objects.

In Pannon GSM Zrt Cause. Erzsébet against Sustikné Győrfi[2], Judgment of the Court (Fourth Chamber) of 4 June 2009, the ECJ also ruled that the national court is required to examine ex officio the unfairness of a contractual term where it has available the legal and in fact necessary in this regard.

In Océano Grupo Editorial and Salvat Editores Case[3], the Court ruled that in the case of a contract between a consumer and a seller or supplier under the Directive, a clause drafted in advance by a vendor or a supplier that has not been the subject of individual negotiations, which establishes that the court has jurisdiction to resolve all disputes arising under the contract is the court in whose jurisdiction the registered office of the seller or supplier, meets all the criteria to be classified as abuse in relation to the Directive.

5. Conclusions

In line with ECJ case law that the national court to determine whether a contractual term such as that in the main proceedings meets the criteria to be classified as abusive within the meaning of Article 3 (1) of Directive 93/13. In this way, the national court must consider the fact that a clause in a contract between a consumer and a seller or supplier, which is inserted without having been individually negotiated and which confers exclusive jurisdiction on the court in the county in which the registered office of the seller or supplier may be considered abusive.

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