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CONTENT

THE IMPORTANCE AND THE USEFULNESS OF THE CONCEPT OF *STOCK AND TRADE* WITHIN THE CURRENT LEGISLATIVE FRAMEWORK

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Abstract

*In the heritage of the professional - trader, there is a **"set" of goods** intended to business, goods which, by their nature tangible or intangible, movable and immovable, are regarded as a **fact universality** (de facto) and not a **legal universality** (de jure).*

Thus, from the outset, it should be noted that stock and trade cannot be confused with the heritage, the essential difference consisting in the fact that stock and trade not only contains rights and obligations but goods intended to business that is carried out by the professional person[1], while the assets include all rights and liabilities that can be quantified in money belonging to it (art. 31 C. civil).

*Under these conditions, **the stock-in-trade is not identified with professional dedicated assets**, which, according to the Civil Code (Article 31 paragraph 3 and art. 31 para. 1 and paragraph 2), is represented by the "fiduciary property masses, created under the provisions of Title IV III of the book, those intended to develop a licensed profession and other patrimonies determined by law ".*

Key concepts: *stock-and-trade, dedicated assets, business, goodwill, heritage, company*

1. GENERAL CONSIDERATIONS

Reconfiguring commercial law adopted under the New Civil Code (NCC), defining **assets**, **dedicated assets**, **individual professional assets** legitimates the question concerning the importance and usefulness of "stock and trade" concept, especially because there are authors who consider that the stock and trade is actually a collection of dedicated assets[2].

Interest, the utility of the stock and trade concept is based on general issues but especially on considerations specific to economic operations, legal operations, in which are involved are present individuals and businesses qualified as legal professional traders. Thus, the stock and trade as an essential element of the heritage of the professionals-traders is a reality that cannot be ignored, even if the legislator has not set up a special regulatory framework to meet business features, features that are mainly **speed and security of transactions**.

On the other hand, the concept of "stock and trade" is necessary in the context of free movement of goods, services, persons and capital within the European Union, freedom imposing economic activity / trade by individuals and legal entities in compliance with the law of fair (honest) competition.

However, in the rules of competition, the protection of stock-and-trade fully occupies an important role, but also its elements (the legal entity, company logo, customers and so on). Moreover, the Romanian legislator in Law 11/1991 on Unfair Competition, as amended,

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[1] For the definition of *heritage*, see also C. Barsan*, Civil Law. Principal real rights*., All Beck Publishing House, Bucharest, 2001, p 6; I. Balanescu Rosetti, Al. Băicoianu, *Treatise of Civil Law*, Vol I, Ed Al Beck, Bucharest, 1996, p 522, V. Stoica, *Principal real rights*, Humanitas Publishing House, 2004, page 46 et seq. In another definition, the definition includes property and assets covered by the rights and obligations, Tr Ionaşcu, G. Brădeanu, *Principal real rights in the Socialist Republic of Romania*, Academy Publishing House, Bucharest, 1978, p 13.

[2] St. D. Cărpenaru, Commercial Roman Law Treaty. Legal Universe Publishing, Bucharest, 2012, p. 95. According to the author, at present, according to legal regulations, stock and trade represents a heritage of equity as distinct fraction of assets trader for carrying out business.

provides unfair competition deeds referring to the firm, trader's reputation, goods (products) of merchant, clientage.

In the same pro-merchant assets there may be more funds of stock-and-trade if he develops more different activities. Thus, under the French law, these funds of stock-and-trade appear as "enterprise activity branches".

Specifically, in art. 81. 2 of the Law on 25th January 1985 on the recovery and liquidation of legal assignment it is provided the enterprise cession specifying that the cession operation may be total or partial. About the partial cession, the French law states that "this bears on a set of operational elements which form one or more complete and independent branches of activity"[3] .

Under these circumstances we believe that "stock-and-trade" justifies the interest, the practical utility, both economically and legally.

2. THE LEGAL AND CONCEPTUAL FRAMEWORK OF STOCK-AND-TRADE

The concept of "stock-and-trade" is rarely used by the legislator, both in under the Romanian law and comparative law.[4]

Following the evolution of the Romanian commercial law regulations, we can see that the legislator incidentally used the concept of "stock-and-trade". Thus, in the Commercial Code (now repealed) there was a text, respectively art. 861 applicable to bankruptcy (repealed by Law no. 64/1995), art. 21 and art. 42 of Law no. 26/1990, republished, regarding the trade register, and Title VI of Law no. 99/1999 regarding some measures to accelerate economic reform[5].

The concept of "stock-and-trade" exists, however, in the regulations regarding the accounting activities which provide that it is a part of "goodwill"[6], **goodwill** where the company's reputation, so called "**Good Will**" from the **British common law** or **excess of assessment** from the **French law**, is substantially influenced by the goodwill in its entirety.

Being in accordance with the provisions of the European law, in particular with the 4th European Directive on the annual accounts of 25th July 1978[7], from the economic and accounting point of view, there is no distinction between "stock-and-trade" and "goodwill".

In the Romanian law, in accounting terms, intangible elements of goodwill are recorded in accounting balance assets, items that are related either to customers, such as loyalty, number, merchants customers quality, prospects for its development, elements related to the quality of the suppliers, of the delivered goods or services rendered, elements related to the staff employed and the quality of relationships between employees (employees / workers) and the company's management, elements of business assets: real estate, movable, reputation of trademarks and products, in general, intellectual property rights.

These elements of goodwill are not homogeneous, some are specific to the notion of *enterprise* (such as the human factor), others are specific to the notion of *heritage* (e.g., real estate, movable intended to the trader's activity), so that stock-and-trade appears as a **complex**

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[3] For details about the stock-and-trade in comparative law, see: S. Angheni, *Les fonds de commerce en droit anglais et en droit français, Revue Economique Droit International*, Brussels, 1996, no 2, p 237-255.

[4] For details about stock-and-trade in comparative law, see: S. Angheni, *Le fonds de commerce en droit anglais et en droit français, Revue Economique Droit International*, Brussels, 1996, no 2, pp. 237 255, S. Angheni, *Quelques aspects*, *concernant le fonds de commerce en droit anglais et en droit français, Revue roumaine des sciences juridiques*, tome VII, no 1, 1996, p 56-73, J. Derruppe, *Le fonds de commerce*, Dalloz, 1994, p.1- 99.

[5] Official Gazette no. 236 of 27 May 1999 (repealed by Law no. 287/2009 of the Civil Code).

[6] Regulation on the application of Accounting Law no. 82/1991, republished approved by Government Decision no. 704 of 14.12.1993.

[7] The translation of this document was published in the *Journal of Romanian Specific Expertise Accounting* No. 5/1994 p 2-15.

concept, autonomous, which cannot be confused with the business or dedicated assets or other legal or economic concepts.

Currently, the concept of "stock-and-trade" is used by the legislator in Law no 11/1991, as amended[8], regarding unfair competition. According to art. 1^7 letter c) of this regulation, "*it represents stock-and-trade all movable and immovable tangible and intangible assets (brands, company plates, logos, patents, commercial venue) used by a retailer to carry out his business activity*". Therefore, for the first time in our legislation, the legislature defines stock-and-trade, even if, in our opinion, the definition is not complete.

In the French law, the Law of 17th March 1909 contains provisions relating to stock-and-trade, provisions that are limited to establishment of some rules relating to the sale, secure and monitoring. The legislature uses the term "stock-and-trade", especially in tax matters.

3. COMPARATIVE LAW. STOCK-AND-TRADE IN FRANCE

In terms of history, in **the French law**, the concept of "stock-and-trade" appeared in the nineteenth century springing from practical needs. Old Law acquainted only fund boutiques common to the handicraft trade professions, which gradually identified itself with goods warehoused (stored) in the merchant's exploitation store. At that time, there was a small stock of goods, fewer materials and machines, being a quasitotal absence of industrial property rights. Regarding the intangible elements of stock-and-trade a greater attention was paid to the company and logo.

The term "stock-and-trade", in its modern meaning, was set up in France for the first time in the Law of 28th May 1838, which amended the provisions of the Commercial Code (now repealed), relating to bankruptcy and insolvency. Later, the Tax Law of 28th February 1898 governed the organization, mutations recordings of stock-and-trade, to give prominence to the concept of stock-and-market. The Law of 1st March 1898 launched the institution of the "guarantee of stock-and-trade".

Subsequently, the Law of 17th March 1909 (the 'Act Cordelet' after the senator who proposed it) marked a decisive step in clarifying the concept of "stock-and-market". The Law of 1909 regulated three fundamental operations on stock-and-trade: to ensure the guarantee, sale and contribution to the company fund. Later, the Law of 20th March 1956 regulated the location of the commercial management of the stock-and-trade, business and artisanal operations that involve break-up of the property right of exploiting the stock-and-trade. Legislation only provides an overview of these operations, stock-and-trade remaining a product of practice.

Practical needs that required the stock-and-trade institution materialized in the fact that:

- on the one hand, *the traders wanted to protect their customers against current and potential competitors*. In this purpose, they demanded the protection of intellectual and financial investment they have made during the creation and development of the enterprise. Finally, they obtained the protection of the goods resulted from their work, enjoying a special status, including the possibility of assigning these goods, both by legal acts *inter vivos* and *mortis causa* legal acts. Thus, traders went out of the ordinary category of workers (entrepreneurs), entering the category of "capitalists" because the results did not come exclusively from their work, but also from the capital invested in stock-and-trade.
- on the other hand, *the recognition of stock-and-trade was claimed by traders' creditors* . The goods from trade exercise are elements of heritage asset traders. Only to remove or mitigate the risk of the trader to develop legal operations in fraud of creditors (e.g. prices disguise, occult sales etc.) the assignment of stock-and-trade was subject to specific

[8] Law no. 11/1991 on Unfair Competition, published in Official Gazette no. 24 of 30 January 1991, amended by Law no. 298/2001, published in Official Gazette no. 313 of 12 June 2001.

procedures and formalities. And yet, this procedure was and it is also incomplete because the fund creditors do not enjoy preferential treatment in relation to other creditors whose claims arise from civil legal acts (e.g., all creditors are entitled to object to the price at which the goods were sold from stock-and-trade).

4. DELIMITING THE TERM "STOCK-AND-TRADE" FROM OTHER CONCEPTS

The concept of "stock-and-trade" is quite difficult to establish, especially that it is often confused with some similar institutions, as follows:

a) stock-and-trade should be delimited from what is called the *store* where the professional-trader operates, even if there are similar elements. Stock-and-trade cannot be reduced to the notion of "store" which traditionally is specific to retail trade.

b) stock-and-trade must be delimited from *customers*. Traditionally, the "customer" is an essential element of stock-and-trade, which is reflected obviously in the turnover of professional-trader. Therefore, without clients the merchant could not carry on his business. And, yet, in the free concurrence framework the trader has no own right on the customers because those customers can belong to several traders. Therefore, the customers, as a concept, is rather considered as a component of another concept, that of "prosperous business", especially of collective stores.

c) stock-and-market must not be confused with *the building in which the trader operates*. Usually, "building" is dissociated from stock-and-market because there are two categories of goods which not always belong to the same person. The owner of the business is often, if he leased the space in which he operates. Delimitation exists when both stock-and-trade and the building where the fund is exploited belong to one person. As noted, under the French law, the buildings are excluded from the regulation of commercial law, stock-and-market having a purely corporal nature. However, the problem is not resolved if the building and stock-and-market have the same destination or the same economic purpose, a small profit. According to opinions expressed in the French doctrine in this case, the traditional delimitation made by Civil Code in movables and immovables seems to be outdated.[9]

d) stock-and-market must be delimited from *the notion of enterprise*. The term "enterprise" is used both by the legislature and by academics and practitioners to refer to either work developed by natural and legal persons, usually professionals-merchants, or issues of law: one-man businesses (e.g. individual enterprise), corporate enterprises (companies) or even in the sense of stock-and-market. Yet stock-and-market cannot to be confused with the notion of "enterprise". The notion of "enterprise"[10] is much broader than that of stock-and-market:

-The company *is not limited only to commercial activities* (*strictly speaking*), existing also enterprises where the handcraft, relating to agriculture, liberal professions are exercised;

-The enterprise includes also both **material and human** elements, organized and grouped by the merchant, whereas stock-and-trade is devoid of the human factor. Therefore, the concept of enterprise is analyzed, especially, by the Labor Law and purely economic sciences;

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[9] P. Blaise, *Les rapports entre le fonds de commerce et l'immeuble, dans lequel il est exploité*, Rev. trim. de com., 1966, p. 827.

[10] A. Jauffret, *Manuel de droit commercial*, Paris, 1973, p 73; O. Capatina, op. cit., p 172, V. Pătulea, C. Turianu *Course summary business law*, Ed Scripta, Bucharest, 1994, p 56; C. Stoica, S. Cristea, *Regulation in the Romanian legislation of the concept of enterprise, stock-and-trade and heritage equity, in* the *Law Courier Magazine* no. 9/2009, p 498-499, St. D. Cărpenaru, *Commercial law treaty*, Legal Universe Publishing, 2012, p 91-92, Gh Piperea, *Commercial Law. New regulation undertaking Civil Code*, Ed GH Beck, 2012, pp. 55 ff, V. Nemes, *Commercial Law under the New Civil Code*, Ed Hamangiu, 2012, p 50-51

-The enterprise may be a matter of law, whereas stock-and-trade is without patrimonial autonomy, even if some goods have a legal regime different from other recognized to other goods from the professional-trader heritage.

e) stock-and-trade may be delimited from the *notion of company*[11]. The distinction is somewhat delicate, because "society" is a legal concept. The commercial society is a legal person, a legal subject, whereas stock-and-trade consists of a set of goods belonging to a company, so, between stock-and-trade and society there is a legal traditional connection, the *relation between person and goods*. Thus, *stock-and-trade is an element of the society's heritage.* The heritage meets other values of assets, liabilities and, in particular, real estate.

f) stock-and-trade can be delimited from the notion of **branch office** without conceptualizing the term of branch, Romanian legislator in Company Law no. 31/1990, republished, with subsequent amendments, provides in art. 43 par. (1) that „*branches are subsidiaries of companies, being qualified as their branch offices, as well as agencies, representative offices or other establishments*."

Branch is characterized by two *defining features*: the absence of legal personality and management autonomy.

Lacking legal personality, the branch office differs from *subsidiary*, which is a legal entity, legally distinct, but economically dependent on a "parent-company".

Branch presents more economic benefits than legal advantages, that means that it is entitled to have material devices of production and must be led by a person who has the power (the right granted by the power of representation) to deal with third parties and to represent the company in these relationships.

The consequences of qualification branches as unincorporated bodies, but with management autonomy are reflected in the fact that:

-They have their own clients (through self-management) and have a distinct stock-and-trade of the company besides which they work;

-They need to undertake their registration in the trade register.

The branch office differs from simple branch establishments (offices, warehouses) which are just parts of an enterprise, lacking autonomy.

Stock-and-trade, as an entity in its own right, can be found both within the enterprise, the company, as well as the branches, without being confused with any of them.

Stock-and-trade, as an entity in its own right, can be found in the national point of view both within the enterprise, society and the branch being a common element to them, but without being confused with each other.

g) **stock-and-trade and dedicated assets**. As we stated, stock-and-trade is not the same with dedicated assets even though elements of stock-and-trade (movable, immovable) can be components of dedicated assets.

The essential difference between the two concepts results from current legal definitions (even incomplete, if we refer to stock-and-trade).

The general, common and legal framework for the concept of "dedicated assets" is art. 31 Civil Code (NCC)[12] which enshrines the **principle of the uniqueness of the assets** consisting in rights and obligations estimated in money (economic value, pecuniary, s.n.) (paragraph 1); the possibility of dividing of the assets in financial assets and liabilities and also the possibility of assets under law regulations (par. 2); the definition of dedicated assets, rights,

[11] Le Floch, *Le fond de commerce*, éd. Librairie Générale de droit et de jurisprudence, Paris, 1986, p. 24

[12] Article 31. 1 Civil Code "Every natural or legal person holds a heritage that includes all rights and liabilities that can be monetised and belong to it." Article 31. 2 Civil Code "This may be a division or assets only in the cases and conditions provided by law." Article 31. 3 "The dedicated assets are financial masses and fiduciary liabilities, created under the provisions of Title IV of Book III, those dedicated to licensed professions and other assets determined by law".

obligations and goods with economic dedicated to develop accredited profession and fiduciary liabilities.

For the **licensed professions**, the legislature provides in art. 33 par. 1 Civil Code the concept of "individual professional heritage", consisting of financial mass dedicated to the individual development of an accredited profession, representing the document signed by the owner (which may be a statement) in the manner prescribed by law.

Special legal framework for professionals - individuals (traders) is represented by GEO. 44/2008[13] where the legislature defines the dedicated assets for authorized individuals, individual enterprises and family businesses.

Analyzing the content of the quoted legal texts results one conclusion, namely: stock-and-trade do not contain rights and obligations although some contracts are delivered (the transferee of the stock-and-trade) while the dedicated assets are characterized by rights and liabilities valued in money (economic value).

In other train of ideas, the stock-and-trade may contain goods that can be included conceptually in dedicated assets (e.g., a building for offices). The legal basis is Art. 1[14] lit. c) of Law 11/1991 amended by Law no. 298/2001 which defines stock-and-trade, text in which the legislature provides "expressis verbis" that the stock-and-trade consists of all movable, immovable, tangible, intangible, dedicated to trader activity.

Moreover, the existence of the concept of "stock-and-trade" is relevant in terms of the intangible elements mainly of customers, the good custom, dealer reputation, all of which are influenced by the entire stock-and-trade in its complexity.

Under these conditions it cannot be argued that a named customer (own customer) is influenced only by the dedicated assets.

Also, clients, good custom, in terms of notional elements are not parts of dedicated assets.

5. LEGAL NATURE OF THE STOCK-AND-TRADE

5.1. Stock-and-trade - actual universality

In the French law, stock-and-trade is considered as a universal fact and as an incorporeal movable[14].

Stock-and-stage is therefore a *universality*[15], which means that *its identity is independent and is not reduced to its components*.

Stating that stock-and-trade is universality, automatically, we can explain the following consequences:

a) stock-and-stage, itself, *may be subject to non-gratuitous contracts* or free of charge, may be subject to moveable security etc. Such contracts are different from those bearing the components of stock-and-trade (e.g., contracts on transfer of industrial property rights).

b) qualifying the stock-and-trade as a universality, its components can be sold, transformed, destroyed etc. Thus, the goods can be replaced, the logo can be modified or filled etc.

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[13] GEO no. 44/2008, as amended, on economic activities by authorized individuals (PFA), individual enterprises and family businesses, published in Official Gazette no. 328 of 25.04.2008

[14] G. Ripert, R. Roblot, *Traité de droit commercial*, Tome, I, 15e ed., Paris, 1993, p. 467-468; Y. Guyon, *Droit des affaires*, Tome I, 1988, p. 688.

[15] Y. Reinhard, *Droit Commercial*, 3e ed., Ed Litec, 1993, p 278. The unit of the stock-and-trade is purely intellectual, believes the author, the elements that compose it are united by common purpose (dedicated to a trade or business), but without that this unit being legal. Each of its elements, in turn, has its own status.

The stock-and-trade exists in all the moments of the development of an enterprise as an independent entity. However, stock-and-trade is not considered as an asset, but it remains a *component of heritage* alongside and together with other elements.

c) Stock-and-trade is a *universality of fact* and not a legal universality.

On this issue, there are two theories in the French doctrine.

According to the first theory, *the stock-and-trade is a legal universality, representing a distinct heritage, unique*. Stock-and-trade consists of a mass of goods united by one common assignment. It is not just accounting or tax asset, but dedicated assets. According to this theory, the trader has two patrimonies: civil heritage and another one, commercial, represented by stock-and-trade.

The consequences of this theory are that the asset will be dedicated to the commercial liability payment. In case of transfer, it will be transmitted at the same time to the transferee accepting liability. Stock-and-trade will be subject to prosecution by "commercial" creditors which will be satisfied with priority (preference) to "civilian" creditors.

This theory is criticized, primarily on the grounds that yet positive French law establishes the theory of the asset uniqueness. A natural or legal person can have only one asset.

However, in the French law there are arguments in justification of the *universality theory of stock-and-trade*. The right to *bail* (use of the space in which it operates the stock-and-trade), export licenses, employment contracts, all can be transmitted. Also, transmission of tax debt, the existence of financial and fiscal autonomy which is expressed in the accounting balance sheet, the creation of a limited liability company with sole shareholder are examples on which there is established a separation of assets theory.

According to the second theory, *stock-and-trade is only a universality de facto*, of goods actually joined by a link in order to develop their common purpose: the pursuit of a determined trade. Thus, each element retains its own individuality.

This theory is consistent with the requirements of the French and the Romanian law (art. 541 Civil Code). According to this legal text, universality actually means all the goods belonging to the same person and having a common destination determined by his/her will or by law. Goods that can actually compose universality, together or separately, are subject to separate legal acts.

Therefore, stock-and-trade is universality actually. This conclusion is based on the legal argument that stock-and-trade is not an asset and own liability, debts and payables are parts of dealer's assets and not of stock-and-trade.

However, in practice, given the immediate interest of the business operation, the transferee's interest is to take over his predecessor contracts, without being obliged to do so. Thus, the transferee *may take over* contracts which have as their object: the supply of electricity and water, telephone, labor contracts etc. Thus, the transmission of contracts simply not operates *ipso facto* to the assignment of stock-and-trade.

5.2. Stock-and-trade - intangible movable

Stock-and-trade is qualified as an intangible movable, *subject to the movable specific legal regulations.*

Although legal classification made is of "movable", however, some rules of stock-and-trade are based on estate law techniques. For example, provisions relating to constituted guarantees resemble to the real estate mortgage (in the French law). In the Romanian law the legislature provides movable real collateral securities, including stock-and-trade, considering it from this point of view, a good movable.

Because it is qualified as an incorporeal movable, stock-and-trade is not itself in itself. It does not last only as long as it is operated, its existence is less stable than that of tangible property.

The legislature, by Law no. 11/1991 amended by Law no. 298/2001, solved somehow the existing controversy in the specialized doctrine by including in stock-and-trade immovable, featuring, unquestionably, that *the buildings are part of stock-and-trade*.

Although this definition is not complete on the elements of stock-and-trade, however, the legislature merit is incontestable, on the one hand, to provide, for the first time, a legal argument on the concept of "stock-and-trade" and, on the other hand, to solve the controversies over time, both in specialized doctrine and judicial practice, regarding the inclusion or exclusion of immovable from the stock-and-trade.[16]

Including immovable in stock-and-trade does not solve all problems that arise in practice regarding competence dispute: whether it belongs to the commercial court in all cases, currently specialized courts to resolve disputes between professional traders, regardless of the subject of the action, or civil courts (which solves other civil litigation panels).

We believe that, whenever immovable are dedicated to business professionals, traders, the settlement power should belong to specialized courts.

Although the immovable is part of stock-and-trade, however, it is qualified "incorporeal movable", subject to the general rules on movable, plus the provision laid down in Art. 21 of Law no. 26/1990, republished, with subsequent amendments, on the making of the claim in the commercial register of the following operations: donation, sale, lease or pledge constitution.

If the holder alienates the stock-and-trade to a person and the building where the stock-and-trade was exploited to another person practically de *lege lata*, there are no regulations by which the acquirer of the business to maintain the immovable and exploit it. However, if the owner sales the immovable on which the holder of the business disposes on a lease contract, the contract is enforceable against the new purchaser until expiration, if the contract has been concluded under private signature or authenticated by a certain date, the date being the date of registration of the contract to the Tax Administration.

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[16] I.N. Finţescu, Commercial Law Course, vol I, Bucharest, 1929, p.163, I.L. Georgescu, *Romanian Commercial Law*, Vol II, 1947, p 515; C. Bîrsan, V. Dobrinoiu, Al. Contrive, M. Thomas, *Companies,* Sansa SRL Publishing & Media House, Bucharest, 1993, p 97; S. Angheni, I. Ionaşcu, *Legal and accounting difficulties of defining stock-and-trade and goodwill*, *Journal of expertise in account* no. 4/1994, p 30; R. Petrescu, *Romanian Commercial Law*, Publishing House Oscar Print, Bucharest, 1996, p. 85-87, P.M. Cosmovici, Civil Law. Rights. Obligations. Legislation, ALL Publishing House, Bucharest, 1994, pp. 4-7; Cas. III Code, dec. no. 199 of 12.05.1910, the Code of commerce, commented and annotated, Bucharest, 1994, p 472, Cas. III Civil Code , dec. no. 277/1946, in V. Pătulea, C. Turianu, *Judicial practice in commercial matters*, Lumina Lex Publishing House, Bucharest, 1991, p 228; SCJ s com, dec. no. 10 of 2.02 .1994, commented by R. Petrescu, *Romanian Commercial Law*, Oscar Print Publishing House, Bucharest, 1996, p 89. See also O. Căpăţînă, *General characteristics of companies* in the *Law Journal* no. 9-12 / 1990, p 23; St.D. Cărpenaru, *Romanian Commercial Law*, ALL Beck Publishing House, Bucharest, 2000, p 111; Trib. Bucharest Municipality, village com, dec. no. 292/1996, in *Commercial Legal Practice Reports*, 1990-1998, ALL Beck Publishing House, Bucharest, 1999, p 473.

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ACQUISITIVE PRESCRIPTION,
Comparative study between Romanian regulation and Spanish regulation

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Abstract

With the enforcement of the new Romanian Civil Code, the institution of acquisitive prescription was altered substantially, the former regulation no longer being taken over by the Romanian legislator. Through this paper, we shall analyze within overall limits, the regulation regarding acquisitive prescription in Romania, compared with the one existing in Spain. During this study, we will show that acquisitive prescription in Spain largely resembles the old regulation in Romania. In both systems, the acquisitive prescription is a way of acquiring ownership or other real rights over a thing through possession of that thing during a certain period required by law.

1. ACQUISITIVE PRESCRIPTION UNDER ROMANIAN LAW

1.1 Considerations regarding the enforcement of the provisions of the new Civil Code in matters of acquisitive prescription

Before analyzing the legal provisions of the new Civil Code in matters of acquisitive prescription, we need to talk about the enforcement of these over time, given the fact that possession which started before the newly enforced Civil Code is ruled by the old provisions, namely the ones of the Civil Code of 1864.

Under article 82 of Law 71/2011[17], "*provisions of art. 930-934 of the Civil Code relating to acquisitive prescription of real estate apply only where possession began after its enforcement. In cases where possession began before that date, the provisions that were in force on the date of commencement of possession prevail. In the case of real estate for which on the commencement date of possession, no land registers were opened, the provisions of the Civil Code of 1864 regarding acquisitive prescription remain in force*".

Thus, the active Civil Code establishes that when possession began under the rule of the Civil Code of 1864, the acquisitive prescription will be subject to these provisions. When the court will have to solve an action having as object acquisitive prescription, it will have to check the starting date of possession, in order to determine the applicable law in the specific case.

In our opinion, the last sentence of art. 82 of Law 71/2011 establishes some confusion when referring to the "*case of real estate for which no land registers were opened at the starting date of possession, the provisions of the Civil Code of 1864 regarding acquisitive prescription remain in force",* without specifying if it refers to possessions started under the rule of the Civil Code of 1864 or possessions started after the enforcement of the active Civil Code. This provision is confusing, if we consider art. 930 par. (1) c) of the applicable Civil Code governing the prescription outside land book registration.

Although it is not mentioned explicitly, we consider that it is about the possessions started before the enforcement of the Civil Code, because, otherwise, the second sentence of art. 82 would contradict the first sentence of the same article, in the sense that the first sentence says that the new provisions are applicable to the possessions started before enforcement of the Civil Code, whereas the second sentence would say that the old provisions are applicable to

[17] For implementation of Law 287/2009 on the Romanian Civil Code

the same possession. In our opinion, this issue should be considered by the legislature in order to avoid future practical problems and inconsistent case-law.

1.2. Definition and regulation of acquisitive prescription in the Romanian legal system

Acquisitive prescription is a means of acquiring property or other real rights through uninterrupted possession of a real estate or through inversion of possession, for a specific period of time and according to the conditions provided by law[18].

By possessing an asset for a determined period of time, the status de factor becomes status de jure and the possessor becomes the owner. In this case, the original owner cannot claim the prescribed real estate, as the acquirement of the real estate through acquisitive prescription may be held against him, by way of exception[19]. Adverse ownership is regulated by the applicable Civil Code, art. 928-934.

1.3. Scope

Provisions regarding acquisitive prescription apply only to immovable property, as, in the Romanian legal system, movable property is acquired by possession, in accordance with art. 935 of the Civil Code in force which states that*" everyone who, at some point, is in possession of a movable asset is presumed to have acquired the ownership title of the asset".*

Only real estate which is privately owned can be acquired through acquisitive prescription „regardless of the owner (state, municipalities, individuals or companies). Also other real rights that are susceptible of possession may be acquired through acquisitive prescription: usufruct, habitation, continuous and apparent servitude.

Those assets, which were declared inalienable by law before or after entering into possession, are not the object of acquisitive prescription, according to art. 929 of the Civil Code. Public property and assets extra patrimonium cannot be the object of acquisitive prescription[20].

1.4. Types of acquisitive prescription

The Civil Code in force regulates two types of acquisitive prescription: land book registration prescription and the prescription outside land book registration. Unlike the Civil Code of 1864, which established two time periods for the acquisition of property: 30 years and 10-20 years, the current Civil Code did not take over any provision of the old regulation, so we consider that there will occur issues in case-law, since courts will be called upon to settle disputes concerning acquisitive prescription without having any experience in this regard, and especially with regard to Law no. 71/2011 for the implementation of the Civil Code, which contains unclear provisions regarding the law applicable to possessions started before or after the enforcement of the present Civil Code, as noted earlier in this article.

Article 930 of the Civil Code governs prescription outside land book registration. According to the terms of the law, *"(1) The ownership of a property and its dismemberments may be entered into the land book based on the acquisitive prescription to the benefit of whom possessed it for 10 years if a) the owner registered in the land book has died or has ceased its legal existence; b) a declaration waiving the right has been registered in the land book; c) the immovable has not been registered in any land book.(2) In all cases, the possessor can acquire the right only if he made the application for registration in the land book before a third person made its application for registering the right to his benefit, based on a legitimate cause, during or even after the expiry of the term for acquisitive prescription."*

[18] I.R. Urs, P.E. Ispas, *Drept civil, Drepturile reale principale,* ed. Universităţii Titu Maiorescu, Bucureşti, 2012, *op. cit.* p. 75

[19] Ibidem, *op. cit.* p. 75

[20] Ibidem, p. 77

So, if the conditions required by art. 930 of the Civil Code are fulfilled, based on acquisitive prescription, the ownership of a property and its dismemberments may be entered into the land book.

Regarding the provisions of art. 930 of the Civil Code, we consider that it raises some issues that are not regulated currently.

First of all, the Civil Code does not expressly specify whether the procedure of prescription outside land book registration is a judicial proceeding or not, as the legal text only states *"registration into the land book"*. Likewise, we wonder: Does the registrator at the land book have the power of a judge to verify that the necessary conditions for acquisitive prescriptions are met?

Article 884 of the Civil Code states that *"the procedure for registration into the land book will be established by a special law."* Thus, until the issuance of the special law, we cannot know the reason of the legislature for adopting such incomplete provisions.

There is another issue which is not regulated by the Civil Code, but is particularly important: which is the moment of acquiring ownership? Does prescription outside land book registration operate retroactively in the absence of an express legal text? Is the date of acquiring ownership the date of filing the application for registration in the land book or of the date of its solving? We appreciate that acquisitive prescription should operate retroactively, since the possessor exercised possession 10 years prior to registration of the right in the land book. Although the regulation of acquisitive prescription has changed radically since the enforcement of the Civil Code, we consider that the reason and purpose of the institution of acquisitive prescription remains the same, so in our opinion, the date of acquiring ownership should be the date on which the possessor began to possess.

Regarding the possession, art. 930 mentions only the necessity to possess during a time period of 10 years, without saying that possession must be in good faith and without mentioning the consequences of vitiated possession, being here in the presence of incomplete regulations.

The land book registration prescription is regulated by art. 931 of the Civil Code, which provides that: *"(1) the rights of the person registered without a "legitimate cause" in the Land Book as the owner of, or holder of property-related rights in a real estate asset cannot be challenged when he is registered in good-faith and has been possessing the real estate asset for five years from the date of the land book registration, as long as the person's possession is not affected by any vice. (2)It is sufficient that the good-faith of the possessor existed at the moment when his land book registration request was duly admitted, and at the moment that his possession began."* We note that, compared with prescription outside land book registration, the regulation of land book registration prescription is clearer.

According to the Civil Code, if a person registers the ownership or another real right in the land book without legitimate cause, i.e. in the absence of a title that is able to lead to a transfer of rights, the application can no longer be challenged, if: a) the person was in good faith at the moment of filing the application, b) he possessed the good for 5 years from the moment of filing the application and c) if its possession was not affected by vices.

The 5-year period begins to elapse when the other 2 conditions are fulfilled, i.e. useful possession and registration in the land book. If possession begins after filing the application, the period of 5 years begins when acquiring possession, because this is the moment when both conditions are fulfilled and when the acquisitive prescription term may start.

Unlike the article regarding prescription outside land book registration, the above mentioned article establishes when the existence of good faith of the one filing the application is necessary, i.e. at the moment of filing the application for registration in the land book and the moment of acquiring possession.

We consider that people who can invoke land book registration prescription are direct

acquirers of good faith whose title is null and void. Once possession in good faith is started and the other conditions required by law are fulfilled, the person can invoke land book registration prescription.

The question in this case is: who states the intervention of acquisitive prescription? The court or the registrator of the land book? Under this aspect, the regulation of the land book registration prescription is also defective, but we believe that the problems will be resolved along with the first actions that will address the acquisitive prescription.
In addition to the foregoing, we consider that the regulation of the acquisitive prescription in the current Romanian Civil Code is rather poor, although the legislature's intention was good by introducing shorter periods of time for the prescription. These issues will probably be resolved along with the advent of case-law on this subject.

2. ACQUISITIVE PRESCRIPTION UNDER SPANISH LAW

Hereinafter, we will attempt to address in overall limits the regulation of the acquisitive prescription under Spanish law. As we shall see, the regulation of acquisitive prescription under Spanish law is very similar to the regulation of acquisitive prescription in the Romanian Civil Code of 1864.

Since the provisions of the Civil Code of 1864 shall continue to apply to possessions started before the enforcement of the present Civil Code, a comparative study between the two legislations seems appropriate.

2.1. Definition and regulation of acquisitive prescription under Spanish law

Acquisitive prescription is a *primary* means of obtaining property, due to which the possessor becomes the owner, if he possessed in accordance with the legal provisions and within a period of time established by law[21].

Art. 609 para. (3) of the Spanish Civil Code counts the prescription among the methods of acquiring ownership and other real rights. Note that under Spanish law, the Civil Code does not use the term "*acquisitive prescription"*, but only "*prescription".* In the Spanish specialized literature it was claimed that acquisitive prescription is an prescription based on the possession exercised bz the possessor as a right against the previous owner of the right that is claimed to be acquired by acquisitive prescription[22].

Under Spanish law, acquisitive prescription is considered an original way of acquiring property, because the person obtaining ownership does not acquire his rights through any person, but by possession exercised by him within a period of time required by law[23].

2.2 Scope

According to art. 1936 of the Spanish Civil Code, *"all goods that are traded on the market are susceptible to prescription."*

Goods which are in public property (these being inalienable and not prescriptible, like in our legislation) and also common goods, extra patrimonium, such as water, air and light are not traded on the market.

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[21] A. Lopez, V.L. Montes, E. Roca, *Derecho civil. Derechos reales z derecho inmobiliario registral*, ed. Tirant lo Blanch, Valencia, 2001, *op. cit.* p. 144

[22] C. Lasarte, *Propriedad y derechos reales de goce*, ed. Marcial Pons, Madrid, 2006, *op. cit.* p. 138

[23] A. Lopez, V.L. Montes, E. Roca, *Derecho civil. Derechos reales z derecho inmobiliario registral*, ed. Tirant lo Blanch, Valencia, 2001, *op. cit.* p. 145

Rights that can be acquired by acquisitive prescription are those rights which may be the object of possession. The Spanish Civil Code expressly refers to property right, servitude, usufruct, use and habitation, but the regulations of the Code are not exhaustive, so also any other rights which can be the object of possession, such as mortgage or negative servitude[24] may be the object of acquisitive prescription.

Under Spanish law, both movables and immovables are susceptible of being acquired through acquisitive prescription, the only difference applicable to the two categories of goods being the legal time frame required for invoking acquisitive prescription.

2.3. Types of acquisitive prescription in the Spanish legal system

According to the Spanish Civil Code, acquisitive prescription is of two kinds: ordinary and extraordinary.

Ordinary acquisitive prescription

According to art. 1940 of the Spanish Civil Code, *"for ordinary prescription (ordinary acquisitive prescription s.n.) of property and other real rights it is necessary that the possession is exercised in good faith and with just title for the period of time determined by law."*

The ordinary acquisitive prescription under Spanish law resembles the acquisitive prescription of 10-20 years covered by the Romanian Civil Code of 1864 in terms of possession in good faith and just title. In terms of time required for obtaining property through acquisitive prescription, the limitation period for acquisitive prescription varies depending upon whether the property is a moveable or immoveable.

Just title is defined by art. 1952 of the Spanish Civil Code as that title which, from a legal point of view, is enough to transfer ownership or another real that is to be prescribed.

Just title does not represent, as it might be believed erroneously, according to the law, but suitable and enough to transfer ownership or another real right[25]. The transfer cannot be made under this title, if, for example, the transmitter was not the owner of the property right or of another real right or he could not have disposed of it, lacking, for example, the prerogative of disposition[26].

In matters of ordinary acquisitive prescription, a just title is, for example, a donation, a bequest or a sales contract, if the conditions regarding the impossibility of acquiring ownership through them are fulfilled, for example, if the transmitter was not the owner of the transmitted good.

According to the Spanish Civil Code, the title must be true and valid. Just title will be never presumed, it is necessary for the possessor to prove it.

Thus, a putative title is not likely to lead to acquisition of ownership or of other real rights through ordinary acquisitive prescription, because the putative title is not compatible with the legal requirements in matters of ordinary acquisitive prescription.

In terms of good faith, it must be continuous and survive as long possession is exercised in order to acquire through acquisitive prescription[27]. In another view, it is necessary to possess the goods in good faith during a legally established period[28].

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[24] A se vedea J.L Lacruz Berdejo, *Derechos reales. Posesion y propriedad,* ed. Dykinson, Madrid, 2008

[25] M. Gonzalez, comentario de la STS 29.04.1987 en CCJC, *Justo titulo en Enciclopedia juridica basica,* Madrid, 1995

[26] P. De Pablo Contreras, *Curso de derecho civil. Derechos reales*, ed. Colex, Madrid, 2011, *op. cit.* p. 158

[27] C. Lasarte, *Propriedad y derechos reales de goce,* ed. Marcial Pons, Madrid, 2006*, op. cit.* p. 148

[28] M. Alabaladejo Garcia, *La usucapion,* Madrid, 2004

Good faith is the belief that the person from whom he received the thing was the owner thereof, and could transfer the ownership[29].

The limitation period for obtaining property through ordinary acquisitive prescription, varies depending upon whether the property is a moveable or immoveable.

In terms of movable property, this is prescribed within three years, as required by art. 1955 para. 1 of the Civil Code. Immovable property can be obtained through acquisitive prescription after exercising useful possessions for 10 years, in good faith and with just title.

Considering the above relating to the provisions of Spanish law regarding ordinary acquisitive prescription, we consider that these are similar to the prescription of 10-20 years covered by the Romanian Civil Code of 1864.

In the Romanian legal literature prior to the enforcement of the current Romanian Civil Code, it is considered that the just title is any title translative of ownership, like sale, exchange, etc. Essential is the fact that this title comes from someone else than the true owner, because, if it came from the true owner, it would be enough in itself to lead to the acquisition of property, without the need for passage of time; in this case, the basis of acquirement would be the agreement, not the acquisitive prescription[30]. We note that the Spanish legislation is identical to the Romanian one regarding just title.

Similarities appear in the exercise of possession in good faith and with just title, but between ordinary acquisitive prescription under Spanish law and acquisitive prescription of 10-20 years there is a big difference in terms of object, but also regarding the time required by law for acquiring through acquisitive prescription.

Regarding the requirement that the just title should not be a putative title, the Spanish regulation is identical to the Romanian one, the Civil Code of 1864 establishing the same conditions under which the title must exist in reality and not only in the imagination of those who invoke acquisitive prescription.

As shown above, ordinary acquisitive prescription under Spanish law applies to both movable and immovable property. Under Romanian law, acquisitive prescription of 10-20 years applies only to immovable property as *ut singuli*, but not regarding universalities[31].

Another key difference between the two regulations refers to the time needed to acquire through acquisitive prescription. Under Spanish law, the terms are three years for movables and 10 years for immovable goods, whereas the Civil Code of 1864 established that the limitation period for acquisitive prescription of 10-20 years varies depending upon whether the true owner lived in the territorial jurisdiction of the same county court where the immovable property was located or in another jurisdiction[32].

Extraordinary acquisitive prescription

Hereinafter, we will try to present the features of extraordinary acquisitive prescription under Spanish law and then we highlight the similarities between this and acquisitive prescription of 30 years covered by the Civil Code of 1864.

According to art. 1959 of the Spanish Civil Code, *"ownership and other real rights over immovables are also prescribed by uninterrupted possession for thirty years, without the necessity of good faith and just title…"* Pursuant to Art. 1955 of the same Code, *"the ownership of movables is also prescribed by the uninterrupted possession of six years, without need of meeting any other condition".*

Thus, both movable and immovable property can be prescribed by uninterrupted possession of 6 and 30 years, without the existence of just title or of good faith. The

[29] J. L. Lacruz Berdejo, *Derechos reales. Posesion y propriedad,* ed. Dykinson, Madrid, 2008, *op. cit.* p. 172
[30] C. Bîrsan, *Drept civil. Drepturile reale principale,* ed. Hamangiu, Bucureşti, 2008, *op. cit.* p. 327
[31] *Ibidem*
[32] For anz details, see C. Bîrsan

extraordinary acquisitive prescription will be invoked if the person who possessed received the thing from someone other than the owner; in case of an action for recovery brought by the true owner, the owner cannot invoke ordinary acquisitive prescription, because he does not fulfill de conditions required by law[33].

Extraordinary acquisitive prescription under Spanish civil law resembles the acquisitive prescription of 30 years covered by the Romanian Civil Code of 1864. The only difference between the two is that the acquisitive prescription of 30 years is applicable only to immovable property, while the extraordinary acquisitive prescription applies to both movable and immovable property.

In both systems of law, useful possession of the good within the time required by law is necessary, but neither good faith nor just title are required.

Conclusions

In this study, we tried to briefly present the regulation of the acquisitive prescription in the Spanish legal system and in the Romanian legal system. The current regulation in Romania is, in our opinion, a rather sparse regulation, which will raise serious problems in case-law, but we hope that the gaps will be addressed. We chose to do a comparative study between the Civil Code of 1864 and the Spanish Civil Code because the regulations are, with few exceptions, almost identical, and the Civil Code of 1864 shall continue to be applied in matters of acquisitive prescription for possessions that started before the enforcement of the current Civil Code.

Between the current Romanian Civil Code and the current regulation regarding acquisitive prescription under Spanish law, the resemblance lies only in the finality of the institution – acquisition of ownership.

Although the Romanian legislator wanted to simplify the procedure acquisitive prescription, setting shorter prescription deadlines, we consider that it would have been better for the Romanian legal system to keep the conditions of the two types of acquisitive prescription and to modify only the deadlines.

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[33] Pedro de Pablo Contreras, *Curso de derecho civil. Derechos reales,* ed. Colex, Madrid, 2011, p. 412

THE INTERNATIONAL JURISDICTION, BETWEEN THE STATE SOVEREIGNTY AND THE NEED OF SANCTIONING THE ATROCITIES

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Abstract

In the international contemporary society, many of the atrocities are committed either in the name of an undemocratic state power, or to express some political or religious beliefs. The deeds are being difficult to sanction on the territory of the state in which they have been committed, because of the close relation that exists between the culprit and the political power. In this context, they have developed the concept of universal jurisdiction, which should ensure the application of the law beyond its jurisdictional space, specific for the state sovereignty. Through the article, it is set forth the notion of universal jurisdiction, the cases of its application and the advantages and disadvantages of its exercise..

Keywords*: universal jurisdiction, sovereignty, atrocities, genocide, state, jurisdiction, crime.*

1. What is the universal jurisdiction? Concept

The term "jurisdiction" describes, at length, the state competence of putting into practice its legal interests, no matter if it is about legislative, executive and justice prerogatives. In short, the term "jurisdiction" refers to the way in which the laws become functional[34], to the capacity of the legal procedural mechanisms of a state to judge the cases that are presented to it to be solved. When a crime[35] is committed, the state must be able to exercise a form of jurisdiction in order to take coercion and punishment measures, against those who, no matter their status, they have infringe the imperatives norms of the law. Traditionally, the state, viewed as the original subject of the international law is privileged by having judicial competence on the offences committed on its territory. The application of the territorial principle seems the reasonable, natural solution, because, the more often on the crime territory it occurs its effects, they find the most relevant evidence and the punishment imposed may represent the most naturally, an example for the others. However the territory does not represent the final limit of the stately judicial jurisdiction. The public international law has identified the specific cases in which the national instance competence can be extended beyond the national territory, on some crimes that have been committed beyond the borders, identifying some guiding principles:

- the principle of the active personality- based on which the state can hold any of its citizens responsible for committing a crime aboard.
- the principle of the passive personality- according to which the state can judge a crime committed against any of its citizen no matter where it occurred
- the principle of protective jurisdiction- according to which the state has the competence over any act that constitutes a threat for the state's vital interests , even though the offender is of a different nationality and is acting in a total different state.

This conception, specific for the nation states, tends to became difficult to put into practice in the context of the globalization, of the improvement of international means of transport and the development of online communications. The international society, viewed as a totality of

[34] Christopher L. Blakesley, *"Extraterritorial Jurisdiction"* în M. Cherif Bassiouni (ed.), *International Criminal Law*, vol. 2, Ardsley, N.Y.: Transnational Publishers Inc, 1999

[35] For utility reasons, the term "crime" used trough the project refers to any violation that implies the torture or the dead of a person: crime , war crimes, the crimele against the humanity, genocide and torture acts

the international law subjects, must react and adapt its legal systems to be resistible to the new challenges. More and more often, the judicial bodies from different countries have made an inquest and accused certain individuals, without any of the traditional jurisdictional connections to be present- and all that, based on a new principle: the universal jurisdiction.
The universal jurisdiction principle is in close relation with the idea that certain crimes have such a grave and dangerous character that all the states of the world have the responsibility and the legal interest to take punishment measures against the culprits, to remove the damages made to the individuals and collectivities and, finally to prevent the repetition of such events[36]. Without undermining the sovereign authority of the states, the concept of universal jurisdiction is covering a procedural institution gap, caused by divers factors (the end of the cold war, the alarming increase of the international terrorism, the exaggerated ultranationalist belief, the development of massacre weapons) that do not enter, for divers reasons, in the state competence (the autocratic regime of that state, which do not have the interest to sanction the crimes committed against the citizens of another state, corrupt power or interested by the increase of the Taliban belief, the protection of the international terrorism cells by the authorities of some underdeveloped states). The concept pleads in this way for the protection of the *erga omnes* international norms, and their observation is the duty of the entire global community. According to this principle, any state can inquire and judge the individuals guilty of committing some grave crimes beyond the borders of a certain state, no matter the nationality, the country of residence or any other relation of the respective individual with the accusing state. The state has the moral obligation and the general interest to punish this kind of deeds thanks to its atrocious and transnational character. The exercise of this principle is difficult in the same time, on the international diplomacy field, and also extremely controversial, because the jurisdiction is a manifestation of the sovereignty of a state, and the application of any extra-territorial form of jurisdiction, can lead, as one may observe already on the international scene to diplomatic tensions and inter-states conflicts[37].

2. **The sanctioning of the piracy**, the **incipient form of the international jurisdiction**

Historically speaking, the first and the only accepted application of the universal jurisdiction was the pursuit of the pirates on the sea. The piracy has been identified as a problem since the X century[38], and the states have exercised the competence of pursuing and capturing them, regardless their nationality, the place where they have committed the offences, for almost 50 years. The practice has evolved along with the increase of the importance of the naval changes and the communication connections between the states that were under the permanent threat of the piracy. Moreover, the pirates' capacity to navigate beyond the territorial waters or to commit serious offences in the open sea have consecrated them the status of being hard to capture and judge. Consequently, the pirates have been universally recognized as "hostis humani generis" (the enemies of the humanity) and punished in the courts of all and any nation. Whereas all the states were affected by the piracy, all of them were willing to capture the pirates. In these conditions, the universal competence has been conceived as the best compromise solution in order to "avoid the

[36] T. Buergenthal, H. G. Maier, "*Public International Law in a Nutshell* " , West Group, St Paul, 1990, p. 172; M. Hans, "*Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or an International Criminal Court Accomplish This Goal?"* in Transnational Law, n.3, 2002, p.78;
[37] L. Hannikainen, "*Peremptory Norms in International Law, Historical Development, Criteria, Present Status"* , Finnish Lawyers Publishing Co, Helsinki, 1988, p. 67.
[38] Amnesty International, "Chapter Two: The History of Universal Jurisdiction" in "Universal Jurisdiction: The Duty of States to Enact and Implement Legislation", AI Index: IOR 53/002/2001), 2001.

potentially uncountable competence conflicts"[39]. Any state which arrested a pirate had the competence of judging him in its national instances. This practice has been recognized and it became a traditional rule of the international right followed by its codification in the subsequent conventions, including the Convention regarding the Law of the Sea, in 1958 and the Convention regarding the Right of the Sea, in 1982.
In a more recent context, the high jacking has been compared with the piracy, and the relevant articles of the Convention concerning the Right of the Sea, mentions the airplanes along with the naval ships[40]. The universal jurisdiction in the cases of high jacking is expressly stipulated in the Article 4 of the Convention of Hague for the Repression of Illicit Capture of the Airplanes, in the form aut dedere aut judicare ("extradite or judge").
Although the concept of universal jurisdiction appeared indeed in the context of the fight against the piracy, the analogy between this struggle and the war crimes that are submissive nowadays to the universal jurisdiction is inaccurate, because there are some elements which differentiate clearly the original application of the principle from the modern application of it. In this sense we underline that most of the times, the pirates were not affiliated to any govern, being most of the times stateless persons, and their deeds were committed in the open sea, on a territory that lacked any sovereign power that could exercise the formal territorial jurisdiction. We can notice that the universal jurisdiction has been conceived and applied initially as a purely legal, uncontroversial instrument that did not affect the sovereign power of the states.

3. The sanction of the slavery, an universal jurisdiction

In 1815, in the Declaration of the Vienna Congress, the slavery commerce was declared similar with the piracy[41], and until the end of XIX century, an international general consensus has appeared, regarding the illegality and immorality of the slaves commerce. The states manifested the reticence in expanding the application of the universal jurisdiction for the identification of the ships suspected by slaves transfer, even though the competence of such actions was an edict of the treaties. The inexistence of an international judicial instrument meant to ensure the procedural environment for the sanction of slavery deeds, regarded as ut singuli, has been an impediment that the state perceived with rigor, even though the interdiction of developing such practices reached the status of jus cogens, implying "the universality of the obligation of forbidding the slaves commerce"[42].
In the specialty literature, there are diverging opinions concerning the interpretation of the Article 110[43], from the Convention regarding the Right of the Sea, in 1982. Although the Article 99 gives only to the pavilion state the competence to forbid or punish the slavery, the Article 110 allows any warship to inspect any vessel suspected of slaves' traffic in the open sea. Some researchers are approaching this stipulation as the background for the application

[39] A. Cassese, "*When May Senior State Officials Be Tried for International Crimes? Some Commentson the Congo v Belgium Case*", în European Journal of International Law , nr.3 , 2002
[40] E. Kontorovich, "*The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation"* George Mason University School of Law, Law and Economics Working Paper Series, nr. 9, 2003, at one disposal on http://ssrn.com/abstract_id=385900
[41] L. Hannikainen, "*Peremptory Norms in International Law, Historical Development, Criteria, Present Status"* , Finnish Lawyers Publishing Co ,Helsinki, 1988, p. 149
[42] R. Clark, "Things I Have thought About in the Past 40 Years: International (Criminal) Law, Conflict of Laws, Insurance and Slavery", Rutgers Law Journal, nr. 55, 1999
[43] Art 22 from the Genève Convention regarding the Law of the sea in 1958 and the Art. 110 from the Convention concerning the Right of the sea from 1982 stipulate that "a war ship that meets a stranger ship in the open sea…does not have the permission to inspect it *unless there are reasonable suspicions that…the ship is involved in the slaves commerce*

of the universal jurisdiction in the case of slavery traffic, while others affirm that the number of the conventions and treaties signed after the movement for the eradication of the slavery in Great Britain in the XIX century, resulted in "the recognition of the international crime character of the slaves' commerce", integrating it in the universality theory[44]. The different states, like Greece, New Zeeland or Nicaragua, have sustained the incidence of the universal jurisdiction on slavery apparently without critics from other states. Even the U.S, known for the rejection of any order that could affect any of its citizens, encouraged this practice[45]. Viewed globally, these interpretations of the legislation of the human rights concerning slavery have led to the conclusion, generally admitted, that the international right allows the activation of the universal jurisdiction for the slavery abolition[46].

De lege ferenda, we consider that the international juridical instruments do not sanction with the same force and in a unitarily way the modern forms of slavery. It is necessary that the illegal traffic in persons for purpose of prostitution, of hard labor, of the abuse of the children, should be considered deeds of a maximum gravity for the international society and they should command international norms that could allow explicitly to the international jurisdiction instruments to fight against such events. Even though, nowadays, such practices have reached a high level of conviction by diverse international instruments, we consider that the level of protection given is superficial and inefficient. The majority of the treaties lack the mechanisms of the dispositions' implementation, and the states failed, most of the times, to transpose the stipulations in the national relevant legislation or they have formulated significant reserves.

4. The Nuremberg trial

"The courts from Nuremberg have functioned on the assumption that the actions of the states cannot be controlled by the law, except the case in which the law can control the actions of the people in charge of the states politics. Nuremberg opens the way to increase the attempts of corresponding application of the postulates of the international rights on the actions of those who carry the final responsibility for the state actions[47].

An important moment in the evolution of the international justice, as a supranational instrument, component of the international right, is the creation of the International Military Court, competent in the Nuremberg trial, aimed to those who committed international crimes during the Second World War. The supporters of the universal competence quote- for the justification of such competence- the principles appeared in the Nuremberg trial, confirmed at the General Meeting of ONU as the base for the application of the universal jurisdiction in the case of the crimes against the humanity, war crimes, genocide and others[48]. Although the instance from Nuremberg did not recognized even for a moment the universal jurisdiction as it should, the Chart and its principles could serve as the paragon of the changes that appeared in *jus cogens.*

The principles of the trial had as a starting point the principles of the international rights stated in the Chart that governed the proceedings. According to the forth principle from Nuremberg"the fact that a person acted following the orders issued by the government or its

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[44] J. Bassiouni, *"Theories of Jurisdiction and Their Application in Extradition Law and Practice"* , in the World International Law Journal, n. 3, 1974

[45] Henkin*,"International Law: Cases and Material,",* West Group, St Paul, 1993, p. 1049.

[46] R. Higgins, " Problems and Process, International Law and How We Use It", Oxford University Press, 1994, p. 58

[47] Th. H. Sponsler, "The Universality Principle of Jurisdiction and the Threatened Trials of American Airmen" in the Loy Law Review, nr. 43, 2002, p. 45

[48] Nuremberg Principles (1950), UNGAOR, 5th Session, Supp. No.12, în Christine Van den Wyngaert, "*International Criminal Law, A Collection of International and European Instruments"*, Kluwer Law International, Haga, 2000

superior, does not assume the respective person from the responsibility under the international right, if his own moral choice had been possible[49]. Moreover, as one can notice in the Chart, "the official position of the guilty ones", either as head of states or as responsible in the government environment, won't be considered exonerated by the responsibility or by any attenuated circumstance. However, many critical analyses concerning the application of the universal jurisdiction in the Nuremberg trial doubt the solidity of this juridical base. In the case of the Nuremberg trial, the juridical fundament for the establishment of the Court consisted in the exercise of the German sovereign power by the Allies, made possible through the instrument of the German capitulation. The consecration of the Nuremberg trial as the most important modern precedent of the universal jurisdiction application is a little ironic, due to the inaccurate analogy between piracy and war crimes, an analogy that creates, on one hand, an ambiguous base for the modern utilization of the principle, and on the other, due to the lack of a certain universal reference to the Nuremberg Chart or its incidence in the decisions of the International Military Court, which most of the times has as a background the traditional forms of the judicial competence (the principle of personality or the principle of universal protection)[50]. The appearance of the universal jurisdiction incidence in the case of the war crimes and the crimes against the humanity in the Nuremberg trial is still regarded as illegal from some perspectives and it makes the subject of some controversies. The exceptional character of the measure of court establishment, the limited competence to the facts that had a causality connection with the Second World War, the positioning of this one in the environment of the public international right, are the many arguments which deny the universal jurisdiction character. Also, the argument according to which Nuremberg represented nothing more than "the justice of the winners" decreased the credibility in the idea of the initial precedent of the trial. On the other hand, what does the Nuremberg creates and demonstrates is the more relevant precedent for the application for the individuals' international right, its effect on the utilization of the universality being more subsidiary. None of the courts established after the Second World War, in 1945 at Nuremberg and Tokyo did not have as a support the universal jurisdiction on the war crimes. This situation is due to the fact that the trials have been supposed as a part of the conditions of the surrender of the countries defeated by the Allies Powers. However, the trial has determined significant changes in the international political-juridical system.

5. The trial of Adolf Eichman

"*The crimes approached in this case are not crimes considered as such by the Israeli legislation, but they are in essence crimes against the law of the nations"*[51]. During the trial against Eichman, "the Holocaust architect" the judicial instances from Israel have established a modern precedent in the development of the universal jurisdiction, by putting in evidence the subsidiary character of the universal jurisdiction. Nazi war criminal, Adolf Eichman has been caught in Argentina by the agents of the Israeli's secret services and taken to Israel to be judged. In a detailed notice, the instance lodged an appeal to the concept of natural right for the application of the universal jurisdiction, because it ascertain that "the genocide against the Jewish peoples "is without doubt a crime "against the public international right, generally accepted in the international society[52]. *The instance retained that "the crimes approached in*

[49] The Principles of the international right recognized in the Chart of the Nuremberg Court, IV U.N. Doc. A/CN.4/SER.A/1950/Add.1 (1950).

[50] Hari M. Osofsky, "*Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*" in Yale Law Journal, nr. 195, 1997.

[51] http://respondeat.wordpress.com/2010/02/09/universal-jurisdiction-and-the-eichmann-and-pinochet/

[52] Quoting Grotius, the CourtCurt statuated : "according to the natural right,*the victime can defend on its own and punish the criminal , being also allowed to any of the integrity characterisez person to submit the offender to a punishment; but all the natural rights have been limited to the organisation of the society and delegated to*

this case are not crimes considered as such by the Israel's legislation, but they are in essence crimes against the law of the nations". Indeed, the offenses discussed do not represent an open creation of the legislators that promulgated the law of the Nazi and their collaborators punishment; these ones have been defined by the respective law according to a model prescribed already in the international laws and conventions that define the crimes from the nations right" and that "the national jurisdiction and universal jurisdiction are simultaneous applicable, and the universal character of the crimes is the one that played the central role in the decision of the instance[53].

6. The trial against the Chilean dictator Augusto Pinochet

An important event in the achievement of an international justice form is represented by the turning of the dictator Augusto Pinochet in front of the Spanish justice. The Spain trial began when the members of the Spanish Union of the Public Prosecutors Department made in April 1996, a complaint through which they accused the military forces from Argentina of genocide, terrorism and torture against a great number of Spanish people and their descendants that lived on the Argentinean territory. The case has begun in accordance with the Spanish laws, allowing to the public interest organization and to the blessed individuals to go forth and maintain the complaints even without the support of the public prosecutors department. Thus, a group of human rights activists supported by the politic parties from the opposition and by the professional associations have maintained the trial even without the consent of the state, only with the engagement from its side that it won't interfere in the independence of the judicial system. The article 23(4) from the Spanish Judicial Law[54] allows the accusation of the non-Spanish citizens for certain crimes committed outside the Spanish borders; the genocide is counted between them, also the terrorism and other crimes considered as such by the international right ratified by the treaties of Spain. The law allows its application to its victims of any nationality. The case has been distributed, by hazard, to the judge Baltazar Garzon, who constituted an investigation team and asked the government the documents and the evidence in connection with Pinochet activities. The Argentinean government refused any cooperation, despite the existence of a judicial cooperation treaty signed with Spain, considering the Spanish actions a violation of the Argentinean sovereignty of the state. In 1998, Garzon emitted an international mandate on the name of the general Galtieri and another nine Argentinean officers followed soon by another hundred of these mandates. The first defendant, who arrived in the custody of the Spanish state in 1997, the captain Adolf Sailingo, confessed that they used to through prisoners alive from the airplane into the sea. Once he arrived in the country, the trial began: the Spanish law that did not allow the judgment in absentia, being finally completely respected.

Meanwhile, another complaint had been deposed on the name of the General Pinochet, being accused of the dead and the disappearance of thousands of citizens from Chile. The Pinochet case was annexed to the Galtieri case, the judge Garzon continued to judge and he issued an international arrest mandate on his name, asking the Great Britain his extradition. The decisions of the Lords Chamber of negating the immunity of the General Pinochet allowed his extradition and his presence in front of the justice. In the first decision, the Chamber of the Lords affirmed that for certain international crimes, between which the torture, the immunity does not exist, not even for a former head of state. The second decision, allowed the advance of the extradition proceedings, but it limited the accusations brought to the

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the judging instances

[53] http://respondeat.wordpress.com/2010/02/09/universal-jurisdiction-and-the-eichmann-and-pinochet/

[54] http://heinonline.org/HOL/LandingPage?collection=journals&handle=hein.journals/newlr35

general about the torture cases committed after 1988, the date at which the United Kingdom had implemented the legislation in accordance with the Convention against the Torture[55].
The first interesting aspect, in the Spanish decision and also in the British one, concerning the applied jurisdiction is that both of them are based on local and not international norms. They have mentioned the universal jurisdiction but they based their decisions on national laws. The fact that the authorities reported to the moment of the ratification of the international treaties by the states, shows, undoubtedly that they had in view the positioning of the mach in the limitative frame of the application of the international right norms. The application of the treaties cannot be anterior to the transmission of the international ratification instruments[56]. In order to justify the reasonable application of the international norms which condition the existence of an affective and effective connection between the victims and he state that sanction, the list of the victims retain only the Spanish citizens that had disappeared or had been killed in the America, involving the principle of passive personality[57].
The second significant aspect of the trials refers to the effects of the universal jurisdiction application in the states on the territory of which the crimes have been committed, the principle of the territoriality being based on the international right.
As a comparison, the application *lex fori* in the international private right establishes only the procedural mechanisms in order to ensure the equity of a trial:

- The international trials are a positively catalyzing factor for the national trials that most of the times appear as impossible, due to the power and the majority influence of the offender exercised in the interior of the state structure
- politically speaking, the national belief has been reactivated for Chile and for the national justice, becoming a question of national pride meant to sustain that the General can be judged in his own country
- the trials developed in Europe have revitalized the anti-impunity movement in the justice courts, in the legislation and society. They have reactivated laws that have led to the investigation and punishment of over 100 officers and also laws that have indemnified the survivors of the concentration camp[58].

7. The forms of the universal jurisdiction

The international right has developed two types of universal jurisdiction in praesentia and in absentia. The first form- in praesentia- appears as the continuation of the fact that the offender enters the territory of a state and he is retained for committing an offender. In this form, the fundamental element that gives to the state the competence of judging the deeds is his presence on the national territory[59]. An example of this form of universal jurisdiction is represented by the legal proceedings in connection with the request of Spain addressed to the Great Britain for the extradition of the former president of Chile Republic, Augusto Pinochet, for committing serious violations of the human rights. This type of universal jurisdiction is the most frequent, because there are numerous international conventions that impose to the states implied the obligation to pursuit or not the extradition of the individuals suspected to have committed some offences, relevant in function of the convention that are on that territory.
The second form of the universal jurisdiction is in absentia. The exercise of this competence in his form is purely universal, extraterritorial, -and the individual submitted to the trial do

[55] http://www.publications.parliament.uk/
[56] Bolintineanu, Alexandru, Năstase Adrian, Aurescu Bogdan, *Drept internaţional contemporan*, Ed. All Beck, 2000, p.38
[57] Ibidem, p.74
[58]http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=102x2241483
[59] M. D. Evans, "*International Law", ed. 2, Cambridge University Press, Cambridge* 2006, p. 348

not have any connection with the respective state and he is not present on its territory neither. While the first form of the universal jurisdiction represents, most of the times, an obligation imposed to the states by diverse international treaties, the universal jurisdiction in absentia represents rather he right of a state- the elaboration of an intern legislation as the base for this form of universal jurisdiction, being left at the choice of the states- consequently as mentions a decree of the International Justice Court, is submitted to the abuses.

The universal jurisdiction supposes the existence of some application difficulties:

- The assurance of the legal and financial resources necessary for the development of the trials is in the state task that begin the proceedings at a high level on the base of exercising the universal jurisdiction
- The task of the probation comes to the state that intentions to apply the norms of the universal jurisdiction
- At the political level, there must be identified the diplomatic proceedings through which they explain to the other states and to the other intern actors the motives why they have chosen debatable proceedings, that can violate the sovereign authority of these ones on their own citizens
- The application of a sanction is difficult to put into practice, while the states do not extradite frequently the citizens and many of the inter-state cooperation forms do not stipulate extradite accords.

The arguments against the universal jurisdiction are considered by the supporters of the principle- elements that assure the impunity o the greatest criminals of the world. On the other hand, to the critic of automatic appeal to the universal jurisdiction is responded by the outline of the difference between justice and peace, punishment and reconciliation.

8. A realistic conception concerning the universal jurisdiction

The accomplishment of the final goal of the universal jurisdiction- the achievement of the justice- can be blocked in the reconciliation efforts of some states. Henry Kissinger outlined in an article became famous that "the role of a state employee is to choose the best option when he seeks to promote the peace and the justice, realizing that most of the times between these two there is a tension[60]. Kissinger affirms that the universal jurisdiction expanded with an extraordinary speed without being submitted to a systematic debate, due to its intimate passion of its supporters. Of course, the violation of the human rights, the war crimes, the genocide or the torture acts spread in a variety of places have disgusted the modern society at a such level that the efforts of implementation of the legal forms for the prevention and punishment of the guilty ones are more than welcomed. But the danger appears where these efforts are taken to the extremes, encouraging this way "the replacement of the governmental tyranny by that of a judge". The history has demonstrated that the dictatorship of the virtuous ones has led most of the times to inquisition and even witch hunting. Any universal system should stipulate, along with the proceedings of punishment of those who violate the fundamental norms of the rights, "limits for the immaculate individuals". The system should not allow that the juridical principles should be used as weapons for the political, intern or international fights. Questions like- which of the legal norms are applied? On what does the probation process is based on? What trial guaranties do exist for the offender? In what way the researchers made will affect another interests or fundamental objectives of the external policy –must find their answer.

[60] H. Kissinger, *The Pitfalls of Universal Jurisdiction,* Foreign Affairs, nr.2 , 2001, available on http://www.foreignaffairs.com/articles/57056/henry-a-kissinger/the-pitfalls-of-universal-jurisdiction

Kissinger outlines that another serious problem in the exercise of the universal jurisdiction consists in the using of extradite proceedings conceived for the usual offenders. In the moment of publishing the article in 2001, Kissinger warned that if the Pinochet case would be consecrated as precedent, which happened- the magistrates will be able to emit an extradite request without any warning of the accused, and without any reservation, toward the existence of some procedures that are already in the country of his. The experience of the last decade demonstrates in the most part, the reality of Kissinger's predictions. The state asked the extradition, is confronting afterward with the taking of a decision apparently technically-juridical, but which, in fact, involves the exercise of the power of political appreciation- if there is or not a base in order to allow the request. Once the extradition proceedings are developing, the accusing has not the permission to contest the fundament of the cause, in the best case the appeals being limited to the aspects of the procedure: an imminent vice in the demand of extradition, the incapacity of the judicial system from the solicitant country to ensure an equally trial, or that in the solicitant country do not exist legal norms of incriminating the deed for which the mandate has been emitted.

Such proceedings create the favorable environment for teasing actions, of political harassment long before the incriminated ones to be able to prepare their defense. Kissinger outlines this way the irony of the transformation of a doctrine meant to transcend the political trial in the way of following rather he political enemies, than the accomplishment of the universal justice. "If the characters of the president Pinochet would be applied word by word, these would allow, for example, to the two parts of the Arabian-Israeli conflict or to any other parts involved in an intense international controversy to project the battle in different states by the pursuit of the enemies with extradition request[61]. The accuracy of Kissinger's predictions is confirmed once again by the event from the end of the year 2009, when, based on a complaint made by many Palestinian people for the supposing war crimes committed in Gaza, a British judge emitted an arrest mandate for the former Israeli external minister Tzipi Livni[62].

When the power of appreciation of which cases should be submitted to the universal jurisdiction is left for the national magistrates, the domain of application of the arbitrary become very large. As an answer to the critics formulated by Kissinger concerning the universal jurisdiction, Kenneth Roth, the director of the Human Right Watch, claims the contrary; "the alternative of Kissinger to the judges' tyranny, created by the application of the universal jurisdiction, would signify impunity for the true tyrannies of the world. Roth outlines that "the concept of extraterritorial jurisdiction is not new at all; what is new, is the desire of some governments to accomplish this duty against the guilty ones that are in leading places" covering finally a great gap of the contemporary right system- the gap of impunity[63] .

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[61] H. Kissinger, http://www.thirdworldtraveler.com/Kissinger/Pitfalls_Univ_Juris_Kis.html

[62] www.guardian.co.uk/world/2009/dec/14/tzipi-livni-israel-gaza-arrest

[63] K. Roth, *The Case for Universal Jurisdiction*, in Forreign Affairs, September-Octobre 2001, available on http://www.foreignaffairs.com/articles/57245/kenneth-roth/the-case-for-universal-jurisdiction

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THE LEGAL NATURE OF THE ADMINISTRATION OF THE PROPERTY OF OTHERS

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Abstract

The delimitation of the legal institution of administration of the property of others by comparing it against other institutions to which it presents similarities, leads us to the conclusion that the administration of the property of others has a complex legal nature which implies the presence of elements of the analyzed legal institutions (mandate, fiducia, business management, agency etc.) without reducing or confusing it to each of them.

Key words: administration, property, power of attorney, legal nature, convention, legacy.

1. Assess of legal nature of the administration of the property of others

The delimitation of the legal institution of administration of the property of others by comparing it against other institutions to which it presents similarities, leads us to the conclusion that the administration of the property of others has a ***complex legal nature***[64] which implies the presence of elements of the analyzed legal institutions (mandate, *fiducia*, business management, agency etc.) without reducing or confusing it to each of them. In other words, the administration of the property of others, depending on the form of administration (simple or full administration), comprises elements of the contract of mandate when legal acts are concluded on behalf and on the account of the person whose property is being administered, elements of the business management each time the administrator undertakes material facts necessary and useful for the administered property. At the same time, the administration of the property of others, especially in the form of full administration, is close to the contract of ***agent of affairs*** (from the French law), the administrator having to *preserve and to make use, in a profitable manner, of the goods, to develop the property or to carry out the appropriation of the property providing this is for the interest of the beneficiary* (art. 800 Civil code).

Even if there are interferences with several legal institutions, the strongest connection of the administration of the property of others is with the mandate. This conclusion is based on the very expression of the legislator who often uses the term "power of attorney" (art. 792 Civil code). Therefore, the administrator is empowered by another person to manage one or several goods or a mass of the property or the entire property belonging to this person. The difference between the two institutions is that, in the case of the mandate, the attorney in fact is empowered to conclude legal acts referring to the person of the grantor of power, as well as to his property[65], while the administrator is empowered to conclude legal acts or to undertake material facts, only with respect to the patrimonial elements or to the entire property of the beneficiary of the administration.

It is not less true that, also in the case of the agency contract, the legislator uses the word "power of attorney" or "empowers" (art. 2072 Civil code), only the agent is empowered by the principal to negotiate or to negotiate and conclude contracts on behalf and on the account of the principal, compared to the attorney in fact who receives the power of attorney from the

[64] Concerning the legal nature of the administration of the property of others, please see, collective, the new Civil Code, comments, literature and case law, volume I, art. 1-952, About the civil law. Persons. Family. Goods. Ed. Hamangiu, 2012, p. 1115

[65] The Civil code of Romania, Notary Handbook, volume I, Official Journal Publication, 2011, p. 265

grantor of power for the conclusion of legal acts. Basically, the attorney in fact, is his quality of representative of the grantor of power, usually, does not negotiate the contract.

Unlike the agent, the administrator of the property of others is acting, according to the case, as an attorney in fact, if legal acts are concluded, as well as an agent, if, for the purpose of the administration, he has to negotiate and conclude contracts. Hence, the agent, according to the law (art. 2072 paragraph (2)), is an ***independent intermediary*** who acts on a basis of a professional title which means that he makes a profession for himself from this authority, condition which is not required for the administrator of the property of others. The latter may be, according to the case, a representative or an intermediary who acts for the purpose of the administration of the property of others, as well as a professional in the sense of article 3 of the Civil code[66] or a non-professional (*any other subjects of civil law*).

In addition, the administrator of the property of others, just like the agent, undertakes a series of material facts (acts) which make them different from the attorney in fact and similar to the manager (business manager) or to an entrepreneur.

The ***complex legal nature*** of the administration of the property of others is specific to the ***complex contracts***, like the consignation contract which comprises in its structure three legal operations: sale, deposit and commission[67].

As the specialized legal literature[68] states, one must not forget the fact that the source of inspiration for the Romanian legislator was the Quebec Civil code which, on its turn, combines ***particularities*** of the French law (continental law) with elements belonging to the legal system of ***common law.***

Thus, as far as the legal institution of ***agency*** is concerned, the liability of the agent towards the principal is, on one side, a contractual liability, just like of the attorney's in fact, but, on the other side, it is a tort liability for torts and technical offences (torts).

The presence of the institution of administration of the property of others in the Romanian legal system having as source the Canadian law of the province of Quebec, makes us treat this institution taking into account the reasons which determined the Canadian legislator to create the legal institution of administration of the property of others. Therefore, according to the specialized literature[69], the Canadian law preferred the qualification as attorney in fact of the administrator of the property of others in the detriment of that of ***trustee*** (according to *commom law* system) which means ***sui generis*** owner or holder of the administered property. If, as far as the activity of the administrator is concerned, sometimes, there are perfect similarities between his obligations and those incurring to the attorney in fact, on the other side, the regulation of mandate, of the reports between the grantor of power and the attorney in fact, is far more restrictive which, ***in our opinion,*** is determined by the "*intuitu personae*" character of the mandate. Taking into account this character, it results that the mandate may be revoked at any time by the grantor of power, the powers of the attorney in fact being, in most of the cases, limited (special mandate), characters which do not exist in the case of the administration of the property of others[70].

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[66] Article 3 paragraph (2) "All those who exploit an enterprise are considered professionals". Constitutes exploitation of an enterprise – the systematic exercise, by one or by several persons of an organized activity which consists in the production, administration or alienation of goods or in the delivery of services, irrespective if it is lucrative or not.

[67] For details concerning the consignation contract, please see St. D. Carpenaru, Treaty of Commercial Law, Ed. Universul Juridic 2012, P. 538-543, S. Angheni, M. Volonciu, C. Stoica, Commercial Law, Ed. C.H. Beck, 2008, p. 365-368

[68] The new Civil code, Ed. Hamangiu, 2012, already quoted, p. 1115

[69] M. Cartin, L'Administration des biens d'autrui dans le Code civil de Québec, The Catalan Journal of Private law, volume III, 2004, p.17-19

[70] For details on the legal characters of the mandate contract, please see Fr. Deak, Civil Law, Special Contracta, Ed. Actami 1996, p. 268; L. Stanciulescu, Civil law lectures. Contracts according to the new Civil code, Ed.

Going back to the Canadian law, the reason of the legislator to regulate a new legal institution - the administration of the property of others, resided in the fact that the conventional representation was not sufficient and efficient even in the conditions of the existence of the irrevocable mandate, of the commercial mandate, of the mandate in common interest, of the mandate without representation, of the *post mortem* mandate. The legal provisions concerning the mandate did not respond to all the particularities of the administration of the property of others, especially of a company, and the concerted application of several legal institutions (agency, *fiducia*, business management etc) would have meant a division of the legal provisions applicable to the same legal situation, respectively to the administration of the property of others.

Practical reasons determined the Canadian legislator to create a general legal framework, a common law applicable to the administration of the property of others.

The same reasons determined the Romanian legislator to ***create a general legal framework applicable to the administration of the property of others***, legal framework which will apply each time there are not provided any special regulations in the matter of the administration of the property of others or even if such regulations exist, they have to be supplemented with general provisions, common to the administration of the property of others.

Following the analysis of the general legal framework, the common law in the matter, respectively articles 792 – 857 of the Civil code, one may conclude that the administration of the property of others has a ***complex legal nature*** which combines elements of mandate, business management, *fiducia*, agency, etc. but which is not reduced to each of them, thus justifying its autonomy in the framework of the Romanian law.

At the same time, from the very beginning, one must observe that the provisions of the Civil Code, Book III "About property", Title V – Administration of the property of others – representing the common law for the administration of the property of others, are perfectly compatible to the provisions comprised by the civil Code or by special laws and which represent *applications of the institution of the administration of the property of others, like the guardianship, curatorship , administration of the legal person, administration of enterprises.*

2. The legal basis of the administration of the property of others according to the Civil code may be, according to the case, the legacy or the convention.

Therefore, the legislator first had in mind a legal act "*mortis causa"* (the legacy) and only then thought about the convention[71].

From a terminology and conceptual point of view, the legislator uses the word ***convention*** in Title II – Book V, even if, comparing the provisions of the old Civil code (the 1864 Civil code) with those existing in the present Civil code (the new Civil code), we observe the fact that the previous Title III was named "*About contracts and conventions*". The conclusion is that the legislator kept in some texts the word convention which existed in the previous legislation, term used at least for the case of the legal basis of the administration of the property of others.

Hamangiu 2012, p. 359 and the following; D. Florescu, Civil law, Civil contracts in the new Civil code, the second edition as revised and supplemented, Ed. Universul Juridic 2012, p. 223 and the following

[71] Please see C. Statescu, C Birsan, Treaty of Civil law, The General Theory of Obligations, Ed. Academica RSR Bucharest, 1981, p. 32; T.R. Popescu, P. Anca, The General Theory of Obligations, Ed. Stiintifica, Bucharest, 1968, p. 21. The explanation of the existence of two words: convention and contract in the content the Civil code of 1864 consists in the fact that, article 1101 of the French Civil code, reproduced in the Romanian legislation, defines the contract as being "a convention through which one or several persons are obliged to do or not to do something", considering that the word convention has a larger meaning then that of the contract. The convention would mean the creation, transmission or the extinction of rights and obligations, while the contract would have the effect the creation and the transmission of rights and obligations.

Irrespective of the word used by the legislator, convention or contract, we consider that, from a conceptual point of view, there aren't any differences between the convention and contract, no matter of the name, contract of administration of joint property, association convention etc.

Anyways, when we analyze the legal basis of the administration of the property of others according to the new Civil code, it is important the fact that it may be a "*mortis causa*" ***unilateral act*** (the legacy) or a ***bilateral legal act*** (the convention or the contract).

Analyzing the content of article 792 of the Civil code, especially the provision comprised by paragraph (3), we have to remember the fact that the dispositions are applicable to any administration, except for the case when the law, the constitutive act or the actual circumstances require the application of another legal regime of administration.

In these obviously exceptional cases, the legal basis is, according to the case, ***the law*** (the case of guardianship, the curatorship, the judicial administration), ***the constitutive act*** (the case of commercial companies, the cooperative companies, the simple companies etc.) or ***actual circumstances.***

It is important to highlight the fact that the unilateral legal act – ***the legacy*** - produces effects ***only if the power of attorney given by the legacy is accepted by the designated administrator*** (article 792 (paragraph (2) of the Civil code), acceptance which is produced after the death of the author, because the will (the legacy) produces effects from the date of the death of the testator; the administrator, by notary declaration of acceptance, becomes executor of the will. According to article 1079 of the Civil code, the executor of the will is entitled to administer the estate of the succession for a period of 2 years at the most from the date of the opening of the succession even if the testator did not expressly conferred this right to him. The 2 years deadline may be extended by the court for justified reasons, by granting successive deadlines of one year.

The legal act of administration

In the specialized literature, the legal act of administration was defined as „*that civil legal act by which it is aimed to carry out a normal enhancement of a good or of a property*"[72]

Adapting this definition to the content of the provision comprised by article 792 paragraph (1), the object of administration of the property of others may be detailed, including "*one or more patrimonial masses*", which do not belong to the owner and which are entrusted to a person empowered as administrator.

The administration act implies the enhancement of a single good "*ut singuli*", situation in which the administrator, by the activity that he deploys, by the legal acts that he concludes, aims only at enhancing that good, without concluding disposition acts; the administration of a property or of a patrimonial mass might also need legal acts of alienation of the goods belonging to the patrimonial mass or in the respective property[73].

2.1. The legacy-legal basis for the administration of the property of others

Even if the institution of administration of the property of others represents a transposition in the Romanian legislation of the provisions of the Civil code of Quebec, still there are certain differences, among them being the legacy, as source or basis of the administration of the property of others. Thus, in the Civil code – Quebec, the legacy is not provided as basis of the legal relations between the administrator and the beneficiary. Only the convention is[74].

[72] G. Boroi, Civil law, General part, the persons, Ed. All Beck, 2008, p. 144
[73] Idem, p. 145
[74] Fl. A. Baias, E. Chelaru, R. Constantinovici, I. Macovei (coordinator), the new Civil code, Comment on articles, p. 837

2.2. Convention – basis (source) of the administration of the property of others

The source of the administration of the property of others is a convention (contract of administration) which comprises the agreement of the parties.

The legal provisions applicable to the ***convention*** by which a person is empowered by the owner with the administration of his property are the general ones, as provided in article 1166 and the following from the Civil code, rules which take into account the ***principle of contractual freedom*** (article 1169 of the Civil code) and of ***autonomy of will in establishing its content***, ***the principle of good faith***[75] at the negotiation and the conclusion of the contract, as well as all along its execution, the ***principle of mandatory force*** (*pacta sunt servanta*) etc., principles which imply ***limits or exceptions***. As far as the contractual freedom is concerned, the limits are established by article 1169 of the Civil code which provides that is has to be exercised in ***the limits imposed by the law, by the public order and by the good character.***

Just like any convention (contract), the convention of administration of the property of others is required to comply with the conditions of validity, common to all contracts: the legal capacity of the parties, the consent expressed in a valid manner, the existence of a determined object, of a licit object etc.; the existence of a moral and licit cause, according to the public order. Each validity condition is particularized in the contract of administration of the property of others taking into account the object of administration, the type etc.

As far as the ***form*** of the contract is concerned, the legislator does not provide for a certain form as a condition "*ad validitatem"*, but the agreement of the parties has to take up the written form *ad probationes,* taking into consideration the provisions of article 303 paragraph (2) according to which "*no legal act cannot be proved with witnesses if the value of its object is superior to 250 lei".*

Having in mind the principle of symmetry of form of legal acts, if the acts which are to be concluded by the administrator have to be concluded in an authentic form – *ad validitatem* – normally, also the convention by which the administrator is empowered has to be concluded in authentic form[76].

As it was established by the specialized literature, it is possible that the power of attorney of the administrator exist in a clause inserted in another type of contract, clause which has to be valid from a legal point of view so that it produces the effects specific to the administration of the property of others.

2.2.1. Legal characters of the convention of administration of the property of others

Analyzing the content of all provisions which form the legal framework of the institution, it results that this convention/contract is, usually ***a contract for valuable consideration***, because the administrator is paid for the deployed activity, the remuneration being established by the constitutive act (the convention), by subsequent agreement of the parties, by law or, in absence, by court decision.

Concerning the modality of establishing the remuneration by court decision, the Civil code provides in article 793 paragraph (2) the last part that, in this case, usages and, in absence of such criterion, the value of the services provided by the administrator, will be taken into consideration.

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[75] For details on the good faith, please see D. Gherasim, the Good Faith in the civil legal reports, Ed. Academiei RSR, Bucharest, 1981, p. 63-64

[76] Constantinovici/Mitu in the new Civil code, coordinator Fl.A. Baias, E. Chelaru, R. Constantinovici, I. Macovei, already quoted, p. 838

According to article 793 paragraph (2) "*the person who acts without this right or without being authorized for this is not entitled to remuneration, staying applicable, the case may be, the rules governing the business management*". Therefore, if a person administers the property of others without a power of attorney, acts as a ***de facto administrator*** without being entitled to remuneration.

Exceptionally, according to the law, the constitutive act or the subsequent agreement of the parties or the actual circumstances, the administration is carried out ***without consideration*** (article 793 paragraph (1) of the Civil code) for example the case of guardianship of the interdicted person of the executor of the will.

Therefore, usually, the contract/convention of administration is a ***contract with valuable consideration.***

According to the existence or not of a reciprocity of actions, we consider that the legal institution of the administration of the property of others which is based on the convention of the parties is an ***unilateral contract***, applying the definition comprised in article 1171 of the Civil code, according to which the "*contract is synallagmatic when the obligations resulting from it are mutual and interdependent. Contrary, the contract is unilateral even if its execution implies obligations for both parties"*

In these conditions, it is obvious that the administration of the property of others originating from the convention/contract does not entail mutual and interdependent obligations, even if the owner of the goods or the holder of the property entrusted for administration, shall have the obligation to pay to the administrator the remuneration established and determined by the law or even by the court[77].

The convention (administration contract) is a ***commutative contract*** because, at the moment of its conclusion, the existence and the scope of the obligation are certain, and their scope is determined or determinable.

As far as the form is concerned, as we highlighted before, the convention has a ***consensual character,*** the mere agreement of the parties being enough (article 792 corroborated with article 1174 of the Civil code), the written form being required *ad probationem,* in the cases where the value of the obligations exceeds 250 lei, which normally happens in the case of the administration even of a single good which belongs to another person.

2.2.2. The content of the convention/contract if administration of the property of others

According to the principle of autonomy of will, the contracting parties establish the content of the contract, according to the forms of administration, respectively the ***simple administration*** or the ***full administration***. The obligations of the parties depend on the form of administration, the essential differences being defined by the legislator. Thus, in case of the simple administration, the person empowered with administration has to undertake all necessary acts for the preservation of the goods, as well as the useful acts so that these goods may be used according to their normal destination, which means that the administrator will conclude, mainly, acts of administration and preservation of the goods, of the property mass or of the entire property (article 7095 of the Civil code); on the other side, if the administration is full, besides the preservation obligation, the administrator also has the obligation to use the goods in a profitable way, to enhance the property or to carry out the appropriation of the property mass provided this is for the best interest of the beneficiary, meaning that, besides the administration and preservation acts, the administrator will have to conclude ***disposition acts,*** if they are in the interest of the beneficiary (article 800 of the Civil

[77] C. Statescu, C Birsan, Civil law, The General Theory of Obligations, the Obligations, the Xth edition, Ed. Hamangiu, Bucharest, 2008, p. 26; L. Pop, Treaty of Civil law. The contract, volume II, Ed. Universul Juridic, Bucharest, p. 98-102

code). Speaking about the interest of the beneficiary, the administrator will not be able to draft legal acts without consideration with regard to the goods subject to administration and, in respect of the acts of alienation and of pledging with consideration, these ones shall be concluded only if they are in the best interest of the beneficiary[78].

Even if the clauses of the convention will be established by the parties, still, they have to be in accordance with the provisions regarding the legal regime of the administration provided in Chapter III, Section I of Title V of the Civil code.

In the specialized literature, for the interpretation of the provision of article 792 paragraph (1) of the Civil code, it was expressed the opinion according to which "the power of attorney through a convention comprises any *inter vivos* legal act by which a person is entrusted with the administration of the property of others, irrespective if it is a ***mandate contract, a constitutive act of a legal person, a convention of association, a contract of administration of the joint property***[79]."

This approach of the problem is not less interesting, only, as we already highlighted, the administration of the property of others is not confused with the mandate or with the constitutive act of a legal person even if there aren't impediments that the attorney in fact empowered through the mandate contract is empowered to manage one or several goods of the beneficiary or of the entire property of the beneficiary. In these conditions, the mandate contract would be subject to different regulations, on one side, to those regarding the mandate and, on the other side, to the provisions applicable to the administration of the property of others.

We have the same reserves with respect to the opinion according to which the constitutive act of the administration is represented by the convention of administration concluded between the parties.

The different interpretations of the legal texts (article 792, article 793 of the Civil code) are generated by the wording of the legislator. Thus, in article 792 of the Civil code, the legislator provides that the power of attorney is given to the administrator through ***legacy or through convention,*** while in article 792 paragraph (3) and article 793 paragraph (1) of the Civil code, the legislator refers to the constitutive act, the law or the actual circumstances which require the application of another legal regime or that the administrator is entitled to a remuneration established by constitutive act or by the subsequent agreement of the parties, by law or, in absence, by court decision.

Analyzing these texts and interpreting them in a systematic manner, we could conclude that the legislator had in mind the constitutive act of administration (legacy or convention), the law or, in the circumstances enumerated which require the application of another legal regime.

As far as we are concerned, we consider that, *de lege ferenda*, it would be necessary that the legislator expressly provide that this convention through which a person (administrator) is ***empowered*** to administer the property of others is a ***named contract***, respectively a ***convention of administration or an administration contract.*** The argument for this proposal consists in the special legal regime of the administrator of the property of others and to remove any possible confusions with other legal institutions, institutions which represent applications of the administration of the property of others like the guardianship, the mandate etc.

If the legislator would name the constitutive act of administration, namely the convention of administration or the administration contract which would add to the other constitutive act, respectively the legacy, different interpretations would be removed.

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[78] UNPR, the Civil code of Romania, Notary Handbook, volume I, already quoted, p. 268

[79] UNPR, the Civil code of Romania, already quoted, p. 263

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CRIMINAL LIABILITY OF MINORS IN THE LIGHT OF THE NEW CRIMINAL CODE. CRITICAL OBSERVATIONS

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Abstract

The education is the basis of any society, helping to its progress and development. To this end, the sentences should cover not only the punishment itself, but also the rehabilitation and social reintegration. In the case of minors, the criminal liability involves more discussion, since it is conditioned by its psycho-physical condition. Minors' consciousness is emerging and that is why the re-education process has to be a special one. Unlike the current Criminal Code, which provides for the punishment of juvenile and educational measures, the New Penal Code provides for punishing a minor consisting of only educational measures involvingdeprivation or non-deprivation of liberty. Finally, we present some critical remarks, such as the lack of clarity of some provisions of the New Criminal Code or the abundance of attributions of the probation service.

I. INTRODUCTIVE CONSIDERATIONS

The basis of any society is the education. Educating the children in a civic, moral and correctspirit from the humanly and legal point of view, is the starting point for the harmonious development of any society or community. Therefore, when they are wrong, it must be applied the best method to reformation.

In legal terms, the punishment is insufficient,as it does not allow a proper rehabilitation or social reintegration of the minor. In some cases, imprisonment of minors may lead to worsening their situation.

In the juvenile justice domain, the law systems follow two patterns: the traditional one, according to which from a certain age, to minors there are applied penalties, and most recently, it gives priority to education. In both models, tothe minors below a certain age who have committed criminal offenses there are applied only protective measures.[80]

The international institutions conducting their activities in the direction of prevention and treatment of juvenile delinquency concluded that achieving this goal can alsobe accomplished through improving the criminal law and improving its effectiveness.[81] In this regard, at the level of our country through the New Criminal Code it is desired the efficiency of measures taken against minors, with the main purpose of reeducating them.

Criminal liability of minors is conditioned by their psycho-physical condition at different stages of the minority. Depending on their psycho-physical development, minors are considered to have discernment.

The meaning of the term "minor" is established in Decree no. 31/1954: "the person becomes an adult at the age of eighteen. The minor who marries acquires thereby full legal capacity".[82]

Both the current Criminal Code and the New Criminal Code provide that "the minor under the age of 14 years is not criminally liable" (article 113, paragraph (1) New Criminal Code), "minor who is aged between 14 and 16 years is criminally liable if it proves that he committed the crime with discernment" (article 113 paragraph (2) New Criminal Code) and

[80]J. Pradel, *Droit Pénal Comparé/Comparative criminal law*, Dalloz, Paris, 2002.
[81]Al. Boroi, *Drept penal. Partea generală – conform Noului Cod penal/Criminal Law. The general part - according to the New Criminal Code*, C.H. Beck Publishing House, Bucharest, 2010.
[82]Article 8. (2) and (3) of Decree no. 31/1954 regarding physical and legal entities.

"the minor who has attained the age of 16 is criminallyliable" (article 113 paragraph (3) New Criminal Code).

In the laws of European countries, in addition to "minor", it also appears the notion of "young". Youth age limits vary from state to state. Thus, in France, Germany and Great Britainthere are considered young (in legal terms) people aged between 18 and 21 years. In Switzerland, there are young the people aged between 18 and 25 years. It is applied either specific sanctioning regime to minors, or attenuated common law regime,

II. MINORS' CRIMINAL LAW SANCTIONS IN THE NEW CRIMINAL CODE

The developments and the changes, that have taken place in the economic, political, social, cultural, all areas, exerted an influence on the juvenile delinquency, which caused a particular concern for combating it. By the new legislation it is intended to take appropriate measures for educational and preventive purposes to those who have committed or may commit offenses under the criminal law.

At national level, extending the situation of economic crisis has determined the rise of all kind crimes.

In the fight against crimes committed by juveniles, there should be taken into account the specific characteristics of their age, compared to adults. Juveniles, unlike adults, are in full training and psycho-physical development, unable to have the same discernment as adults. Juveniles are more easily influenced and they can be easily determined to commit certain acts. However, they require rehabilitation and special rules. The minors' consciousness is in continuous formation, as their education. Therefore, the rehabilitation must be under special terms.

Under these conditions, the New Criminal Code comes with significant changes in terms of sanctioning juveniles.

The most important modification of this system is to eliminate punitive sanctions. While the Criminal Code in force provides that"to the minor criminally liableit can be taken an educational measure or a penalty may be applied"[83]; in accordance with the new Criminal Code, to the juvenile offender it may be applied only the educational measures, the deprivation or non-deprivation of liberty. In this sense, the article 114 New Civil Code provides:

"(1) To the minor at the time of the offense, aged between 14 and 18 years it may be applied an educational measure of non-deprivation of liberty.

(2) To the minor provided in paragraph (1) it can be taken an educational measure of deprivation of liberty in the following cases:

a) if he committed a crime for which it was proceeded an educational measure that has been executed or the execution of which began before the offense for which it is judged;

b) when the penalty prescribed by law is imprisonment for seven years or more or life imprisonment."

The educational measures involvingnon-deprivation of liberty are: length of civic formation, surveillance, suspension for weekends, daily assistance [art. 115 par. (1) pt.1 New Criminal Code].The educational measures for deprivation of liberty are hospitalizing in an educational center, internment in a detention center [article 115 paragraph (1) point 2 New Criminal Code].We will proceed into a short presentation.

1. The Educational Measures involving Non-deprivation of Liberty

Regarding the enforcement regime of the non-deprivation of liberty educational measures, we note that under the provisions of the law, during its execution, the court may impose to the minor one or more conditions.

[83] Article 100, the current Criminal Code.

The obligations that may be imposed to the minor during the execution of an educational measure are:

- following a course of education or training;
- not exceeding, without the probation service approval, the territorial limit set by the court;
- not being in certain places or at certain sports events, cultural or other public gatherings, established by the court;
- staying away and not communicating with the victim or members of his family, with participants to the commitment of the crime or other persons established by the court;
- reporting to the probation service at aset date;
- complying with the control measures, treatment or care.[84]

In order to ensure that the non-deprivation of liberty educational measures ordered to the minor who has committed an offense, the legislator has also provided for the possibility of their extending or replacing.

Thus, if it finds that the child does not comply, in bad faith, the execution conditions of the educational measure or the imposed obligations, the court shall order one of the following measures:

- Extension of the educational measure for a time that does not exceedthe maximum stated by law;
- Replacing the measure with another more severe measure of non-deprivation of liberty;
- Replacing the measure with internment in an educational center, where, initially, it was taken themost severe non-deprivation of liberty educational measure during its maximum duration.

Important to note is that in order to have the educational measure extension or replacement first decided, it requires that the court finds that the minor does not comply with the conditions,in *bad faith*, of executing the educational measure or the execution of the imposed obligations. This means that if the child is found not to comply with other objective reasons which are not attributable to the execution of the educational measure conditions or obligations, he will not suffer the mentioned consequences that is the extension or replacement of the ordered educational measure of the initial court.

1.1. Civic Training Course

The first penalty provided for in article 115 para. (1) point 1, letter a) is the civic training stage, which is [according to article 117 para. (1)] in the minor's obligation to participate in a civic program lasting four months, in order "to help them understand the legal and social consequences to which he is exposed for committing crimes and to make them responsible for their future behavior."[85]

Probation Service is required to oversee and organize the activities of the minor. These activities must take place outside school or professional hours of the minor "not to disrupt its cultural and intellectual development specific to his age."[86]

This measure is taken if the minor committed a less serious offense. The court may impose to the juvenile one or more of the obligations referred to in article 121 of the New Criminal Code. If the child does not comply, in bad faith, the executing conditions of civic training or commits a crime again, the court may extend the educational measure, which shall not exceed the maximum period of four months or replace it with a more severe measure of

[84]Article 121 line (1) of the New Criminal Code.
[85] Article 117 New Criminal Code.
[86]Al. Boroi, *Drept penal. Partea generală – conform Noului Cod penal/Criminal Law. The general part - according to the New Criminal Code*, C.H. Beck Publishing House, Bucharest, 2010.

non-deprivation of liberty. If after the extension of the educational measure to four months or by replacing it with a more severe one, the child continues his inappropriate behavior, the court shall order the replacement of the ordered measure with the internment inan educational center.

The purpose that this measure seeks to achieve is to determine the minor to realize the impact of his actions on himself and on others and to correct the wrong behavior in order to prevent further offenses.

1.2. Surveillance

According to article 118 of the New Criminal Code, the surveillance educational measure is to control and guide the child to respect his daily program, lasting between two and six months. The probation service institution is responsible for coordinating, which must ensure that the child attends school or participates in vocational training. It should also prevent certain activities or getting in touch with certain people.

The juvenile court may impose certain obligations under article 121 of the New Criminal Code. If the minor during surveillance, commits another offense, or is on trial for a competitivecrime previously committed, the court may extend the educational measure, without exceeding the maximum of six months, or may replace it with another more severe measure, that is suspension for the weekends or daily assistance. Also this measure may be replaced by an educational measure involving deprivation of liberty.

This measure is intended to ensure the child participation to classes, representing his formation and preventing the perpetration of offenses under the criminal law, by preventing its communication with certain people that might influence the child to do so.

1.3. Suspension for the Weekends

The measure of suspension for the weekendis provided in article 119 of the New Criminal Code and it represents the obligation of not leavingthe home on Saturdays and Sundays, except for the obligations to participate in certain activities imposed by the court, for a period between 4 and 12 weeks. Still the probation service is in charge of monitoring this measure.

In case where the minor does not follow the execution conditions of the measure, the court may extend it or it may replace it with daily assisting educational measure. Also, the court may impose to the minor some measures under article 121 of the New Criminal Code. In those conditions, the court may order the modification or termination of the obligations set out initially, of course, in accordance with the attitude and behavior of the child.

"The suspension implies a higher degree of constraint, since the child is bound not to leave the premises of his residence on Saturdays and Sundays."[87] It is a more severe measure, which is applied in the case of more serious crimes or where the educational measures described above have failed to be effective.

1.4. Daily Assistance

The most severe non-deprivation of liberty educational measure provided for in article 120 of the New Criminal Code is the daily assistance. This minor is required to comply with the court's imposed program and he is supervised by the probation service, which involves timing and conditions of their activities and interdictions. The measure is taken for a period between 3 and 6 months.

The juvenile court may impose the same obligations under article 121 of the New Criminal Code, and in case of breach of the conditions of execution, in bad faith,the court extends the period of daily assistance to its maximum or replace it with the educational measure of internment into an educational center. Also, depending on the conduct and

[87]Al. Boroi, *Drept penal. Partea generală – conform Noului Cod penal/Criminal Law. The general part - according to the New Criminal Code*, C.H. Beck Publishing House, Bucharest, 2010.

behavior of the juvenile, the court may order the modification or termination of the obligations initially set out.

During this period, in addition to regular activities specific to education in relation to age, the child is required to participate in different activities according to the purpose of the measure. Thus, he fulfills his duties, learning, which are his priorities, and carries out the specific daily routine according to his age and his education. By imposing this program it seeks to prevent other prohibited activities and keeping a schedule which would keep him on the right path.

2. The Educational Measures involving Deprivation of Liberty

According to the provisions of article 115 paragraph (1) Section 2 of the New Criminal Code, the educational measures involving deprivation of liberty that may be ordered against a juvenile who has committed an offense is internment in an educational center and internment in a detention center.

2.1. Admission into an Educational Center

The educational measure involving deprivation of libertyof the admission into an educational center is defined in article 124 of the New Criminal Code and it consists of the admission of the child to an institution specialized in rehabilitation of the juvenile. Here, the child participates in school and training programs designed to develop his skills in conducting a trade, according to his skills. The measure has a period between one and three years.

According to the provisions of article 124 paragraph (3) of the New Criminal Code, if during internshipthe juvenile commits a new crime or is trialedfor a competitivecrime previously committed, the court may retain the measure of an educational center, extending its duration, without exceeding the maximum stated by law, or replace the measure of internment into a detention center.

However, if the child shows interest in school and professional activities and makes good progress in the social reintegration and executed at least one half of the measure, the court may order its replacement by a non-deprivation of liberty educational measure to daily assistance on a time period that equalsthe timeremaining for the unexecuted measure, not exceeding six months, if the admitted person is under the age of 18. Also, if theadmitted person turned18, the court may release him from the educational center.

With the release or replacement, the court will enforce one or more of the obligations under article 121, but until the end of the duration of the internment measure.

If the minor does not follow, in bad faith, the execution conditions or obligations imposed by the daily assistance measure, the court returns to the substitution orrelease and it enforcesthe execution of the unexecuted remainder of the measure of internment in a center.

2.2. Internment in a Detention Center

This is the most severe educational measure and it consists of, according to article 125 of the New Criminal Code, the minor being admitted to an institution specialized in child recovery, with security and surveillance regime, which will follow intensive reintegration social programs and programs of education and training according to their skills.

This measure has the period between 2 and 5 years, except where committing more serious offenses, the penalty provided by law is imprisonment for 20 years or more or life imprisonment, when the length of the stay is between 5 and 15 years.

If during the execution he commits another crime or he is trialed for a competitive crime, the court extends the measure of internment, not exceeding 15 years, the term being determined by the worst of the punishment provided by law for committed offenses. The educational measure is subtracted from the length of time served until judgment date.

If the child shows interest in school activities and professional reintegration, making obvious progress of social reintegration and he has executed at least half of his provided

measure, the court may replace this measure with the daily assistance on the remainder of the unexecuted measure, but not more than 6 months, if the person has not turned 18. If the person turned the age of 18, the court may order his release.

With the replacement of the measure or release, the court will enforce one or more of the obligations provided by article 121 (which we reviewed earlier), until the fulfillment of the duration of internment.

If the juvenile fails to comply, in bad faith, the execution conditions of daily assistance measure or imposed obligations, the court returns on the substitution or release and it enforces the execution of the unexecuted remainder of the duration of the measure of internment in a detention center.

In the event that during the execution of an educational measure involving deprivation of liberty, the interned person who has reached the age of 18, has a behavior which adversely affects or hinders the recovery and reintegration of others, the court may continue the execution of the educational measure in a penitentiary (article 126 of the New Criminal Code).

Since the above provisions have certain features, leaving the usual pattern of criminal sanctions applied to minors who committed a crime, we will emphasize some clarifications.

Firstly we note that these provisions are the only ones modifying the execution of the sentence, the minor will execute the remaining of the punishment into a penitentiary regime, a specific regime for adult offenders. This provision goes beyond the general framework of the legal sanctions against juvenile delinquents and because of that, in order to have this extreme measure, it is necessary that the minor has reached the age of 18 during the execution of the educational deprivation of liberty measure, but in a educational or detention center for juvenile offenders only.

Secondly, we note that in order to have this extreme measure, the court must find that the child in question must have a behavior which adversely affects or hinders the process of recovery and social reintegration of others. This means that the court has provided all the necessary evidence attesting with certainty the inappropriate behavior of the person concerned.

Finally, a last remark concerns the age of that person.Webelieve that the person in question who may have this measure does not have the status of a minor, becoming an adult, where the penitentiary regime can be considered appropriate.

The duration ofdeprivation of liberty educational measures ordered by the juvenile court shall be calculated according to the general rules set for adults in article 71-73 of the New Criminal Code.

Preventing and combating juvenile crime was and is a permanent concern of the criminal policy of the modern states.[88]

Among the conditions that favor the juvenile delinquency we mention:

- The lack of awareness of parents of the entourage, places and environments frequented by minors;
- The influence of offenders who are in the minors' entourage, determining them to commit crimes;
- The lack of permanent links between home and school;
- The discontinuity in the education and supervision of children by the parents or legal protectors.[89]

[88]C-tin Mitrache, C. Mitrache, *Drept penal român. Partea generala*/*Romanian Criminal Law. The generalpart*, Universul Juridic Publishing House, Bucharest, 2003.

[89] www.clujafaceri.ro

III. CONCLUSIONS AND CRITICISM

Juvenile offenders sanction regime was a constant concern of all states with recognizeddemocratic regimes.

Features specific to minors, mostly related to age, the social environment where he isliving and studies, the living conditions that pose a significant imprint on the intellectual development of the child, the social environment in which he lives, level of preparedness and so on, are all conditions that may favor the inclination of the minor towards the criminal world.

The most important issue that occurs after the minor committed the offense is that of finding and subsequently adopting the most effective type of rehabilitation and social reintegration.

Given the depositions of the New Criminal Code on the criminal sanctions applicable to juvenile offender, we consider that they represent a step forward made by the Romanian legislator.

In our doctrine, it was assessed that reported to the bio-psychical state of the minor, the juvenile imprisonment appears to be less appropriate for achieving the purpose of the criminal law in relation to juvenile offenders, this constraint means tend to reeducate the adult offender, while for juvenile offenders, it would not be necessary a reeducation, that is a recovery of prior education, but an initial education with appropriate means.[90]

It is recommended that when choosing the sanction, there must be protected the interests of the child and of the society. Therefore, the minor must be reintegrated as reeducated, reformed.

The main consequences of imprisonment applied to the minor are:

- Loss of school year (for students);
- The stain in the criminal record that will create difficulties in employment or filling for a position;
- Difficulties of readjustment to normal conditions after imprisonment;
- Reluctance and mistrust that the minors would receive from thefamily, friends, neighbors which in most cases they will avoid them.[91]

Currently, under the provisions of the current Criminal Code, the criminal sanctions applicable to juvenile offenders are educational and safety measures and penalties.

The provisions of the New Criminal Code exclude almost all penalties for juvenile offenders, the only exception being that in certain circumstances expressly provided by the legislator, the deprivation of liberty educational measure may be served in penitentiary.

Although the provisions on the sentencing regime of the juvenile offender under the new Criminal Code are, in our opinion, superior to those existing at present, researching them allows us to formulate some critical observations.

A first observation concerns the lack of clarity of the provisions of article 126 of the New Criminal Code, where it is regulated the institution of changing the execution regime. Thus, the legislator has determined that during the execution of a deprivation of liberty educational measure, theinterned person, who has reached the age of 18, has a behavior which adversely affects or hinders the recovery process and reintegration of others, the court may continue the execution of the educational measure in a penitentiary. In our opinion, these provisions have some imperfections. Firstly, the legislator has determined that the court may take this measure to the person who turned 18 (so he is no longera minor) and he is serving one of the two custodial educational measures. We appreciate that in this situation the

[90]V. Dongoroz, *Explicaţii teoretice ale Codului penal român, Partea general/ Theoretical Explanations of the Romanian Criminal Code, The general part,* Vol II, Academia Republica Socialistă România Publishing House, Bucharest, 1970.
[91]www.clujafaceri.ro.

legislatorshould have distinguished between the two deprivations of liberty measures, because they are different as severity and enforcement regime. Thus, when to the person whois required the change of execution regime is interned in an educational center, the regime should be changed, in order to be sent to a detention center. Consequently, only when the person is in a detention center can be sent to penitentiary. The same text is incomplete, as it states that the person will continue the execution of the educational measure in penitentiary. It is known that the educational measures may be taken against the person concerned only in a specific detention regime, according to article 125. Also we consider that the enforcement regime change will disrupt the person in question. The Solution that we would impose, in our opinion, is the continuation of the execution of imprisonment in a special prison for these categories of individuals.

Another observation concerns the variety and complexity of the tasks set by law for the probation service, something which will implicitly lead to over sizing the institution and even an inability to execute the tasksofsupervising the juveniles during their non-deprivation of liberty educational measures.

A final observation concerns the need for the national police involvement in surveillance activity of children during the execution of non-deprivation of liberty educational measures, regarding the greaterpossibilities of this institution, possibilities, otherwise conferred by law. We argue this necessity on the grounds that the child, after committing a crime, should actually feel that he is monitored, that he is not allowed to perform certain activities or travel to certain places. The lack of ensuring effective supervision will have in our opinion a negative effect on the child.

Also we note that the analysis of other European legal systems can conclude the need for a special law for minors in our country.

In conclusion, the sanctioning system based solely on the educational measures should prove more effective (than the one which includes penalties) in the reintegration into society, his rehabilitation, and also understanding the social principles and duties.

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RULE OF LAW RECONSTRCUTION IN POST-CONFLICT AREAS

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Abstract

Conflicts often arise from the failure of a State's legal system to protect rights and punish perpetrators of human rights violations. Discrimination, corruption and abuse of power by law enforcement officials, and the military in many cases, fuel and exacerbate conflicts and make it even harder to achieve reconciliation after the conflict. Injustice, literally, drives people to take up arms. Understanding how the justice sector actually worked in the State before and during the conflict, and how it should function if the rule of law is to take root, should be a central feature of the reconstructing process.

1. INTRODUCTION

Before turning to the contents of this article, a few words about key concepts such as rule of law, failed states and post-conflict are in order.

The rule of law is a legal maxim whereby governmental decisions are made by applying known legal principles. Such a government can be called a nomocracy, from the Greek *nomos* (law) and *kratos* (power or rule). The phrase can be traced back to 17th century and was popularized in the 19th century by British jurist A. V. Dicey.

The concept was familiar to ancient philosophers such as Aristotle, who wrote "Law should govern". Rule of law implies that every citizen is subject to the law. It stands in contrast to the idea that the ruler is above the law, for example by divine right.

In general, a failed state is characterised by: (a) breakdown of law and order where state institutions lose their monopoly on the legitimate use of force and are unable to protect their citizens, or those institutions are used to oppress and terrorise citizens; (b) weak or disintegrated capacity to respond to citizens' needs and desires, provide basic public services, assure citizens' welfare or support normal economic activity; (c) at the international level, lack of a credible entity that represents the state beyond its borders.

Failing and failed states can offer havens for terrorists to conduct operations that endanger the lives of citizens residing far from those countries. Failed states have been referred to as a 'sleeping giant' threat that requires concerted attention. Thus, the rationales for international intervention have expanded beyond humanitarian and development objectives to encompass national and global security.

The role of state failure as cause and consequence of conflict and civil war has highlighted the importance of governance in establishing peace, pursuing state reconstruction and avoiding conflict in the first place.

Post-conflict rarely means that violence and strife have ceased at a given moment in all corners of a country's territory. In practice, most post-conflict reconstruction efforts take place in situations where conflict has subsided to a greater or lesser degree, but is ongoing or recurring in some parts of the country. Post-conflict environments are characterized by mostly destroyed, distrusted or dismissed political institutions and widespread insecurity.

2. THE RATIONALES FOR RULE OF LAW RECONSTRUCTION

There are at least four rationales that have been put forward by different agencies as justifications for rule of law reform in fragile, post-conflict or underdeveloped states (this has varied partly on the basis of mandate or vogue).

1. Economic development: the argument that rule of law is essential to economic development focuses on the need for predictable and enforceable laws for contract enforcement and foreign investment.
2. Democratization: the protection of human rights and mechanisms holding government accountable are essential in liberal democracy, and inherent in rule of law.
3. Poverty reduction: rule of law reform is considered essential to poverty reduction as the poor suffer more from crime, the impact of crime on their livelihood is greater, and they are less able to access the justice systems.
4. Peacebuilding: transitional justice, creation of courts to resolve conflict, and writing constitutions and legislation to remove sources of conflict and injustice are increasingly considered essential aspects of peacebuilding in fragile and post-conflict states.

The one area which has raised sustained controversy has been that of the relationship between rule of law and economic development. China is sometimes cited as evidence that the economic development rationale for rule of law is flawed.

However, China's example, while interesting, does not challenge the basic premise that predictable and enforceable commercial and contractual matters are essential for foreign investment and economic development. While China certainly does not abide by a Western conception of rule of law in relation to human rights or a government subject to law, it does nonetheless subscribe to rule by law, and has in its own way ensured predictability and enforceability of commercial dealings.

3. THE TYPES OF RULE OF LAW RECONSTRUCTION PROJECTS

Although there is growing focus on rule of law in post-conflict countries, there is little guidance on how to approach such rule of law reform, nor how the strategy adopted ought to differ from that in developing countries.

Post-conflict states will present many of the features of fragile and underdeveloped states but to a more extreme degree, and with particularly acute peace and security, law and order, and transitional justice concerns.

Key features of transitions from civil conflict include a devastated infrastructure, destroyed institutions, a lack of professional and bureaucratic capacity, an inflammatory and violent political culture, and a traumatized and highly divided society. In many cases the degree of capacity, physical infrastructure, and public trust in the government and its institutions will be dramatically lower than in developing countries.

Other common problems include a lack of political will, judicial independence, technical capacity, materials and finances, and government respect for human rights. In addition, in the post conflict context, a shadow or criminalized economy is likely to be entrenched and there is likely to be widespread access to small arms reflected in a high level of violence in the society. Given the lack of law and order, accountability and trust it is difficult to entrench major reform, and ultimately the reforms that are sustainable may be somewhat limited.

The types of rule of law reconstruction projects that have taken place in post-conflict countries across the different agencies and players can be broken down into five different categories representing different social goods:

- Human security and basic law and order;
- A system to resolve property and commercial disputes and the provision of basic economic regulation;
- Human rights and transitional justice;
- Predictable and effective government bound by law;
- Access to justice and equality before the law.

4. PROMOTING A CULTURE OF LAWFULNESS - PREREQUISITE FOR ACHIEVING RULE OF LAW RECONSTRUCTION

Post-conflict States are commonly defined by the absence of a culture of lawfulness. Formal laws may not exist; where they do, they may not be based on international human rights standards; and even if they are based nominally on such standards, human rights may not be respected in practice. Justice in the broadest sense may be absent, and in the worst cases a culture of impunity and violence may exist. In its most visible form, impunity holds sway in a society when high-profile, serious offenders, who were or are involved in well-known criminal activities, circulate freely within the community, hold government positions, or play significant roles within the justice system.

In order to cultivate a culture of lawfulness, a broad spectrum of society needs to be involved. A culture of lawfulness presupposes that even when "government may have a lead role in providing a lawful environment for the citizenry, civic, religious, educational, media, business, labor, cultural and social organizations at all levels of society have important roles to play."[92] These different sectors of society must not only be mobilized but also work synergistically if cultural change is to occur on the scale required to usher in a culture of lawfulness.

Four sectors, or "pillars," have critical roles to play: educational institutions; centers of moral authority; mass media and popular culture; and education of criminal justice actors.109The four pillars that can effectively promote a culture of lawfulness in the following ways are:

a. Educational institutions—ranging from primary and secondary-level schools to law schools, political science departments, professional organizations, and justice-sector training academies—can teach and deliver positive messages about justice and the rule of law to both the next generation and those responsible for making the legal system work in this generation.

b. Centers of moral authority, whether public figures or organizations associated with a religion or located within civil society and the education system, publicly insist on the need for justice and the rule of law. When they speak out against criminal behaviour such as organized crime, they can significantly diminish the extent to which society tolerates such behaviour. The value in engaging centers of moral authority as change agents derives from the level of recognition and respect they enjoy within the wider society

c. The mass media, when independent and trustworthy, can monitor government institutions and the private sector, unveil crime and corruption, and promote public deliberation and civil discussion among citizens and different sectors of society. Popular culture plays a fundamental role in shaping the public discourse on the justice system. When used constructively, it can also contribute to generating law-abiding citizens and institutions.

d. A professional cadre of criminal justice actors and a culture within justice organizations that is supportive of lawful behaviour and respectful of citizens' rights are essential to inculcate a culture of lawfulness in a post-conflict society. Education of criminal justice actors can play a fundamental role in enhancing their effectiveness by developing such a culture. Individually or collectively, these pillars have traditionally acted as agents of change when their societies have confronted crises.

The opportunities for synergy among these pillars can be significant in post-conflict settings. For instance, the educational and the moral centres may be able to leverage their leadership through collaboration with the mass media, which typically exercises significant social influence in a post-conflict environment. Synergy, however, is by no means

[92] Roy Godson, "A Guide to Developing a Culture of Lawfulness"(paper presented at the Symposium on the Role of Civil Society in Countering Organized Crime, Palermo, Italy.2000)

guaranteed—nor, indeed, is the participation of any of the pillars in what can be a dangerous undertaking.

5. CONCLUSIONS

Perhaps the most important lesson from the rule of law reconstruction in post-conflict areas is the essential complementarity between human rights monitoring and institution-building.

Monitoring gave reconstruction process the ability to identify the sources and scope of human rights problems throughout the country. This information could then be used to design reform measures and training programs. Finally, field monitoring provided direct feedback on the effectiveness of reform strategies or programs as they were implemented.

The rule of law must be seen as a flexible concept. It is more than just reforming courts, criminal justice systems or penal law. In many countries, property disputes, birth registrations, juvenile justice, citizenship/statelessness, corruption, public administration/civil service reform, and demobilization and disarmament of combatants will be a priority.

Therefore I believe the most important aspect for reconstructing the rule of law is to assist post-conflict country's institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening the justice system and police, ensuring that these institutions are free from political interference and adhering to internationally recognized standards and best practices.

I also think the reconstruction process is foreseen to be terminated when the local authorities have gained enough experience to guarantee that all members of society benefit from the rule of law.

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COMMERCIAL RELATIONS OF ROMANIA

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Abstract

This paper reveals Romania's trade from 1990 up to present. In the first part we described a series of internal and external factors that have led to major structural changes and then we continued with a description of trade policy in relation with neighboring countries and the European Union.

Commercial relations of Romania between the years 1990 and 2004 were influenced by internal and external factors that have led to major structural changes.

Internal factors that caused major structural changes are:

- Wrong perception of the importance of geo-strategic position to attract foreign investors;
- Domestic market is small (size, space, purchasing power);
- Continuous depreciation of the national currency;
- Provision of basic factors is appropriate, but it does not apply for intangible factors (legislation, administration).
- Lack of flexibility of the economy;
- High inflation;
- Situation of certain sectors (agriculture).

Among the external factors that produced changes we can include:

- Current problems that some major EU countries have;
- Increasing protectionism and economic nationalism;
- Complete diversion of trade with the former Soviet Union;
- Reconsideration of the position of EU countries on group priorities (unemployment);
- Difficulties arising from the accession of new members.

European Commission Report for 2003 placed Romania on the last position in terms of economic criteria not granting it the status of a functioning market economy.

Achieving efficiency in resource allocation in the sense of their reallocation from low productivity sectors to high-productivity ones was a difficult process in practice.

Economic policy measures, in turn, accelerate or brake sometimes, integration, warning European Parliament report is suggestive.

In the context of Romania has decided to make a model based on international specialization by product:

- Primary products
- Labor-intensive products
- Capital intensive products
- Standardized manufactured goods

Romania has ranged between 49.3% in 1998 and 56.3% in 2003, above average values found at groups of textiles, chemicals, plastics.

Czech ranged between 70.14% and 82.61% in 1993 to 1998, but the index for high-technology intensive goods rose from 44% in 1993 to 76% in 2001.

Poland 71.85% in 2001, 98.68% of the recorded value metal products, machinery and equipment 98.42%.

Hungary throughout their average values over 69%, with peaks of 99.89% for electrical and optical equipment, but 65.45% of the food.

Greece has recorded only 53.88% in 1981 and 49.15% in 2001.

Spain recorded 85.06% in 2001, with maximum values in ship construction and repair of 99.43%, and the minimal office equipment 51.46%.

The UK has seen 86% in 2001, with over 99% in groups auronave and flight equipment. For Group high-technology intensive products index is 88.68%.

In France 87.48% overall and 83.6% in high-technology intensive products.

Subcontracting, based on the advantage of low cost labor could be better as it provided jobs for millions of Romanian and may be less good because those jobs were in sectors with low added value, thus keeping wages low and standard low life.

Sectors appeared as the winner they could keep this position as long as they keep costs low wages. There was a substantial under-utilization of labor and in the context of future scarcity of labor in the EU, it Poteau be an advantage.

To change this state of things, and count us in echelon advanced countries, we had no other choice than to follow the investment in research and development, education and vocational training.

Romanian exports to the EU, but overall were concentrated in a few sectors (textiles, footwear, iron and steel, machinery and equipment).

Analysis specialization indexes orientation groups proved labor intensive, low value-added and energy-intensive. For some groups with significant share in exports has no comparative or competitive advantages (machinery and equipment, vehicles, and so on).

Corresponding deficit affect increasingly more BoP due inefficiencies policies to promote foreign investment and reduced nivelulului credibility of economic policies.

Romania's foreign trade has undergone a complex process of adaptation taking place geographical reorientation of trade, in which the European Union was the most important partner. At the same time, adopted a new structure of traded goods, for maximum exploitation of comparative advantages of the economy.

Although significantly reoriented, Romania's foreign trade continued to be unstable, poorly restructured and less competitive than other countries in transition.

Traded goods structure reveals a high degree of substitution of imports: a large proportion of imports are goods which were also exported. Imported technology, although significant, does not induce an effective restructuring of industrial activities, with the largest contribution from foreign trade.

Foreign trade has not contributed sufficiently to economic growth and the economy was not able to recover enough to improve the trade regime of international trade. Economic factors that determine the dynamics of imports and exports were, for the most part, conjectural nature.

A significant improvement in foreign trade capacity could not be possible without major change to the current structure of economic activities, with an emphasis placed on structural reforms. Trading capacity was limited by a high level of inefficiency of economic activities. Found to lack or ineffectiveness of economic policies (and thus trade) assets. There was nor trying to create a culture among consumers for quality orientation domestic products at the expense of imports (often poorer quality and more expensive). Be aware that the EU is not a support structure, but one based on the laws and regulations of the national policy level high

Romania's trade with countries in the region recorded a significant advance in the last decade, the transactions with the five neighboring countries reached in the first two months of 2009, 1.13 billion euros, almost to the level recorded throughout the year 1999.

Between 1999 and 2008, trade with countries in the region increased almost nine-fold, from 1.26 billion euros to 11.1 billion euros, while total commercial transactions in Romania increased only five times, according to calculations made on National Institute of Statistics data.

Commercial transactions Hungary - Romania's regional trading partner - rose from 644 million in 1999 to over 5.8 billion euros.

Meanwhile, Romania's trade deficit in relation to Hungary rose to 1.34 billion euros over 2.46 billion.

In the first two months of 2009, the trade deficit stood at 284 million euros, while the trade between the two countries registered a value of 168.5 million euros, down from 55.1% of the value recorded in the same period last year.

During January-February 2009, Hungary occupied the third position among commercial partner imports and exports fifth.

Trade in Bulgaria registered the first two months of 2009 a deficit estimated at 19.8 million euros. Bulgaria is also in the top ten trading partners, exports to the decreasing but at 128.6 million euros in January and February, to 62.2% from the level recorded in the same period last year.

In 2008 imports and exports between Romania and neighboring south reached a cumulative value of 2.36 billion euros, compared to 180 million a decade ago. In 2008, Romania's exports to the Balkan country exceeded imports by 413.6 million euros in the same period.

In the case of Ukraine, Serbia and Moldova were recorded trade surpluses valued at 7.6 million, 37.9 million and 19.9 million euros respectively, in January and February.

In 2008, transactions between Romania and the three neighboring countries reached 2.86 billion euro trade surplus of 847 million euros was recorded.

By comparison, in 1999 trade with Ukraine, Serbia and Moldova Rebublica totaled euro 427 million, of which exports of 235 million euros. Among other countries in Central and Eastern Europe, among the top 20 trading partners include Austria, Czech Republic, Poland, Russia and Slovakia, exports to these countries totaling EUR 383.8 million in the first two months of 2009. Transactions in the Czech Republic and Poland have risen strongly, reaching to 1.65 billion euro in 2004 to 4,520,000,000 in 2008. The trade deficit in relation to the two countries amounted to 2.14 billion euros in 2008.

Largest trading partner is Germany, Romania, transactions between the two countries exceeding EUR 9.4 billion in the first two months of 2009.

The trade deficit in relation to Germany stood at 1.4 billion euros in January-February 2009, after which in 2008 reached 3.63 billion. euro.

Strong growth in trade between Romania and neighboring countries in recent years is made by analysts due to common ownership of major economic structures, a common past, but also a replacement phenomenon of trade relations with developed countries.

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GLOBALISATION AND HARMONIZATION OF CONTRACT LAW

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Abstract

The draft of a common contract law for the countries of the European Union contained in the "Principles of European contract law "is published in 2000 and 2003, the "Principles of European contract law" has been developed later by the "Common frame of reference".

A legal system which governs 27 States, written in 23 official languages concerning the contracts could be useful for the national courts of justice in their interpretation too.

Promoting integration and harmonization of the contract law was the aim of all the groups of study appointed by the Commission.

Key concepts: globalization, harmonization, integration of law, principles of European contract law.

Globalization and economic integration promoted integration of law, as well as in the field of contract law. It seems to be more difficult than appreciated at the beginning and hoped by prof. Lando more than 30 years ago.

The Convention for International Sale of Goods of 1980 facilitated the Unidroit principles of International Commercial Contracts of 1994 and its second edition in 2004 regarding the trade between the countries all over the world.

The draft of a common contract law for the countries of the European Union contained in the "Principles of European contract law" part I and part II, prepared by the Commission on European contract law were published in more versions[93].

Created as instruments to serve as models for future super national laws, these "principles" are now, after the "Green Paper" used as optional instruments.

Published in 2000 and 2003, the "Principles of European contract law" has been developed later by the "Common frame of reference".

There are converging tendencies in Europe on the rules governing contracts in order to bring European systems together in spite of some national attitudes towards the grooving of globalization of the trade.

The purpose of unifying the contract law In Europe is that of a better cooperation, a sure and simple movement of goods and services within the common market.

A legal system which governs 27 States, written in 23 official languages concerning the contracts could be useful for the national courts of justice in their interpretation too. Promoting integration and harmonization of the contract law was the aim of all the groups of study appointed by the Commission.

As regards the idea of unity in European Law it is an issue to be analyzed from a political point of view, an economic viewpoint and that of legislation.

Some economists give economic arguments against the unification of the contract law in Europe pointing to the existing divergences of the rules in Member States, fact that affects the movement of goods and services.

The European Convention on Human Rights and the European Charter on Fundamental Rights must be respected by any Principle on contract law through real freedom of contract, non-discrimination, and social justice. The principle of good faith and fair dealing promotes contractual loyalty and cooperation.

[93] an Italian version - C. Castronovo, Milano, 2001; a Spanish version - F. Martinez Sanz, Madrid, 2003; a German version - R. Zimmermann, Munchen, 2002; a French edition - G. Rouhette, Paris, 2003, etc

It is very important to give an account of the essential moments of the work of each working-group of study.

Explaining the significance of the most important issues, the comments on them, the text itself may help to understand the adopted form in the context of the general low as well as the technical elaborations considered necessary to define the contract and obligations.

Legislative provisions to implement European Directives (e.g. the directive of 25 July 1985 on liability for directive products, etc) reflect the tendencies of the modern low.

The question is how necessary is to keep the rules existing on contractual matters in the Member States. The members of the working groups more divided on this point.

As regards contractual and extra contractual context there are the "Principles" to deal with general rules concerning the methods applicable.

It is known the thinking in legal scholarship on contractual obligations and the doctrinal position on a neutral term for contract but the purpose of harmonization in European contract low is not only to unify national rules, it is to give more protection to the parties of the contract.

At present, certain uncertainty exist, as long as the adopted formula for the European contract low is "optional". The compulsory application of the contractual regime reflects the tendency to reject innovations fact that explains considerable discussion within the study groups.

The recognition by the great majority of the lows of the countries in the EU of the Vienna Convention on the International Sale of Goods and of the Principles of European Contract Low gives validity to contract teams.

Conclusion:

There are serious arguments in favor of harmonization but there are voices against it. Integration as a condition of costs is favorable to harmonization. There are mentioned the advantages of the diversity in law as source of concurrence in the internal market.

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PERSONAL CONSIDERATIONS RELATING TO LAW 82/2012 ACCORDANCE WITH THE CONSTITUTION

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Abstract

Analyzing this law with what the Constitutional Court has mentioned through Decision no. 1258/2009 I appreciate that there still are legal provisions like those which declared the Law no.298/2009 unconstitutional.

The Law was promulgated by Decree no. 419 from 12.06.2012 and subsequently it was published in the Oficial Monitor, Part I., no. 406 from 18.06.2012. The Law will come into force on 21.06.2012. According to the statements expressed by the initiators (from http://www.cdep.ro/proiecte/2012/000/10/0/cl1092.pdf), the law is meant to be a valuable instrument for preventing, searching, discovering and prosecuting for offenses and especially of the organized crime.

It is also invoked the deadline for transposition of Directive 2006/24/CE regarding retention of data generated or processed in the business of providing electronic communications services and of amending Directive no. 2002/58/EC.

It is also mentioned in the Explanatory Memorandum that, as long as Law no. 298/2008 which transposes the Directive 2006/24/CE, generates no legal effects (being declared unconstitutional by (Decision no.1258/8.10.2009), the European Commission has formally requested to Romania, by issuing reasoned opinion, to take within 2 month measures in order to respect the EU provisions about the save of date.

According to the penultimate paragraph from the Explanatory Memorandum, the competent authorities want to prevent, search, discover and prosecute the serious offenses by means of this law. At the same time are assured the fundamental human rights: non-retention of the communications and the respect of the personal data.

According to art.1, the law establishes the duty of the providers of public electronic communications service to retain some data generated and processed during their activity for the use of the Police, Courts and State authorities with responsibilities in national safety. The aim of using them is to prevent, explore, discover and prosecute the offenses or for the solving of the cases about lost persons or for the execution of a warrant or execution of sentence.

These legal provisions apply to traffic and location data about individuals and companies, as well as for identifing a subscriber or a registered user.

The law applies only to those generated and processed data as a consequence of a conversation or a commnication service and it does not apply to the content of the communication or information that were found out during the use of the electronic communications networks, in those cases is appling the Code of criminal procedure and other special laws.

According to art.3, the providers of public services of electronic communications and the providers of electronic communications services to the public have the duty to assure on their own costs the development and the managing of some electronic data base in order to store the following cathegories of data if those are created and processed by them:

- necessary data for the identification of the source of communication
- necessary data for the identification of the destination of communication
- necessary data to find out the date, hour and time of communication
- necessary data to identify the type of communication

- necessary data to identify the equipment of the communication or of the devices used by the user as equipment
- necessary data for identifing the location of the mobile communication equipment

All data are stored for 6 monthes from the time of communication. The providers of the electronic communications have the obligation to send within 48 hours from the time of request, according to the Criminal code of procedure and other special laws, the data to the Police, Courts or State authorities with responsability in national security.

The providers of electronic communications will sign the required data by using an electronic signiture based on an qualified certificate issued by a accredited certification service provider.

According to art.12 (1), interception and storage of communication content or information accessed while using an electronic communications network are prohibited. In these situations are applied the provisions of the Criminal Code of procedure and of the other special laws.

Article 13 establish the principles that should govern the storage activity:

- the storage data must have the same quality and must be protected as the network data
- the storage data have to follow some technical and organizational measures in order to be protected by accidental or intentional damage, alteration or accidental loss, storage, or illicit process and access.
- the storage data must be subject of some technical and organizational measures so that only the authorized staff have access to those data

Judicial police investigators have the right to request the data stored according to this Law only with the approval of the prosecutor who supervises or performs the prosecution or of the competent prosecutor. The judge decides through a reasoned conclusion pronounced in council chamber upon the request of the prosecutor to send the data in 48 hours.

If a solution of not beginning the prosecution, removal of criminal prosecution, termination of prosecution has been ordered the store on which are stored the information are archived at the prosecution office, in special places and sealed envelope ensuring the confidentiality and it is kept until the fulfillment of the limitation of criminal liability for the deed. Then the envelope is destroyed and a report is concluded.

If the court pronounced conviction, acquittal or the end of the trial the stored data are archived together with the case file at the court's office, according to the Law.

Conclusions

Analyzing this law with what the Constitutional Court has mentioned through Decision no. 1258/2009 I appreciate that there still are legal provisions like those which declared the Law no.298/2009 unconstitutional.

Therefore, art.1 (2) from this law reffers to "traffic and location data of persons and of companies." without defining the terms. It is true that, in art. 4-9 there are described the aspects taken into consideration for each of these categories, but the similar provisions from the Law no. 298/2008 (art.3 and art.4-9) were not considered plentiful by the Constitutional Court. On the contrary, the legal paragraph was considered as "not being accessible and foreseeable." At the same time, "the lack of a clear legal provision which can determine the exact scope of those data necessary to identify individuals and companies, opens the possibility of abuses in the activity of storage, process and usage of stored data by providers of electronic communication for public or by public communication network." (Decision of Constitutional Court no.1258/2009)

- article 3 (2) from Law (which reveals the provisions of art.6 from Directive no.2006/24/CE) are similar with provisions of art.2 (2) from Law no.298/2008 regarding the storage of data for 6 months from the moment of the communication. On this aspect, in the

same Directive no. 1258/2009, the Constitutional Court appreciated that "Law no.298/2008 in whole, establishes a rule regarding the storage of personal data, that is their continuously storage over a period of 6 months from the moment of their interception." In this context, the Constitutional Court appreciated that "the regulation of positive obligations concerning the continuous restriction of the right to private life and to the secret of correspondence determines the degradation of the essence of right by removing the guarantees for its exercise. The individuals and the companies, who are mass users of electronic communications services and of public communications network are constantly the victims of this lack of privacy without having the possibility of a free manifestation than as direct communication, excluding the major media currently used."

- article 5 from the Law (which reveals the provisions of art.5 (1) B from Directive no.2006/24/CE), as already the Constitutional Court mentioned, leads to "unjustified restriction of the right to privacy life of the person" because even if "he/she is a passive subject in the communication relation, the person called may become without his/her willing suspect from the point of view of which the authorities held the criminal investigation activity. From this point of view, the interference with the private life of the person, ..., is excessive."(Decision no.1258/2009 Constitutional Court).

As a guarantee of respecting the right to personal life, Law 82/2012 brings the exact mention that it is not applying " to the content of the communications or information consulted during the use of an electronic communication network, in these cases are applied the provisions of the Criminal Procedure Code and of the other special laws in the field." (art.1 (3))

But, the phrase "provisions of the Criminal Procedure Code and of the other special laws in the field" is not the best one, given that the Constitutional Court appreciated already that it is necessary to indicate all the identification elements of the considered normative acts.

Article 8 c) uses a series of terms (dial-up, DSL line) which were not defined at art. 2. In these conditions, we appreciate that the law does not respect the requirements of the normative style imposed by Law on Legislative Drafting/ Technique.

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CONCEPT AND VALIDITY OF LAW

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Abstract

Around the concept of law existed, there probably exist, constituted an essential problem of the relationship between law and morality. The legal definition of law as a system of rules, the concept of validity of the law is content defined concept of law and is characterized by three concepts: the sociological - covering social validity, ethics - covering moral validity and legal - covering legal validity. These concepts of validity are correspondence of three elements of the concept of law: social efficiency - reflect the quality of any actions to ensure the satisfaction of human needs with social and material nature, cultural, spiritual, educational, accuracy of content and legitatea authoritarian - in terms of real power down the system of rules that comprise the right. Analyzing all these elements to shape the legal definition of law that contains principles that can build arguments in order to take decisions by law enforcement jurisdiction.

Keywords: *validity of law, concept of law, law, ethics, sociology.*

1. THE CONCEPT OF LAW. ELEMENTS OF CONCEPT OF LAW.

Coexistence, in society, requires to impose its members some conducts their coexistence absolutely necessary, conducts on which exerts its many categories of social norms, most important being the legal rules[94]. Man can not live only in society and the human every society needs to organize, order and discipline. The evolution of human society confirmed the Roman adage „ubi societas, ibi jus" (where is the society is law there) but opposite is exactly „ubi jus ibi societas" (where is law is and society).

The word *law* is used in many meanings and derives from the Latin directus which evokes the sense of direct, rectilinear, that is a rule of conduct without specifying the content, word that has its correspondence in other languages: droit - in french, diritto - in italian, derecho - in spanish, recht - in german, right - in english for the rights, subjective law - in english for the right objective[95]. Specific of legal rules than other the social rules, the purpose or scope of these rules, their mechanism of operation in the society, relations with law with the state, the public power, all these aspects is in so many branches and chapters of law. The right is the principle of direction of social cohesion, it gives society the character of defined, of consistency [96].

Usually, the term of law means, in general, the following directions:

a) *the objective law* - all legal norms, ie the rules of social life established in the society, rules of conduct which impose obligations, establishes and guarantees the rights and freedoms, protect the interests, recognize certain abilities, abilities and possibilities of people of the state to protect these rights.

b) *the positive law* - that part of the objective law which exist at a time which represents the applicable law, necessarily, carried out if necessary by the public force or coercive force of the state.

c) *the subjective law* - is the faculty, powers, its obligations as return of a person and opportunity to defend their injured rights against third parties.

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[94] Popescu Sofia, *General Theory of Law*, Lumina Lex Publishing House, Bucharest, 2000, p.121.
[95] Craiovan Ioan, *Treaty of general theory of law*, Universul Juridic Publishing House, Bucharest, 2007, p.157.
[96] Popa Nicolae, *General Theory of Law*, CH Beck Publishing House, Bucharest, 2008, p.29.

I.Santai defines[97] *law* as „all the general rules of conduct established or recognized (sanctioned) of State, expressing will the general and social and aimed at regulate the social relations in accordance with the fundamental interests of society, and their observance is guaranteed by force constraint of the state".

Around the concept of law the main problem is constituted of the relationship between law and moral[98], report has face to face two categories of competing fundamental theories[99]:

- *the positivist theories*, which support the separation thesis supposes that legal definition does not include the moral elements,

- *the non-positivist theories*, which support the connection thesis supposes that the definition of law to contain and the moral elements.

To be able to define as precisely or as adequate the concept of law must be made in connection three essential elements: lawfulness authoritarian, the social efficiency and that the content while, depending on how to exploit the relative significance of these elements can be constitute various conceptual approach of law[100].

So, who assigns meaning only the accuracy and not stops and lawfulness of authoritarian and social efficiency obtains only a pure concept of law and otherwise obtain a purely positivist concept of law.

2. THE VALIDITY OF LAW

The definitive elements that define of concept of law (lawfulness of authority, the social efficiency and correctness of the content), correspond to three elements of the concept of validity of the law, namely: the sociological concept, the ethical concept and the legal concept[101].

2.1. The social validity

The concept of social validity has as object the social validity and imply that a rule is valid in terms of capital if it is respected or if it failure to is sanctioned by the actions social efficiency of the right .

In a first perspective, a legal rule can be respected in a position different just as and failure of that rule can be punished in a position different, with the consequence that the social value of a rule is a problem of extent this is also one of the perspectives of social validity of efficacy research.

A second perspective of research of the social validity effectiveness is that it can be recognized by taking as a based on two criteria: respect or non-respect of the rule.

A third perspective is that non-respect of the rule of law is the result of coercion by the coercive force of state.

Obedience to law is a social necessity - indicate famous french constitutionalist Léon Duguit – „but everyone is free to appreciate the value of a law and do what is possible without recourse to violence to evade of a law which it considers contrary law, and from doing any act which it considers illegal" [102].

Thus, the social validity represents in fact the forms of realization of the law which[103], in concrete terms, occurs in two forms (modalities):

- *realization of law by activity of respect and enforcement of law.* Law establish an obligatory behavior for the subjects which it is addressed. The legal rules are always

[97] Santai Ion, *Introduction in General Theory of Law*, 2000 Publishing House, Cluj-Napoca, 2000, p.34.
[98] S. Popescu, *op.cit.*, p.124.
[99] Robert Alexy, *Concept and validity of law*, translation by Adriana Cinta, Parallel 45 Publishing House, Bucharest, 2008, p.11-12.
[100] R.Alexy, *op.cit.*, p.21.
[101] *Idem,* p.109.
[102] Léon Duguit, *Traité de Droit Constitutionnel*, tome III, Paris, 1920, p. 745
[103] N. Popa, *op.cit.*, p.187.

„commandments" or „order" of the state. In this sense, for as they are respected and law achieving the purpose, the legal rules must be made public.
Of consistent and promptly mode in which the public authorities make known the legal rules depends largely on learning a legal consciousness in the social plan. People need to know and understand the meaning of legal rules and obey them.

The variants considered in this form of making of law are: the subjects of law as follows closely the conduct imposed by legal rules; the subjects of law shall refrain and not give rise to juridical relations (the law in conservation); the public authorities participate, in limit of the competences in the execution of these competences through a legal, continues and normal activity.

- *application of law by the authorities and public institutions.* The social requirements should be given the satisfaction with the adoption of general normative of society. The rules of law and edicts have pursued but their execution, which implies direct involvement of the public authorities in the process of of law. Achieve the purpose of legal rules, so it supports, sometimes on that coercive state intervention. In the strict sense law, the Act of application of the law must have a concrete character, rooted at a particular case that it solves, is therefore application from general to particular. An application act does not like with another of equal value for that specifics situations does not resemble between them. If the legal rule shall apply as long as is in force, the acts of application are considering individualization of facts in a general context of the law.

Characteristics of acts of application of the law in relation to the normative activity are:

a) - the act of application of the law is equivalent to a juridical fact, causing birth, modification or termination of a legal report;

b) - the acts of application are distinguished of normative acts and in terms regards the formal conditions of validity. We can say that there is no *the rule* in *the rule* of application of the law. This is because we have a variety of the legal rules which may be violated, but also different means by which the state intervenes in respect of the law.

The process of application of the law depends on how of the rule violations (criminal, civil, administrative, etc..), of authority called to restore the law (courts, administrative authorities, financial, etc..), of competence and the means that it uses according to law.

2.2. The moral validity

The moral validity is ethical object of the concept of validity in that the validity of a rule of natural law or of rational law is based only on the accuracy of its content without considering of social efficiency or of its set of autoritarian laws . This ethical concept of validity of law based the theories of natural law and of rational law[104].

The theory of natural law, which appeared in antiquity, but well defined during the Middle Ages and the Renaissance is conceived as something greater than man and of society, with its the positive law[105].

So, this conception is based on the idea that law is manifested in two aspects: *the positive law* - developed of human and *the natural law* - deduced from the nature of things, eternal, absolute, immutable.

The ancient concept of natural law see in law and in the state a means of realization of justice and equity in virtue of that law would contains three fundamental precepts: to live honestly, to not harm anyone else, to give each what is his own.

After Hobbes, by creating the social contract, appears the social purpose as the manifestation of common good as a final of society[106] - that represents the understanding by

[104] R.Alexy, *op.cit.*, p.111.
[105] S.Popescu, *op.cit.*, p.45
[106] Dogaru I., Danisor D.C., Danisor Gh., *General Theory of Law*, Scientific Publishing House, Bucharest, 1999, p.57.

which the human transition from natural state to a state „status civili" based on natural reason - protects the State which involves transferring the humans rights to those who govern who promise to obey them without conditions. However one condition must be the governors, namely that to manage and maintain law and order. So here it is the idea of justice as an element of social purpose in the sense that the justice creates order and the order requires justice[107].

Kant defines the natural law as „the ensamble of conditions, thanks to which the arbitrary preference of each can be approximate with the arbitrary preference for the other in a universal laws of freedom" [108].

So the natural law is composed of rules which reason it recognizes as available in mode a priori, that independently of any concrete realization. For example, Kant says, is not necessary to notice by the experience in a number of cases, we have to repect the parents or should not do to others what I do not like me do me, the validity of these rules being notified of once in rationally mode. Against natural law have been formulated many critics and the most important opponent of natural law school was established in the positivist group that is the historical school of law.

The theory of rational law claims that rational law, constituted with the help logic and reason, is the basis of positive law imposed by society and expressed through norms and rules that impose, in their turn, by law. Only then can be justify the legislative authority and freely consenting respect to the authority. But, unlike the concept of natural law, rational law designed by Mircea Djuvara place and time is variable depending on the objective changes. That is, the rational activity of the legislator does not appear sufficient to create the legal systems of rational law. Because this problem, Mircea Djuvara[109] goes with judiciary conception to prohibiting lawyers to strike: because the lawyer is and must remain attorney of legal order, he represents ultimately the refined subtlety of reason and persuasion, that the law itself, in the victorious fight with the passionate and the brutal force. At the same time, Mircea Djuvara captures the drama of citizen which, on the one part shall be required, obedience to a positive law sometimes unfairly, on the other part to fight for justice, for the rational law.

2.3. The juridical validity

The object of the legal concept of validity is represented by the legal validity. These two concepts, sociological and ethical of validity is not must always include in necessarily mode the hallmarks of other concepts of validity (are pure concepts), but if of the concept of legal validity, if a system of rules or one rule does not has a minimum of social efficiency those rules are not valid from legal point of view[110].

So, in necessarily mode, the concept of validity includes the elements that is the concept of social validity is spoke to about a positivist concept of legal validity. In case that also includes and elements of the concept of the ethical validity then we can speak about a non-positivistic concept of legal validity. In the absence of elements of concepts of social and moral validity can exist and a concept of legal validity in the narrow sense which is based on only specific characteristics of legal validity getting so the contrary character to moral and social concepts of validity. It can be exemplify the existence of such a rule valid of legal point of view when issued by a authoritarian law , in a particular mode which is in the accordance with the law. So you can see existence of two main problems of the legal concept of validity: one internal and one external.

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[107] *Idem*, p. 63.

[108] Kant apud Danisor Gheorghe in *Philosophy of law to Hegel*, Ramuri Publishing House, Craiova, 2001, p.137.

[109] Djuvara Mircea, *General Theory of Law. Right rational, sources and positive law*, All Beck Publishing House, Bucharest, 1999, p.503

[110] R.Alexy, op.cit., p.112.

The internal problem.

The internal problem leadings to the problem of realization of the basic rule the fact that requires as legal validators results directly from the legal definition of legal validity, internal problem that leads to the „the basic norm".

The basic rule is the most important instrument that is aimed at tackling the problem of circularity of rule in the definition of legal validity , circularity created from theory that a norm is valid if issued by a competent organ - the autoritarian law - in a specific manner determined this purpose and if is not infringe any senior law.

The basic rules are classified into three categories: *the analytical rules* - found of Hans Kelsen, *the normative rules* - found of Kant and *the empirical rules* - found of Hart.

2.3.1. The basic analytical rules.

A basic rule is a rule that justifies the value of all norms of a legal system, with the exception of his own values[111].

In his main book „The pure doctrine of the law", Kelsen[112] categorically rejects the natural law theory, the sociological theory of justice and the historical theory of law school. Kelsen's belief was that the theory of law must be pure, that be reject any political influence, moral, sociological or historical to be a theory „freed from any political ideology and all the elements of natural science, conscious of its own lawfulness of the object them and in this way conscious of its specific". The purpose pursued by the author in this book, on the theory of law, „was you develop tendencies directed not toward shaping the rules of law, but exclusively toward their knowledge, and as approach as possible the results of these tendencies to the ideal any science - objectivity and reliability".

The concept of foundation of Kelsen's normativism is that of validity in the sense that the validity of any rule of law is ensured systemic, depending on conformity with the superior rule of law. According to the author, theory of law remains pure, that is free from any interference from outside of science strictly legal. This means that the validity of legal norm does not depend on her efficacy or the act of will which gave her birth, but only about of the existing legal assembly building in a certain area and within a certain time. Kelsen's belief is that the law is a system that is based and develops itself as a perfectly logical deductible system. Kelsen is not as convincing when trying to demonstrate how the basic rule is based, the supreme rule: „search the ground for validity of a rule can not go on forever, as happens with the search for the cause of an effect. It should end up at a time that is supposed to be last, the supreme. As a supreme rule it must be supposed, because it can not be set by an authority whose competence should be based on another rule, and higher. Such a rule, assumed to be supreme, is called here the basic norm" [113].

The idea of the rules of basic gave birth to a great dispute in the theory of law, dispute that requires an extremely of vast base approach and which has as bases: necessity, possibility, content and status of the basic norm[114].

Through the basic norm Kelsen[115], states that if someone wants can interpret each rule in existing and efficacy as valid rule of the legal point of view without such to impose itself any the moral obligations.

For H. Kelsen the legal order is a edifice of multi-storey stacked. The edifice ends with a supreme rule which is the basis of all legal orders. Thus, to lowest level is the act of coercion exercised against those that violate the law, the validity its has as source the decision of the judge, the validity of the judge derives from competence (*the authority*) which was invested

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[111] R.Alexy, *op.cit.*, p.122
[112] Hans Kelsen, *The pure doctrine of the law*, Humanitas Publishing House, Bucharest, 2000, p. 5.
[113] *Idem,* p. 236.
[114] R.Alexy, *op.cit.*, p.125.
[115] *Idem*, p. 153.

by the laws of judicial organize. This law is based on special laws, which in the general laws and the general laws in the Constitution - the Constitution is the fundamental rule because it has not over is no a positive rule. H. Kelsen's doctrine is positivist in that it is prohibited to criticize the existing law in the name of different judgments of value.

2.3.2. The normative rules of the basis.

In opposed by Kelsen, in his philosophy about the law, Kant does not speak about a basic rule in a disctinctiv mode but about a rule which preceding the positive law, a rule which is part of the justification of the necessity of positive law, the necessity which is part from the tradition of social contract theories. The basic rules which Kant defines them as a natural law justify empowerment of authoritarian lawfulness to deliver with the consequence of their value justification. Kant's basic norm, if would not be limited, would says that you must we obey of the moral point of view to each rules to existing and efficiently which must be interpreted legal point of view whether it is desired or not this interpretation.

The external problem.

The external problem has in view the reports between the legal notion of validity of the law with the other two concepts of validity of law - the concept of social and of moral concept.

The first form of report is report with the ethical concept of validity which is found in the context of legal pozitivism.

The legal positivism is a theory of jurisprudence which holds that law is a social construct, something created by the people, by the society and refers to the existence of conventional rules of recognition which represent the sources of law and which establishing how the law is created, modified and canceled.

The legal positivism claims that are not necessary the moral criterias for the validity of laws, but as stated and Kenneth Einar Himmat[116], „leaves open the question whether it would be possible the moral criterias of validity". From this the legal positivism is divided into two currents, namely the legal positivism inclusive and exclusive legal positivism. The followers of first current claims that between law and moral are a link, not in the sense the moral principles should be the criterion of validity of laws, but in the sense a contingents connections. A concrete example of this theory would be that the individuals, to understand the law, can turn to the moral reasonings. The second theory, of the legal exclusive positivism claims that the moral principles do not have any connection with the validity of laws, that to understand the content of law the individuals do not need of the moral reasonings.

The legal positivism includes, in his view Himmat three theses: that of the law as the *social fact*, that of conventionality and that of separability. The first theory, that social theory refers to the fact that the right is a social construct, is something that depends on some social facts. The second sentence mentioned refers to the foundation conventionality of law, and the third sentence states that „the law and the moral are conceptually distincts"[117].

Because of the complexity of relations between the concept of legal validity and other concepts, of the social validity and of the moral validity, Robert Alexy[118] treats the extreme cases the so-called the collision of validity and their approach is very complex. These theories are based on the idea that what applies to a system of rules must not necessarily also apply to the individual norms.

In the collision between the legal validity and the social validity, condition that a system of the rules to be valid of legal point of view is that the rules of system in question are valid from social point of view. A rule that is effective and is part of a legal system in general, socially effective system, not only loses the legal validity just fact that the is not respected frequently

[116] Jules Coleman, Scott Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law,* Oxford: Oxford University Press, 2004, Kennteh Einer Himma, *Inclusive Legal Positivism*, p.125.
[117] *Idem,* p.130-135.
[118] R.Alexy, *op.cit.*, p.113-114.

and it is not very rarely sanctioned, because in the case of the individual rules the social efficiency does not condition of legal validity that this rule is already part of rules of law system social efficient. However, a rule is not completely without of social efficiency but also can be said in order to be legal valid a rule must have a minimum of social efficiency or even a „chance for social efficacy" [119].

In the collisions between the legal validity and the moral validity, a system of rules which does not, explicitly or implicitly pretense to fairness then it is a invalid juridical system of law. Based on the argument unfairness or injustice which apply to the individual rules within a system, the character of absence of legal validity is given if there is enough the individual rules that give for a system of legal rights.

Conclusions

This study wants to contribute to reconsider the practice from of elaboration of legal rules in the sense that should be considered the validity of norms in the social life because the individual rules shall cease to be legal validity or legitimacy only if they are unfair to extremely so have not even minimal the moral justification.

The role that has the social and moral validity of regard to the individual rules is the same structure and in the concept of legal validity, regarding such limiting cases by this is demonstrating that authoritative lawfulness in a social efficient system represent the dominant criterion validity of individual rules.

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[119] *Idem,* p. 116.

CONTRIBUTIONS TO THE EXECUTION OF LEGAL DATA BASES

Ştefan CIURESCU

Abstract

Legal data are the raw material for the execution of legal databases, the electronic component of a legal data base management system. The data preparation for recording is called data normalization and implies a certain experience not only in the legal field, but also in the execution of the relevant information system, so that the legal data base is in such a way structured as to fulfill the user's needs. Data normalization and the measurement of the degree in which data bases answer to the user's needs is the subject of this article.

1. INTRODUCTION

Each legal informatic system is provided with specific features and has a particular finality. The large range starting from the elaboration of documents, to the legal department, from discussions to conclusions or to defense in court, has its associated informatic documentary tools or traditional documents. The law, doctrine magazines, the collections of texts, the monographies are not conceived according to the same principles, but in documentary informatics the elements which make the difference among data bases are the technical options related to the adaptation of the electronic tool to the documentary material and the purpose of the data base. The data base structure is built on the reports requested by the user and the need of its integration into a unitary legal informatic system.

The indicators which determine the fidelity of the legal data base answer are:

a. The noise and the silence

The system pertinence depends on the selection of certain technical options and it is determined by quantifying the noise and the silence. The answer obtained from a data bank is **noisy** when it includes documents comprising concepts within the question statement, but without any relation to the subject. Such confusions are classical and belong to the legal informatics' folklore. Another effect is the **silence**, which means that no pertinent documents were obtained, even if they were listed in the documentary funds, but excluded from the enunciation of the problem or question.

b. The reliability unit of measure (coefficient of pertinence)

The pertinence coefficient of a data bank, K_{mz}, K_{ml} respectively, can be measured by means of certain average **noise** and **silence coefficients.**

K_{mz} is the ration between the number of pertinent documents and the total number of documents obtained during a research;

K_{ml} is the ratio between the number of the obtained pertinent documents and the total number of pertinent data included in data bank.

$$K_a = \frac{K_{mz}}{K_{ml}}$$

is the degree of adaptation of the documentary funds to the user's needs, coefficient defined through the ratio between the number of pertinent documents and the total number included in the data bank. This degree is relative and can be replaced by knowing *a priori* the structure of the documentary fund.

Legal advisors and computer experts search for the technical solutions which provide the maximum pertinence of a system. That means searching in the data base for specific interesting documents. The identification of such a document wouldn't be a problem if we knew that the researcher uses, in order to define his question, the word or logical phrase which is part of the document likely to bring him the hunted information.

This word should cover alone three types of expressions:

- the one of the concept searched by the user;
- the one of a computer selection criteria;
- the one of the wording performed by the document author.

We know what approximately is in the transit from concept to word and from a verb to writing. The used style issue naturally impels the writer to vary the expression forms of a unique concept. The figure of speech, the hyperbola, the paraphrase, the resort to images and sophisticated words, are frequently used in the elaboration of legal texts.

The designers of documentary systems established various solutions, even apparently conflicting: in certain circumstances, two leveled; some of them reach *a priori* the structure of the stored document, meanwhile others are interesting for the research program running.

2. PRIMARY DOCUMENTS' ANALYSIS METHODS

One can perform changes on the original documents, modifying its content so that it coincides with the other documents from the documentary collection. Choosing a certain analysis method, defining it, lead to many controverses in the beginning of the 1970s among the owners of legal informatic systems, which, through practical experiments and the informatic technology development, have been adjusted. Paradoxically, by the time the followers of **indexing**, of the **abstract** and of the **enrichment of the entire text** saw that their points of view were slightly related, the dispute restarted between those suggesting a prior treatment of primary documents and those challenging its utility.

2.1 Storing the rough text (full text)

The controversy restarted in France, in the 1980s, at the same time with the implementation of one of the American "LEXIS" systems, which require a single informatic base located in the United States, the most important worldwide legal data base both due to the number of stored data, and to the number of the connected terminals. The main feature of the system, in France like in the Great Britain and the U.S.A., is to store the legislative texts and the decisions of the Supreme Courts of Justice, in their original state, the rough state.

With all the reserves on this method, we acknowledge the economic efficiency improved by the absence of any intellectual added value, the advantage of a quick disclosure of data, and for the legal sector, the completeness.

If a legal advisor asks a legal informatic system on the **civil liability**, he will not obtain the basic text unless it was stored in its original form.

The full text storage of the regulatory document, under the data base in progress of elaboration, has the Official Journal as the unique source. For example, the Decisions of the Constitutional Court are stored in the data bases of the Constitutional Court Informatic System, representing according to the "black box" principle the output function transmitted to the Official Journal; the data base comprising the Decisions of the Constitutional Court is adjusted after their issuance in the Romanian Official Journal.

The programmers of the legal data banks, in their whole, turn to various prior analysis procedures, performed according to the results of the theory of systems, legal logics, law history, compared law and hypothesis, principles and concepts governing the legal branch which makes the data base object.

2.2 Indexing

The process of indexing is the first process used in the analysis of legal documents, applied ever since the period of the computer sorting procedures.

Indexing is the operation consisting in the coverage of document content through a small number of significant words or expressions, generally called **key-words**. Indexing is defined by a closed vocabulary and is slightly different from the alphabetic tables from law magazines. In order to work on an informatic system, indexing obeys to the following rules:

- having as unique function the identification, the basic expressions will be deprived of all syntactic appareil, the system intelligibility ordering for them to be adapted to a natural language content;

- they will be stabilized following a closed vocabulary, which is the only one acknowledged by the computer and accepted under a unique syntactic form, generally substantial.

Among its qualities, is the one to have been the first to use pre-informatic sorting instruments and thus to have established more sophisticated systems. If nowadays its use cannot be excluded from creating documentary folders with a reduced number of records, we, however, must observe that it is more difficult to use in the management of big documentary assemblies. The descriptions of data banks show that, even those which had been created according to such principle, have significantly evolved through access to information. The imperfections of pure indexing are currently inventorized:

a) the interfference of a third on the original text;

b) the limited vocabulary of the analyst which may, at the same time, generate ambiguities or opposite meanings born from the need to include each document in a rigid ranking;

c) the limitation *a priori* of the indexing vocabulary forbids the researcher to turn to multiple access ways and especially to the descriptive notions of such fact. Impelled to only use the access ways acknowledged by the system, the researcher is practically forced to check their availability in a list for each question;

d) the grammatical and syntactic solution of the sorting appareil brings along hardly ignorable errors;

e) they remove any possibility to introduce important identification nuances, considering the negation, total or partial, or the relation subject-object translated through the word order and the phrase grammatical structure;

f) the dull system will take into consideration the nuance expressed in an original text through words like: OBLIGATIONS INCOMPLETELY FULFILLED.

2.3 The enriched or explicit unabridged text

Considering the imperfections of indexing, the promoters of certain systems have thought about turning towards the **management of the unabridged text**; it is important to make the difference between the rough unabridged text and the enriched unabridged text. The fundamental idea sustaining this last method consists in making the researcher benefit from the access to the primary document, limiting or even bearing the risks of its ambiguity.

The preparation work within such a system is relatively reduced compared to indexing, since the analyst is not concerned to solve ambiguities in the content of the document under analysis, not being forced to recompose the complete content or the general sense. This operation is called **expliciting** and consists in including the clear content of notions in the primary text, observing the rules generally valid for the basic assembly. This systematic information of each document can furtherly be completed through enchainment so

as to be related to other texts: application, abbrogation for legislative or regulatory sources, confirmation or confutation, cassation or remit, for jurisprudence.

Within the text, the most easily explicitable access ways are the following:

- the category umbrella terms often lack from the original text;
- the formal explanations will solve the occasional and style ambiguities; the pronouns will be mentioned by repeating the replacing term.

This method can be considered pertinent, since it allows a very smooth investigation degree, including all the concepts treated within the text. It takes into consideration the syntactic relation between words inside the phrase and provides immediate and complete information of the researcher.

Meanwhile the expliciting analysis is considered less dull and eventually more objective than indexing, the volume of treated texts has control problems, the solutions of which involve the availability of modern informatic tools.

2.4 The abstract method

The informatic treatment of legal sources generated a methodological reflection which was not that clearly formalized in any other documentary field. This leads to the establishment of an original method of content analysis and especially of law praetorian source treatment. Such method is based on two hypotheses: (i) knowledge of basic jurisprudence, which is requisite to the legal advisor; (ii) no informatic system is provided with storage capacities able to record phenomenal volumes of texts that jurisprudence represent. This procedure intends to surpass the inconveniences of indexing and closed vocabulary. Thus, it also approaches the methods of the free unabridged text, but limits the derivations through an *a priori* control of the open language and balances out the inconveniences through a reorganization of the information under the law sources.

The difference of the legal document finality brings along new differences in the form: the articulation of end speeches does not obey to any unique pattern, but, on the contrary, it is built in a very supple context, available for any judge.

Finally, the influence of the arguments in the conclusions, their presentation, and the discussions on the reality of the actual circumstances of the case, contribute to the significant increase of the semantic reach and variety.

Compared to such texts, the abstract represents a more compelling content analysis method, which provides the integration in the stored documents of all the useful information in its ordered, concise and precise form. In this sense, the analyst reviews the useful information, the used legal concepts and the sense of decision. Further, he looks for the most judicious expression of such informative elements, a delicate search during which he must consider the vocabulary fidelity and standardization according to the methods used for all the field abstracts. In this matter, he gets support, in sufficiently repetitive materials, from the analysis structures, prefab models for each case, when the free vocabulary regains its rights. The analyst will order the concepts thus, generally, expressed by the classical method of the law towards the fact or of the general towards the particular.

Within such type of system, the abstract not only provides the identification of the pertinent argument, but it also provides the user's information. When the identification will be accomplished through a simple judicious juxtaposition of the key-words, the abstract intelligibility will be obtained through the logical ranking of concepts and the preservation of a certain number of significant terms. Advantages:

- the first is the easiness to learn the data bank by the neophyte user. Before being trained to read abstracts, he will come across texts similar to the ones he was used to;
- the analyst will find during the abstract elaboration an outport to introduce the useful informatic elements that are forbidden to be included in the abstract by the abstract method.

Actually, each of the described systems has advantages and disadvantages. We discover that, in time, methods have evolved in terms of similarities. Pure indexing does no longer exist; the solutions of the explicit unabridged text integrate abstracts in their documentation. The abstracts have been enriched with longer and better structured phrases and with a natural language.

But the analysis method is not enough to describe a documentary research system, because for all the systems really operating, the performance improvement was intended and a remedy for the weaknesses of the respective method within the addition of other semantic instruments.

3. SEMANTIC INSTRUMENTS

3.1 The inquiry software

To be competitive, an inquiry software must contain a certain number of functions, which should exceed the pure and simple acknowledgement.

What is essential, is rather the management of the gap between the known words and less the solution of the linguistic problems.

3.2 The boolean search

The boolean combination of search words, as I presented it, is performed by the computer, in absence of more precise instructions, within the documentary unit. It can be reduced to a few words in one system through indication, but it will be much longer in an anaysis through abstract or in an unabridged text. Therefore, we can ask ourselves on the pertinence of an answer in which the combined descriptors are located very far one from the other.

3.3 The adjacency

The described notion of juxtaposition, of two or several words, can transform their sense or, often, intensify or specialize it. For example, "donation between spouses" clearly means a legal institution whose sense is totally different from an expression like "donation by frauding the spouse's right". Or "work accident" will define the legal regime of a deed which will be expressed through "accident during work" or "during working hours".

It is fundamental for a researcher to be able to ask to a system in a free language the immediate proximity of two words. For this, the softwares generally propose one of the following methods: either the compound expressions will be pre-determined and introduced in the vocabulary as unique terms, or the system will have to accept an adjacency operator. In the last case, the operator will have to mention the maximum gap, which is the number of words tolerated between the two researched terms.

3.4 The proximity operators

For example, in terms of child tutelage, we perform a research on the consequencies that the judges impute to the fact that the tutor or the applicant lives in concubinage; the problem will be expressed as follows: *tutelage or concubinage?*

We will quickly observe that the answer is noisy; divorce-related decisions appear, for which the judges retain the concubinage as the cause of divorce and furtherly make statements, without relation to the first deed, on the tutelage. In order to remove such documents, we can use a proximity operator for which we will establish the intuitive manner gap of 10, 15, 20 words. It is obvious that such method decreases the noise. Safer is the abstract method, which forces the analyst to carve the document in as many paragraphs as different law problems he's treating. Right within the paragraph, the phrase is understood as a group of words framed by two separating signs, which define a more reduced sub-assembly of words necessary for the expression of a single concept. But this carving in proximity areas has no sense, unless the computer takes into consideration such areas and the inquiry language contains the gap restriction operators which strictly correspond to the structure of the

documents in line. We note the importance of the perfect adaptation of the research software to the nature of the documents in line.

3.5 Learning the linguistic imprecision

Learning the semantic problems is the most difficult for the problems to be solved. The computer does not assimilate the equivalent forms of the expressions in the language variation conditions, even if they are grammatical or syntactic variations (singular, plural, gender, verbal forms) or semantic variations. Reverse to the indexing process, where the research vocabulary is more closed and forces the users to switch to an exclusive form of expression, the other system with an open vocabulary must include informatics procedures able to give rise to the equivalence notion. These procedures are more or less delicate.

4. INFORMATIC PROCEDURES FOR SOLVING THE LINGUISTIC IMPRECISIONS

4.1 Truncation

The simplest solution tends to solve only the grammatical approximations and does not manage to do it perfectly. Its principle is to make the computer recognise a truncated expression, a radical, giving the instruction to add to these all the existing termination in the database. For example: RESPONSIB will call: responsible, responsible, responsibility, responsibilities.

In such a system, in general, the researcher is the one who sets the truck and can choose to have attached only a termination with a fix length or to call all the existing terminations, no matter their length. The first option has as an object, in general, the identification of the singular and plural. The calling of an undefined termination is wider, but does not allow the direct distinction of the terms whose radical does not ensure an equivalence of the meaning. Independent of the approximations caused by the search of a radical, such a system ignores the semantic derivations, keeping the existence of the roots of diverse origin, especially Greek and Latin. For example: blood, bloodie... and hematic, hemoragic...

Generally speaking, he is incapable to assimilate the synonymous terms. However, these days the main equivalent interrogative programs have headed toward this solution. There are better solutions, but they haven't been developed yet, only on systems meant for managing only one database.

4.2 An "automated lexicon"

Another solution has been found through the organization of the *priori* of the vocabulary in the lexicon file. We remember that it is part of the 3 files necessary for the functioning of a research program. In the lexicon file, all the words recognized by the system will be registered with the help of a number, this number taking afterwards, the place of the chain of characters in the research process of a reversed file. So, it is enough, to affect the same number for two notions and the computer will totally amalgamate them. So, all the alphanumerical forms will be treated and the system must foresee a procedure of putting into light, which allows the inclusion of some new notions in a document either under an existing number, if it owns an already known equivalent, either under a new number.

This system has singular advantages compared to the truncation procedure. It gives rise to equivalent grammatical forms, but also to some linguistic synonyms and in general, to all the possible assimilations. So we will be able to write the number in its literary form or in its digit form. We will be able to find the institutions based on their logo or based on their truncated expression: RCC- Romanian Constitutional Court.

A minimal development of this procedure allows the considerable "strengthening" of the management of the intellectual construction of the sematic approaches. It consists of the

regrouping of the notions numbered of the lexicon in sub-assemblies often named “families”. The operator will be able to:

- call the precise term and obtain only the absolute equivalents of this term;
- call with the help of a simple command, named “generalization operator”, all the terms included in the family of the used word, meaning all the analogies.

This function is fundamental, allowing, for example the rational creation of some prefixes especially based on the juridical terms. In certain cases, it will be necessary to collect exclusively documents which offer one of the alternative binary solutions, which constitutes the posed problem.

On of the main advantages of lexicon defined as such is the consent of an intellectual construction of linguistic treatment and the correction of such inevitable aberration infiltrated by a strictly automated system. It allows the tones and the inherent difficulties of this treatment to be taken into account. So, the semantic halo can be more or less defined based on the importance the term considered in the juridical database caries; the right terms will be strictly separated, and the descriptive terms will be assimilated.

Example: *automobile, truck, van* will be, on demand, assimilated in an ensemble which covers the terrestrial vehicles.

Certainly, no system will solve the ambiguity which comes from “action”, but the strict isolation of such a term in the middle of the lexicon will limit this polysemy (act, action, active) to strictly irreducible cases. As it is written, an automated lexicon is often assimilated to an automated thesaurus.

4.3 The thesaurus of the connection file

The thesaurus represents the connection file, which, besides the key-words, includes a network of connections, exclusions, differences, kinships, analogies, with references to the vocabulary, syntax and the style of the memorized documents. It sets through connections the lists of synonyms to the descriptors, also sets the differences which are imposed regarding the polysemic and homograph words.

The thesaurus includes the terms of a higher level to the descriptors, it makes analogies and sets the differences between the different terminological acceptances which result from the order of the terms or of the prepositions which unite them; regarding the style, it must recognize the figurative style, which most of the times, does not contain the corresponding institutional terms, eliminating the parasitical or incidental terms.

In a documentary system, this term (thesaurus) represents the repertory of connections or existing relations between the articles which compose the documentary funds.

The many instruments meant to help the interrogation come into this definition. So, for example, it is named “thesaurus” the organization of the concatenation of legislative texts introduced in the memory. With the same name will be named the dictionary which reviews all the words which express a given concept and which must necessarily be consulted by the user, to know the key-word of the indexing authorised by the system.

As far as we are concerned we prefer to assign a term to an instrument made to help the complementary interrogation of the analysis method and of the automatic lexicon.

The standardization of *the priori* of the analysis vocabulary when it is made, the management of the semantic analogies obtained through a lexicon corrects this weakness in all the cases when the assimilation of the descriptive terms of the evoked concept can be semantic. In most of the cases, the analogy is nothing more than occasional and aggravating circumstance, the researcher, preoccupied by his problems, not only will not see all the possible expressions, but also will not realize the possible semantic deviations of the word he is using.

So, the thesaurus is meant to suggest to the researcher an ensemble of formulations useful in a research and to prevent him regarding the risks of shortfalls. He will not have a

direct or automated action on the search procedure, because the jurist will be free to introduce or not suggestions in his interrogation strategy. He will be very clearly distinguished in the automated lexicon, because it will be conceived as a memory help in the form of: "think of...".

For example we can't ask the computer to automatically tie the word: "rules" to any other term. We can remind the jurist that this term can be replaced or combined (through the operator "or") according to the necessities and alternatively with: REGULATION etc.

The establishment of an exhaustive list of these analogical reports represents a considerable intellectual investment, which explains the number of actual achievements in this domain. It necessarily implies a strict determination of the retained analogy degree. Limited to term whose juridical connotation is sure, it represents the review of thousands of relations:

- of analogy and perfect synonymy :

UNFORSEEABLE CIRCUMSTANCES FORCE MAJEURE
TERMINATION ANNULEMENT

- conceptual analogy:

LICENCING TERMINATION OF LABOUR CONTRACT

- ofantonymy:

RECEIVABLES LIABILITIES

- occasional joining:

IN THE ABSENCE OF... LACKING OF...

We can't imagine that it includes the terms; its construction would become a complete rewrite of the documentary body.

Whichever the thought of perfection which a documentary system has reached, this leaves rooms for imaginations and creation.

5. CONCLUSIONS

1. It becomes obvious that the linguistics occupies a fundamental role in the constitution of the juridical databases. The reseach on the juridical synonymy and polysemy are developing at the same time with the creation of the abstract, of the rating concept or revealing fact, of the species, which in its intelectual approach which resumes the „funnel principle" and which includes a series of descriptors ordered from the broadest sense to the most precise sense. That, cuppled with a thesaurus and/or with a lexic which authorises a lingvistic purification through the integration of lexical fields, semantic and morphological derived bonds of the words (or alotaxic variables- the treatment through the computer of the alotaxic variables), allows to be operated a more fine approach of a juridical problem through a question addressed to the database.

2. Precisely this coherence, these fine bonds between juridical concepts, between fact and law, will create the substance of the true formalization of a system. Because it can't be defined, because of its multiple character , it is proper that we take away not the universal representation, but a representation of the law. We rationalize in choosing terms, regarding the explored domain and the assimilation and understanding methods of this domain. Any representation includes a degree of partialism which we can reduce by calling the common reason, meaning by adopting the recognised solution by the highest number of interested persons.

3. The informatics will be recognised bit by bit as an object which can't be separated from the juridical. Each branch of the law, each laboratory interested in this challenge will try to develop its own juridical aplications through the use of informatic instruments.

4. At the same time with the databases, the researches are done with the scope of developing support for learning the law, meaning computer assisted teaching programs. These instruments are additional to teaching and learning law.

5. Another face of the juridical informatics regards the support systems for making a decission or expert systems, in which the first inovations have been felt in the banking system.

6. The juridical sociology will also benefit from the development of the juridical informatics. The jurists which are interested in this instrument which has been born and it is imperfect, named the calculator, have used it to make sociological researches or cantitative reseaches on the texts already introduced in memory. Just these new researches, with intimate statistical vocation imposible to do before, are the ones which have allowed to spread some light on the imperfections and paradoxes of the juridical system and have contributed to the recalling into discussion, the review of the traditional vision on the law.

7. As we have found, the forms of the juridical representation are diverse, but they operate in a universe of constraints. The contraints are at the same time internal, as we must make structural choices, and external, taking into consideration that around the juridical informatics come other disciplines which influence its development significantly. We think about disciplines such as copyright or the recent right of information, the juridical status of the knowledge[1] or broader domains, juridical cybernetics, juridical logic or game theory.

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INTERESUL PUBLIC, CONDIŢIE DE ACCES LA INSTANŢA DE JUDECATĂ CONFORM ART 8 DIN LEGEA NR. 554/2004 A CONTENCIOSULUI ADMINISTRATIV. ANALIZĂ DIN PERSPECTIVA ART. 6 DIN CONVENŢIA EUROPEANĂ A DREPTURILOR OMULUI SI ART. 52 DIN CONSTITUŢIA ROMÂNIEI

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Abstract

Având în vedere reglementarea distinctă a accesului la justiţie pentru persoanele care invocă un interes public, faţă de persoanele care invocă un interes privat lucrarea îşi propune să răspundă la următoarele întrebări: În ce măsură condiţiile impuse pentru contestarea actului administrativ ca urmare a încălcării interesului public nu reprezintă o limitare a dreptului de a sesiza instanţele de judecată? Prevederile art. 8 din Legea nr. 554/2004 a contenciosului administrativ respectă dispoziţiile art. 6 din Convenţia Europeană a Drepturilor Omului? Mijloacele de protecţie a interesului public, reglementate prin art. 8 alin. 11 din Legea nr. 554/2004 sunt cu adevărat eficiente şi îşi ating scopul sau este necesară o regândire a acestora astfel încât să nu creeze numai aparenţa existenţei posibilităţii de contestare a actelor care încalcă interesul public? Răspunsurile la toate aceste întrebări provin din analiza atât a dispoziţiilor normative interne şi comunitare cât şi a jurisprudenţei instanţelor de judecată şi Curţii Constituţionale. Totodată, se doreşte clarificarea obiectului acţiunii judiciare formulată în materia contenciosului administrativ. Sunt urmărite în principal corespondenţele dispoziţiilor art. 8 din Legea nr. 554/2004 a contenciosului administrativ cu cele ale art. 6 din Convenţia Europeană a Drepturilor Omului şi art. 52 din Constituţia României.

Aparent Legea nr. 554/2004 a contenciosului administrativ dă posibilitatea oricărei persoane vătămate într-un drept sau într-un interes legitim, indiferent dacă este interes privat sau interes public, să se adreseze instanţei de judecată. Aceasta este interpretarea care rezultă din prevederile art. 1 alin. 1 din actul normativ menţionat.[121] Totodată, alin. 2 precizează că "se poate adresa instanţei de contencios administrativ şi persoana vătămată într-un drept al său sau într-un interes legitim printr-un act administrativ cu caracter individual, adresat altui subiect de drept."

Coroborând aceste dispoziţii observăm că o persoană poate sesiza instanţa de judecată, chiar şi atunci când a fost vătămată printr-un act administrativ cu caracter individual adresat altui subiect de drept, dacă este lezat un drept al său sau un interes legitim, spunem noi, public sau privat, în lipsa unei specificări exprese a categoriei acestuia, făcută de către legiuitor.

Legea nr. 554/2004 a contenciosului administrativ stabileşte astfel subiectele de sezină dar şi obiectul contestaţiilor care pot fi formulate, respectiv vătămarea interesului privat sau public al persoanei atât printr-un act administrativ individual sau normativ adresat

[120] Beneficiary of the „Doctoral Scholarships for a Sustainable Society" project, co-financed by the European Union through the European Social Fund, Sectoral Operational Programme Human Resources and Development 2007-2013".

121 "Orice persoană care se consideră vătămată într-un drept al său ori într-un interes legitim, de către o autoritate publică, printr-un act administrativ sau prin nesoluţionarea în termenul legal a unei cereri, se poate adresa instanţei de contencios administrativ competente, pentru anularea actului, recunoaşterea dreptului pretins sau a interesului legitim şi repararea pagubei ce i-a fost cauzată. Interesul legitim poate fi atât privat, cât şi public."

direct (art.1 alin. 1), cât şi printr-un act administrativ individual adresat unei alte persoane (art.1 alin. 2).

Pentru înţelegerea prevederilor legale trebuie să avem în vedere şi semnificaţia dată **interesului legitim privat**, reprezentând posibilitatea de a pretinde o anumită conduită, în considerarea realizării unui drept subiectiv viitor şi previzibil, prefigurat.

Mai complexă este sfera **interesului legitim public**. Definiţia dată prin Legea nr. 554/2004 a contenciosului administrativ, cuprinde sintagme a căror înţelegere necesită căutări suplimentare, nefiind clarificate prin acelaşi act normativ. Interesul public vizează ordinea de drept şi democraţia constituţională, garantarea drepturilor, libertăţilor şi îndatoririlor fundamentale ale cetăţenilor, satisfacerea nevoilor comunitare, realizarea competenţei autorităţilor publice. Interesul legitim public include valori care stau la baza statului de drept şi tocmai această particularitate îi dă importanţă şi face să fie necesară stabilirea unor măsuri suplimentare de protecţie printr-o legislaţie adecvată. Interesul public presupune preocuparea, importanţa pe care o are pentru societate respectarea valorilor prevăzute în Constituţie, în alte acte normative interne şi în actele Uniunii Europene. [122]

Analizând în continuare dispoziţiile Legii nr. 554/2004 a contenciosului administrativ observăm însă că art. 8 al acesteia limitează obiectul acţiunii judiciare, spre deosebire de art.1, anterior enunţat, şi impune implicit restricţii subiectelor active ale acţiunii[123]. Astfel, articolul 8 din Legea nr. 554/2004 cuprinde mai multe teze cu privire la obiectul cererilor formulate în temeiul legii contenciosului administrativ:

- O primă teză este regăsită în alin. 1 al art. 8, conform căruia **poate sesiza instanţa de contencios administrativ persoana vătămată într-un drept recunoscut de lege sau într-un interes legitim printr-un act administrativ individual,** prin nesoluţionarea la termen,

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[122] Un prim principiu care se regăseşte în noţiunea de interes legitim public este "ordinea de drept". Cuvântul "ordine" ne duce cu gândul la organizare, la reguli, la stabilitate. Reprezintă ordinea stabilită prin lege, incluzând şi ordinea publică şi referindu-se atât la cetăţeni cât şi la instituţiile statului, la organizarea acestora conform legii. Presupune respectarea reglementărilor care organizează societatea, atât de către cetăţeni cât şi de către instituţiile statului.

"Democraţia constituţională ", principiu regăsit în art 1 alin. 3 din Constituţie, România fiind stat democratic, presupune exercitarea puterii de către popor în limitele şi condiţiile prevăzute de Constituţie. Se consideră că democraţia implică: limitarea libertăţii, societatea impunând legea majorităţii, participarea subiecţilor la formarea ordinii juridice, egalitatea participării şi un pluralism al participării, prin exprimarea voinţei unor categorii diferite de cetăţeni. (Dan Claudiu Danisor, Constituţia României comentată, Ed. Universul Juridic, 2009 p.44,45)

"Drepturile, libertăţile si îndatoririle fundamentale ale cetăţenilor" sunt cele prevazute în capitolele II şi III din Constituţie. "Satisfacerea nevoilor comunitare" se referă la drepturile şi obligaţiile asumate de statul roman ca membru al Uniunii Europene. "Realizarea competenţei autorităţilor publice" se referă la îndeplinirea atribuţiilor stabilite de Constituţie şi de legile care conferă autorităţilor administrative drepturi şi obligaţii în realizarea puterii publice. Competenţa autorităţilor publice reprezintă "ansamblul activităţilor desfăşurate de autorităţile administrative de stat, cele autonome locale, asociaţii de dezvoltare intercomunitară şi organisme prestatoare de servicii publice şi de utilitate publică de interes local sau judeţean, prin care, în regim de putere publică, se execută legea, în sens material, concret sau prin emiterea de acte normative cu forţă juridică inferioară legii sau se prestează servicii publice (Verginia Vedinas, Drept administrativ, Ed. Universul Juridic 2009, p. 30)

[123] . "(1) Persoana vătămată într-un drept recunoscut de lege sau într-un interes legitim printr-un act administrativ unilateral, nemulţumită de răspunsul primit la plângerea prealabilă sau care nu a primit niciun răspuns în termenul prevăzut la art. 2 alin. (1) lit. h), poate sesiza instanţa de contencios administrativ competentă, pentru a solicita anularea în tot sau în parte a actului, repararea pagubei cauzate şi, eventual, reparaţii pentru daune morale. De asemenea, se poate adresa instanţei de contencios administrativ şi cel care se consideră vătămat într-un drept sau interes legitim al său prin nesoluţionarea în termen sau prin refuzul nejustificat de soluţionare a unei cereri, precum şi prin refuzul de efectuare a unei anumite operaţiuni administrative necesare pentru exercitarea sau protejarea dreptului sau interesului legitim.

(1^1) Persoanele fizice şi persoanele juridice de drept privat pot formula capete de cerere prin care invocă apărarea unui interes legitim public **numai în subsidiar, în măsura în care vătămarea interesului legitim public decurge logic din încălcarea dreptului subiectiv sau a interesului legitim privat."**

prin refuzul nejustificat de soluţionare a unei cereri, prin refuzul de soluţionare a unei anumite operaţiuni administrative. **Această primă teză se referă de fapt la persoana vătămată într-un interes legitim privat.**

- Cea de-a doua teză, este prevăzută de art. 8 alin. 1^1, conform căruia **persoanele fizice şi juridice pot formula capete de cerere, prin care invocă apărarea unui interes legitim public**. Condiţia pentru aceste cereri este ca vătămarea **interesului legitim public să decurgă din încălcarea dreptului subiectiv sau a interesului legitim privat.**

Diferenţa dintre categoriile de persoane prevăzute de art. 8 si art. 1, apare în privinţa celor care pot invoca incălcarea interesului public. Constatăm că o persoană poate formula acţiune în contencios administrativ pentru încălcarea unui interes public, numai dacă aceasta rezultă din încălcarea unui drept subiectiv sau a interesului legitim privat. Astfel, art. 8 vine în completarea art. 1 limitând categoria persoanelor care au calitatea de subiecte active.

Faţă de aceste prevederi acţiunile în care o persoană se consideră vătămată prin încălcarea unui interes legitim public trebuie să întrunească următoarele condiţii:

- să fie încălcat un drept individual sau un interes legitim privat, iar această vătămare să fie obiectul principal al acţiunii,
- încălcarea dreptului individual sau interesului legitim privat să aibă drept consecinţă vătămarea interesului legitim public.

Consecinţa acestor condiţii este faptul că nici o persoană nu poate invoca în mod direct apărarea unui interes legitim public, dacă nu i s-a încălcat totodată şi un drept sau un interes individual. Ajungem astfel la situaţia în care încălcări grave ale ordinii de drept nu sunt sancţionate. Situaţii de încălcare a interesului legitim public, frecvent invocate de persoane care nu au putut demonstra un drept sau interes privat şi respinse de instanţele de judecată pentru lipsa de interes a subiectelor active au fost: cereri având ca obiect anularea unor autorizaţii de construire emise cu încălcarea dispoziţiilor legale, formulate de persoane care nu sunt titulari ai autorizaţiilor ci doar simpli locuitori ai zonelor pentru care acestea au fost eliberate; acţiuni având ca obiect anularea ordinului prin care se reorganizează instituţii publice formulate de angajaţii acestora, acţiuni având ca obiect anularea planurilor urbanistice zonale, realizate în mod ilegal prin nesocotirea dispoziţiilor legale cu privire la protejarea monumentelor istorice; acţiuni având ca obiect anularea hotărârilor consiliului local privind trecerea unor bunuri din domeniul privat în domeniul public, respinse ca fiind formulate de persoane fără interes, etc. Nu se poate spune că acestea sunt cazuri care convin societăţii şi că nu există cetăţeni care au impulsul de a le înlătura, astfel încât să fie respectată legea, însă apar situaţii în care interesul public nu este apărat iar persoanele nu a nici un mijloc pentru a interveni, atunci când Ministerul Public şi Avocatul Poporului, singurele instituţii care au competenţa, nu înţeleg să sesizeze instanţele de contencios administrativ.

Având în vedere valorile pe care le include noţiunea de interes legitim public, esenţiale pentru funcţionarea statului de drept, posibilitatea de a atrage atenţia asupra încălcării lui şi de a cere repararea vătămărilor aduse, ar trebui acordată fiecărei persoane prejudiciate.

Totuşi, legea limitează acest drept numai la categoria persoanelor care suferă în principal o vătămare rezultată din încălcarea unui drept individual sau interes individual, dacă aceasta are ca efect vătămarea interesului legitim public.

• Un prim aspect asupra căruia ne oprim atenţia, este acela al regăsirii în practica instanţelor de contencios administrativ a situaţiilor în care "vătămarea interesului legitim public decurge logic din încălcarea dreptului subiectiv sau a interesului legitim privat", astfel de cazuri fiind aproape inexistente. De altfel, este greu de imaginat o posibilă situaţie care să întrunească condiţia menţionată, majoritatea cazurilor la care ne

putem gândi fiind inverse celor prevăzute de lege, din încălcarea unui interes legitim public rezultând încălcarea interesului legitim privat.

Este importantă o astfel de analiză pentru a vedea în ce măsură reglementările art. 8 alin. 1^1 din Legea nr. 554/2004 sunt cu adevărat eficiente şi îşi ating scopul. În practică, majoritatea cauzelor soluţionate favorabil au ca obiect încălcarea unui interes legitim privat şi chiar dacă apar situaţii de natura a duce în subsidiar la încălcarea interesului public, cererea persoanei vătămate se rezumă la realizarea propriului său drept sau interes, fără a mai invoca şi interesul public.

Lipsa situaţiilor sociale care ar trebui să facă obiectul reglementărilor art. 8 alin. 11 duce la concluzia ineficienţei şi inutilităţii acestei reglementări, care cât timp nu îşi găseşte aplicabilitatea în practica instanţelor de judecată, are doar un caracter pur formal. Nu rezultă necesitatea unei astfel de prevederi, ea nefiind susţinută de raporturile concrete dintre administraţie şi cei administraţi întrucât în relaţiile dintre cele două părţi nu apar situaţii în care în subsidiar din vătămarea interesului privat să rezulte vătămarea unui interes public.

Luând în considerare jurisprudenţa instanţelor de judecată mai pregnantă apare necesitatea de a acorda dreptul de invocare a interesului legitim public, ca cerere principală, celor care consideră că au suferit un prejudiciu direct din încălcarea acestuia, şi nu doar în subsidiar în măsura în care le este încălcat un drept individiual sau un interes privat. Această reglementare presupune însă modificarea dispoziţiilor art. 8 din Legea nr. 554/2004, astfel încât ele să corespundă realităţilor sociale.

Lipsa de eficienţă a art. 8 din Legea nr. 554/2004 a contenciosului administrativ şi limitarea acţiunilor care au ca obiect apărarea interesului public numai la cele care respectă condiţiile prevăzute în alin. 1^1, duc la concluzia că legiuitorul a creat numai aparenţa respectării art. 52 din Constituţie, în fapt neexistând mijloace pentru apărarea interesului public în relaţia cu aparatul administrativ.

Articolul 8 alin. 1 ind. 1 din Legea nr. 554/2004 a contenciosului administrativ ar trebui să fie expresia dispoziţiilor Constituţionale care dau posibilitatea persoanei vătămate într-un drept sau interes legitim, indiferent dacă este interes privat sau public, să obţină recunoaşterea dreptului pretins sau a interesului legitim, anularea actului şi repararea pagubei. (art. 52 alin.1) **Este drept că alin. 2 al art. 52 prevede posibilitatea stabilirii prin lege organică a condiţiilor şi limitelor exercitării acestui drept însă, fiind atât de limitate cazurile persoanelor care pot invoca interesul public, apare întrebarea în ce măsura actuala formă a Legii nr. 554/2004 a contenciosului administrativ, respectă într-adevar prevederile Constituţiei?**

Ceea ce ar trebui să primeze în formularea răspunsului la această întrebare este posibilitatea de realizare a scopului prevederilor Constituţionale, respectiv prevederea prin legea organică (Legea nr. 554/2004) a unor mijloace suficiente pentru protejarea dreptului sau interesului persoanei vatamate prin actul administrativ. Ori în privinţa posibilităţii de invocare a vătămării interesului legitim public, nu putem constata decât o reglementare distinctă faţă de cea care permite invocarea interesului legitim privat care duce la o limitarea a categoriei persoanelor cu drept de formulare a acţiunilor în contencios administrativ. Ar mai trebui analizat în ce măsură această limitare este excesivă, făcând practic imposibilă invocarea vătămării interesului legitim public în faţa instanţelor de contencios administrativ, pentru că ajungerea într-o astfel de situaţie duce la concluzia insuficienţei mijloacelor de realizare a dreptului sau interesului legitim public şi implicit la încălcarea drepturilor persoanei vătămate de autoritatea publica şi a art. 52 din Constituţie.

• O altă problemă apărută în aplicarea art. 8 din Legea nr. 554/2004 a contenciosului administrativ se referă la corespondenţa acestuia cu prevederile art. 6 din Convenţia Europeană a Drepturilor Omului. Este important de apreciat în ce măsură condiţiile

impuse pentru apărarea interesului legitim public nu constituie o îngrădire a însuşi dreptului de acces la justiţie.

Conform prevederilor art. 6 din Convenţia Europeană a Drepturilor Omului "Orice persoană are dreptul la judecarea cauzei sale în mod echitabil, public şi în termen rezonabil, de către o instanţă independentă şi imparţială, instituită de lege, care va hotărî fie asupra încălcării drepturilor şi obligaţiilor sale cu caracter civil, fie asupra temeiniciei oricărei acuzaţii penale îndreptate împotriva sa.". Chiar dacă aparent această dispoziţie reglementează dreptul la un proces echitabil, doctrina în materie şi jurisprudenţa Curţii Europene a Drepturilor Omului au statuat că art. 6 prevede în primul rând dreptul oricărei persoane de acces la instanţa de judecată, de a solicita recunoaşterea drepurilor şi intereselor sale adresându-se instanţelor de judecată, pentru că numai ulterior exercitării acestui drept fundamental se poate analiza în ce măsură un proces s-a desfăşurat în mod echitabil. Exercitarea accesului la justiţie presupune tocmai asigurarea accesului oricărei persoane la un tribunal instituit de lege, adică garantarea unei proceduri judiciare în faţa căreia să se poată realiza, efectiv, acest drept.

De altfel, dreptul de acces la instanţă este garantat şi prin art. 21 din Constituţia României, aceasta cuprinzând "dreptul de acces liber la justiţie."[124], prin urmare **un drept recunoscut tuturor cetăţenilor, fără nici o restricţie**, astfel cum ar fi trebui reglementat şi dreptul de a invoca în faţa instanţelor un interes legitim public, întrucât dispoziţiile Constituţionale nu fac nici o distincţie între categoriile de drepturi a căror recunoaştere poate fi solicitată puterii judecătoreşti. **Chiar dacă art. 52 din Constituţie dă posibilitatea reglementării prin lege organică a condiţiilor şi limitelor exercitării drepturilor persoanei vătămate de o autoritate publică, nu dă şi posibilitatea limitării posibilităţii persoanei vătămate prin încălcarea unui interes legitim public de a se adresa instanţei de judecată, întrucât acest drept este garantat numai de către art. 21, care nu prevede nici o excepţie.** Prin urmare, stabilirea condiţiilor şi limitelor exercitării drepturilor persoanei vătămate în relaţia cu autoritatea publică nu înseamnă împiedicarea recunoaşterii drepturilor persoanei ci doar stabilirea condiţiilor şi limitelor în care poate beneficia de drepturile sale şi obţine satisfacerea intereselor sale. Stabilirea condiţiilor şi limitelor exercitării drepturilor şi intereselor persoanei, reprezintă etapa de după sesizare instanţei de judecată, aceasta din urmă, după investire, verificând dacă autoritatea publică a respectat limitele şi condiţiile în care cetăţeanul işi exercită drepturile.

Exigenţele art. 6 parag. 1 din Convenţia Europeană a Drepturilor Omului, astfel cum a fost interpretată în jurisprudenţa europeană, cer întrunirea anumitor condiţii pentru a putea fi limitat dreptul de acces la instanţa de judecată. Aceste condiţii trebuiau respectate şi de textul art. 8 din Legea nr. 554/2004 a contenciosului administrativ, pentru a putea fi restrâns în mod legitim dreptul de invocare a interesului legitim public în faţa instanţei de judecată.

- O primă condiţie este ca limitarea accesului la justiţie să urmărească un scop legitim. Scopul art. 8 alin. 1 ind. 1 este de a preveni aglomerarea excesivă a rolului instanţelor de judecată, însă dacă avem în vedere că rolul puterii judecătoreşti este tocmai de a soluţiona litigiile şi a restabili ordinea de drept în societate, pare firească găsirea altor soluţii pentru a degreva rolul instanţelor de judecată, referitoare în principal la organizarea şi personalul acestora, şi nu limitarea accesului cetăţenilor. Astfel, scopul limitării nu putem spune că este protejarea activităţii de justiţie, ci chiar restrângerea acesteia, limitarea atribuţiilor puterii judecătoreşti, art.8 art. 1 ind. 1, derogând de la principiile organizării sistemului judiciar.
- Cea de a doua condiţie este ca limitarea să nu afecteze însăşi substanţa dreptului, ori prin îngrădirea posibilităţii persoanelor de a sesiza instanţa de judecată cu privire la încălcarea unui interes legitim public este afectată însăşi substanţa dreptului, persoana fizică neavând o

124 Orice persoană se poate adresa justiţiei pentru apărarea drepturilor, a libertăţilor şi a intereselor sale legitime.

altă posibilitate pentru a obţine recunoaşterea interesului public, anularea actului administrativ şi repararea pagubei. Acordarea posibilităţii Ministerului Public, Avocatul Poporului şi organismelor sociale, de a formula acţiuni întemeiate pe încălcarea interesului public (art 1 alin. 5 si art. 2 alin. 1 lit a) nu reprezintă o posibilitate reală pentru persoana fizică de a obţine recunoaşterea interesului public şi anularea actului administrativ, **aceste organisme nefiind mijloace pe care persoana fizică le poate controla în mod direct şi neexistând nici o sancţiune aplicată lor în cazul în care nu îşi exercită competenţele în materia contenciosului administrativ.** Curtea a stabilit că efectivitatea dreptului de acces la un tribunal impune ca exercitiul lui să nu fie afectat de obstacole sau impedimente de drept sau de fapt care ar putea să pună în discuţie însăşi substanţa sa.

- Cea de a treia condiţie este asigurarea unui raport rezonabil de proporţionalitate între scopul urmărit de lege şi mijloacele alese. Dacă considerăm că scopul urmărit de lege a fost eliminarea aşa numitelor „acţiuni populare", actio popularis, înaintate de diverse persoane de drept privat, mijloacele alese, respectiv limitarea cazurilor în care persoanele pot invoca încălcarea interesului public sunt disproporţionale faţă de acest scop, **prin efectul de îngrădire totală a accesului la justiţie** ca urmare a imposibilităţii de demonstrare a cazurilor în care interesul public este rezultatul încălcării unui interes public individual şi a imposibilităţii de sesizare a instanţei de contencios de către persoanele de drept privat care invocă o încălcare a unui interes legitim public ce nu rezultă din încălcarea unui interes legitim individual.

Nerespectarea prevederilor art. 6 din Convenţia Europeană a Drepturilor Omului (CEDO), prin limitarea dreptului de acces la instanţele de judecată, are consecinţa încălcării dreptului la un recurs efectiv, prevăzut de art. 13 din CEDO. Conform acestuia orice persoană, ale cărei drepturi şi libertăţi recunoscute de Convenţie au fost încălcate, are dreptul să se adreseze efectiv unei instanţe naţionale, chiar şi atunci când încălcarea s-ar datora unor persoane care au acţionat în exercitarea atribuţiilor lor oficiale. Prin urmare este încălcat dreptul persoanei de a contesta ilegalitatea actului administrativ în faţa instanţelor de judecată. Art. 13 garantează existenţa în dreptul intern a unui remediu care să permită persoanei să se prevaleze – şi să demonstreze nerespectarea lor – de drepturile şi libertăţi din Convenţie, astfel cum aceasta le consacră.[125]

Cu privire la toate aspectele anterior menţionate, în repetate rânduri a fost sesizată Curtea Constituţională, pentru a se pronunţa asupra neconstituţionalităţii art. 8 din Legea nr. 554/2004 a contenciosului administrativ. Soluţiile Curţii însă au fost de respingere a solicitărilor făcute, deşi din motivările formulate nu a rezultat o analiză temeinică a argumentelor invocate. Amintim în acest sens Decizia Curţii Constituţionale nr. 66/2009 conform căreia "Curtea constată că dispoziţiile de lege criticate nu conţin norme care să restrângă exercitarea accesului liber la justiţie sau a dreptului la un proces echitabil, astfel cum pretinde autorul excepţiei. Dimpotrivă, textul dă posibilitatea şi persoanelor fizice sau juridice de drept privat ca, în anumite condiţii, să invoce în faţa instanţei de contencios administrativ apărarea unui interes legitim public, atribuţie ce aparţine, de regulă, competenţei autorităţilor publice, şi nu persoanelor fizice sau juridice de drept privat. Astfel cum rezultă şi din prevederile art. 1 din Legea contenciosului administrativ nr. 554/2004, privind „Subiectele de sesizare a instanţei", Avocatul Poporului, Ministerul Public, Agenţia Naţională a Funcţionarilor Publici sau prefectul sunt instituţii publice care, potrivit propriilor legi de organizare şi funcţionare, dar şi Legii nr. 554/2004, au atribuţii specifice în ceea ce priveşte sesizarea directă a instanţei de contencios administrativ dacă apreciază că un act administrativ (normativ sau individual, după caz) este nelegal ori afectează drepturile, libertăţile şi interesele legitime ale cetăţenilor sau interesul public. Prin urmare, interesul general al

[125] http://jurisprudentacedo.com/Boyle-si-Rice-contra-Marea-Britanie-Conditii-de-aplicare-ale-dreptului-la-remediu-intern.html

societăţii este protejat de instituţii publice cu competenţe speciale în această materie, iar dispoziţiile de lege criticate oferă aceeaşi posibilitate şi persoanelor fizice sau juridice private, sub condiţia justificată ca interesul legitim public pretins încălcat să fie rezultatul încălcării dreptului subiectiv sau a interesului legitim privat al acestora."

În Deciziile Curţii Constituţionale, însă se observă că aceasta se limitează în general la analiza dispoziţiilor Constituţiei, fără a răspunde şi argumentelor referitoare la încălcare dispoziţiilor art. 6 si 13 din Convenţia Europeană a Drepturilor Omului, deşi acestea sunt invocate de către autorii excepţiilor şi deşi conform art. 11 alin. 1 din Constituţie "Statul român se obligă să îndeplinească întocmai şi cu bună-credinţă obligaţiile ce-i revin din tratatele la care este parte."

CONCLUZII

Persoanele fizice nu pot acţiona în contenciosul administrativ subiectiv decât dacă şi sub condiţia de a dovedi că sunt titulari al unor drepturi subiective sau interese legitime private (art. 2 alin. 1 lit. a din Legea contenciosului administrativ) şi ca atare nu pot formula o acţiune în contencios obiectiv, respectiv de a cere anularea unui act administrativ pornind de la premisa lezării unui interes legitim public decât dacă şi sub condiţia în care probează că vătămarea interesului legitim public exhibat decurge logic (ca o consecinţă, existand un raport de cauzalitate) din încălcarea dreptului subiectiv sau interesului legitim privat (art. 8 alin. 11 din Legea contenciosului administrativ nr. 554/2004).[126]

Condiţiile impuse persoanelor fizice pentru a invoca interesul public par excesive şi duc la situaţia respingerii majorităţii actiunilor formulate cu acest obiect, din practica judiciară rezultând că sunt puţine cazurile în care din încălcarea unui interes legitim privat rezultă încălcarea unui interes legitim public, astfel încât apare necesitatea reglementării celei din urmă situaţii şi a acordării posibilităţii de invocare în mod direct a interesului legitim public şi nu în subsidiar astfel cum prevede actuala legislaţie.

Singura explicaţie pentru restricţiile în exercitarea acţiunii în contencios administrativ prin care se invocă interesul public, impuse de legiuitor, este evitarea aglomerării rolului instanţelor de judecată. Este de înţeles faptul că aceste restricţii îşi au raţiunea în eliminarea aşa numitelor „acţiuni populare" actio popularis înaintate de diverse persoane de drept privat, fizice sau juridice, **însă riscul formulării unor acţiuni nefondate, unele introduse chiar cu rea-credinta, trebuie pus în balanţă cu riscul de a nu asigura mijloace eficiente pentru protecţia interesului public. Faţă de această situaţie se impune o regândire a art. 8 din Legea nr. 554/2004 a contenciosului administrativ, astfel încât să fie garantat în mod eficient dreptul persoanei de a invoca vătămarea interesului public.**

O primă variantă ar fi acordarea acestui drept persoanelor care reuşesc să demonstreze vătămarea unui drept sau interes privat decurgând în mod logic din vătămarea unui interes public. Obiectul principal al acţiunii îl va reprezenta încălcarea interesului public, cu condiţia ca acesta să aibă drept efect şi încălcarea unui drept sau interes individual. Aceasta este teza inversă actualei reglementări legislative, însă ea corespunde nevoilor societăţii, astfel de cazuri fiind frecvent întâlnite şi presupunând un facil efort probator. O altă variantă o reprezintă tot acordarea directă persoanelor, a dreptului de a invoca încălcarea unui interes legitim public, însă în măsura în care reuşesc să demonstreze cauzarea unui prejudiciu moral sau material. Plata unei cauţiuni pentru exercitarea dreptului de a invoca încălcarea interesului legitim public de către persoanele fizice poate fi de asemenea o soluţie mai puţin restrictivă

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[126] http://www.studiijuridice.ro/feed/resurse_juridice/jurisprudenta/jurisprudenta_romania/16443-acte-de-autorizarea-edificarii-unei-constructii-de-uz-si-interes-public.txt
Curtea de Apel IASI, Decizia Nr. 618/CA/11 noiembrie 2009

faţă de actualele prevederi legislative. De asemenea, acordarea dreptului de a invoca interesul public ar putea fi recunoscută persoanelor în funcţie de gravitatea interesului public încălcat.

Temerea că extinderea acordării dreptului de a solicita anularea actelor administrative care încalcă interesul public, ar duce la înregistarea unui mare număr de acţiuni nefondate este o falsă problemă dacă facem o paralelă cu dreptul de a solicita anularea (constatarea nulităţii absolute) actelor civile, reglementată de Codul Civil, şi a cărui exercitare deşi acordată nelimitat pentru motivele de nulitate absolută, nu a avut drept consecinţă încărcarea nejustificată a rolului instanţelor de judecată.

Actualele mijloace de protecţie a interesului public, prevăzute de alin. 5 al art. 1 care dau competenţe Ministerului Public de a solicita anularea actelor normative administrative prin care se vatămă un interes legitim public, se dovedesc a fi ineficiente, pe de o parte pentru că această protecţie este acordată numai în privinţa actelor normative, nu şi a celor individuale, iar pe de altă parte ca urmare a multitudinii de atribuţii pe care această instituţie trebuie să le îndeplinească, şi care, de cele mai multe ori, au drept consecinţă nesesizarea sa şi pasivitatea faţă de domeniul administrativ. Competenţe asemănătoare au fost acordate prin dispoziţiile art. 2 alin. 1 şi grupurilor sociale şi Avocatului Poporului, care, de asemenea, pot sesiza încălcarea unui interes legitim public, fără însă a se dovedi eficientă în practică o astfel de reglementare, ca urmare a neexercitării în fapt a acestei competenţe de către entităţile menţionate. Având în vedere că în urma sesizării instanţelor prin intermediul Ministerul Public sau prin intermediul Avocatului Poporului petiţionarul, respectiv persoana vătămată, "dobândeşte de drept calitatea de reclamant", şi nu instituţia, dreptul de a se prevala de încălcarea unui interes legitim public este recunoscut totuşi de legiutor ca aparţinând numai cetăţeanului şi nu altor autorităţi. **Întrucât Curtea Europeană a Drepturilor Omului pretinde ca realizarea drepturilor să fie efectivă şi nu teoretică şi iluzorie, pentru a avea pe deplin recunoscută posibilitatea persoanei de a invoca încălcarea interesului legitim public în faţa instanţei de judecată, se impune acordarea dreptului de a formula în mod direct acţiunile introductive şi nu prin intermediari.**

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FAMILY BACKGROUND ON DISSOLUTION BY DIVORCE

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Abstract

Old Civil Code does not distinguish between termination of marriage and its dissolution by divorce, stating that divorce occurs by death of a spouse, death or judicial declaration of divorce. Family Code introduced aceasră distinction is maintained under current regulation, so that the termination of marriage is a different case of its dissolution, which can be achieved through divorce. Divorce can be extrajudicially (administrative or notary) or judicial.

Keywords

family, divorce, husband, infidelity, marriage, cohabitation

Achieving and maintaining family solidarity and stability occur differently. Some families are unable to establish relations of solidarity, others can not maintain solidarity made and others made solidarity and maintained. In the first two cases, the chances are great family dissolution. Instability and family dissolution are at the same time, individual and social problems both in their conditionalities and the effects they have.

In European societies, statistics show that the family is less stable today than it was a few decades ago, increased divorce rate and decreased average length of cohabitation of a couple so the family entered a long period of crisis.

Dissolution of marriage is based on three stages:

- Conflicts and erosion, which may occur sooner or later with effects of dissolution and erosion of marital life by manifesting satisfaction with living together as a couple. Women invokes: alcoholism spouses, physical aggression, lack of communication. Men invokes: lack of affection and understanding, verbal aggression and infidelity.

- Termination sex, a natural consequence of conflicts and a path to separation or divorce. All cases of separation lead to divorce.

- Dissolution Legal - final form of conjugal relationship breakdown, legal sanctioning of this situation

Divorce is a complex psychosocial phenomenon, is the final dissolution of conjugal life, life changing partners and their descendants. It involves pressure stages, conflicts, frustrations and dissatisfactions of effects that extend beyond the delivery of court[127].

This can be determined by economic factors, cultural, psychological, moral, religious acting partner level, inside and outside couples.

Factors that may cause divorce are of two types namely: internal factors and external factors.

Internal factors:

- Experience premarital partners and their mutual attitude towards it. Large differences in premarital experience is a strong factor which is hindering family solidarity.

- Motivation marriage and how to end a marriage (marriage motivated by economic benefits, social or marriages imposed).

- Age at marriage and age differences between spouses.

- Heterogeneity couple family in relation to the area of origin of the spouses, level of education, profession, physical and temperamental traits.

[127] Maria Voinea, Family Psycho, University of Bucharest, 1996, Bucharest, page 65.

- The position of women in society and family. If the wife is economically dependent to spouse, divorce is low. If it is economically independent not support some family relationships and the couple is headed for divorce.

- Mental and temperamental incompatibilities partners.

- Emotional-affective and sexual dissatisfaction.

- Infidelity.

- Aggressive behaviors.

- Alcoholism one of the partners.

External factors:

External factors favoring dissolution of family solidarity not produce these effects unless they are combined with the action of factors within the family.

- The emergence and maintenance of demographic imbalance between the number of women and number of men in a given area or community.

- The increase of migration and urbanization.

- Reduction of social control that leads to the conclusion that family life is a strictly personal matter.

- General economic conditions may indirectly promote dissolution of couples.

Modifying factors ensuring family stability was accompanied by a change in attitude towards divorce. Changes in attitude can be found, social institutions and whole societies. From a survey of the 80 made in France showed that young people had a favorable attitude toward divorce compared to older generations and attitudes men and women have relatively similar.

In Romania there was a more positive attitude to divorce younger than the elderly and the families of workers. Before 1990 intellectuals had a restrictive attitude toward divorce is influenced by norms and values promoted then. After 1990 they began to show a more positive attitude toward divorce.

Divorce is the legal form of dissolution of marriage or dissolution of marriage by court order.

Systems or views on divorce are:

Concept of divorce-punishment - states that marriage dissolution is made from one spouse finding fault. Divorce can not rule against innocent husband. As a sanction for misconduct can decide if you sued, even when marriage becomes impossible to continue the fault committed.

The divorce - remedy - a marriage is completely compromised solution that allows partners to gain a marriage remarriage success.

The concept of mixed or divorce remedy - penalty - this theory combines elements of the first two concepts presented, are always considered divorce as a remedy but, in many cases, with labază and fault one or both spouses whether divorce is viewed as punishment, but can also be a remedy[128].

In Romania, the divorce was exceptional character ending marriage life. This character was removed in 1993 when the legislature has set several conditions for the court to pronounce divorce

a) Until the date of application for divorce must have been at least one year of marriage. Spouses may enter into agreement before one year old, agree that you will use this term after expression.

b) there are no minor children resulting from the marriage. After checking that spouses consent, the court set a deadline of two months in open session within leaves can husbands to return the calls.

[128] Alexander Bacaci, Viorica-Dumitrache Claudia Cristina Codruţa Hageanu, Family Law, issue 7, in regulating NCC, CHBeck Publishing House, Bucharest 2012

If the divorce is not going to give up without administration proceedings evidence of the grounds for divorce.

Even if divorce is far less dramatic consequences on those who divorce, even if economically children whose parents were divorced were less affected, divorce continues to train strong emotional disorders. " For society, divorce is a democratic solution to the wishes of citizens an opportunity to avoid the trauma of couples with relationship conflict and avoiding the educational failures of such minor child relationships and the possibility of formation of normal couples, functional. "[129]

Effects of divorce

Legal act of marriage causing an economic and personal effects-patrimonial between spouses, on the one hand and between them and the children, on the other hand, obvious that divorce generates a series of adverse effects. In general rights and obligations arising from marriage between spouses disappear with its dissolution [130].

1. Effects on personal relations between spouses

a) Name - with divorce, each spouse will resume its name before marriage was. Where both spouses kept at marriage, the name had, in divorce situation will remain unchanged.

b) Obligation moral support, loyalty, and that to live together ends with divorce.

c) *Exercise capacity*, she gained minor by marriage is kept, even if at the time of divorce she turned 18.

2. Effects on property relations between spouses

a) matrimonial regime chosen by the spouses during the marriage ends and its liquidation occurs

b) common residence of the spouses - whether between spouses does not intervene any agreement, courts are called upon to have spouses whose home is to be awarded, depending on the interests of minors and other preference criteria which have been described previously.

c) The obligation to bear the costs of marriage and support material also ceases due to divorce.

d) *The legal obligation of support* between the spouses ceases, but arises under certain conditions, legal maintenance obligation between former spouses.

e) *The right of inheritance*, the surviving spouse has with the remaining assets to the spouse's death, is lost.

3. Effects on personal relationships between parents and children, which are governed by Article 396 et seq. Civil Code[131].

4. Effects on economic relations between parents and children

5. State allowance for children

Unlike termination of marriage, which is based on natural causes and objectives, death or judicial declaration of death of a spouse through divorce divorce can occur only during the life of the spouses, under certain conditions which the legislature has established in Article 373 and seq. Civil Code.

[129] Ion Mihailescu family in European societies, University of Bucharest, 1999, Bucharest, page 128

[130] Alexander Bacaci, Viorica-Dumitrache Claudia Cristina Codruţa Hageanu, Family Law, issue 7, in regulating NCC, CHBeck Publishing House, Bucharest 2012

[131] Civil Code and Civil Procedure Code, last amended by Law No. 60 to / 2012 published in Official Gazette No 255 of 17.04.2012, CHBeck Publishing, Bucharest 2012

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ASPECTS OF THE LEGAL IMPLICATIONS OF BIOTECHNOLOGY IN THE CONTEXT OF ENVIRONMENTAL LIABILITY AND LIFE

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Abstract

A clear and effective legal protection in biotechnology is essential, both for economic development in Europe and for scientific and technical research. Social and legal reality requires to take into account the development potential of biotechnology on the environment and, especially, the usefulness of this technology for the development of cultivation methods cleaner and more economical in terms of how to exploit the land. The development of biotechnology is important for developing countries, both in health and combating major epidemics and endemic diseases and in that of combating hunger in the world, and the implementation of biotechnological inventions have not only imposed limitations of inventions, but also specific legal protection.

1. GENERAL ISSUES REGARDING BIOTECHNOLOGY

Biotechnology is a field of research, which, through the fact that it has created innovative techniques in different and most diverse other fields of research, it also raises and has risen various social, economic and legal issues.

With the amazing development of science and technology, in the matter of biotechnology, issues regarding the question of "how biotechnology is affecting fundamental human rights?" have risen.

Fundamental human rights require, as expected, limitations regarding biotechnology research and innovations that can transform them into reality.

F.Fukuyama[132] stated that "the most significant threat posed by contemporary biotechnology is the potentiality to change human nature".

The uncertainty of the laws engages with public anxieties about social danger posed in legal, ethical and anthropological terms by Biotechnology. More or less obvious is the fear of a possible biotech apocalypse. The law is called upon to decide between maximum permeability and rigorous limitation of scientific research and biotechnology applications. Biotechnology should be subject to regulation where the key to success should be a scientifically organized and rationally managed system, which should ensure a fair assessment of risks and institute rigorous security and control procedures[133].

2. LEGAL IMPLICATIONS REGARDING BIOTECHNOLOGY

Currently, regarding the regulation of legal implications, limitations and influences of biotechnology in the context of protection of fundamental human rights there is a legal framework instated by the European Convention for Human Rights and Dignity towards the applications of biotechnology and medicine and the Convention regarding human rights and biomedicine, ratified by the Romanian Parliament by Law no. 7 of 22.02.2001.

This Convention assumes that scientific research and biotechnology should be used properly for the benefit of present and future generations, tending towards an international cooperation with the purpose to ensure the benefits of biotechnology and medicine for the entire population of the world, but emphasizing the need to respect human beings and their right to dignity.

The main ideas arising from the above mentioned legal text are:

- Human interest and care must prevail over sole interest of society or science (2nd art.)

[132] Francis Fukuyama , *Viitorul nostru postuman,* Humanitas Publishing House, Bucharest, 2004, p. 19
[133] Costica Voicu, Dreptul şi Biotehnologia, http://fs.legaladviser.ro/643bc446935353d14e236c7e017f13ff.pdf

- Any intervention in the health field, including research, must be in compliance with professional standards and obligations. (4th art.)
- An attempt designed to modify the human genome may only be pursued out of preventive, diagnostic or therapeutic purposes, and only if its' main purpose is not that of introducing a change in the genome of progeny. (13th art.)
- Medically assisted procreation technology use is not permitted for choosing a future child's sex but only to avoid a serious hereditary sex-related disease. (14th art.)
- Research upon human beings are not to be carried out unless the following conditions are met:
  - There is no alternative method to human being research with comparable efficacy.
  - The risks taken by the person are not disproportionate to the potential benefits of the research
  - The research project was approved by the court after having been subject to independent examination of its scientific relevance, including and assessment of the importance of the research and also and multidisciplinary examination of the level of its ethical acceptability.
  - The person upon whom is being carried the research has been informed of his rights and the guarantees provided by law for their protection.
  - The consent referred to in the 5th art. was given expressly, specifically and has been recorded in writing. Such consent may be withdrawn at any time, freely.

- When research on embryos IN VITRO is allowed by law, it shall ensure adequate protection of the embryo.
- It is not allowed to create human embryos for research purposes[134].

Starting from the principle that the above mentioned Convention according to which the human body and its parts shall not be sources of pecuniary gains, springs one of the forms of civil liability which occurs in this area, translated by the rule which supposes that the person who has suffered undue harm from a medical intervention, is entitled to fair compensation according to the conditions and procedures prescribed by law.

Legal regulations of various aspects of biotechnology are not uniform throughout European legal systems, even if the mentioned European Convention establishes some general principles and rules to be followed by the European countries.

Thus, for example, there is still no coherent, unified stand on the status of the embryo. In some countries (Hungary, Poland, Norway, Ireland, Switzerland, Italy) embryo research is prohibited. In Germany and Austria it is forbidden to use the embryo for purposes other than its implantation in a MAP (Medical Procedure Assisted fertilization). Other countries, such as Spain, Sweden and Finland allow research on supernumerary embryos. England authorizes the use of supernumerary embryos for precise purposes of research and diagnosis of genetic diseases. France has criminal sanctions for reproductive cloning.

Scientists consider the embryos to be an exceptional research material, embryo cells allowing the healing of neurological or genetic diseases[135].

However, in most democratic countries, legal regulations exist on abortion, in vitro fertilizations, diagnosis before implantation, sex selection, research on STEM cells, cloning for reproductive and research purposes, and germline engineering.

Both agricultural biotechnology (genetically modified organisms) and human biotechnology are areas where the power of the legislature should materialize in strict

[134] http://fs.legaladviser.ro/643bc446935353d14e236c7e017f13ff.pdf
[135] *idem*

regulations. "If Biotechnology proves to be beyond the control power of any individual country, then it should be internationally controlled. We must begin even now to think concretely how to build institutions that can distinguish between good and bad uses of biotechnology, which can efficiently implement these rules, both nationally and internationally"[136].

A perfect unification of European law, not to mention international one, presents serious difficulties as the problems that arise in biotechnology research techniques cause controversy of ethical, legal, social – according to political systems – cultural and religions of different countries, manner.

For example, the Romanian legal system, although in a previous version of the draft Criminal Code, established a special chapter of special crimes and felonies against the human genotype, inspired by modern European codes which contained regulations in this area, as the Spanish Code, but subsequently such legislation has been abandoned.

C.E. Recommendation No. 934/1982 states that freedom of scientific research (fundamental value of human society and a condition of adaptability to changes occurring in the world) determines duties and responsibilities, especially with regard to public health, safety and freedom of the lifestyle; Paragraph 7 recommends to the Committee of Ministers to express recognition in the European Convention of Human Rights, the right to a genetic heritage, which has not undergone any handling, except resulting from the application of certain principles recognized as fully compatible with human rights, for example in the application of biotechnology for therapy, stating that the rights to life and dignity guaranteed by the ECHR includes the right to inherit features that have not undergone any genetic modification and the importance of maintaining genetic diversity of human beings[137].

The development of biotechnology is important for developing countries, both in health and combating major epidemics and endemic diseases and in that of combating hunger in the world, and the implementation of biotechnological inventions have not only imposed limitations of inventions, but also specific legal protection.

For these reasons and many others involving the need to encourage, but at the same time protect and limit the effects of different techniques involved in biotechnology, the European Parliament and Council has adopted on 6 July 1998 the Directive 98/44/EC on the legal protection of biotechnological inventions, which defines the patent in terms of biotechnology inventions, the scope of the patent concept and the need that the Member States adopt coherent legislation in line with the European Act.

EC Treaty contains no specific provision applicable to biotechnology. Article 157, however, provides a legal basis in the EU industrial policy. EU may take a number of actions in the various sectorial and horizontal policies at the international level of the EU and Member States and at a local level, such as competition rules (Articles 81-89) and the mandate of 30 May 1980 authorizing the Commission to submit proposals in industrial policy (Article 308), trade policy and the completion of the internal market (Article 95).

Biotechnology industry sector is increasingly important for the EU because of its economic, social and environmental potential. For this purpose, it is crucial that EU countries cooperate, because the challenges and needs of the sector remains significant.

Scientific and technological developments in life sciences and biotechnology continues at a steady pace.

The Commission proposed a strategy for Europe and an action plan in the statement "Life Sciences and Biotechnology" [COM (2002) 27 final], which focuses on three main issues:

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[136] Francis Fukuyama , *op. cit*., p. 22.

[137] Alexandra Huidu, Reproducerea umană medical asistată-etica incriminării versus etica biologică, Lumen, Iași, 2010, p. 336-337

- Life sciences and biotechnology offer opportunities to meet the significant global needs regarding health, aging, nutrition, environment and sustainable development;

- Broad public support is essential, and societal consequences and ethical concerns must be taken into account;

- Scientific and technological revolution is a global reality, which creates new opportunities and challenges for all countries.

The main premise that constitutes the basis of the Commission Communication to the Council, the European Parliament, the European Economic and Social Committee also the Committee of Regions on the interim evaluation of the Strategy on Life Sciences and Biotechnology {SEC (2007) 441} is that "biotechnology is a means important to promote growth, employment and competitiveness in the EU ".

In terms of liability for environmental and life protection regarding agricultural and animal biotechnology, the basic principle, reflected in the international legislation is the Precautionary Principle.

As said[138], this is a principle of anticipation: damage did not occurred, and the event's occurrence is not undeniably demonstrated or demonstrable. The risk is uncertain, its realization is only possible or plausible. This is an early preventive action in the context of uncertainty about risk, difficult to define, but still has a positive effect in law.

The only serious regulation invoking the precautionary principle refers to human and environmental risk assessment of hazardous substances[139] and especially those related to biotechnology, as privileged field of application of this principle.

Thus, the use of genetically modified micro-organisms requires that those who are concerned to assess health and environmental risks of their work, even if they are not known[140].

Since genetically modified organisms may give rise to new types of damage that can be currently unknown, but where there is a high probability of occurring, states have looked different into the eco-economic issues and legal impact of biotechnology involved.

The main concern is in regard to public health, as consumption of products derived from genetically modified plants or animals can have consequences undiscovered by science and which may have an unknown impact and long-term health effects.

Precautionary Principle was found by some of the countries as a solution to encourage in some limits the agricultural and animal biotechnology, in response to a legal reality in which science and technology have gained very strong momentum, being ultimately an expression of liability based on uncertainty.

The basic idea is that because no one can predict the future and the new risks arising from unrestrained development of science and technology "there should be a remedy of law to punish those who do not adopt appropriate behavior of this new existential situation."[141]

For full compatibility of national legislation with the EU, Romania has adopted Emergency Ordinance no. 43 of 23 May 2007 on the deliberate release into the environment and placing on the market of genetically modified organisms, prohibiting through art. 3, 4 ff., according to the Precautionary Principle, to avoid adverse effects on human health and the environment, the deliberate release into the environment of a genetically- modified organism, for research and development purposes or for any other purposes than placing on the market

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[138] Constantin Teleaga, Principiul precauţiei şi viitorul răspunderii civile, in Revista de Dreptul Mediului 1(3)-2004, p.33

[139] Directive 93/67 CEE from 20. 07. 93

[140] Constantin Teleaga, *op. cit.,* p. 33

[141] Denis Mazeaud: „Responsabilité civile et précaution“ in Responsabilité Civile et Assurances Nr. 6 bis/2001, p. 72

without authorization, issued by the competent authority in the strict conditions imposed by law, in case of failure applying the sanctions specified in the Law.

In Europe, New Zealand, and the United States, producers and users of agricultural biotechnology are subject to the usual rules of civil (legal) liability that apply to all persons and products. More specifically, if a producer or user of transgenic crops or animals causes damage to the property, person, or markets (economic interests) of another person, the producer or user may be liable for those damages[142].

We can identify different categories of damages: damage to property, person, markets, etc.

Property damage may occur most likely in two contexts – seed production and organic production. In both contexts, the source of the alleged damage will originate with pollen flow from the transgenic crop to non-transgenic crops. Organic producers may claim that transgenic pollen flow has damaged their organic production, rendering it no longer "organic." Seed producers may claim that transgenic pollen flow has damaged the purity of their seeds, rendering them no longer certifiable for specified purity as required by law. Even so, seed producers and organic producers may face significant difficulties in proving that the farmer growing transgenic crops caused damage.[143].

Persons who believe that their land or crops has been damaged by a neighbor's transgenic crops may bring a tort claim in strict liability – i.e. liability without fault and despite the exercise of utmost care – if the activity of growing transgenic crops is abnormally dangerous[144].

In the United States, The Restatement of the Law (Second) Torts sets forth the common law principles for strict liability in §§ 519-524 established that in determining whether an activity is abnormally dangerous, the following factors are to be considered:

(a) existence of a high degree of risk of some harm to the person, land or chattels of others;
(b) likelihood that the harm that results from it will be great;
(c) inability to eliminate the risk by the exercise of reasonable care;
(d) extent to which the activity is not a matter of common usage;
(e) inappropriateness of the activity to the place where it is carried on;
and
(f) extent to which its value to the community is outweighed by its dangerous attributes[145].

As regard to the damage of the person, persons claiming personal damage arising from transgenic crops might assert harm based on toxicity of the transgenic crop or its food product, an allergic response to these crops or their food products, or a claim that long-term exposure to transgenic crops or their foods caused ill-effects to
health. In the United States, concerns about the health effects of transgenic crops and their food products explain why the Food and Drug Administration (FDA) and the Environmental Protection Agency (EPA) exercise regulatory control over transgenic crops[146].

The damage to economic interests refers to the damage filed against agricultural biotechnology companies by farmers who did not grow transgenic crops, saying that while their particular crops have suffered property damage through cross-pollination, their more significant damage claim is that the presence alone of the transgenic crops in the agricultural

[142] Stuart Smyth et al., Liabilities and Economics of Transgenic Crops, 20 NAT. BIOTECH. 537 (2002).
[143] Drew L. Kershen, Legal Liability Issues in Agricultural Biotechnology, The National Agricultural Law Center , University of Arkansas School of Law, nov.2002, p.5
[144] Idem. Also see A. Bryan Enders, "GMO:" Genetically Modified Organism or Gigantic Monetary Obligation? The Liability Schemes for GMO Damage in the United States and the European Union, 22 LOY. L.A. INT'L & COM P. L. REV. 453, 488-91 (2000)
[145] Drew L. Kershen, *op. cit*., p. 8
[146] *Idem*

sector has affected market access and the market prices for their non-transgenic crops generally[147].

3. Conclusions

The research made in the field of biotechnology, even though is very important for various aspects of life, has to be protected by law, so that the possible damages could be prevented or the factual damages could be repaired.

That is why many states have found solutions regarding legal liability for the damages caused by GMO. Also, in many states was created a great jurisprudence on this matters, but Romania isn't really one of them. There are few cases that raised the question of civil liability regarding genetically modified organisms.

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[147] *Idem*

ADMINISTRATIVE DOCUMENTS THEIR LEGALITY AND OPPORTUNITY IN SOME OF THE EU MEMBER STATES

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Abstract
Legality represents the main element of the juridical regime present in the Romanian doctrine and jurisprudence. Between the world wars and nowadays, in the French and German doctrine. The administrative law makes the difference between the government acts and the administrative acts of discretionary authority. Though both categories were evoked by the expression "the discretionary power of the executive" or of the "power of appreciation of the executive". The relation legality-opportunity of the administrative documents, refer to the fact that, through the view of juridical practice, some theoretical solutions should be made up by reporting to the existent right and other theoretical solution reported to the right created by the judge. In other words, the aim of the public administration, namely a legality element, while the means for touching this target (aim) are aspects linked to opportunity.

Legality - a central element of the juridical element of the administrative (documents) acts.

Juridical regime represents a set of regulations of content and shape, which give particularity to the administrative acts in the juridical circuit, namely rules (conditions) of validity of the administrative document, the perspective rules that govern the effects the document is producing. In a generic formulation, by the legality of the administrative documents we understand their compliance with the laws adopted by the Parliament (legislative power), as well as with the pieces of legislation which have a superior, juridical force.

The legality-opportunity relationship in the Romanian interwar doctrine

The interwar school treated the problem of discretionary power; that is of the Administrative documents of discretionary authority, as a normal problem of the "executive power", the governing activity and the administrative activity. The administrative law dated December 23rd 1925 (Art. 2) makes distinction between the government acts and the administrative documents of discretionary authority, though both categories were evoked by the expression (the discretionary power of the executive "or of an" appreciation power of the executive. Essentially, (In a nut shell) when they analyzed the discretionary power, they made distinction between: "the opportunity issues and the legality issues"; in the case of administrative activity "the executive had discretionary power to express opportunity but not the legality of its acts, while in the case of government acts "the executive power" had the quality to appreciate not only the opportunity (issues) but also issues linked with legality".

The legality-opportunity relationship in the French doctrine and jurisprudence

In the French doctrine they speak about a right to appreciate the public administration to evoke the action administration in a law-permitted frame, while the notion of opportunity is used to evoke an action of the public administration actually, in exceptional cases, a necessary but illegal action. We can notice that both in the French and German doctrines, the report between the legality and the opportunity, respectively the discretionary power is also looked at through the juridical practice, going so far as to formulate certain theoretical solutions by

reporting them to the existent right and other theoretical solutions reported to the right created by the judge. As a general idea, the aim of the public administration and namely the fulfillment of the public interest is always a legality element, while the means to achieve this target are aspects related to opportunity. The administration doesn't have the right to commit on behalf of discretionary power, errors, manifestos, nor to do absurd things, but if this happens then there are reasons that entitle an appeal for excess of power.

The legality-opportunity relationship in the German doctrine, law and jurisprudence.

The traditional German doctrine, through discretionary power evoked a certain quantity of freedom of the public administration in its decisions and actions, that is the possibility to choose among more possible attitudes (to do a), to do b) or to do nothing).
For the substantiation of the discretionary power in Germany, more theses have been formulated along the years, among which the theory according to which the basis of the discretionary power would be found in the existence of the undetermined juridical notions; public good, public utility, public order, public roads, public security, public interest, traffic safety, danger, profile, advantage, disadvantage, aptitude, good order abuse, night, more times, often, etc. The tradition of the discretionary power of the German administration, continued after 1945 too, the administrative courts continuing to follow this tradition.

Conclusions regarding the present Romanian jurisprudence

The letter and the spirit of our Constitution, the necessity of penetration of the Democratic European Institutions in the practice of instances of administrative law, in our country, too, guide us to state that no matter how we consider opportunity in report to legality, the administrative law judge has the right to check if the public administration didn't act abusively, against the public interest, as this results from the law on which the administrative act is founded.

The conditions of legality

According to professor R. Ionescu's point of view by the standard legality conditions, they refer to:

a) the administrative document should be issued based on and in compliance with the law
b) the administrative document should be issued based on the documents of the state organs which are superior to the issuing administrative body
c) the administrative document should be issued by the administrative organ only in the limits of their competence (ability).
d) the administrative document should be in compliance with the aim of the law of other normative documents which are superior to the issuing administrative organ.
e) the administrative document should follow the legal requests regarding its shape
f) The administrative document should be opportune in Ilie Iovanas's work dated 1977 we quote the following criteria:
    - the moment in which a normative document is being adopted
    - the concrete place and conditions in which the administrative document is to be applied,
    - the material and spiritual means which the administrative decision requested by its going to engage, as well as the duration requested by its application.

- The correspondence (conformity) of the administrative document to the aim of the law

In conclusion we can identity on the one hand, *the general conditions of legality* and on the other hand *the specific conditions of legality, based on opportunity grounds.*

General conditions of legality

a) the administrative document should be issued on the grounds of the letter and of the spirit of the Constitution
b) the administrative document be issued according to the letter and the spirit of the orders
c) the administrative document should be issued based on all the documents of the public administrative bodies which are superior to the issuing administrative body
d) the administrative document should be issued only according to the limits of its composition
e) the administrative document should be issued in the form and with the procedure stipulated by the law. Is the legal limit of the right of appreciation (of the opportunity) as regard the sphere of the legality conditions on the grounds of opportunity, the aim of the law is reporting the administrative law judge, that is the excess of power the non-fulfillment of one of the legality conditions attracts the appliance of the sanctions typical to the administrative law.

The form and the procedure of the administrative document

I. The form (shape) of the administrative document

The manifestation of will which constitutes the administrative act, can't produce juridical effects, if it's not materialized as a rule in a written form, which for the administrative document-the document of authority-is as conditions of ad validitatem, and of which other conditions of exterior form are linked, such as: the language in which the document is drawn up, the heading (which shows the organ that emitted it) the title, the preamble, the signatures, the seal, the dry stamp or stamp, the date and place of issuance, the order number, the exit number. The motivation of the document- any administrative document, it is normative or individual, according to the exigencies of the constitution, must be motivated. The non-fulfillment of these requests, attracts the nullity or by the case the canceling of the document. According to article 13 of the Constitution, in Romania the official language is Romanian, as such the administrative documents, can't be drawn up in any other language but Romanian.

II. The phases of the elaboration procedure of the administrative document

The proceedings elaboration of administrative documents can be made in several ways, from the simplest to the most complicated ones. There are cases when administration can proceed without being obliged to obey a pre-established proceedings from this reason the research of the procedure rules of elaboration of administrative documents is difficult to achieve, thus is explained why the proceeding rules of the regime of the administrative documents analyzed as "the proceedings forms of elaboration of the administrative documents" are as a rule, divided into three categories, in comparison with the moment of the elaboration of the document; anterior, concomitant and posterior.

Conclusions

The letter and spirit of our Constitution, the need to penetrate democratic European institutions and the practices of contentious administrative courts in our country give us the right to state that, regardless of how we look at the opportunity reported to legality, the contentious administrative judge has the right to check if the public administration hasn't taken abusive action, in contrast with the public interest, as it results from the law which the administrative documents is based upon.

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THE PRINCIPLES OF PRODUCER LIABILITY FOR FOOD QUALITY [148]

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Abstract

Freedom of choice is a fundamental right of the consumer under which production takes place the entire mechanism-circulation-consumption. State, national and international mechanisms has, or should have, as an objective consumers unlimited access to products and information about them. However, food law should have general objectives and the protection of human health, consumer interests, the use of fair practices in food trade. This is because it is necessary to follow to protect consumer interests and to provide information needed by them to knowledgeably choose the foods we eat, to prevent the counterfeiting of fraudulent or deceptive practices or any practices which may induce confusion to consumer.

1.General considerations

Products are marketed food must be within the standards set by institutions in this respect for the existence and effective operation of a food safety circuit[149]. Romanian legislature attempted through various regulations ensuring a high level of protection of human health and consumer interests in relation to food, taking into account, on the one hand, diversity of supply, on the other hand, the efficient functioning of domestic market. "Product" is defined by the Romanian legislator good as any material intended end use consumer or individual or collective[150]. Analyzing this sense, we see that the product falls within the definition of any good material to achieve a goal of serving the consumer can imagine a variety of goods such as proximate form of the term 'product'.

Given that the producer liable to the consumer for all products that do not conform for marketing, consumer or manufacturer send another consumer good than desired, the liability[151] of the manufacturer is closely linked with the principles underlying its responsibility.

1.1. The principle of harmonization of national legislation to EU Member States on mutual recognition[152]

In compliance with this principle, the romanian state has transposed into national law such as to ensure the harmonization of national legislation with the EU member States. Thus, the definition of the consumer on the Romanian legislator various acts is taken from that offered by EU directives. So, under domestic law, the consumer is "any person who buys, acquires, uses and consumes food outside professional activity"[153] or " person or group of

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[149] Food security concept was formulated for the first time after the Second World War in the discussion Food and Agriculture Organization (FAO) in Rome when it was launched in 1963 the famous manifesto "Proclamation to the right of each person to eat and quench hunger "

[150] Article 2 of the Ordinance no. 21/1992 on consumer protection

[151] For details on contractual liability, see M.Tăbăras, *" Răspunderea contractuală. Daune interese "* – Ed. All Beck, București, 2005,

[152] G.A.Oanta, La polita de seguridad alimentaria eu la Union Europea, Valencia,2007, p.91

[153] art.2 alin.2 pct.5 from Law no.321/ 15.10. 2009

natural persons acting for purposes outside his trade, business, industrial or production[154] craft or profession[155]".

Without realizing at this point an analysis of their content, I intend to mention only the definition that these directives have sought to give the notion of consumer.

So, in accordance with Directive 85/577 consumer is "a natural person who, in transactions covered by this Directive is acting for purposes which can be regarded as not part of his trade or profession".

Nuanced variations we can found in directives 93/13/CEE[156], 97/7/CE[157], 99/44/CE[158], 2000/31/CE[159] and 2002/65/CE[160] which are defining the consumer as a person who is acting for purposes outside business activity, business or profession.

Directive 2208/122/CE[161] defines "consumer" as any person who is acting for purposes which are not related to his trade, business, craft or profession.

From the perspective of Directive 98/6/EC[162] consumer is any person who buys a product for purposes outside the scope of its commercial or professional activity.

There are also different meanings of the consumer: for example in Directive 90/314/EEC[163] which defines the consumer as the person who takes or agrees to take the package[164] or any person on whose behalf the principal contractor agrees to purchase the package[165] or main contractor or any of the other beneficiaries transfers the package[166].

Directive 2005/29/EC[167] has the same meaning for the consumer person , being defined as any natural person who, in commercial practices covered by this Directive, for purposes which are outside his trade, business, craft or profession.

As can be seen, despite differences in form, all definitions have in common:

- consumer reports only to individuals, so the consumer can not be a legal person;

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[154] through professional activities the Romanian legislature understood trade, industrial production, craft or profession; through this list legislature did not intend to restrict commercial activities in addition to those listed may be included in other activities related to the performance of

[155] Annex 1 section 13 of the Law on Consumer Code no.294/2004 republished in the Official Gazette Part I, nr.224 of March 24, 2008

[156] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

[157] Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts

[158] Directive 99/44/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts

[159] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27 / EC.

[160] Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27 / EC.

[161] Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 regardind the protection of consumers in respect of certain aspects of contracts relating to the right to use immovable timeshare holiday product contracts with timeshare term long, and the resale and exchange contracts.

[162] Directive 98/6/EC of the European Parliament and of the Council of 16 February 1988 on consumer protection in the indication of prices of products offered to consumers.

[163] Council Directive of 13 June 1990 on package travel, package holidays and package tours

[164] main contractor

[165] other beneficiaries

[166] the assignee

[167] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair commercial practices business-to-consumer internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) no. 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive ").

- the purpose for which it is acting outside business activity, trade, professional or artisan, these being the result of an evolution in time of the term.

1.2.The principle of proportionality

Although at first sight this principle would conflict with the principle of free movement of goods in reality it is a preventive measure left to the Member States to restrict or prohibit the introduction into their territory of certain goods. According to this principle the State concerned may allow import of goods from other countries only as the extent to which these products are required to achieve protection objectives legitimately pursued health. Therefore, each state is sovereign to determine what products transiting his country, that imported products in relation to the need for and dangers of such products may launch its own domestic market.

1.3.The precautionary principle

According to this principle, the producer must introduce on market products whose effects do not give rise to serious and irreversible damage. Surely the launch of any product on the market (whether or not food) there are certain risks[168] involved in putting it into circulation, but these risks must be reduced so that the producer does not lead to the emergence of the likely effects of affect human health or assets. The precautionary principle underlying the manufacture of any product regardless of its nature, consequences that can produce market launch of a product, the manufacturer of the first things you need to consider.

It is obvious that the entire human society in general is mainly oriented towards consumption, something which inherently led to the growth and diversification of products designed to meet the evolving needs of consumers, but also market and the emergence of more and more products presenting a risk to consumers.

1.4. The principle of equality

In relation to this principle, any manufacturer will respond to any customer if in the circulation of a certain consumer product caused a particular injury. However, in law, the term 'producer has a fairly wide sense, traders entering this category broadly, however, and persons holding capacity of the seller or distributor, trader are considered manufacturers that produce a finished product or component of a product, the raw material manufacturing, who applied his name, trade mark or other distinguishing feature on the product, who reconditions the product, trader or dealer who, through his work, change product features, registered representative of a business operator not established in Romania or in his absence, the product importer, trader who import products in order subsequently to a transaction of sale, hire, leasing or any other form of distribution, the distributor of the imported product, if not known importer, even if the manufacturer is listed, the product distributor if the importer can not be identified, if not inform the injured person, within 30 days of the request the identity of the importer[169]. In a synthetic definition, we can say that the manufacturer is the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part

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[168] For details on the risk random contracts, see M.Tăbăras *"Situaţia premisă încheierii contractului de asigurare: riscul"* – în ProExcelsior Asociaţia Alumni a Universităţii Titu Maiorescu, seria drept, anul III, nr. 2, septembrie 2011, Ed. Universul Juridic

[169] Alice Mariana Apetrei, *Notiunea de consumator in Regulamentul (CE) nr.583/2008 al Parlamentului European si al Consiliului din 17 iunie 2008 privind legea aplicabilă obligaţiilor contractuale (Roma I) si, respectiv, in legea română (Codul Consumului –Legea nr.296/2004)*, Dreptul nr.1/2011, p.158

and any person who, by putting his name, trade mark or other distinguishing feature on the product presents as its producer. As such, the provisions of paragraph 2 item 3 report of the Law 240/2004, the person responsible[170] is the manufacturer.

A careful analysis of the content of the provision of Article 3 of Law 240/2004[171], we can note that security must be extended to all those involved in the production and distribution of product on the market, taking into account in determining liability both work real manufacturer, as well as that of the former.

1.5. The principle of good faith

Principle of good faith[172] is a central pillar of relations between the two parties since the conclusion and throughout the course of this, the manufacturer has the obligation[173] to guarantee the consumer against any defects in the product delivered and to indemnify in the event of lack of conformity product or whether it produces consumer injury.

1.6.The principle of subsidiary responsibility

According to the Law 240/2004 on liability for damages producers caused by defective products, law continues to have effect after the entry into force of the new Civil Code representing the general material manufacturer's liability for damage caused to consumers by putting the movement of defective products, the producer is the person who will be responsible for both the lack of conformity of products and consumer injury.

However, in case the manufacturer is not known, will be held liable distributors and importers. In other words, if the manufacturer can not be identified, the responsibility falls to each provider who fails to inform the consumer within a reasonable time prejudiced identification of the manufacturer or the person who supplied the product therefore the manufacturer is paramount and only secondarily intermediaries will be held accountable[174].

Conclusions

The current structure of the domestic legal system as a whole behaves special meanings determined by evolution and adaptation of national norms and principles of the European Union.

Institution of consumer and producer liability for defective products was outlined in the context of substantive changes to civil liability. However, the principles underlying such liability are the same, whether the liability is classified as a tort or a contract.

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[170] For details, see, M.Tăbăraş, *„Daune-interese. Dobânzi. Penalităţi. Răspunderea contractuală“* – Ed. C.H. Beck, Bucureşti, 2009,

[171] regarding the manufacturers liability for damages caused by defective products published in the Official Gazette. N. 552 of 24 June 2004 and republished in the Official Gazette. No. 313 of 22 April 2008

[172] For details, see, M.Tăbăras, *"Principiile răspunderii juridice a asigurătorului"* – în Revista română de drept al afacerilor nr. 5/2006, Ed. Wolters Kluwer 2006

[173] M.Tăbăras, *"Particular Aspects regarding the Meeting of the Obligations in the Light of the New Regulations of the Civil Code "*- Universitatea "Valahia" din Târgovişte, Facultatea de Drept şi Ştiinte Social-Politice, Conferinţă ştiinţifică internaţională, "Tradiţie şi modernitate în noile coduri din România", ediţia a VIII-a

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SOME ASPECTS OF INVESTIGATING AND PROSECUTING TRAFFICKING OFFENSES

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Abstract

Human trafficking has been called the slavery of 21st century. Although the phenomenon is partially known, its amplitude for which is made responsible of recently is not yet known correspondingly.

Up to 4 milion persons are registered annually to have been trafficked, most of them being women and children, albeit the traffickers target as well an increasing number of men and boys for exploitation for forced labour and other exploitation practices. Human trafficking has became a national and international major issue.

This involving a large number of people, has profund implications for social and economic affects many people and countries. Trafficking demonstrates a profund violation of basic rights and becames a problem that is steadily worsening.

Keywords: *human trafficking, forced labour, exploitation practices.*

Human trafficking is a phenomenon with many dimensions: a serious violation of human rights, economic and social phenomenon, revealing at the same time and a criminal aspect. It is a serious offense, as provided in Article 2, letter b of Law nr.39din 2003 on preventing and combating organized crime, the victims are treated as assets and sold to obtain illegal profits. Trafficking in human beings can be, while bond for the offenses of drug trafficking and terrorism, which is why it must be undertaken activities to counter this phenomenon.

Trafficking offense is within the jurisdiction of the prosecutor research in the Directorate for Investigating Organized Crime and Terrorism, which guides and supervises officers in specialized structures of Romanian Police to combat organized crime.

As a referral in practice is very rare denunciation, victims are not willing, because violent and traumatic experiences, to press charges against traffickers, so that identification of trafficked persons is due in most part, information-operative activities conducted by police to combat organized crime structures. According to Article 16 of Law no. 678/2001, the consent of the trafficked person does not exclude criminal liability of the perpetrator. So human trafficking offenses are punished regardless of the consent of the victim. Thus even if the victim consented to go abroad and accepted the dealer to perform necessary formalities and pay the amounts transported his victim's consent trafficking offense not criminal liability of the perpetrator.

Minor traffic offense is criminalized in Article 13 of Law no. 678/2001 even though the action of recruitment, transportation, harboring or receipt of a minor in order to exploit it, it is achieved by providing for methods of coercion such that the legislature, in these situations, minor victim with age than 18 years, is unable to express a valid consent.

Identification of possible victims require the investigator the ability to distinguish between offenses of prostitution and trafficking in sexual exploitation between dealer and pimp, as distinct active subjects, to be conducted at an early stage of research.

During the hearing, the victim must establish the exact steps of trafficking: recruitment, exploitation, trafficked person's statement is directed to these issues. Most times the trafficked person resulting statement and other victims of this same network of traffickers, so identifying a single victim are key starting point in investigating crime of human trafficking..

Scientific witnesses taken in psychology have shown that the mechanism of perception, fixing of record and playback varies from person to person, in relation to mental development, the degree of culture, the profession, the environment and the conditions under which perceived facts and circumstances, with an infinity of other elements, which initially acts or overlapping between perception and the playing time, so any statement appears inevitable deterioration coefficient of initial or subsequent deformation.

Investigation and research activities of human trafficking offenses, involve the use of special investigative techniques such as surveillance operations, the use of undercover investigators, interception and recording of telephone conversations, records in the environment, surveillance of bank accounts and assimilated accounts, and international cooperation on case.

International cooperation on the case is made by the police, through the International Police Cooperation Centre (Interpol, Europol liaison officers Romanian and sneezing), through its anti-trafficking in the countries involved in the case, but police interest data and information are not supported by by the courts. Investigation and research activities aimed at proving the guilt of criminals, making use of data from procedural documents.

House searches in homes traffickers may seek lifting of goods, money or valuables, which served or were obtained as a result of the offense. After conducting house searches in homes traffickers pass, necessarily, the hearing traffickers. They will be heard on offense, and if the act of negation, proceed to the presentation of evidence in the case, confrontation, recognition, etc. group. Documents may be obtained from local authorities in respect of income by traffickers, criminal prosecution, stating that have been investigated for other crimes, criminal record, and remittances required by the traffickers or victims in EU countries in Romania. If the crime of human trafficking investigation, depending on the nature of traces found on site or at finding flagrant crime, the case will have any sort of expertise or technical-scientific and the graphic traseologice, technical examination documents, fingerprint, ballistic, chemical, etc.

Particularly important are the technical expertise of documents and graphics expertise because these can be clarified through a series of problems such as original writing that completed the act under consideration and can be falsified by Repressing, imitation, deletion, addition, traces of violation by photography application, amendments to the writing, which are filled biodata, semnalmentele, validity period, the country has issued.

Both technical-scientific and graphic expertise for identifying persons who have completed writing made on forged documents. A major concern for these crimes the establishment forensic examination of the victim must be such a close time after its discovery by the judiciary.

Finding is forensic specialists forensic network, according to the power set of rules providing forensic services. Forensic finding may be finding proper forensic and forensic psychiatric observation. Forensic finding itself aims to establish the cause of death or bodily health mechanism injured person. Finding forensic psychiatry is to determine the defendant's mental illness, the nature of discernment to reduce or eliminate the deed.

Expertise becomes increasingly more interdisciplinary or multidisciplinary nature, because their performance requires the participation of specialists from several fields, such as forensic, technical, medical, to formulate conclusions in the expert report.

Prosecution of trafficking offenses or in connection with human trafficking efectuează necessarily be the prosecutor and judge in the first instance by the Court. In art. 21-25 of Law nr.678/2001 procedural provisions contained more special. To collect the necessary data prosecution can be used undercover investigators under the law.

When no data or clues that a person who prepares an offense of trafficking in persons or in connection with human trafficking or who has committed such an offense uses

telecommunications or computer systems, the prosecution may, with the approval of the prosecutor, to access for a specified period of these systems and to supervise.

Proceedings in cases of trafficking in persons referred to in Article 13 and child pornography under Article 18 are not public. The conduct of the trial may assist the parties, their representatives, advocates, and other persons whose presence is deemed necessary by the court. In examining other crimes provided by art. 12 and of Article 17 of Law nr.678/2001- or adult trafficking and offenses related to human trafficking, at the request of the victim, the court may declare the meeting secret

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COMPLAINT AGAINST THE LEVY OF EXECUTION AND THE OPPOSITION TO THE EXECUTION IF BILLS OF EXCHANGE AND PROMISSORY NOTES

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Abstract

The promissory note is a commercial effect, signed by a person named issuer or underwriter undertakes to pay a sum of money due to another person named beneficiary, or to order it. Form, promissory note resembles an acknowledgment of debt by the debtor to his creditor.

Being a commercial basis value, the promissory note is a debt instrument, notes, formal and complete, which incorporates an obligation abstract, autonomous and unconditional payment of a fee by the subscribers, held jointly for performance .

One of the problems frequently encountered in legal practice is challenging routes promissory notes by debtors, whether this appeal concerns the enforcement itself or just the ways and forms of its enforcement.

Competition between common law legal regulations on appeal from enforcement of the Code of Civil Procedure and regulations in the Law no. 58/1934 on bills of exchange and promissory notes, put before a court delicate operation qualification of actions which neither parties often do not know to qualify rigorous qualification by the court later depending on a number of key issues on admissibility, the time limit for the appeal, suspend the enforcement conditions.

Chapter 1: COMPLAINT AGAINST THE LEVY OF EXECUTION AND THE OPPOSITION TO THE EXECUTION - DEFINITION THEIR LEGAL PROCEDURES AND REGULATIONS:

According to Art. 399 paragraph 1 Code of civil procedure, "Against foreclosure and against any act of execution appeal can be made by the interested or injured by execution. Also, if you didn`t use the procedures provided by article 281 ^ 1, you can appeal and if necessary clarification on the meaning, extent or application of enforcement, and if the execution authority refuses to start foreclosure or to perform an act of performance under provided by law."[175]

Same legal text, at paragraph 3, provides that "If foreclosure is under a writ of execution is not issued by a court can be invoked in opposition to enforcement defense fund against writ of execution, unless the law provides for this purpose a other remedy."[176]

Final settlement of the legal provisions mentioned above, sends us when promissory notes, to the provisions of art. 62 paragraph 1 of Law no. 58 of 1934 updated, according to which "within 5 days of the summons, the debtor may contest the enforcement."

Appeal to execution is thus mainly a procedural instrument specifically designed for the enforcement procedure, a "complaint" specifies the procedure by which to obtain cancellation or removal of implementing acts or sometimes even annihilating effect of an enforceable executory title. [177]

[175] Code of Civil Procedure, art. 399 alin. 1
[176] Idem, art. 399 alin. 3
[177] Viorel Mihai Ciobanu, Gabriel Boroi – Civil Procedural Law. Selective course. Ed. All Beck, Bucuresti, 2003, pag. 502

By a special law, namely Law nr.58/1934 of bills and promissory notes, has been regulated a special procedure that opposition bills through which the debtor may claim exemptions from paying bills entrusted with enforcing respectively invested.

But for the debtor to make this opposition bills, creditor, through the bailiff must communicate an order of execution. Summons or summons enforcement bill of exchange (applicable in case of a promissory note) shall include accurate transcription or protest of bills and other documents which show the amount due, according to Article 61, paragraph 6 of Law no.58/1934 of bills and promissory notes. Summons against the bill, the debtor may object, within 5 days of receipt of summons, the court has vested with enforceable bill – article 62 of ante-mentioned law.

Chapter 2: AWARDS PROCEDURE IN OPPOSITION TO COMPLETION AND OPPOSITION TO COMPLETION:

2.1. Scope

Since art. 399 align. 3 of Civil Procedure Code provides mandatory and restrictive that appeal to execution procedure can be used to attack the merits of enforceable only for which the law provides a judicial procedure to challenge the merits, promissory notes and bills of exchange are excluded at the outset of the appeals the performance of the title itself.

Moreover, given that the special law stipulates the procedure of challenging the merits of bills and promissory notes, the principle that special regulation derogates from the general, it is clear that complaints are inadmissible in title itself performance against bills and promissory order.

2.2. Admissibility of appeal in relation to the execution of opposition to execution

In essence, through the enforcement appeal fund can be raised defenses on the promissory note, enforceable under which foreclosure was started.

Related to art. 399 paragraph 3 Civil Procedure Code, in situations where enforcement began under a promissory note that is enforceable under article. 106 in conjunction with article 61 of Law no. 58/1934 on bills of exchange and promissory notes, amended, we are in presence of a writ of execution, which is issued by a court.

Then, the law to which reference has been made, further establish a condition for the execution through the appeal can be invoked defenses against enforcement background "... law provides for this purpose no different remedy. "

According to article 106 of Title II (regulatory office of promissory notes) of Law no. 58/1934, are applicable promissory note bill provisions relating to the execution of opposition regulated by article 62, paraghaph 1: "Within 5 days of receipt somatiunii, the debtor may oppose enforcement." So by exercising opposition, the debtor can dispute the validity of the title, may invoke certain exceptions that arise from the obligation to pay.

In case of competition between general law and special law specific provisions.

In conclusion, in the event that started the foreclosure of a promissory note, **the enforcement appeal is inadmissible.** [178]

This is the opinion expressed by a court of law - court Sibiu in resolving an appeal to performance against an enforcement represented by promissory notes.

We don`t agree with the view expressed by the court in outcome for the following reasons:

First, the debtor has the right to defend themselves in the background even appeal to execution, when he was not served by the bailiff summons bills.

[178] Civil sentence no. 8846/11.11.2010 of Sibiu Court

Thus, no. XV Decision of 5 February 2007, was upheld in the interest of law filed by the Attorney General's Office attached to the High Court of Cassation and Justice, Supreme Court ruling that: the application of art.400 and art .402 of the Code of civil Procedure, in the first instance jurisdiction to hear the appeal brought against the actual enforcement and appeal aimed at clarifying the meaning, scope or application of enforcement does not emanate from a court or tribunal is court. So specific way, which can attack joint enforcement itself, or how it was applied, when the title is not an appeal court decision on execution**.** [179]

For the debtor to make this opposition bills, creditor, through the bailiff must communicate an order of execution. Summons or summons enforcement bill of exchange (applicable in case of a promissory note) shall include accurate transcription or protest of bills and other documents which show the amount due, according to Article 61, paragraph 6 of Law no.58/1934 of bills and promissory notes. Summons against the bill, the debtor may object, within 5 days of receipt of summons, the court has vested with enforceable bill – art. 62 of ante-mentioned law.

According to the provisions of article 63 of Law nr.58/1934 and art..321 of BNR standard, processes bills, either by action or by way of opposition to the writ of execution, debtor creditor may oppose exceptions regarding the nullity of the title , personal exemptions (those arising from personal relationships between owner and debtor bill), procedural exceptions (those relating to the conditions governing the implementation of the action or bill of exchange). Withholding performance is really personal exception arising from the legal relationship that occurred between creditor and debtor, which is usually fundamental report cambial obligation abstract.

Personal exemptions, under art. 328 of BNR standards, are: a) exceptions relating to fundamental report led to the creation and circulation of bills of exchange, b) exceptions relating to the vices of consent and c) exceptions arising from subsequent reports creation bills.

In other words, for the debtor to defend themselves against foreclosure initiated against him should raise against summons served cambial opposition bills.

Under these conditions, indeed the way to execution appeal made under the provisions of the Code of Civil Procedure will be made defenses or exceptions regarding enforcement provisions and not on the merits of, or the legal relationship between debtor and creditor.

Appeal to the enforcement can be done, according to art. 399's. 2 Civil Procedure Code., for any reason due to non-compliance with the legal provisions on enforcement itself or perform any act of execution.

Opposition to execute a promissory note, on the other hand, according to art. 63 of Law no. 58/1934, is limited to invoking the nullity exception objectives of the report drafts or personal exceptions invalidity refers to fundamental legal relationship between the owner and the issuer under which it was issued promissory note (or bill). Exceptions objectives relate to lack cambial obligation (void bill for lack of essential terms, signature distorted settle the obligation promissory note bill of exchange or revocation of an unsuitable condition for action bills) and personal exemptions, which must necessarily be based on a written test according to art. 63 align. 2 of Law no. 58/1934, is based on the common law and it aims fundamental legal nullity report which was issued under the promissory note (or bill).[180] All these exceptions bill of exchange must be invoked until the first day of appearance, according to art. 63 of. 4 of Law no. 58/1934.

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[179] RIL – Decizion no. XV of 5 february 2007 on establishing jurisdiction to hear appeals from enforcement involving the judgments in commercial litigation

[180] Ion Turcu and collaborators, " Law on bills of exchange and promissory notes annotated and commented ", Ed. Lumina Lex, Bucureşti, 1994, page no. 165-166

2.3. Legal deadline for submission

In addition to implementing admissibility of appeals in cases where execution titles are bills or promissory notes, classification requests as opposed to appeal to the execution or performance has a number of other practical consequences of procedural issues.

First, a major difference between the opposition and the opposition is the term for submission. Complaint against the levy of execution is introduced, generally within 15 days of the execution of the act challenged and opposition is lodged within 5 days (3 times faster) for the communication summons enforcement.[181]

This distinction is of great importance, because the qualification action promoted its exercise depends on the term, the penalty being that the failure to file within late promoted action.

2.4. Jurisdiction to hear appeals from enforcement and opposition to execution

Appeal to court enforcement is introduced to execution court. The appeal for clarification of meaning, stretching or enforcement application is lodged with the court that issued the judgment to be executed. If such an enforcement appeal target does not emanate from a body of jurisdiction, jurisdiction of court enforcement belongs. Enforcement court is the court in whose district will be executing unless the law provides otherwise.[182]

If opposition appeal will be introduced to the court for enforcement, who will judge according to the Code of Civil Procedure, the urgency and priority, before any other reasons. Material competence is therefore all the court, but the local jurisdiction is different: court grants the bill or promissory note with enforcing.

According to art. 10 Section 3 of Civil Procedure Code this court was the court of the place of payment (not necessarily the venue court enforcement). By eliminating the art. I, section 16 of Law no. 459/2006 investiture with enforcing the requirement of documents which the law confers enforceable (including bills of exchange and promissory notes under art. 61. 1 of Law no. 58/1934), the provision of special jurisdiction on opposition remained without a valid benchmark, will therefore be applied to the general rule of art. 10 Section 3 Civil Procedure Code., which provides the territorial jurisdiction of the trial court place any payment request that spring from a promissory note (or a bill).

2.5. An appeal against the decision of the first instance

A major difference between the two procedures above is contentious appeal against the decision of first instance data. Thus, while the actual execution appeal involves, according to art. 402's. 2 Civil Procedure Code., the judgment of the first court to be subject only to appeal within 15 days of notification, the decision of the first instance of opposition, on the other hand, is subject to appeal within 15 days *of delivery*.[183]

This difference is crucial, because the classification error application may result in the loss limit for lodging an appeal (if the party considers it a challenge to execution and waits for the judgment appealed it, communication is usually the more than 15 days of the judgment) or to cancel the appeal if the appeal within 15 days of the ruling, nemotivându it within 15 days of the decision taking the view that opposition to execution, and the court of appeal as retraining judicial appeal, applying sanctions stipulated in art. 302 ^ 1 of. 1 point c related to art. 303 of. 1 Civil Procedure Code. (canceling appeal as groundless within).[184]

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[181] Ion Turcu and collaborators, " Law on bills of exchange and promissory notes annotated and commented ", Ed. Lumina Lex, Bucureşti, 1994, page no. 162-163

[182] Art. 400 related to art. 373 align.2 Code of Civil Procedure

[183] Art. 62 align.3 Law no. 58/1934

[184] Marius Floare, lawyer – Cluj Bar - Opposition to enforcement promissory notes and appeal to the

2.6. Possibility of forced execution suspension

Regulations of the Civil Procedure Code and Law no. 58/1934 is radically different and the conditions that must be met to suspend enforcement. If art. 403 of. 1 Civil Procedure Code. regulates the general procedure of enforcement, the suspension of enforcement by the court pending resolution of the appeal to the execution or other enforcement requests if submitted on bail in the amount fixed by the court, art. 62 of. 4 of Law no. 58/1934 regulates more restrictive possibility of suspending enforcement when enforcement is a bill of exchange or promissory note, conditional possibility of suspending enforcement of recognizing the opponent signature by registering in recognizing false or attorney (if subscription bill means promissory notes or by proxy).[185]

The law provided for the suspension only exceptional case of false entry in order to ensure the principle of celerity execution of the bill, its course can not be stopped except in cases where the debtor's rights are violated and when there are indications obvious fraud.

Article 403 paragraph 4 regulates appeal against foreclosure if a special procedure, meaning that in urgent cases, if you bail, presiding judge may order the closing and without summoning the parties, temporary suspension of execution to settlement request for suspension by the court. Conclusion is not subject to any remedies. Bail to be deposited is in the amount of 10% of the value of demand or 5 million for non-monetary claims. Bail set bail deposit is deductible from the court, if necessary.[186]

The question that arises naturally is whether the institution of temporary suspension of the execution operates and where opposition to the execution. Author's opinion is that such an application is admissible and where opposition to the execution. According to the principle *of ubi lex non distinguit, nec nos distinguere debemus* as long as Law. 58/1934 does not expressly prohibit this institution, we believe that we can rely on temporary suspension in the case of opposition to the execution.

Over time, the role of courts were formulated and injunctive requests, based on art. 581 proc code. Civ., involving the suspension of the enforcement of the promissory note.

According to art. 104 et seq. of Law. 58/1934 on bills of exchange and promissory notes, it is an enforceable credit that are applicable provisions of the special law of law.

In Chapter VII titled "regression in the case of non-acceptance or non-payment" in art. 62 ff. from it are provided procedural ways (actions) which may be exercised in the performance, or opposition to execution, the court may suspend performance titles.

As such, while the special law provided for suspension of the procedural means you can not apply the provisions of the Code of Civil Procedure on presidential ordinance, which called temporary unavailable notes, so their suspension.

Chapter 3: Conclusions

The analysis of the two procedures above, it can be concluded that, both appeal to the foreclosure proceedings, and the opposition to execution can be used where a bill of exchange or promissory note. Major distinction between the two procedures, however, is that while opposition to executing targets valid promissory note itself as enforcement, the enforcement appeal if the promissory note may cover only the legality of executing prepared and conducted bailiff, without analysing the validity of enforcement.

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enforcement

[185] Marius Floare, lawyer – Cluj Bar - Opposition to enforcement promissory notes and appeal to the enforcement

[186] Art. 403 align.4 Code of Civil Procedure

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LA RESPONSABILITE PENALE DES PERSONNES MORALES
FRANCE 2012

CLAUDIA GHICA-LEMARCHAND

Le droit pénal français classique[187] retenait la responsabilité pénale reposant sur le discernement et le libre-arbitre de l'individu qui avait nécessairement conscience de violer la loi pénale. En l'absence de cet élément, le châtiment devenait inutile, car dénué de sens. A ce titre, la personne morale collective était soustraite à la responsabilité pénale pour plusieurs raisons fondamentales : le groupement, fiction juridique, était dénué de volonté propre ; l'objet social était nécessairement licite pour la reconnaissance juridique ; les peines avaient été conçues pour les personnes physiques ; la responsabilité pénale collective portait atteinte au principe de responsabilité pénale individuelle et de personnalité des peines. La Cour de cassation considérait que « l'amende est une peine et cette peine est personnelle, sauf pour les cas prévus par la loi ; elle ne peut donc être prononcée contre un être moral, lequel ne peut encourir qu'une responsabilité civile »[188]. La doctrine du XIXème siècle se ralliait massivement à l'adage « *societas delinquere non potest* ».

Cependant, certains éléments plaidaient en faveur de l'admission de la responsabilité pénale des personnes morales. Historiquement, elle n'était pas totalement inconnue, car dans l'Ancien Droit, selon l'ordonnance de 1670, « les communautés, bourgs, villages » pouvaient être frappées de diverses peines telles que les amendes, les confiscations ou le rasement des murailles. Plus récemment, l'ordonnance du 5 mai 1945 déclarait pénalement responsables les entreprises de presse coupables de collaboration avec l'ennemi. De nombreux Etats[189] admettent la responsabilité pénale des personnes morales dans leur droit positif. Plusieurs congrès internationaux de droit pénal, dont certains des plus importants se sont déroulés à Bucarest[190], les projets de révision du Code pénal français[191], l'évolution de la doctrine ont entraîné un changement radical de l'analyse juridique en contrecarrant systématiquement les arguments contraires à l'admission de la responsabilité pénale des personnes morales. L'objet social de la personne morale est nécessairement licite, lors de sa création, mais il peut être dévoyé et conduire à la commission de l'infraction. La condamnation de la personne morale collective entraîne des effets néfastes sur les individus en faisant partie, tout comme la condamnation d'une personne physique sur les membres de sa famille et de son entourage. Une situation d'inégalité des armes en procédure pénale naît de cette situation, la personne morale pouvant se constituer partie civile (dans le rôle de la victime de l'infraction), alors qu'elle ne subirait pas les rigueurs de l'accusation. Le développement excessif de la responsabilité pénale des dirigeants d'entreprise s'explique par l'impunité totale des personnes morales représentées.

Ainsi, la loi du 22 juillet 1992, devenue le nouveau Code pénal, entré en vigueur en 1994, tient compte de cette évolution et consacre la responsabilité pénale des personnes morales. L'exposé des motifs de la loi indique clairement la philosophie pénale de cette innovation majeure « l'immunité actuelle des personnes morales est d'autant plus choquante qu'elles sont souvent, par l'ampleur des moyens dont elles disposent, à l'origine d'atteintes graves ». Le Garde des sceaux a fixé de manière simple le cadre juridique en indiquant que « les personnes

[187] Code pénal 1810.
[188] Crim. 8 mars 1883, D.P. 1884, 1, p. 428.
[189] Canada, Royaume-Uni, Pays-Bas, Etats-Unis d'Amérique, Liban.
[190] 1929 et 1978.
[191] Projet MATTER 1934 – les articles 89 et 116 proposaient la responsabilité pénale des groupements dont « l'activité est de nature commerciale, industrielle ou financière » en raison des infractions commises en leur nom et dans leur intérêt collectif par la volonté délibérée de leurs organes.

morales qui agissent dans les mêmes domaines que les personnes physiques, doivent subir les mêmes contraintes juridiques qu'elles »[192]. Le nouveau Code pénal n'a pas créé de nouveau livre dédié à la responsabilité pénale des personnes morales, mais a procédé par « saupoudrage », en les diluant dans l'ensemble du Code pénal et en posant un principe général à l'article 121-2. Si le champ d'application de la responsabilité pénale des personnes morales a appelé des évolutions législatives d'ajustement, ses conditions d'applications nourrissent une jurisprudence abondante et évolutive.

I. LE CHAMP D'APPLICATION DE LA RESPONSABILITE PENALE DES PERSONNES MORALES

Le Code pénal, essentiellement tourné vers les personnes physiques, a adapté les peines aux personnes morales (B), mais a essayé de garder un cadre général (A) propice à l'application des principes traditionnels.

A. LE CADRE GENERAL DE LA REPSONSABILITE PENALE DES PERSONNES MORALES

L'article 121-2, alinéa 1er, C. pén. définit le cadre général de la responsabilité pénale des personnes morales quant aux personnes et aux infractions.

1. LES PERSONNES VISEES

Le législateur fait prédominer le principe d'égalité des personnes morales devant la loi, même si certaines spécificités peuvent être notées.

Toutes les personnes morales de droit public peuvent être pénalement responsables, à l'exclusion de l'Etat, en vertu du principe de la séparation des pouvoirs et du fait de son monopole du droit de punir qu'il ne pourrait s'appliquer à lui-même. Les collectivités locales voient leur responsabilité pénale limitée « aux infractions commises dans l'exercice des activités susceptibles de faire l'objet de délégation de service public ». La Cour de cassation, s'inspirant du droit administratif[193], a précisé les conditions des activités délégables, qui ne peuvent toucher un domaine régalien, et qui doivent permettre au délégataire d'être « rémunéré, pour une part substantielle, en fonction des résultats de l'exploitation »[194]. Dans le cas particulier des activités scolaires et périscolaires[195], les délégations ne sont pas admises dans le cadre de leur organisation[196], car « elles participent du service de l'enseignement public »[197], mais restent possibles dans le cadre de l'exécution.

Les personnes morales de droit privé, à but lucratif ou non-lucratif, peuvent voir leur responsabilité engagée, même si le système vise plus particulièrement les sociétés à caractère industriel, commercial ou financier. La seule condition exigée par le Code est l'existence effective de la personnalité pénale, ce qui exclut de fait les sociétés en cours de formation, les sociétés absorbées dans le cadre des fusions-acqusitions, les groupes de sociétés ou les sociétés dites « en participation ».

2. LES INFRACTIONS VISEES

Le champ d'application du point de vue des infractions visées a considérablement varié.

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[192] M. Pierre Méhaignerie, lors des travaux parlementaires sur la loi du 22 juillet 1992.
[193] Loi du 11 décembre 2011, MURCEF, loi portant mesures urgentes de réforme à caractère économique et financier.
[194] Crim. 3 avril 2002, Bull. n° 265.
[195] Crim. 12 décembre 2000, Bull. n° 371.
[196] Crim. 6 avril 2004, Bull n° 89.
[197] Crim. 11 décembre 2001, Bull. n° 265.

Le Nouveau Code pénal retenait une responsabilité pénale spéciale des personnes morales, car elle ne pouvait être engagée qu'en vertu des dispositions expresses de la loi ou du règlement. Ce système présentait de nombreux inconvénients. D'une part, il y avait une rupture d'égalité entre les personnes morales et physiques. D'autre part, le législateur se gardait le pouvoir d'apprécier, infraction par infraction, l'opportunité de la responsabilité pénale des personnes morales, mais en cas d'oubli de sa part, le juge ne pouvait pas combler les lacunes. Ainsi, la cohérence même de la répression se trouvait mise en doute lorsque la responsabilité pénale des personnes morales était prévue en cas de viol, mais avait été omise pour certaines infractions en droit pénal du travail, domaine de prédilection des condamnations prononcées en la matière[198]. Enfin, si le juge interprétait strictement le principe de spécialité[199], dans certains cas, il adaptait la qualification d'une infraction permettant la condamnation d'une personne morale en procédant à des assimilations d'éléments constitutifs, malmenant ainsi le principe de légalité pénale.

La loi du 9 mars 2004 a supprimé les mots « dans les cas prévus par la loi ou le règlement » dans l'article 121-2, rendant ainsi général le principe de la responsabilité pénale des personnes morales. Cette réforme laissait l'impression qu'après dix ans d'expérimentation du système instauré par le nouveau Code pénal, il aboutissait à sa maturité et à sa forme définitive. Actuellement, les personnes physiques et morales sont pénalement responsables pour toutes les infractions du Code pénal, ce qui facilite le travail juridique : le législateur n'a plus besoin de préétablir des listes d'incriminations spécifiques pour les personnes morales et le juge ne fait plus « d'acrobaties de qualification » pour adapter les incriminations à la responsabilité pénale des personnes morales.

La réforme du 9 mars 2004 a, cependant, maintenu certaines spécificités de la répression à l'égard des personnes morales.

B. LA REPRESSION DES PERSONNES MORALES

L'inspiration morale de la peine, ainsi que sa nature initiale de contrainte du corps humain, s'accordent mal avec le concept de la personne morale. Le législateur a été « condamné » à innover autant du point de vue des peines applicables, que des principes directeurs de la répression pénale.

1. LES PRINCIPES DE LA REPRESSION PENALE

L'introduction d'un nouveau type de responsabilité pénale entraîne nécessairement une adaptation du droit positif, même si on ne peut parler de véritable bouleversement, en l'espèce.

Le droit pénal français repose sur la classification tripartite des infractions, selon leur gravité[200], qui détermine l'architecture du système judiciaire pénal. Les crimes, délits et contraventions sont déterminés par la nature de la peine encourue. Le critère de la peine n'existe que pour les personnes physiques (la réclusion criminelle désigne le crime, l'emprisonnement et l'amende supérieure à 3750 € détermine le délit, alors que la contravention est punie d'amende inférieure à 1500 €), les articles 131-37 à 131-39 prévoyant une liste globale de peine encourue pour toute infraction commise par les personnes morales, quelle que soit sa catégorie tripartite. Comment déterminer dans ce cas la juridiction compétente pour juger la personne morale ? Il convient de procéder par référence aux peines

[198] Statistique au 1er juillet 2012 : 1400 condamnations de personnes morales, dont plus de la moitié en droit pénal du travail.

[199] Crim. 18 avril 2000, Bull. n° 153 : lorsque le texte d'incrimination désigne comme auteur de l'infraction « toute personne », il ne peut s'appliquer à la personne morale, faute de disposition expresse.

[200] Article 111-1 C. pén.

encourues par les personnes physiques pour les mêmes infractions. Les règles applicables sont identiques, mais déterminées par référence, appelant l'application du parallélisme.

Le droit pénal français réserve une place de choix au principe d'individualisation de la peine qui permet d'adapter la peine « à la nature de celui qu'elle va frapper »[201]. L'individualisation permet de moduler à la fois la durée de la peine, qui se fonde sur l'idée de sanction, et la nature et le régime de la peine, qui vise la préservation de la société[202]. Le Conseil constitutionnel a constitutionnalisé ce principe[203], en le déduisant de l'article 8 de la Déclaration des droits de l'homme et du citoyen. La notion a été consacrée par le Code pénal de 1994, sous la forme du principe de la personnalisation des peines, afin de l'adapter à l'introduction de la responsabilité pénale des personnes morales, qui ne sont des individus, mais sont néanmoins soumises à ce principe. Le principe séculaire d'individualisation de peines est devenu principe de personnalisation des peines, afin de profiter autant aux êtres charnels que désincarnés, devenus sujets de droit pénal égaux.

2. LES PEINES APPLICABLES AUX PERSONNES MORALES

Le législateur a instauré des peines spécifiques applicables aux personnes morales aux articles 131-37 à 131-39 du Code pénal.

La peine d'amende est la peine de droit commun applicable aux personnes morales, puisqu'elle est prévue automatiquement pour toutes les infractions. Son taux est fixé au quintuple de l'amende encourue par la personne physique pour la même infraction, selon l'article 131-38. En cas d'absence de peine d'amende prévue pour l'incrimination criminelle, le maximum applicable est de 1 000 000 €[204].

Le juge peut prononcer les autres peines de l'article 131-39, si elles sont expressément prévues par le texte d'incrimination. Elles sont relatives à l'actif de la personne morale (la sanction-réparation ; la confiscation ; les restrictions à la liberté financière se traduisant par l'interdiction de faire appel public à l'épargne ou d'utiliser des moyens de paiement bancaires, l'exclusion des marchés publics ; les sanctions médiatiques donnant lieu à l'affichage de la décision ou la diffusion par la presse écrite ou autre moyen de communication audiovisuelle) ou à la structure même de la personne morale (la dissolution, le placement sous surveillance judiciaire, les interdictions d'activités ou la fermeture d'établissement). Ces mesures peuvent être cumulées avec l'amende, mais elles sont spéciales et le juge doit s'assurer qu'elles ont été expressément prévues par le législateur dans l'incrimination[205]. Certaines tendent à devenir générales à certaines catégories d'infractions. Ainsi, la confiscation est encourue de droit pour tous les crimes et délits punis de plus d'u an d'emprisonnement, selon l'article 131-39, avant-dernier alinéa[206], et la sanction-réparation est applicable en matière correctionnelle, selon l'article 131-37, alinéa 2[207]. Le législateur a maintenu la peine de dissolution, qui équivaut à la peine de mort pour les personnes physiques, constitutionnellement interdite en France. Cependant, certaines peines portant atteinte à la structure de la personne (la dissolution, le placement sous surveillance judiciaire et l'interdiction d'activité) ne sont pas applicables aux personnes morales de droit public, aux partis politiques et aux syndicats professionnels.

Le législateur a prévu un éventail de peines assez large, mais composé exclusivement de sanctions négatives, le juge n'a aucune possibilité de prononcer une injonction pour procéder

[201] SALEILLES R., « L'individualisation de la peine. Etude de criminalité sociale », Paris 1898.
[202] LE POITTEVIN A., « L'individualisation de la peine », in « L'œuvre juridique de Raymond Saleilles », Paris, 1914.
[203] Conseil constitutionnel n° 2005-520 DC du 22 juillet 2005 .
[204] Loi 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité.
[205] Cour d'appel de Paris, 2 févr. 2012, n° 10/00510, affaire de l'Eglise de scientologie.
[206] Loi n° 2010-768 du 9 juillet 2010 visant à faciliter la saisie et la confiscation en matière pénale.
[207] Loi n° 2007- 297 du 5 mars 2007 relative à la prévention de la délinquance.

à une modification de la structure ou de l'activité. Ce cadre juridique large de la responsabilité pénale des personnes morales s'accompagne de conditions d'application strictes.

II. LES CONDITIONS D'APPLICATION DE LA RESPONSABILITE PENALE DES PERSONNES MORALES

Les conditions de mise en œuvre de la responsabilité pénale des personnes morales sont strictement définies par l'article 121-2, alinéa 1er, du Code pénal qui exige « l'infraction doit être commise pour le compte de la personne morale par leurs organes ou représentants ». Si la nature de la responsabilité pénale des personnes morales a connu de multiples rebondissements, les conditions juridiques de son engagement sont clairement appliquées par la jurisprudence.

A. LA NATURE DE LA RESPONSABILITE PENALE DES PERSONNES MORALES

La responsabilité pénale des personnes morales suppose la commission matérielle d'une infraction par une personne physique. Conçue comme une responsabilité d'emprunt par le Code pénal, ne pouvant exister en dehors d'un substratum humain, la jurisprudence a tenté de lui rendre son autonomie, avant de revenir à une interprétation plus conforme de l'article 121-2, al. 1er, C. pén.

1. RESPONSABILITE AUTONOME PAR REFLET

En application de l'article 121-2 C. pén, l'infraction doit être caractérisée dans tous ses éléments à l'égard d'une personne physique. La question essentielle est de savoir si la responsabilité pénale des personnes morales est une responsabilité par ricochet, auquel cas il convient d'identifier précisément la personne physique ayant commis matériellement l'infraction, ou s'il s'agit d'une responsabilité par reflet, auquel cas une faute diffuse de la société suffit pour entrer en voie de condamnation. Dans un premier temps, la Cour de cassation applique strictement la loi et exige l'identification de la personne physique auteur de l'infraction[208]. Cette interprétation stricte empêche d'appréhender la criminalité diffuse d'une entreprise et atrophie la force répressive de la nouvelle institution, raison pour laquelle la Cour de cassation opère un revirement de jurisprudence en approuvant une condamnation au motif que l'infraction « n'a pu être commise que par ses organes ou représentants »[209]. En énonçant une présomption de commission de l'infraction par une personne physique appartenant à l'entreprise[210], les juges renversent la charge de la preuve, et surtout, modifient la nature de la responsabilité pénale des personnes morales en consacrant une responsabilité reflet et ouvrant la voie d'une conception anthropomorphique. Limitée dans un premier temps aux infractions involontaires, elle est étendue aux infractions volontaires[211] en rendant la présomption quasi-irréfragable, étant commise « nécessairement » par un représentant de la société[212].

Cette présomption vide de sa substance l'exigence du lien de représentation et favorise largement l'autonomie de la responsabilité pénale des personnes morales[213], celles-ci pouvant se voir directement imputer une infraction[214], sans avoir identifié préalablement l'auteur matériel des faits[215]. La Cour de cassation refuse de renvoyer au Conseil constitutionnel une

[208] Crim. 29 avril 2003, D. 2004, , jur., p. 167.
[209] Crim. 20 juin 2006, Dr. pén. 2006, comm. n° 98, obs. VERON M.
[210] Crim. 26 juin 2007, Dr. pén. 2007, comm. n° 135, obs. VERON M.
[211] Crim. 25 juin 2008, D. 2009, p. 1723, obs. MASCALA C.
[212] Crim. 28 janvier 2009, Dr. pén. 2009, comm. n° 48, obs. ROBERT J.-H.
[213] Crim. 22 février 2011, Bull. n° 33.
[214] Crim. 14 mai 2008, Dr. pén. 2008, comm. n° 114, obs. ROBERT J.-H.
[215] Crim. 24 mars 2009, Dr. pén. 2009, comm. n° 84, obs. VERON M.

question prioritaire de constitutionnalité portant sur l'imputation des infractions aux personnes morales car « la question posée, sous le couvert de la prétendue imprécision des dispositions critiquées, tend en réalité à contester l'application qu'en fait la Cour de cassation »[216], la question n'étant considérée ni nouvelle, ni sérieuse[217]. La doctrine se montre fort critique à l'égard de cette nouvelle analyse prétorienne et appelle de ses vœux le retour à une interprétation plus orthodoxe de l'article 121-2 C. pén.[218].

2. RESPONSABILITE PAR DELEGATION

La Cour de cassation choisit de revenir sur sa jurisprudence et de se montrer plus stricte dans l'application des conditions légales posées par le Code pénal en exigeant l'existence effective de la caractérisation de l'infraction à l'égard d'une personne physique identifiée en tant qu'auteur matériel[219]. Les commentateurs[220] y ont vu la volonté des juges de renoncer à la présomption énoncée en 2006, « artifice gratuit » qui modifiait la nature des dispositions de l'article 121-2, et de la remplacer par un raisonnement par implication, « une déduction rationnelle d'une conclusion dictée par les circonstances ». La nouvelle position est confirmée[221], permettant de sonner le glas de la présomption, la juridiction suprême exigeant que les juges du fond recherchent si le manquement avait été commis par une personne physique appartenant à l'entreprise, consécration de « l'interprétation légitime de l'article 121-2 C. pén. »[222]. Ainsi, la Cour de cassation condamne l'imputation directe d'une infraction à une personne morale sans référence à une personne physique précise, mais elle n'exclut pas, quant à la preuve, que cette imputation puisse être établie par un raisonnement déductif, fondé sur cette présomption[223]. Cette solution est confortée par la nouvelle rédaction de l'article L 4741-1 du Code du travail[224] qui désigne l'employeur comme l'auteur de l'infraction, renvoyant ainsi directement à la personne morale. De surcroît, elle est parfaitement respectueuse de la légalité pénale. Un seul domaine peut connaître l'autonomie de la responsabilité pénale des personnes morales, existant en dehors de toute infraction caractérisée à l'égard d'une personne physique : la faute simple en lien de causalité indirecte avec le dommage[225], selon l'article 121-3, alinéa 4. La loi du 10 juillet 2000 a créé ce régime juridique particulier pour favoriser la répression[226] des fautes non-intentionnelles commises par les personnes morales[227].

La responsabilité pénale des personnes morales retrouve ainsi sa nature juridique initiale de responsabilité par représentation. Elle n'est pas une responsabilité pénale du fait d'autrui, car

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[216] Crim. QPC 11 juin 2010, Dr. pén. 2010, comm. n° 111, obs. VERON M.
[217] Crim. 27 avril 2011, 2011-147, non publiée au Bull.
[218] GALLOIS J., « La responsabilité pénale des personnes morales, une responsabilité plus que jamais personnelle », AJ Pénal 2011, p. 589.
[219] Crim. 11 octobre 2011, Bull. n° 202.
[220] MAYAUD Y., « Homicide involontaire à la charge d'une personne morale : frein, mais non fin, de la jurisprudence relative à son imputation présumée », RSC 2012, p. 825.
[221] Crim. 11 avril 2012, AJ Pénal 2012, p. 415, « confirmation de l'application normale de l'article 121-2 alinéa 1er du Code pénal », BOULOC B.
[222] BOULOC B., « Vers une interprétation légitime de l'article 121-2alinéa 1er du Code pénal »,AJ Pénal 2012, p. 35.
[223] SAINT-PAU J.-Ch., « Imputation directe et imputation présumée d'une infraction à une personne morale », D. 2012, p. 1382
[224] Loi n° 2011-525 du 17 mai 2011.
[225] Crim. 24 octobre 2000, RSC 2001, p. 162, obs. MAYAUD Y.
[226] SAENKO L., « De l'imputation par amputation ou le mode allégé d'engagement de la responsabilité pénale des perosnnes morales », Dr. pén. 2009, études, n° 14.
[227] MARECHAL J.-Y., « Les errements de la répression des personnes morales », JCP 2009, p. 402

elle est « personnellement punissable », mais repose nécessairement sur une personne physique agissant ès qualité et lui donnant une « expression physique et morale »[228].

B. LA DEFINITION DES CONDITIONS DE LA RESPONSABILITE PENALE DES PERSONNES MORALES

Pour engager la responsabilité pénale des personnes morales, il ne suffit pas qu'une infraction ait été commise par un membre de cette dernière, encore faut-il que cette personne revête une certaine qualité - d'organe ou de représentant. De surcroît, l'infraction doit être commise pour le compte de la personne morale.

1. INFRACTION COMMISE PAR UN ORGANE OU UN REPRESENTANT DE LA PERSONNE MORALE

Seul un organe ou un représentant de la personne morale peut engager, par ses actes ou ses omissions, la responsabilité pénale des personnes morales. Si la définition de l'organe est stricte, celle de représentant laisse plus de latitude au juge pénal.

L'organe désigne l'organe de droit, constitué par une ou plusieurs personnes physiques auxquelles la loi ou les statuts donnent une fonction particulière en les chargeant de « son administration ou de sa direction », englobant les organes de décision et de représentation.

La définition du terme « représentant » soulève plus d'interrogations, raison pour laquelle elle a été précisée par la jurisprudence. Le « représentant » comprend « l'organe », en tant que représentant légal, mais s'applique plus largement, englobant les personnes ayant accompli des actes avec le pouvoir d'engager la société. Ainsi, le dirigeant de fait[229], le délégataire de pouvoir[230], le subdélégataire, sont des représentants de la personne morale ayant le pouvoir d'engager sa responsabilité pénale. Mais, la Cour de cassation a ouvert plus largement le domaine de la représentation l'appliquant à de simples salariés qui ne bénéficiaient pas de délégations de pouvoirs, mais dont les fonctions participaient du pouvoir de direction au sein de ces sociétés (sur le fondement de trois critères – le pouvoir de représentation vis-à-vis des tiers, une autorité pour prendre les décisions au nom de l'entreprise, une autorité pour exercer un contrôle dans son sein)[231]. Cette extension de la notion de « représentant » a atteint son point culminant avec l'arrêt dit de « l'Erika »[232], la responsabilité pénale de la société pétrolière Total ayant été retenue sur le fondement d'une faute d'imprudence commise à travers la personne physique désignée pour le représenter et qui assumait des hautes fonctions au sein de la société, même si elle ne bénéficiait pas expressément d'une délégation de pouvoirs, mais avait agi « pour le compte de la personne morale ».

2. INFRACTION COMMISE POUR LE COMPTE DE LA PERSONNE MORALE

L'article 121-2 exige que l'infraction soit « commise pour le compte de la personne morale », sans définir la notion. De manière générale, agit pour le compte de la personne morale le dirigeant qui agit dans l'intérêt de l'entreprise, pour lui procurer un profit ou lui éviter une perte. La jurisprudence retient une conception extensive de la notion en considérant que l'infraction est commise pour le compte de la personne morale si l'acte relève des

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[228] SAINT-PAU J.-Ch., Gaz. Pal. 9-10 février 2005, p. 10.
[229] Crim. 31 octobre 2007, D. 2008, pan. 1573, obs. MASCALA C.
[230] Crim. 1er décembre 1998, Bull. n° 325 ; Crim. 9 novembre 1999, Bull. n° 252 ; Crim. 15 mai 2007, Dr. pén. 2008, chron. 9, SEGONDS M.
[231] Crim. 23 juin 2009, Dr. pén. 2009, comm. n° 121, obs. VERON M.
[232] Crim. 25 septembre 2012, n° 10-82.938, Bull. à venir

activités, de l'organisation ou du fonctionnement, de la stratégie ou de la politique commerciale de l'entreprise, même si celle-ci n'y a trouvé aucun intérêt et aucun profit concret[233]. Cette définition exclut, par principe, tous les actes commis dans l'intérêt personnel du représentant (abus de biens sociaux, harcèlement sexuel).
Cependant, les illustrations d'infractions pouvant engager la responsabilité pénale des personnes morales sont diverses, allant de la discrimination à l'embauche, trafic de mères porteuses aux atteintes involontaires à la personne. La responsabilité pénale de la personne morale a été conçue selon un modèle d'articulation cumulative avec la responsabilité pénale de la personne physique auteur matériel de l'infraction, puisque cette dernière n'est pas exclue, selon l'article 121-2, alinéa 3, du Code pénal, ce qui affermit la force répressive du système.

CONCLUSION

En conclusion, si la responsabilité pénale des personnes morales n'a pas constitué le bouleversement attendu du droit pénal positif, elle en a modulé les principes généraux et affermi l'équité en rendant la loi pénale applicable à toutes les personnes juridiques. La plupart des procès retentissants et médiatisés appliquent ce concept, qu'il s'agisse de l'affaire de l'Erika, A.Z.F. ou l'Eglise de scientologie. Au début conçue comme un mode de consolidation de la réparation à travers l'application des sanctions pécuniaires et de meilleure répartition avec la responsabilité pénale de la personne physique dirigeant l'entreprise, la responsabilité pénale des personnes morales libère ses ardeurs répressives et s'ancre de plus en plus profondément dans l'essence du droit pénal et la protection de l'ordre public.

[233] Crim. 25 juin 2008, Dr. pén. 2008, comm. n° 140, obs. VERON M.

EXTINCTION OF TAX LIABILITIES THROUGH SET OFF AND RETURN

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Abstract

We deem that the Title VIII of the Fiscal Procedure Code is not wrong mainly as since2002 the legislator used the phrase "fiscal debts collection" through the Government Ordinance No.61/2002, when it replaced the phrase "execution of fiscal debts" that has been used under the Government Ordinance No.11/1996. We would emphasize that to the legal fiscal procedural institution "collection of fiscal debts" belongs also the field of extinction, voluntarily or by coercive force of the State, of tax obligations. It results from the legal provisions under Title VIII, with no doubt, that extinction of tax liabilities is achieved through ways that are common also for other legal obligations, such as: payment, dation in payment, prescription, enforcement: and through several specific means, such as: compensation, restitution, cancellation, insolvency, starting of the judicial reorganization procedure or through bankruptcy.

1. BRIEF HISTORY ON THE EXTINCTION OF TAX LIABILITIES IN THE LIGHT OF THE DECREE NO.221/1960, THE GOVERNMENT ORDINANCE NO.11/1996 AND THE GOVERNMENT ORDINANCE NO.61/2002

One of the most important characteristics of the fiscal obligation is its extinction with the source, the beneficiary, the form, conditions of settlement and modification. Therefore, the legislator both before and after 1989, as well as the theorists[234] have been concerned to make rules and to analyze this feature of the fiscal obligation.

In chronological order, the norms that have ruled the extinction of tax obligation have been the following: Decree No.221/1960 concerning the enforcement against natural persons on the payment of tax and liabilities that were not paid in due time and against the debts of the socialist organizations, and also the enforcement of seizure[235]; the Government Ordinance No.11/1996 related to extinction of fiscal obligation[236] and Government Ordinance No.61/2002 on collection of fiscal debts[237]. This latter has been abrogated by the Government Ordinance No.92/2003 concerning the Fiscal Procedure Code, as modified and amended.

Until the issuance of the new Fiscal Procedure Code, the specific laws, which are identical in essence, ruled the ways of extinguishing the public debt, by stating as common ways: payment, prescription and enforcement, and as specific ways: compensation, lowering and cancellation.[238]

On the Explanatory Memorandum of the Government Ordinance No.92/2003 related to the Fiscal Procedure Code it is shown that to achieve an efficient administration of taxes and fees (registration, reporting, collection, tax inspection and administrative and tax litigation), it appears the need of covering all the legal provisions concerning this field under a Fiscal Procedure Code.

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[234] The first paper after the 1989 Revolution where it is outlined the need to code the procedural laws on fiscal matters has been drawn up by **D.D.Saguna, S.Iliescu, D.Coman Sova**, in *Fiscal Procedure, Oscar Print Publisher, 1996, page.4-5.*

[235] Republished in Official Gazette No.144/15.12.1969

[236] Published in Official Gazette No.23/31.01.1996

[237] Published in the Official Gazette No.644/30.09.2002

[238] In the sense of a broader jurisprudence, see "*The Bulletin of the Jurisprudence of the High Court of Cassation and Justice (The Supreme Court of Justice)"*, **Manuela Tabaras and others**, *All Beck Publisher, 2004, ISBN: 973-655-379-5*

As a conclusion, the appearance of the Fiscal Procedure Code enables the special tax laws to be relieved of the procedural provisions, which are almost identical, as we noted before, thus avoiding repetition of procedures in each of those laws.

2. RELATION EXISTING BETWEEN THE FISCAL PROCEDURE CODE AND OTHER NORMS

As it results from the provisions under art.2 of the Fiscal Procedure Code, in the matter of administration of taxes, charges, contributions and other liabilities owed to the consolidated general budget, the Fiscal Procedure Code is common law. Therefore, if no special procedure for administration of taxes, charges, contributions and of other amounts owed to the consolidated general budget exists, it shall be applied the related procedure mentioned under the Fiscal Procedure Code.[239]

Also, special proceeding provisions in the matter of tax administration are included as well in other special rules, such as: Fiscal Code[240], Customs Code[241], but those are prevailing over the common law in matter.

There are several methodological norms, instructions, orders that have a lower power than the law, but they include proceeding rules concerning the administration of the tax and duties.[242]

Finally, the Fiscal Procedure Code is completed by the provisions of the Civil Procedure Code.

3. Ways of Fiscal Duties Extinction

Extinction of the tax liabilities is achieved through ways that are common also for other legal obligations, such as: payment, dation in payment, prescription, enforcement: and through other specific means, such as: compensation, restitution, cancellation, insolvency, starting of the judicial reorganization procedure or through bankruptcy.[243]

Payment had been the subject of another article, therefore we are going to analyse only the compensation and restitution.

4. Extinction of Tax Liabilities through Set Off[244]

Compensation intervenes when the taxpayers have done undue payments or higher payments to the consolidated general budget. The amounts that are overpaid or that are illegally owed shall be compensated by other tax obligations of the taxpayer, which are outstanding or future.

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[239] See **D.Dascalu, C.Alexandru**, *Theoretical and Practical Explanations of the Fiscal Procedure Code, Rosetti Publisher, 2005, op.cit.p.71*

[240] *The Law No.571/2003* on the Fiscal Code has been published in the *Official Gazette of Romania* No.927/23.12.2003. It includes provisions related to the filing of Yearly Tax Statement, Estimating Income Statements, filing of value added tax refund, a.s.o.

[241] The Customs Code of Romania has been published in the *Official Gazette of Romania* No.180/01.08.1997. Its Chapter V includes the customs procedure to be applied in various stages of the customs clearing.

[242] For details, see **D.Dascalu, C.Alexandru**, *Theoretical and Practical Explanations of the Fiscal Procedure Code, Rosetti Publisher, 2005, p.74-75.*

[243] In the light of the new rules of the common laws that are applicable to the enforcement of obligations, see *Reflections on the Optics of the New Civil Code Legislator in the matter of enforcement" – International Conference "A Society Based on Knowledge"* organized by the University Titu Maiorescu of Bucharest, Vth Edition, published under the Conference Book with the same title, *Publisher Titu Maiorescu University, Bucharest, 2011.*

[244] See **I.N.Vaduva**, *Compensation of debts and Tax Liabilities, in R.R.F. No.5/2007;* **T.Anghel**, *Compensation and Calculation of Accessories in Tax Matter, in R.R.F. No.10/2007.*

The legal basis is represented by the provisions of art.116 of the Fiscal Procedure Code and by the provisions of art.111.1-111.5 of the Methodological Norms.

In fact, compensation is still a payment, since if it will be done with outstanding amounts, it will lead to their liquidation, and if it is done with future amounts owed, it provides their payment before the payment dead-line, and it will be equivalent to a prepayment.[245]

Compensation represents a more simple way of extinguishing the tax obligation, by avoiding a double payment.

The fiscal authority in whose territorial jurisdiction the debtor has its fiscal domicile is competent in making compensation.

In case of fiscal debts extinguished through compensation, interests and penalties for delay shall be owed until the date of extinction.[246]

4.1. Differences between Compensation and Set Off

Offset is ruled by art.1616-1623[247] of the New Civil Code.

Offset represents the way of extinguishing liabilities that consists of the extinction of two mutual obligations, until the lesser of them is reached.

Offset may be: legal, when operating in the light of law, by meeting certain conditions: conventional, when operating by parties' agreement[248]; judicial, when operating through a court decision[249].

Unlike the common law, which regulates three types of setoff, under the fiscal procedure compensation has an administrative nature, excluding the setoff way types.[250]

By compensation the debts administered by the Ministry of Public Finances are extinguished, representing amounts to be either reimbursed or refunded from the budget, until reaching the lesser amount, when both parties gain mutually both the quality of creditor and that of debtor, if not provided in other way by the law. The same rule is provided by the legislator concerning the compensation of fiscal debts that are flowing to the local budgets.

Under the common law, the legal compensation may be seen also as a protection mean of one person, who without being enough diligent to put his debtor in delay (so that interests could flow), has at his disposal this protection mean against its debtor (who is at the same time creditor). But under the fiscal law the disproportion is evident, if we consider the fact that the State can claim interests and penalties for delay even from the moment of his claim chargeability, whilst the taxpayer is obliged to file a restitution or compensation application to generate this effect, without being able to defend himself by simply invoking a compensation.[251]

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[245] See **D.D.Saguna**, *Financial and Fiscal Law, Publisher Oscar Print, Bucuresti, 1994, p.370.*

[246] Regarding the jurisprudence as commented in the case of "interests and penalties for delay", see "*Contractual Responsibilities. Damages"* - **Manuela Tabaras**, *Publisher All Beck, Bucuresti, 2005, ISBN 973-655-644-1* and *"Damages. Interests. Penalties. Contractual Responsibilities"* – **Manuela Tabaras**, *C.H.Beck Publisher, Bucuresti, 2009, ISBN 978-973-115-573-9.*

[247] Under the old regulation of the Civil Code, the institution of offset has been ruled under 1143/1153.

[248] For models of conventions, see "*Commercial Contracts. Notary Documents. Lawsuits" – Rentrop & Straton Group for Publishing and Business Assistance, 2004, ISBN 973/722/001/3, ISBN VOL.1 973/722/001/1, 938 pages, ISBN VOL 2 973/722/003/X* and *"Adviser: Models of Contracts and Forms of Legal Proceeding", Rentrop & Straton Group of Publishing and Business Assistance, 2007.*

[249] See **C.Statescu, C.Birsan,** *Civil Law. General Theory of Obligations, Publisher All, Bucuresti, 1992, p.340-341.*

[250] For details, see **C.Statescu, C.Birsan,** *The General Theory of Obligations*, *All Publisher, Bucuresti, 1992, p.340-341.*

[251] See **D.Dascalu, C.Alexandru,** *Theoretical and Practical Explanations of the Fiscal Procedure Code, Publisher Rosetti, Bucuresti, 2005, p.357-358.*

4.2. Compensation on Request

The debtor that made higher payments or payments that were illegally owed may file o compensation request with the competent fiscal authority, under the prescription period of 5 years.

The compensation claim shall contain the applicant's identification elements and also the amount, the nature of the fiscal debts that are object of the compensation. The claim shall be accompanied by the documents proving the debtor's right to reimbursement or restitution from the budget of the related amounts, such as: certified copies of the final and irrevocable court decisions, either of the decisions of solving contestations that remained final, or of the taxation decisions issued by tax authorities, and also copies of all documents wherefrom it results that the amount paid does not represent fiscal liabilities.

The result of claim compensation shall be mentioned under a compensation note that shall be submitted to the debtor within 7 days from the date of the operation completion. In case the debtor's request is not solved either it is rejected, he can submit the claim to the court, by asking for the obligation of the fiscal authority to perform the compensation.[252]

In case of tax debts extinguished by compensation on request, the interests and penalties for delay are owed until the date of filing with the competent authority of a compensation claim (art.122 Fiscal Procedure Code). If it is found after exercising the tax control or after analyzing the compensation claim, that the amount to be compensated is lower than the amount specified in the compensation claim, the interests and penalties for delay shall be recalculated for the difference remained from the registration of the compensation claim [art.122 Fiscal Procedure Code].

4.3. Compensation Ex Officio

The competent tax authority can perform the compensation *ex officio*, before the restitution or reimbursement of certain amounts that are to be paid back to a debtor.[253]

The compensation *ex officio* can be done by the tax authority along the limitation period provided by law for each of the obligations submitted to compensation, from the moment when both obligations meet the conditions provided under the common law procedure, i.e. from the moment when those ones are certain, liquid and exigibles.

The tax authority may perform the *ex officio* compensation whenever it finds out the existence of some mutual debts.

Compensation *ex officio* does not operate for negative amounts of the reimbursement of value added tax, if no reimbursement option exists.

The result of *ex officio* compensation shall be recorded in a compensation note that shall be notified to the debtor within 7 days from the date of operation.

As regards the tax debts extinguished by *ex officio* compensation, the interests and penalties for delay are owed until the date of registration of the compensation operation by the territorial treasury unit, according to the compensation note drawn up by the competent tax authority, whilst the compensation done as a result of a restitution or reimbursement claim for the amount due to the debtor, the extinction date is the date of filing the reimbursement or restitution claim.

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[252] As regards the opinion that a claim for stating the fact that compensation has been done can be filed to the court see **D.Sova**, *Contestation to the Enforcement in Tax Matter (I), RRDA No.5-6/2004, p.11.*

[253] In this sense, see ICCJ, Contentious Administrative and Fiscal Business Section, Decree No.4607/29.09.2005.

4.4 The Sequence of Compensations

The provisions of art.115 of the Fiscal Procedure Code on the sequence of debts extinction are applicable for compensation on debtor's request or before the restitution or reimbursement of the amounts owed to it.

In case of compensations done by the tax authority *ex officio*, the debtor's tax debts shall be compensated by liabilities owed to the same budget, and from the remaining difference the debts towards other budgets shall be compensated, in a proportional manner.[254] Exception to this rule are the receivables of local budgets.

The tax receivables resulted from legal customs relations shall be compensated with the debtor's amounts owed, representing amounts to be refunded of the same nature[255], under the conditions of art.115 of the Code. Any differences remained shall be compensated by other tax liabilities of the debtors to the same budget, and the remaining difference shall be compensated by the obligations towards other budgets, in a proportional way.

5. Extinction of Tax Liabilities by Return

Return represents a new manner of extinguishing the tax liabilities, and it is ruled on art.117 of the Fiscal Procedure Code and through O.M.F.P. No.1899/2004 for the approval or Procedure for restitution and reimbursement of the amounts from the budget, as well as by granting an interest owed to the contributors for restitution and reimbursement that exceeded the legal term.[256]

The debtor has the possibility to ask, within the general limitation period of 5 years from the date of January 1 of the year that follows that one when the right to the restitution of certain amounts arose, for the restitution of certain amounts over the amounts owed legally or illegally, paid to the consolidated general budget. Under these circumstances, the competent tax authority shall decide the restitution[257] of the following amounts: those paid without existing a claim title; those paid in excess as compared with the tax debt; those paid as a result of a calculation error; those paid following a wrong application of legal provisions; those to be reimbursed[258] from the state budget; those established through decisions of the judicial authorities or other competent authorities according to law; those remained after distribution the price during the stage of goods recovery within the tax enforcement procedure; those resulted from the recovery of goods seized or from withholding through garnishment, as the case may be, in the light of the Court decision ordering the abolition of enforcement.

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[254] Under the older rule of the Fiscal Procedure Code [before the change of line (5) of art.116 by art.I item 19 of the G.O. No.47/2007], while the mutual tax debts do not pertain to the same type of budget or differences to be reimbursed were remaining after performing the compensation by amounted owed to the same budget, the compensation of debtor's debts was done by the debts to other budgets, based on a express and imperative sequence ruled by the code, as followed: debts to the state budget; debts to the risk fund for state guarantees, for external loans; debts to the budget of state social securities budget; debts to the Sole National Fund for health insurance; debts to unemployment insurance budget.

[255] For customs debts, O.M.E.F. No.1939/2006 shall be applied, to approve the Procedure of compensation the tax receivables resulted from legal customs relations and of refunding casual differences, following a claim for compensation/restitution, filed by the contributor holder of the customs operation (published in Official Gazette No.936 of November 20, 2006).

[256] Published in the Official Gazette No.13 of January 5, 2005.

[257] See **V.Pintea**, *About some aspects concerning the request in Court for restitution of amounts from the state budget – Comments on the Decision No.122/2009 of the A.C.Bacau,* in *Curierul Judiciar* No.5/2009.

[258] See **C.A.Paun,** *Reimbursement of tax taken over illegally in the light of jurisprudence of the Court of Justice of the European Communities, in Curierul Fiscal No.4/2007;* **D.Patroi***, Reimbursement of value added tax, in Curierul Fiscal No.1/2009;* **S.L.Marinescu,** *Assessment of VAT Reimbursement Fraud, in Curierul fiscal No.7/2009.*

The restitution claim shall be accompanied by copies of the documents wherefrom it results that the amount has been paid to the budget illegally or that it exceeds that one which is legally owed. The claim shall be solved within 45 days, and this period may be expanded by the period between the date when the debtor has been asked to give additional information relevant for its solving and the date when that information are registered by the competent fiscal authority. The competent tax authority shall issue the restitution decision and it shall be approved by the manager of the tax unit. Based on the restitution decision already approved, the competent tax authority shall draw up the restitution note.

An essential condition to operate the restitution is that debtor shall have not outstanding tax liabilities. If the debtor has such outstanding tax obligations, the amounts claimed shall be first compensated then if any differences remain, they shall be refunded to the debtor. If the amount to be reimbursed or refunded is lower than the outstanding tax liabilities of the debtor, the compensation shall be done to the value of the amount to be reimbursed or refunded.

The following exception results from the rule described above: the tax authority shall return, *ex officio*, the amounts representing tax differences resulted from the annual adjustment of the income tax owed by natural persons. Restitution shall be done within a period of not more than 60 days from the date of tax decision notification.

The differences in income tax to be refunded that are lower than 5 lei shall be kept in tax records to be compensated with future debts, and they shall be refunded when the amount cumulating them will exceed the limit mentioned above. By exception, the differences that are lower than 5 lei could be refunded on the taxpayer request, but only cash, as by bank settlement or post order the expenses involved for the restitution of the amount will be higher than the amount to be refunded.

A special situation ruled is that of the amounts in currency seized, which shall be refunded based on a final and irrevocable court decision that decided the restitution. The amounts in currency shall be refunded in lei, at the reference exchange rate for Euro as informed by the National Bank of Romania on the date when the Court decision ordering the restitution remained final and irrevocable. We consider that the text referring only to Euro does not be judged restrictively, in the sense that no other amounts shall be returned than those expressed in Euro.[259]

If the amount to be reimbursed or refunded is higher than the amount representing outstanding tax liabilities of the debtor, the compensation shall be done up to the amount of the outstanding fiscal obligations, the difference that resulted will be refunded to debtor.

For the amount to be refunded or reimbursed from the budget by the State, on taxpayer's request, interests starting from the moment of the expiry of 60 days from the notification of the tax decision or of 45 days from the answer of the tax authority to the restitution request submitted by the debtor, if no legal reasons exist to extend that term.[260]

Payment of the interest due to the taxpayer shall be made only on the basis of express request filed by him with the competent tax authority. The claim for interest payment shall be solved within 45 days.

The interest level is that provided under art.120 line (7) of the Code, *i.e*. 0.04 % for each delay day[261], and it shall be supported from the same budget from which it is returned or

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[259] For details, see **D.Dascalu, C.Alexandru**, *Theoretical and Practical Explanations of the Fiscal Procedure Code, Publisher Rosetti, Bucuresti, 2005, p.341.*

[260] See CA Iasi, Sect.Cont.Fiscal Adm., Decision No.58/CA/2009, in Curierul Fiscal No.2/2010.

[261] We said that interest has undergone frequent changes. E.g., the interest level has been changed by art.I item 17 of the G.E.O. No.39/2010 to 0,05 % for each day of delay. As per art.III line (1) of the G.E.O. No.39/2010, art.I item 17 entered into force on July 1, 2010. Prior to those changes, the interest level has been established by Government decision, based on the proposal of the Ministry of Public Finances, related to the level of reference interest of the Romanian Bank of Romania, whereto 10 percentage points shall be added once a year, in December, for the year to come or during an year, if the reference interest rate is changed by over 5

reimbursed, as the case may be, the amounts asked for by payers. The interest shall be calculated for each day, from the day after the expiry of terms as referred above, to the date of extinction also of the payment obligation through compensation, restitution or reimbursement.[262]

Interest shall be supported from the same budget as that from which are reimbursed or returned the amounts asked for by the debtors.

percentage points.

[262] See **C.F.Costas**. *The Interest Owed to Taxpayers for the Amounts to be refunded from the State Budget, in Curierul fiscal No.2/2009;* **C.F.Costas**, *On the Fiscal Responsibility, in RRDA No./2009.*

SHORT INTRODUCTION ON THE CIVIL LIABILITY IN THE CASES OF PREJUDICIAL CONCEPTION

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Abstract

The last years of twentieth and the first years of twenty-first century brought considerable progress in medicine, technology methods being applied in many of its branches, particularly in regard to prenatal diagnosis. However, the field of human reproduction has experienced extraordinary advances that have led logically to the introduction of legal instruments which have authorized some human reproductive control methods, which resulted in the emergence of new hypotheses concerning civil liability.

Traditionally, it is considered damage "the damages suffered a person in all physical integrity (bodily, and aesthetic harm...), on its assets (property loss, financial loss, material ...), in his feelings (moral damage), giving to the victim a right to compensation."
In the West European and the North American case different types of liability actions have developed over the last thirty-five years, for damages directly related to the birth of a child.
It was stated[263] that this area of law is based on considerations that go beyond simple legal technique. That in this field, the experts consider not only legal, but equally analyze the extra-judicial, especially factors related to ethics and morality.
The first question that was asked was: how can a baby be considered a source of injury? If we look at the problem in these terms, which may seem shocking is that this situation occurred in major Western legal systems, especially in Germany, France, UK and USA. The solutions offered by national laws differ from country to country, but this sensitive issue raised live discussion not only among lawyers, but also in the civil society.
In fact, actions for damages related to the birth of a child raised questions that other types of liability actions have not raised[264]. As follows:
- If the damage complained of is the fact the birth of a child, this event should have an influence on the outcome of that court shall decide in such a dispute?
- There is a subjective right of the individual not to be born?
- Certain fundamental rights, such as respect for human dignity, are likely to relieve the author of a fact, a priori detrimental, of responsibility?

The question if a baby can be constitutive damage is not limited to one type of situation, but instead covers several assumptions. These assumptions have been divided into two main categories, depending on the individual plaintiff in such an action. Thus, the solutions differ when such action is brought by parents on their own or is brought on behalf of the child.
Western doctrine also distinguishes between a situation where unwanted baby was born healthy and when the child was born with disabilities.

I. The birth of an unwanted healthy child

There are many situations where parents of an unwanted child born healthy may be tempted to bring an action for damages against the doctor or other professional from whom they consider responsible for that birth.

[263] Géraldine DEMME, Romain LORENTZ, *Responsabilité civile et naissance d'un enfant, Aperçu comparatif,* Revue Internationale De Droit Comparé, nr. 1-2005, p. 104
[264] *Ibidem*

According to American terminology, we distinguish between actions known as "wrongful conception" and actions known as "wrongful pregnancy".

The first case refers to the situation where the parents of a healthy but unwanted child intend to receive compensation, citing a medical mistake of a sterilization procedure or abortion or citing doctor or pharmacist mistake in prescribing contraceptive drugs or the sale or manufacture of such contraceptives.[265]

The second situation relates to cases where, following a wrong diagnosis of non-pregnancy, the parents were unable to exercise their choice to make -in the range provided by law - abortion.[266]

While some national jurisdictions reject such actions, other states recognize the existence of parents who have suffered injury and allow this fact to be repaired.

In France, the law[267] explicitly ruled that, in an action for civil liability which has as source the birth of a healthy child, the mother is unable to obtain compensation following the birth of his child, that birth cannot be considered in itself an injury. Of course, this position is based on ethical points of view, legal aspect being completely circumvented.[268]

In Germany, the first decision on the possibility of a right to damages requested for a healthy but unwanted child birth was marked in 1969 by a Regional Court.[269] The facts that led to the introduction of this action are simple: a pharmacist issued a woman instead of contraceptive drugs medicines to relieve heartburn. The father of the born child later sued the pharmacist, asking damages. Regional Court gave the right to the father, the pharmacist being sentenced to pay him the maintenance and education of the born child but unwanted. This decision, which was often cited as "pharmacist baby", caused controversy in the law literature.[270]

Using the term "child as harm" ("Kind als Schaden"), the expression was strongly criticized as being contrary to human dignity and violation of Art. 1, para. 1 of the Basic Law, the question whether a baby can be a source of harm has been widely debated in Germany, the doctrinaires rather taking positions on contrary doctrines. However, the law did not deny the lack of damage in such a case, the damage consisting of living expenses and education that induced unwanted child birth.

A limited number of U.S. states (in the U.S.A. private law in general, and responsibility - in particular, is highly regulated specifically in each) have also adopted a position comparable to the French courts. Under current law, only three countries refused to recognize that the birth of a healthy child can be the damage that could be repaired.

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[265] Kimberly D. WILCOXON, *« Statutory Remedies for Judicial Torts: The Need for Wrongful Birth Legislation* », 69 U. Cin. L.Rev. 1023, p. 1027 et s.

[266] Maryse DEGUERGUE, *« Les prejudices liés à la naissance »,* Resp. civ. et assur., mai 1998, p. 16.

[267] Conseil d'État had in 1982 (EC Ass. 2 juillet 1982, Gaz. Pal., 1983, I, p.193, note F.MODERNE) such a case. It was about a woman who decided to interrupt pregnancy - the period allowed by law. Medical intervention has failed and she gave birth to a healthy child. Applicant's request focused on the one hand, request compensation for moral damages suffered both during pregnancy and childbirth undesirable due to its status as a single mother, on the other hand, compensation for economic damage caused by future maintenance and education about child. (VJB D'ONORIO, notes sous EC Ass. 2 juillet 1982 Dell. R., D. 1984, Jur., P 426) The Council of State argued that there is damage - so that one component of the action liability is absent, without examining other conditions of action, ie medical negligence and the causal link between act and injury because, in this context, the injury was considered nonexistent. The Court of Cassation ruled the same in 1991 (Civil Code 1ère 25 juin 1991, D. 1991, I swear. P. 566, note P. Le Tourneau) in a similar case, holding that "the existence of a conceived child can not by itself to be the damage of the mother that can be repaired by law (...) ".

[268] Géraldine DEMME, Romain LORENTZ, *Responsabilité civile et naissance d'un enfant, Aperçu comparatif,* Revue Internationale De Droit Comparé, nr.1-2005, p.107

[269] Regional Court Itzehoe, Version R 1969, pp. 265 ff.

[270] A similar action for damages was upheld by the Higher Regional Court of Düsseldorf (NJW 1975, p 595) and the Higher Regional Court of Zweibrücken (NJW 1978, p 2340). But Munich Regional Court I (Version R 1970, p 428) or Duisburg Regional Court (VersR 1975, p 432) refused such action.

Thus, the Kansas Supreme Court[271] rejected the claims of a mother saying that "for reasons of public interest, normal and healthy childbirth is not injury in a legal sense, to open right to request compensatory damages." Similarly, the Nevada Supreme Court refused to consider the birth of a healthy child can give right to compensation, even if the birth is partly due to negligence of a doctor.[272]

But at least thirty-five U.S. states recognize actions for "wrongful conception" or "wrongful pregnancy". The reason for the admission of such action is that judges attached transcend the ethical question of birth phenomenon, not to see in such an action than a mere action for damages for medical error.[273]

These actions correspond to a classical scheme identical to an action in tort (negligence) liability of the common law, which consists of four elements: a duty of care that incumbent upon the author injury, a violation by the latter of the obligations (breach of duty) injury and the existence of a causal link between the breach and the damage. (proximate cause)

Thus, in a case from 1983[274] in which the parents had introduced an action against the doctor, the Kentucky Supreme Court ruled that, after a poorly conducted medical sterilization and birth of a healthy child, the birth "can be considered as an injury to the fundamentals about human life (...)."[275]

Minnesota Supreme Court[276] acknowledged the existence of a duty of care in charge of a doctor in a case of vasectomy, who performed a wrong operation, which was for the Court, in violation of (Breach of Duty) patient. The consequence of this was the birth of a healthy child. The question was to know if childbirth is the immediate cause of the error of the doctor.

Regarding injury, North American courts have avoided the difficult problem that of the birth of a healthy child is qualified as an injury, identifying an injury related to that birth but without qualifying birth as such.

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[271] 237 Kan. p. 225; 699 P.2d p. 468 : « As a matter of public policy, the birth of a normal and healthy child does not constitute a legal harm for which damages are recoverable »

[272] 715 P.2d 1076, p. 1078 « [normal birth] is an event which, of itself, is not a legally compensable injurious consequence even if the birth is partially attributable to the negligent conduct of someone purporting to be able to prevent the eventuality of childbirth ».

[273] Boone v. Mullendore, 416 So.2d 718 (Alabama, 1982) ; University of Ariz. Health Sciences Ctr. v. Superior Court, 667 P.2d 1294 (Arizona, 1983) ; Wilbur v. Kerr, 628 S.W.2d 568 (Arkansas, 1982) ; Stills v. Gratton, 127 Cal. Rptr. 652 (Californie, 1976) ; Ochs v. Borelli, 445 A.2d 883 (Connecticut, 1982) ; Garrison v. Medical Ctr. of Del., Inc., 571 A.2d 786 (Delavware, 1989) ; Flowers v. District of Columbia, 478 A.2d 1073 (D.C., 1984) ; Fassoulas v. Ramey, 450 So.2d 822 (Floride, 1984) ; Fulton-DeKalb Hosp. Auth. v. Graves, 314 S.E.2d 653 (Georgie, 1984) ; Cockrum v. Baumgartner, 447 N.E.2d 385 (Illinois, 1983) ; Garrison v. Foy, 486 N.E.2d 5 (Indiana, 1985) ; Nanke v. Napier, 346 N.W.2d 520 (Iowa, 1984) ; Byrd v. Wesley Medical Ctr., 699 P.2d 459 (Kansas, 1985) ; Schork v. Huber, 648 S.W.2d 861 (Kentucky, 1983) ; Macomber v. Dillman, 505 A.2d 810 (Maine, 1986) ; Jones v. Malinowski, 473 A.2d 429 (Maryland, 1984) ; Burke v. Rivo, 551 N.E.2d 1 (Massachusetts, 1990) ; Rinard v. Biczak, 441 N.W.2d 441 (Michigan, 1989) ; Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (Minnesota, 1977) ; Girdley v. Coats, 825 S.W.2d 295 (Missouri, 1992) ; Kingsbury v. Smith, 442 A.2d 1003 (New Hampshire, 1982) ; P. v. Portadin, 432 A.2d 556 (New Jersey, 1981) ; O'Toole v. Greenberg, 477 N.E.2d 445 (New York, 1985); Jackson v. Baumgardner, 347 S.E.2d 743 (Caroline du Nord, 1986) ; Lovelace Medical Ctr. v. Mendez, 805 P.2d 603 (Nouveau Mexique, 1991) ; Johnson v. University Hosps. of Cleveland, 540 N.E.2d 1370 (Ohio, 1989) ; Morris v. Sanchez, 746 P.2d 184 (Oklahoma, 1987) ; Mason v. Western Pa. Hosp., 453 A.2d 974 (Pennsylvanie, 1982); Smith v. Gore, 728 S.W.2d 738 (Tennessee, 1987) ; Terrell v. Garcia, 496 S.W.2d 124 (Texas, 1973) ; C.S. v. Nielson, 767 P.2d 504 (Utah, 1988) ; Miller v. Johnson, 343 S.E.2d 301 (Virginie; 1986) ; James G. v. Caserta, 332 S.E.2d 872 (Virginie Occidentale, 1985) ; McKernan v. Aasheim, 102 Wash.2d 411, 687 P.2d 850 (Washington, 1984) Marciniak v. Lundborg, 450 N.W.2d 243 (Wisconsin, 1990) ; Beardsley v. Wierdsma, 650 P.2d 288 (Wyoming, 1982), citat de Géraldine DEMME, Romain LORENTZ, în *op.cit.* p.109

[274] Schork v. Huber, 648 S.W.2d p. 861 (Kentucky, 1983)

[275] Schork v. Huber, *op. cit*., p. 862, « That a child can be considered as an injury offends fundamental concepts attached to human life (…) ».

[276] Sherlock v. Stillwater Clinic, 260 N.W.2d 169 (1977)

Minnesota Supreme Court referring to *Custodio v. Bauer* Cause[277] says that the damage lies not in the fact of birth, but of diminishing family fortune that affected all members. The Court therefore considered possible that parents of a healthy baby, but undesirable to obtain compensation directly originating from the failure of the operation of sterility.
Indiana Court of Appeals has provided a clear definition of causation, as "for an act of negligence to be an immediate cause to injury needs only to be the result of a natural and believable damage, and the result, depending on the circumstances, have been reasonably foreseen or anticipated."[278]
American States, Germany, Britain, Belgium recognize the existence of an injury when, despite the measures taken by parents to avoid pregnancy, a healthy baby is born, however, recognizing the cause admission principle, but there are important differences between the provisions relating to the grant amount for damage.
While some have decided to pay an amount limited to the damage, others have opted for a full repair.
Most American States which recognize action conception / pregnancy illicit (wrongful pregnancy/ conception) are conducive to repair the damage strictly limited, in turn the limit having varying degrees. So, there are granted only for physical and moral damage directly associated to pregnancy and childbirth. For example, the Minnesota Supreme Court held that, to the extent that parents were the victims of a medical error, it is normal for them to obtain damages at least equal losses directly related to pregnancy and birth, which is consistent with the principle that aims to restore the victim reparations in the state where it would have been if the injury would not have occurred.[279]
There are also U.S. states that admit to total repair the damage, taking into account not only physical and moral damage suffered by the mother as a result of unwanted pregnancies caused by medical negligence, but also sums for the maintenance and education of the child until the full age.[280]
In Germany, to determine the level of damages awarded, judges use so-called "differentiated hypothesis" (Differenzhypothese)[281] as the repairable patrimonial damage is the difference between actually real state caused by the harmful act and the hypothetical state that would have existed in the absence of that act. Applying this assumption leads to full compensation for the injury, parents are not required to pay to child raising and educating, unwanted expenses that would not be done if the doctor would not be wrong. To calculate these damages Federal Court of Justice did not take into account the specific situation of the family, but the Court applied an objective account.[282]
Three decisions pronounced by Belgian Courts opened the way for debate. Two of them can be assigned to actions as "wrongful conception" and "wrongful pregnancy".[283]
The first case concerns a vasectomy followed by pregnancy. Thirty-seven days after the surgery his wife was pregnant with the fifth child that was born healthy. But the couple

[277] 251 Cal. App.2d 303, 59 Cal. Rptr. 463, 27 A.L.R.3d 884
[278] Garrison v. Foy, 486 N.E.2d 5, p. 10: « In order for a negligent act to be a proximate cause of injury, the injury need only be a natural and probable result thereof, and the consequence be one which in light of the circumstances should reasonably have been foreseen or anticipated ».
[279] Sherlock v. Stillwater Clinic, 260 N.W.2d, p. 175: « the parents of an unplanned child should at least be entitled to recover all damages immediately incident to pregnancy and birth. The allowance of these damages, we believe, is wholly consistent with the elementary principle of compensatory damages which seeks to place injured plaintiffs in the position that they would have been in had no wrong occurred ».
[280] Marciniak v. Lundborg, 450 N.W.2d, p.244
[281] Peter BASSENGE et al., *Palandt - Bürgerliches Gesetzbuch*, Munich, C. H. Beck, 2003, p. 266, n° 8
[282] Ulrike RIEDEL, *Kind als Schaden*, Frankfort, Mabuse-Verlag, 2003, p. 35 şi urm.
[283] Christian Van ROMPAEY, *Du droit à l'éthique, La naissance peut-elle être un préjudice?,* disponibil pe www.courdecassation.fr, 2004

notifies the justice reproaching to the surgeon and family doctor insufficient information about the fact that after a few months of operation, the living cells may still be present. Court of First Instance in Antwerp (17 January 1980) recognized, in terms of accountability, there is a brochure that does not mean that medical information may be missing. According to the court, the surgeon was negligent in providing post-operative care for this type of intervention, so that responsibility quasi-delict was committed. Regarding rulings, most of the applicants' requests were rejected, paying damages amounting to 50,000 F.
This decision tends the admission of certain exceptions to the rule that there isn't, in medical liability, an obligation of means. An obligation of result exists when the existing scientific resources pose no question about the outcome. This is the case for vasectomy operation.
The second case, the Court of First Instance of Courtrai (January 3, 1989) refers to an action against a gynecologist, after an operation to sterilize a woman who subsequently becomes pregnant, giving birth after 11 months after the operation. In the actal stage of science and technology, it is recognized that the risk, however small it may be, to remain pregnant continues to exist after sterilization. The responsibility of the physician was to prove that he informed the couple that there may be a minimum chance of pregnancy. Default, the doctor removed the couple a chance to take the necessary measures to prevent a possible pregnancy. Causal link between the fault and the damage has been well established. As regards non-pecuniary damage, it could not be accepted in case such a decision showing that a child could be considered a burden. The application of damage did not have the same effect. It was felt that parents are entitled to claim compensation for damage to property caused by pregnancy, childbirth and child education. Medical expenses and inconveniences related to the operation of sterility were also compensated.

II. Birth of a disabled child

Birth of a child with disabilities has led to the establishment of a civil liability regime, which differs significantly from actions involving the birth of a healthy child. In recent years, Western courts faced with a proliferation of legal proceedings aimed at obtaining compensation for damage caused by the birth of a disabled child.
This action, known as the Western doctrine of "wrongful birth" (wrongful birth), covers both cases where malpractice is committed before procreation, but also other cases where the error occurs after the child was conceived.
The first set of assumptions relates primarily to genetic diagnostic errors made during pre-conception, when the doctor did not warn parents about the risk of disease or genetic defect that the child, they want to develop, could acquire them. Based on this erroneous medical opinion, parents decide to conceive a child born with a severe disability. However, if the doctor would not be wrong, the parents decide not to conceive it.[284]
A second set of assumptions concerns the situation where, while the mother is already pregnant, the doctor makes a mistake diagnosis on the health of the fetus or mother and the disease may affect the fetus. If the doctor was able to detect these pathologies, parents would choose to stop pregnancy.[285]
Prerequisite for any action involving termination of pregnancy is the legality. But abortion regime in the states as aforesaid overlaps with action for damages. The issue of liability of doctors involves bringing together three conditions: a mistake, injury and causal link between the fault and the damage.

[284] Mary B. SULLIVAN, *« Note: Wrongful Birth and Wrongful Conception: A Parent's Need for a Cause of Action »,* 15 J.L. & Health 105, p. 108 (2000/2001)
[285] *Ibidem*

In the first series of "birth illicit" hypotheses Germany recognizes civil liability action so that in a case in which, although the parents of a disabled child were informed about the probability that the next child will be born with the same disease despite reassuring but erroneous diagnosis of the doctor, the couple gave birth to a second child with disabilities, and the Federal Court of Justice awarded damages parents.[286]
Action for "wrongful birth" is recognized by French judges. While French judge dismisses the cause of the parents of an unwanted healthy born child, the Supreme Court and State Council leave open the possibility for parents to seek cover the damage, if the damage is beyond normal duties of motherhood.[287]
Only in 1996, the French Court of Cassation expressed the opinion in two cases concurrently. In one case a doctor was charged for not having informed the couple on genetic risks that their child would face if he had been designed.
The second case was one of the famous case Perruche stages. Thus, a doctor prescribed to a pregnant woman, who presented a rash, blood tests to determine whether is the Rubella, where she had to interrupt pregnancy. Following test results, doctor and lab conclude that the patient has been immunized against rubella. The mistake made by the laboratory, adding to the lack of diligence in informing the patient of the doctor, has resulted in the birth of a child with severe disabilities.
French Cassation Court has recognized, in both cases, the responsibility of physicians, who by their mistake led parents to take their concept plan to the end. Court found that doctors' blame is the direct cause of the injury suffered by parents who were unable to make a choice.[288]
But the great merit of the case Perruche, settled 17 November 2000 by the Court of Cassation, is that francophone lawyers warned about a problem involving both legal and ethical issues specific to the extent suffering family, called to plead to the judge idea of an illicit birth of their child.
The third case tried by Belgian courts falls under the action of "wrongful birth".
The Court of First Instance of Mons was seized of an action against a gynecologist by parents in their own name and as legal representatives of their son, born with a severe disability. They claimed that the doctor did not take seriously medical data recorded at ultrasound, did not inform parents about these data and not done further testing that would certainly be revealed the diagnosis of malformation. In the 1993 decision, the Court of First Instance of Mons has appointed an expert to be able to determine, especially if there is a fault of the doctor and the damage alleged by the applicants may be certain damage and legal repair. From this decision, which was appealed, note the following considerations: "no principle of law can be an obstacle to what can be argued in court, when the life of a severely disabled person is injured."
It was for the first time in Belgium when it was recognized the action "wrongful birth".
Once recognized by the U.S. Supreme Court the rights to voluntarily pregnancy interrupt[289], at least twenty-three states allow action in "wrongful birth". Thus, in a case tried by the Supreme Court of Washington state, a woman was not prevented by the risks of a drug on the state of pregnancy, or if she knew the risks, she chose to resort to abortion. The Court held that "parents have the right to prevent the birth of a child with disabilities and the health professionals have a corresponding obligation to that right. This duty requires the latter to

[286] Federal Court of Justice, AVI to Cam. Civil Code, 16 novembre 1993, BGHZ 124, p.128
[287] Herbert TRÖNDLE / Thomas FISCHER, *Strafgesetzbuch und Nebengesetze*, Munich, C. H. Beck, 2001, p. 1273, n° 21
[288] Cass. plén. 17 nov. 2000, Gaz. Pal. 25 janv. 2001; 26 et s., note Jean GUIGUE
[289] Roe v. Wade, 410 U.S. 113

inform patients about the possibility of disabled children who will be born, to allow prospective parents to decide to avoid conception or birth of these children."[290]

III. Liability situation and the birth of a child in Romania

In Romania such actions are not known. Moreover, Romania has not been resolved yet legal nature of medical liability. Doctrines have still not agreed, whether medical liability is a contractual or tort liability.[291]

[290] Harbeson v. Parke-Davis, Inc., 656 P.2d 483, p. 491: «We believe we must recognize the benefits of these medical developments and therefore we hold that parents have a right to prevent the birth of a defective child and health care providers a duty correlative to that right. This duty requires health care providers to impart to their patients material information as to the likelihood of future children's being born defective, to enable the potential parents to decide whether to avoid the conception or birth of such children».

[291] Ş. BELIGRADEANU, *Civil liability of physicians and health units* in *Law* no. 3/1990, p.6, IF POPA, *Medical Liability* in *Law* no. 1/2003, p 54; I. Anghel, Fr. Deak, M. POPA, *Liability*, Scientific Publishing House, Bucharest, 1970

PRECAUTIONARY PRINCIPLE RELATED ON FOOD SAFETY

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Abstract

By this study we will try to present the precautionary principle regulated in General food law by defining the principle, presenting a short history of it and two important cases law. In our opinion, it`s very important to know all those principles established in Regulation 178/2002 because it`s crucial for our safety and for our security to know that in case of danger, authorities will fight for us.

1. Defining the Precautionary Principle

An early definition of the Precautionary Principle that became very well known can be found in Principle 15 of the Rio Declaration adopted in 1992. It reads as follows: *"in order to protect the environment, the precautionary approach shall be widely applied by States according to their capability. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation".* This definition encompasses a 'hurdle' of damage that is either serious or irreversible, and concentrates its scope on the protection of the environment.

In the 2000 Cartegena Protocol, where Article 11(10) explains that "*lack of scientific certainty due to insufficient relevant scientific information and knowledge regarding the extent of the potential adverse effects of a living modified organism on the conservation and sustainable use of biological diversity in the Party of import, taking also into account risks to human health, shall not prevent that Party from taking a decision, as appropriate, with regard to the import of that living modified organism intended for direct use as food or feed, or for processing, in order to avoid or minimize such potential adverse effects*." Although it can be argued that the element "environmental degradation" used in the Rio Declaration also encompasses human health, it is definitely better to make this explicit in order to avoid discussion. Hence the Cartegena Protocol and Regulation 1107/2009 on plant protection products, both mentioning risks to human health next to environmental concerns, form examples that should be followed when defining the Precautionary Principle.

At the international level, the lack of an accepted definition probably contributed to the reluctance of courts and tribunals to accept the principle as a binding rule of international customary law or as a general principle of international law. The International Court of Justice (ICJ), for instance, only of 20 April 2010. The ICJ pointed out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States"[292]. A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of *another* State. This Court has established that this obligation "is now part of the corpus of international law relating to the environment"[293].

At European level, the Precautionary Principle is regulated and defined in Regulation 178/2002 of the European Parliament and of the Council laying down the general principles

[292] United Kingdom v. Albania, Merits, Judgment, I.C.J. Reports 1949, p. 22

[293] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, paragraph 29)."(paragraph 101

and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety[294].

Article 7 of the Regulation mentioned before establish that: "1.*In specific circumstances where, following an assessment of available information, the possibility of harmful effects on health is identified but scientific uncertainty persists, provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, pending further scientific information for a more comprehensive risk assessment. 2. Measures adopted on the basis of paragraph 1 shall be proportionate and no more restrictive of trade than is required to achieve the high level of health protection chosen in the Community, regard being had to technical and economic feasibility and other factors regarded as legitimate in the matter under consideration. The measures shall be reviewed within a reasonable period of time, depending on the nature of the risk to life or health identified and the type of scientific information needed to clarify the scientific uncertainty and to conduct a more comprehensive risk assessment*".

Therefore, whenever a risk assessment concludes that "the possibility of harmful effects on health is identified but scientific uncertainty persists", provisional risk management measures necessary to ensure the high level of health protection chosen in the Community may be adopted, while other scientific information to complement the assessment is awaited[295].

According to established case law, that means that, in exercising their discretion relating to the protection of public health, the Member States must choose measures that: must be confined to what is actually necessary to ensure the safeguarding of public health; they must be proportional to the objective thus pursued, which could not have been attained by measures which are less restrictive of intra-Community trade[296].

As we can see, Regulation no. 178/2002 dedicated to the principle of precaution one article only, which could be interpreted as a low weight of this principle in the field of food security. In literature was expressed the opinion that this Regulation ensured compliance of the Precautionary Principle in food legislation in the European Union, considering 3 reasons[297]:

In the first place, the Precautionary Principle appears expressed regulated near the others general principles regarding food safety, with risk analysis[298] and the protection of consumers interests[299]. On the second place, it is recognized that the use of the precautionary principle incumbent to those who are responsible with political decision since it states that to achieve the overall objectives of the food legislation, risk management shall take into account the determination of the risk result and, in particular, the precautionary principle is relevant when the condition mentioned in article 7 paragraph 1. In the third place, article 7 par. 2 establishes 4 characteristics for the measures adopted according to article 7 par. 1, as: they will be proportionate to the aim pursued, the measures will not be trade restrictive than required to achieve the level of protection provided by the Treaties, they will take into account the

[294] Published in the Official Journal of the European Communities no L31/1 on 01.02.2002

[295] Alberto Alemano, *Trade in food. Regulatory and judicial approaches in the EC and the WTO*, ed. Cameron May, London, 2007, p. 123

[296] Case 174/82 Sandoz 1983 ECR 2445, at 18; Case C-192/01 Commission v Denmark 2003 ECR 9693; Case C-24/00 Commission v France 2004 not yet reported , paragraph 52 and Case C-41/02 Commission v Denmark 2004 not yet reported at paragraph 46, cited in Alberto Alemano, Trade in food. Regulatory and judicial approaches in the EC ant the WTO, ed. Cameron May, London, 2007, p. 123

[297] G.A. Oanţă*, La politica de seguridad alimentaria en la Union Europea*, Tirant lo Blanch, Valencia, 2007, p. 339

[298] See art. 6 of Regulation 178/2002

[299] See art. 8 of Regulation 178/2002

technical and economic feasibility and other factors regarded as legitimate in the matter under question[300].

2. The history of the Precautionary Principle

The precautionary principle emerged during the 1970s in the former West Germany at a time of social democratic planning[301].

Germany introduced the principle as an environmental policy principle to the international scene at the North Sea Conferences **Considerations on the application of the Precautionary Principle in the chemicals sector**

Bremen Declaration 1984: *"damage to the marine environment can be irreversible or remediable only at considerable expense and over long periods and that, therefore, coastal states and the EEC must not wait for proof of harmful effects before taking action."*

London Declaration 1987*: "in order to protect the North Sea from possible damaging effects of the most dangerous substances, a precautionary approach is necessary which may require action to control inputs of such substances even before a causal link has been established by absolute clear scientific evidence."*

The Hague Declaration 1990: *"will continue to apply the precautionary principle that is to take action to avoid potentially damaging impacts of substances that are persistent, toxic and liable to bio-accumulate even when there is no scientific evidence to prove a causal link between emissions and effects."*

In line with the broad German interpretation of "*Vorsorge"* no clear distinction was made between prevention and precaution in the 1984 Declaration. As of 1987, the focus became mainly precaution as a means of avoiding potential risks in situations of scientific uncertainty. Other early examples of a precautionary approach can be found in various places, for instance:

1980 IUCN World Conservation Strategy advises to "*keep in mind that in spite of present knowledge, what we know about the biosphere, ecosystems and their interrelationships is less than what we do not know. Consequently, it is often difficult to accurately predict the effects of human actions. Gaps in knowledge should be filled where possible, the report continued, but in the meantime risks should be reduced."*

1982 World Charter for Nature (adopted by UN General Assembly) demands that activities which are likely to cause irreversible damage to nature shall be avoided; and activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed.

In the 1980s and 1990s, interest in the precautionary principle spread well beyond Europe at remarkable speed. Today, it appears regularly in national legislation, in international statements of policy and in the texts of international conventions. It is also being continuously developed at sub national levels of governance. Crucially, it appears in the 1992 Rio Declaration – a statement of principles and general obligations to guide the international community towards sustainable forms of development.

The Treaty on European Union, as amended in 1996, does not define the "precautionary" and "preventive" policies that must be adopted. The distinction is important: prevention

[300] For detailes, see Gabriela-Alexandra Oanţă*, La politica de seguridad alimentaria en la Union Europea*, Tirant lo Blanch, Valencia, 2007, p. 339

[301] Carolyn Raffensberger, Joel A. Tickner, *Implementing the Precautionary Principle*, ed. Island Press, Washington DC, 1999

consists of actions taken to reduce known risks, while precaution aims to anticipate and reduce more uncertain risks[302] (It is very important to distinguish between precaution and prevention because those 2 terms do not represent the same thing.

Prevention consists of actions taken to reduce known risks, while precaution aims to anticipate and reduce more uncertain risks[303].

3. Case Law related to Precationary Principle

3.1. The vitamins line of cases

These cases were intended by the Commission to the following states: Denmark[304], France[305], Italy[306] and the Netherlands[307] because, in particular, the Commission contested that practices entailing the systematic prohibition on marketing of foodstuff fortified with certain nutrients which did not meet a nutritional need of the Danish and Dutch population[308]. The Commission challenged the French and Italian system of prior approval for fortified food lawfully produced and marketed in other Member States[309] At the time of those actions, there were no regulation regarding the conditions regulating the addition of vitamins and minerals to foodstuff[310].

For justify the trade restrictive administrative practices, the Dutch and the Danish Governments sustained that a proper application of the precautionary principle presupposes, in the first place, the identification of the potentially negative consequences for health of the proposed addition of nutrients, and, secondly, a comprehensive assessment of the risk of health based on the most reliable scientific data available and the most recent results of international research[311]. They also sustained that "when it proves to be impossible to determine with certainty the existence or extend of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures[312].

In those cases, the Court has gone beyond the mere negative conditions ruling out all the alleged hypothetical risks as a basis for precautionary action and has established a positive threshold for the invocation of the principle by a Member State. Once a Member State's precautionary measure is preceded by a comprehensive risk assessment showing that the likelihood of real harm may persist should the negative eventually occur, that measure will be allowed to stand[313].

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[302] Marco Martuzzi and Joel A. Tickner, *The precautionary principle*, World health organization, 2004.
[303] *Ibidem*
[304] Case 192/01 Commission c Denmark, 2003
[305] Case C24-00 Commission v France, 2004
[306] Case C-270/02 Commission v Italy, 2004
[307] Case C-41/02 Commission v Netherlands, 2004
[308] Alberto Alemano, *Trade in food,* ed. Cameron May, London, 2007
[309] F. Erlbacher, *Restrictions to the free movement of goods on Grouns of the Protection of Human Health,* cited in Alberto Alemano, *Trade in food,* ed. Cameron May, London, 2007
[310] In present, those aspects are regulated in Regulation 1925/2006 of the European Parliament and of the Council on the addition of vitamins and minerals and of certain substances of foods, published in Official Journal L404/30.12.2006
[311] Commission v The Netherlands, paragraph 53and Commission v Denmark, paragraph 51
[312] Commission v Denmark, paragraph 52 and Commission v The Netherlands, paragraph 54
[313] Alberto Alemano, *Trade in food. Regulatory and approaches in the EC and the WTO*, ed. Cameron May, London, 2007, p. 139

As stated in the Regulation 178/2002, precautionary measures are provisional and may only be maintained for so long as the scientific data remain inadequate, imprecise and inconclusive[314].

3.2. Precautionary Principle and GMO Austrian Judgements

In this case, Austrian authorities challenged the Commission decision rejecting the ban of the use of genetically modified organisms in upper Austria.

On 13 March 2003, the Republic of Austria notified to the Commission a draft law of the province of Upper Austria intended to prohibit the cultivation of seed and planting material composed of or containing GMOs.

Austrian Authorities tried to obtain a derogation on the basis of Article 95(5) from Directive 2001/18 on the deliberate release into the environment of GMOs.

The introduction of new national provisions must be based on scientific evidence relating to the protection of the environment.

In this case, European Food Safety Authority was requested to elaborate an opinion according to legal dispositions from Regulation 178/2002 art. 22(5) which provide that "*the mission of the Authority shall also include the provision of... scientific opinions on products other than food and feed relating to genetically modified organism as defined by Directive 2001/18/EC and without prejudice to the procedures established therein"* and art. 29(1) which establishes that "*the Authority shall issue a scientific opinion at the request of the Commission, in respect of any matter within its mission, and in all cases where Community legislation makes provisions for the Authority to be consulted".*

European Food Safety Authority issued an scientific opinion on 4 July 2003 and concluded that "*the scientific evidence presented contained no new or uniquely local scientific information on the environmental or human health impacts of existing or future GM crops or animals*".

The opinion also concluded that "*no scientific evidence was presented which showed that this area of Austria had unusual or unique ecosystems that required separate risk assessments from those conducted for Austria as a whole or for other similar areas of Europe".*

Those were the circumstances in which the Commission adopted Decision 2003/653/EC of 2 September 2003 relating to national provisions on banning the use of genetically modified organisms in the region of Upper Austria notified by the Republic of Austria pursuant to Article 95(5) of the EC Treaty (OJ 2003 L 230)

According to the contested decision, the Republic of Austria failed to provide new scientific evidence or demonstrate that a specific problem in the Land Oberösterreich arose following the adoption of Directive 2001/18 which made it necessary to introduce the notified measure. Since the conditions set out in Article 95(5) EC were not satisfied, the Commission rejected the Republic of Austria's request for derogation.

The case had the following procedure and the following problems:

According to settled case-law, the statement of reasons required by Article 253 EC must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the Community judicature to exercise its power of review (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and Case C-159/01 *Netherlands* v *Commission* [2004] ECR I-4461, paragraph 65).

The question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to its wording but also to its context and to all the legal

[314] For details, see Alberto Alemano, p. 140

rules governing the matter in question (Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16, and Case C-114/00 *Spain* v *Commission* [2002] ECR I-7657, paragraphs 62 and 63).

Although the Commission is obliged to state the reasons on which its decisions are based, mentioning the matters of fact and law which provide the legal basis for the measure in question and the considerations which have led it to adopt its decision, it is not required to discuss all the issues of fact and of law raised during the administrative procedure (Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 150).

In order to comply with the obligation to state reasons laid down in Article 253 EC, a decision adopted by the Commission on the basis of Article 95(5) EC must contain a sufficient and relevant indication of the factors taken into consideration in determining whether the conditions laid down by that article for the grant of a derogation are met.

Article 95(5) EC requires that the introduction of national provisions derogating from a harmonisation measure be based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to the Member State concerned arising after the adoption of the harmonisation measure, and that the proposed provisions as well as the grounds for introducing them be notified to the Commission. Since the conditions are clearly cumulative, they must all be satisfied if the request for derogation is not to be rejected by the Commission (Case C-512/99 *Germany* v *Commission* [2003] ECR I-845, paragraphs 80 and 81).

In the present case, the Commission has set out its arguments in a detailed and comprehensive manner, enabling the addressee of the contested decision to be aware of its factual and legal grounds and the Court to review the lawfulness of the decision.

The Commission relied on three main factors in order to reject the Republic of Austria's request. First of all, it found that that Member State had failed to demonstrate that the notified measure was justified in the light of new scientific evidence concerning protection of the environment (recitals 63 to 68 of the contested decision). Moreover, the Commission considered that the notified measure was not justified by a problem specific to the Republic of Austria (recitals 70 and 71 of the contested decision). Finally, the Commission rejected the arguments of the Austrian authorities seeking to justify the national measures by recourse to the precautionary principle, taking the view that those arguments were too general and lacked substance (recitals 72 and 73 of the contested decision).

As regards the question whether the Commission infringed Article 253 EC by failing to express a view on the arguments put forward by the Republic of Austria in which it claimed, in essence, that the notified measure was justified by an insufficient level of environmental protection until the expiry of the period laid down by Article 17(1)(b) of Directive 2001/18 for the renewal of consents granted before 17 October 2002 under Directive 90/220 for the placing on the market of a GMO as or in a product, it should be noted that the contested decision does not expressly deal with that point. However, that lacuna is attributable not to a lack of reasoning, but to the nature of the reasoning followed by the Commission in setting out the factual and legal grounds which justify the contested decision. Since the Commission set out why it considered that the notification failed to meet the requirements of Article 95(5) EC concerning the existence of new scientific evidence relating to protection of the environment and of a problem specific to the Member State concerned, it was not required to respond to the arguments of the Republic of Austria as regards the level of environmental protection achieved by Directive 2001/18 until 17 October 2006. This plea have been dismissed as unfounded.

Regarding to infringement of Article 95(5) EC

The applicants submit that the Commission should have granted the Republic of Austria's request, since the requirements of Article 95(5) EC were satisfied. They claim that the

notified measure was intended to protect the environment, that it was based on new scientific evidence, that it was justified by a problem specific to Austria and that it complied with the principle of proportionality.

In Court opinion, Article 95 EC, which by virtue of the Treaty of Amsterdam replaces and amends Article 100a of the EC Treaty, distinguishes between notified provisions according to whether they are national provisions which existed prior to harmonisation or national provisions which the Member State concerned wishes to introduce. In the first case, provided for in Article 95(4) EC, the maintenance of existing national provisions must be justified on grounds of major needs referred to in Article 30 EC or relating to the protection of the environment or the working environment. In the second case, provided for in Article 95(5) EC, the introduction of new national provisions must be based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure.

The difference between the two situations envisaged in Article 95 EC is due to the existence, in the first, of national provisions predating the harmonisation measure. They are thus known to the Community legislature, which cannot or does not seek to be guided by them for the purpose of harmonisation. It is therefore considered acceptable for the Member State to request that its own rules remain in force. To that end, the EC Treaty requires that such national provisions must be justified on grounds of major needs referred to in Article 30 EC or relating to the protection of the environment or the working environment. By contrast, in the second situation, the adoption of new national legislation is more likely to jeopardise harmonisation. The Community institutions could not, by definition, have taken account of the national provisions when drawing up the harmonisation measure. In that case, the needs referred to in Article 30 EC are not taken into account, and only grounds relating to protection of the environment or the working environment are accepted, on condition that the Member State provides new scientific evidence and that the need to introduce new national provisions results from a problem which is specific to the Member State concerned and subsequent to the adoption of the harmonisation measure (*Germany* v *Commission*, paragraphs 40 and 41, and *Denmark* v *Commission*, paragraphs 56 to 58).

Under Article 95(5) EC, in the present case it was for the Republic of Austria to demonstrate, on the basis of new scientific evidence, that the level of environmental protection afforded by Directive 2001/18 was not acceptable having regard to a problem specific to that Member State which arose after the adoption of Directive 2001/18. It is therefore necessary to examine at the outset whether the Commission erred in finding that the Republic of Austria had failed to demonstrate the existence of a specific problem which arose after the adoption of Directive 2001/18.

The Commission adopted the conclusions of EFSA, in particular those according to which, first, 'the scientific evidence presented contained no new or uniquely local scientific information on the environmental or human health impacts of existing or future GM crops or animals' and, second, 'no scientific evidence was presented which showed that this area of Austria had unusual or unique ecosystems that required separate risk assessments from those conducted for Austria as a whole or for other similar areas of Europe' (recitals 70 and 71 of the contested decision).

It must be stated that the applicants have failed to provide convincing evidence such as to cast doubt on the merits of those assessments as to the existence of a specific problem, but have confined themselves to drawing attention to the small size of farms and the importance of organic production in the Land Oberösterreich.

In particular, the applicants have not put forward evidence to rebut EFSA's conclusions that the Republic of Austria failed to establish that the territory of the Land Oberösterreich

contained unusual or unique ecosystems that required separate risk assessments from those conducted for Austria as a whole or in other similar areas of Europe. When requested at the hearing to comment on the scale of the problem posed by GMOs in the Land Oberösterreich, the applicants were not able to state whether the presence of such organisms had even been recorded. The Land Oberösterreich stated that the adoption of the notified measure was prompted by the fear of having to face the presence of GMOs because of the announced expiry of an agreement pursuant to which the Member States had temporarily committed themselves no longer to issue consents for those organisms. Such considerations, by their general nature, are not capable of invalidating the concrete findings set out in the contested decision.

Consequently, the arguments by which the applicants have disputed the findings made by the Commission on the condition relating to the existence of a problem specific to the notifying Member State was rejected.

Regarding the precautionary principle

The applicants criticise the Commission for ignoring the fact that the notified measure was a measure of preventive action within the meaning of Article 174(2) EC, justified by the precautionary principle; the Commission disputes that.

This Court believed this plea is irrelevant. A request had been submitted to the Commission under Article 95(5) EC. It decided that the conditions for application of that article were not met. This Court has found, following examination of the third plea, that the contested decision was not incorrect. The Commission therefore had no option in any event but to reject the application which was submitted to it.

Conclusions

As we can see, the Precautionary Principle has a very important role in European and International Case Law. When human activities lead to morally unacceptable harm, some actions shall be taken to avoid of, if nor possible, to diminish that harm. This principle has won acceptance as a general principle in international and European law and we believe that this is a very good thing regarding all the dangers that are next to us, ready to harm us, like people or our health.

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GLOBALIZATION – TOWARDS INTERNATIONAL GOVERNANCE

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Abstract

Before joining the European Union both the Romanian authorities as well as the less informed citizens lived the story of thinking that our European integration will bring us only economic growth and prosperity. Now the things are changing, we have seen on the one hand, that the integration is far to be over, being actually a very long process and on the other hand, the institutional form of the European Union as we knew it is also under change, a very proper field for Euro skeptics to say: "where are we actually integrating?"

The world is passing through delicate moments, terrorism, drugs, natural disasters and it seems that one solution should be applying the concept of globalization.

But this solution has also its problems and unfortunately this process have a lot of enemies because the institutionalization of global politics can discover new ways of solving the conflicts at global level.

Globalization means identifying the social relations in the whole world, connecting places from different sides of the world, mutual interdependence, unity in diversity and even more significant, a substantial reduction of poverty.

***Key words**: globalization, world, state, human, economy*

***JEL classification:** F60*

1. INTRODUCTION

The problem of today is haw to make the globalization work in order to maximize the benefits for all and to support sustainable growth. The first years of the third millennium found the human society struggling with complex phenomenon like globalization and deterioration of the environmental conditions, the second one threatening actually the future of life on the globe. Most of the opinions consider that both phenomenons have become out of control.

For many of us, the globalization is associated with a feeling of political fatalism and insecurity because of the fact that the national governments and the citizens have a slaw influence in controlling the change. That means the globalization emphasis the limits of the national policies.

There is this danger for the globalization to become the stereotype of nowadays: the monumental idea that fits everything, everywhere, every time from now on. It is used from the financial markets, to internet, but above all, it is nothing concrete. In spite of all this, we can be sure that the technical progress is guilty for this idea of globalization.

The globalization's time has come!

We can consider that the globalization process will be intensified in the next years. Under the force of the market, the process will be faster and give the developing countries the opportunity to reduce the economic gap between them and developed countries while the earnings of the poor will be higher.

It is the time for international governments' structures to ensure that the world's economy of the XXI-st century is ready to support all the comfort and aspirations of the modern man should have. We are passing very difficult moments for humanity, the war against terrorism, considered by many specialists a response of the poor world.

2. HUMAN EFFORTS IN THE GLOBALIZATION PROCESS

When analyzing the globalization phenomenon four elements need to be taken into account:
- the individual;
- the national society;
- international system of the societies;
- humanity, in general.

Between the four elements mentioned there are very close relations. R. Robertson, is convinced that globalization has its own logic and at a certain stage the development of this process becomes independent of what it is going on in the national states although at the beginning it was influenced from the inside [13].

The internal logic, R. Robertson (Robertson, 1995) argues, has its roots in the process of "cultural homogenization of the national states" and has more stages:
- first the national states were formed and their well defined borders;
- because of their industrial development they have become soon in contradiction with the resources they had and needed to enter wars to take it and for markets;
- the international relations that formed as a result of those disputes were cooperation or conflicts;
- with time, those relations become uncertain in spite of numerous agreements and treaties;
- many states have proven to be vulnerable in the systematization of the international relations and ensuring its own existence conditions.

The contemporary globalization is a process heavily contested because the infrastructure and the institutionalization of the global politics generate new arena and mechanisms that are able to solve the conflicts.

In this context of globalization if we take into account the territoriality factor we can say that some nations still try to create their own states, want autonomy like in India, or even stronger demands as we seen in Cecenia. Some African states could be in the same situation in the next period.

Also, the specialists are asking if the globalization is a process that is leading us or a process we can control, the only certain aspect is that none is out of the process so our attention should be centered on the ways we can use the opportunities offered by globalization to develop and prosper.

Globalization is a phenomenon that we have to take into account to be able to maximize the positive effects and lower the economic and social costs. The globalization consists in the undefined character of the problems of the world: the lack of a canter, a command, a decision council a managerial bureau.

Ioan Bari referred to some of the advantages of globalization:

-globalization is for the men an integration factor in the world's community;

-offers space for the development of the new global governing systems and a global society;

-refers to those processed that the nations of the world are incorporated in a single society, a global society (Bari, 2004).

The globalization phenomenon can be regarded as an identification of the social relations around the world,

phenomenon that connect long distance localities so that the elements that are taking place locally to be regarded through other similar ones that are happening at many miles distance and the opposite.

Thus, we can see the globalization as a integrated network that brought together communities from this world otherwise isolated. Globalization is to offers opportunities to

real develop at the global level but manifested unequally in different regions. This misbalanced development is to be driven also by the different understanding of "work" in many cultures. The opening of borders especially after the Second World War and the technological advancements have shown that countries with almost no natural resources become very reach, net export countries and drivers of world economic growth. Their development, significantly facilitated by globalization, can also be explained by the cultural understanding of working, in their countries. This is to argue that globalization is not enough to ensure the world economic development. It needs to be accompanied by people ready to make use of its benefits.

Some counties become more and more integrated in world economy with a high speed while others are slower. The countries that managed to be part of the global unique system enjoy stronger economic growth and a significant reduction of the poorness. Together with the raise of the living standards, the democracy and the environment standards have also registered significant improvement.

The force of globalization today is so strong that one may question the capacity of the state institutions to control and manage its negative effects. Thus, it needs to be taken into account the possibility of concrete and strong measures to prevent the possible crisis since the markets will never be completely stable and balanced. Taking this into consideration, the states have reached the conclusion that it is more efficient and wise to start coordinating the economic policies according to the influences of globalization than opposing this phenomenon.

The globalization process suppose a significant expansion of social interactions between individuals, corporations, governments, non-governmental organizations and also a raise of the number of international companies that invest, produce and sell globally.

Globalization has also brought with it an intensification of the aggressions on the life of different species and even human being. The phenomenons of environmental loss, pollution or the epidemic dispersions have also become global.

The states risk having many of their projects completely compromised. For instance, the ability of the developing states to value their economic potential in order to reduce the gaps in what regards the individual income or to maintain an economic stability, is significantly depending on the policies of the most industrialized powers. Thus, the efforts to improve the coherence, complementarily and the coordination of the economic policies are not a simple option today, but a real necessity for all the states of the world. Unfortunately, the reality shows that this objective has remained sporadic and inefficient, although the globalization process has advanced significantly.

The specialists in analyzing the globalization process define it as a new stage in human history in which "the traditional nation-states have become unnatural business units, even impossible ones in a global world". [8] The raise of the interdependences between states have made the commerce and finance two significant keys that can add a plus of coherence and complementarily in the economic policies so that the states can take the maximum benefit as a result of the global development.

But defining a common area of interest between the developed and developing states is not to be an abandoned objective. For instance, all the economic partners recognize the necessity to maintain a stable exchange rate as a precondition of developing an international open commerce system.

The miss-functionalities that periodically appear on many markets have generated negative influences on the global commerce system, which can create instability of the exchange rate and misbalances of the international competition. Instead of promoting deflation forces, the ones that can give the possibility to administrate the different crisis, many countries have used administrative measures that contradict the globalization paradigm. They are responsible for affecting the living standards especially in poor countries that are aiming to the developing

country status.

The most important driver of the globalization process is without doubt the raise of the technology information. It was clearly shown on the operations executed on the financial markets, where the speed, quality and performance of the information have been the essential key of the success.

Complete and effective participation to the global informational networks is crucial for a country in order to benefit from the globalization. But the access to the most advanced technology information is not ensured equally to all countries so that the poorer ones risk seeing the gap between the poor and rich countries becoming even more significant. Thus, while some countries benefit of a relevant human potential, particularly in the field of software, their access to technology information remained considerably out of date. That is why the investment in the technology infrastructure is to be a priority for each country that tries to integrate into the commercial and industrial international networks.

The economy, being a way of human action is through itself in continuing changing, and transition. The economical life is a fight of the man with the principles of the rarity, with the limits of the liberty, in order to transform this into tangible elements of the daily life. "The real problem is that in normal life, usually we don't have to choose between risk and stability, but between the degree of risk and the different possible results". [7]

In this normal life with the limits of our existence, the men and in general, the human community, in permanent transition, learn to adapt to the natural environment in which they live, building specific life surroundings, to produce the daily life. "The progress of the liberty in the history of the mankind, it is not just a progress for defeating the external limits that we have been restricted, but first of all, it is the progress with the limits that the internal nature has been restricted to us, this being in the same time a continuing struggle of man with himself". [6]

This means that to the human action we have found two responsibilities: 1. the individual responsibility of the way the liberty of choosing restricts what we have to do for our own way of living"; 2. the social responsibility of the way the individual liberty restricts other individual's liberty.

Of course there are a lot of criteria of appreciation of human activities. In the context of limited resources, the ensemble of human activities through we aim to answer to the following questions: what, when, how, and for whom to produce, are known as economic activities. In this context, we can find solutions about the fundamental problems connected to the volume, the structure, and the quality of products that are supposed to be produced, the present and future perspectives of producing, but also how we deal with the distribution and the consumption of what we have been producing. Through the economic activities we produce that utilities and services, people need to accomplish their life needs. Because the accomplishment of this life needs is a permanent process, the production that answers to this standard is in a continuing changing also.

The economic activity, or the economy, no matter the times or the historic context, is the basic activity of the people, the need to ensure the existence and to perpetuate the human being. After accomplishing needs like: food, shelter, cloths, we can see the premises for accomplishing the other needs: cultural, spiritual, and political, of the individuals and the community in its ensemble. That's why the economy is the basic field of the society, being involved directly or connected to the needs of the society.

3. THE PHENOMENON OF THE POVERTY

Socio-economic realities in our country are obviously favorable to emigration or temporary migration: the living standards significantly lower than in other European countries - as the

society cannot compensate this difference by other instruments (increased social protection, mother and child protection, health security etc.); lower productivity, lower technological standards compared to the European average, a socio- economic reality that does not intimate fast adjustments, implying a difference in wages for the same type of work; the lack of employment opportunities, the existence of areas/counties where the rate of unemployment is higher than the national average; they will all represent a potential danger of migration among the work force; the desire for professional fulfillment of the individuals with increased potential for specialization or continuation of studies (master, doctor's degrees, research etc.); or simply the desire of living in a more civilized environment, where the citizen feels that he/she is respected and protected. All these add to the behavioral specificity of the Romanian worker, with an increased capacity to adjust to the work environment, which is particularly adaptable when working on the national labor market. Between 2005 and 2012 an average annual migration flows of about 400.000 left Romania. After 2014, the general picture of migration can be radically altered, depending on Romania's social and economic progress.

Considering the Romanian tradition of low work mobility, the young contingents will be dominant among those for employment abroad. Many belonging to this category, being single, corresponding temporary migration will be probably reduced, at least in the first five years after accession. The years of transition and openness towards the West in terms of access to information has noticeably altered the attitude of the population and of the youth towards the Western way of living. They prove to be well informed about the economic and social realities of other states and become increasingly more realistic in their options for migration destinations for work or professional improvement. In many cases the intention to migrate or actual migration, manifested in adolescence turn into an option for temporary emigration for higher qualification or specialization or even disappears if opportunities on the labor market offers satisfactory alternative solution (comparatively high income, a position with a foreign company, etc.) In this context, it should, however, be mentioned that providing employment opportunities to the young professionals with special abilities, the highly qualified ones, to researchers, should represent an important element in the national policy of economic growth. In this way, the migration phenomenon will not be allowed to reach alarming rates, while Romania will remain an interesting area for multinational/translational companies and foreign investors. So far, in our country, the measures, the institutional frame and the migration policy have had a reactive character, connected with the aim of ensuring the adjustment to the European requirements, without having any clear adjectives in mind. However, providing a comparable environment with western countries of the EU for highly qualified workforce is not likely to happen in the next future, fact that will continue to affect both the demographics of Romania and the competitively of the economy.

The phenomenon of the poverty supposes a series of privation connected to the human needs, starting from the basis of the pyramid of the needs of Maslow (biological needs, security needs, status needs, self perfection needs) and going on the top of this, through all the levels. If we analyze the diverse phenomenon of the poverty, we can understand that a series of indicators about the quality of life are affected from the socio-economic reality. These indicators are basic for commenting the situations of privations in lots of fields such as: food, clothes, home, the environment, the utilities of the place, the work conditions, the right to work, the family, the social integration, the political participation, the education.

Analyzing the poverty involves taking into deep consideration of all the aspects connected to life conditions, that is why we can say that poverty status is evaluated regarding to the resources, but also the possibility that people have to participate to the social life, to act as members of the community.

According to Eurostat - *The Statistical Research of Poverty* [5], poor persons could be considered "the families or the groups of people whose resources, material, cultural and

social, will be so limited that restrict people's access to the lowest level of life, acceptable for the country they live".

The World Bank reports, define the poverty as the loss of the capacity to have a minimum life standard. The poverty means also not only the absence the daily material needs, but also the absence of the possibilities to live a tolerable life.

The need for a more clearly evaluation of the poverty imposed facing it on multiple levels, from different perspectives, and led to the development of new instruments for measuring but also to ensure a diversification of the utilized indicators.

In our country the concern about studying the poverty dates from the 50's of the last century, being reinforced at the beginning of the 70's. With this occasion, groups of specialists in economic and social fields made minimal level of budget for a standardized family of employed and for a pensioners one. The evaluation of the poverty continued after 1990, being the first studying objective for many national institutions but also international one, including World Bank.

The growing importance of migration in the socio-economic picture of the EU area is a widely acknowledged fact. The member states, already feeling the effects of demographic ageing, resort to attracting young, qualified, competitive work force which will be able to reduce the dramatic effects of demographic ageing. The balance of migration in the host countries is a positive one, but this is not true for the residence country as well. By external migration, Romania exports more or less free human capital and the effects of this type of export are extremely complex, in a permanent process of transformation and multiplication in both time and space. We consider that migration is a phenomenon that cannot be ignored, since it can bring about negative effects at long term basis on the national economy. In spite of the fact that this phenomenon is particularly hard to grasp and to anticipate in its entire complexity, its analysis is both necessary and beneficial since it can contribute to better understanding and regulation.

This kind of arguments, we take into consideration now, when we try to draw a general frame of the economy evolution, evolution that cannot be finished no matter the different steps it has done during times. The development of the economy, in this stage of evolution, depends on multiple variables with systemically character such as the need for economical strategy.

The concept of economic strategy has a central place in all economic levels. The strategy reflects a supposition about the human behavior, suppositions that aim to bring the highest advantage, the smallest privation that means the smallest opportunity cost.

The economical strategy leads the function of the economy because it includes plans, methods and targets that reflect a correlated view about the development.

Thus, the economical strategy does not match with the economical approach that regards the methods used to accomplish a target or a couple of targets on short term. The normal function of the state in the contemporaneous market economy has to take into deep consideration the mixture between the economical strategy and the economical planning.

In nowadays Romania, the highest need is to use as much as possible the strategic planning in macroeconomic policies so that those policies can have a strategic approach and use resource on medium and long term to ensure sustainable development of the society.

After 1989, Romania failed into the trap of the policies and strategies characterized by improvisation, without a clear reference, without finding proper sources of funding or a preferment management.

The transition management was inefficient, so that for 10 years we actually didn't have an economical strategy agreed by all actors in the field. Until we had the National Economic Development Strategy in 1999, we missed a clear programme for macroeconomic development. But the plans for joining the European Union had to change this status quo and

to ask for an economic strategy and later on a National Strategy for Sustainable Development approved by the Government in 2008.

The historical experience demonstrated the need for the state intervention into the economy in order to prevent an unbalanced development and ensuring a sustainable growth.

Because in the contemporaneous world we assist to a diversity of economic targets and developing instruments, but also different institutions in the field, usually we use the term of "economic policies". Romania, being a country that is likely be severely influenced by external economic impacts, due to the external ownership of most businesses in bank sector and retail, has to take into consideration in developing the economical policies the need to ensure a strong internal market and reorganize the production sector.

The need for strategy is considered acute in all fields, but the most important is in the macroeconomic policy.

In this respect, the factors that ensure and influence the process of economical development are: the population, the natural resources, the natural environment, the agriculture, the industrial production. The strategic planning has to receive also concrete criteria for the connection between needs and resources, but also operational objectives to be reached on short term, as well as strategic objectives on medium and long term, or different tools reaching the final objective.

At the same time, taking into consideration the perspectives of the global economy, we have to build our strategies according to the influences of the external environment, be it the European one or the global one.

It is clear that a coherent economic strategy has to balance the different strategic objectives on a medium term. This kind of strategy has to channel the country's efforts for institutional change, economic transformation, crisis management, sustainable development. Thus the planning should add the raising of the investing rate through stimulating the national capital but also the foreign investitures, continuing the measures for macroeconomic stability, developing the public services, promoting on long term a programme for reducing the ecological risk.

In the field of the human resources, the strategy let us know the need for new employers, the need for professional training, the salary policy and the consequences of all this on the organization. The strategic planning is based on the specialty of the organization (mission, culture, strong points, week points, resources), but also on the conditions, trends, opportunities, risks that the environment give to us. The results of the strategic planning are given by the performances of the organization. The strategic planning of the human resources represents a component of the strategic management that is not considered as it should be in most of the organizations.

The main cause of the success of an investment in Eastern Europe is considered to be the man, so that the management should be turned to this way. The methods used in the strategic planning of the human resources, are slow and inefficient because of the inaction of the management. The accent of the organization in the strategic planning of the human resources is strictly connected to the support and cooperation of the high level managers.

This support of the high level officials should be turned, first of all, in financial field. The top managers will not support any proposal in the field of human resources if they are not sure that the methods used for rising the capacity of the human resources will be effective and productive, which is why the human resources managers should ensure proper solutions when asking for new financial approach.

Nowadays Romania, inherited from the economic dictatorship of the communists, ruled by state control and over planning, this kind of instability that was hidden through arbitrary regulations of the prices, salaries, where the government had absolute powers.

The passing from the economic dictatorship of the communists, to the market economy, unfortunately was followed by unemployment, inflation, budgetary deficit, the loss of equilibrium of the international pay balance etc.

Very important for the development of the economy but also for the social sciences, was Leon Walras who formulated the first the Law of the General Stabile Equilibrium in economy. His point of view is strictly connected to the determinist theory. In the same way others modern economists, Keynes, Samuelson, Friedman, considered the world through the diversity of the conflicts with a single word: "disequilibrium".

The over watch of the global economic crisis, of the way their effects disseminate in every fields of activity, cannot lead us to certain planning or rhythm that can be used in the strategic management and in justifying the economic decisions. The context is much more complex. But all this can help in the consolidation of the market economy in Romania, if we take it into deep consideration when it comes about our economic strategic planning. That is why we should add more and more importance to the continuous training of the human resources as a basic tool of the strategic planning.

L. Voinea considers that "the international society is an economic entity that is composed by a mother-company and its branches in many countries and is characterized by the internationalization of the production based on an international basin of human, material and financial resources while promoting at a global stage of a certain set of specific and own values". [14]

For less developed states from the economic perspective, even if they orient their strategy to cheaper technologies, the problem of the access to those technologies still exist, since many of them are still expensive. All those efforts need to be based on a trained and skilled workforce, ready to make use of the potential of the new technologies that could be implemented.

4. CONCLUSIONS

A significant element of the unification of the states of the world is the creation of the international companies. They use their potential as driver of the globalization of the economic activity, contributing to the internationalization of the production and using all known forms of capital.

Given the significant discrepancies created in the distribution of the wealth both at the global and national level, many economists have posed the question if the globalization is actually condemning some nations to total poorness. However, this is still to be analyzed since it is difficult to consider that a country that has passed from a poor country to a developing one is having this progress due to the globalization process, the internal efforts or international aid or, on the opposite, such factors are keeping that county at the same stage.

With all this, it to be considered that there is a certain contradiction between the globalization process and the expectancies of different countries from this process. That is why, the key aspect in the relation between globalization and development is the inequity in the economic power and capacity to use and administrate resources, in commerce and international economic relations, in sharing the benefits and losses.

A significant argument for globalization is if we recognize that the technologic progress is responsible in a significant manner for the world's proliferation of the globalization.

The globalization has brought with it together with significant benefits and costs, looses in what regards the environment quality, identity and representation of the developing countries. And one can say that this process evoke the "end of state authority", "the end of economic geography" or "the resignation of nation-state".

However, no matter the progress of globalization, the national economies will remain predominantly local. The sovereignty principle will continue to work since it is a fundamental element of international public action.

Even though some aspects of globalization process cannot be controlled, our attention should be centered on the ways we can use the opportunities offered by this process to boost the economic growth.

Globalization should be approached as a phenomenon that needs to be carefully considered in order to maximize the economic opportunities and lower its economic and social costs.

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CRITICAL APRECIATION OF THE NATURE AND LEGAL CHARACTERISTICS OF AN OFFICIAL REPORT IREGULARITIES AND ESTABLISHING BUDGETARY DEBTS FROM IREGULARITIES ISSUED UNDER GOVERNMENT EMERGENCY ORDINANCE NO.66/2011

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Abstract

Minutes of finding irregularities and establishing budgetary debts from irregularities is an act of public financial is issued by a legal entity under public authority in revoking the payments from the EU budget and national under grant contract and through the Operational Programme. Government Emergency Ordinance no. 66 of 2011 is very clear on this even if administrative delegation, work setting and finding irregularities budgetary debts from irregularities may be delegated by the managing authority only an intermediary body is organized in a public institution.

In order to analyze and establish the legal nature of the report finding irregularities and establishing budgetary debts from irregularities is impetuously necessary to have the landmark legal nature of the main legal act (contract grant from EU funds) whose legal act is the accessory minutes finding irregularities and establishing budgetary claims resulting from irregularities is issued for failure of the customer and / or partner, if applicable, the grant contract.

This contract grants from EU funds, is a mutually binding contract granting, free of charge money to named beneficiaries counterparties in return for the discharge by them of any obligation to provide any advantage their administrative contract is a genuine donation of tasks.

Analyzing from the perspective of the legal nature of the legal act primarily minutes finding irregularities and establishing budgetary debts from irregularities, has the nature of an act of partial or total revocation of execution by donor of a gift for the corresponding failure by the donee-beneficiary of tasks set by contract grant, issued under contractual liability pursuant exceptio non adimpleti contractus.

Minutes of finding irregularities and establishing budgetary debts from irregularities is an act of public financial is issued by a legal entity under public authority in revoking the payments from the EU budget and national under grant contract and through the Operational Programme. Government Emergency Ordinance No. 66 of 2011 is very clear on this even if administrative delegation, work setting and finding irregularities budgetary debts from irregularities may be delegated by the managing authority only an intermediary body is organized in a public institution.

Although it is an act of public financial law and not a tax law, national law is not consistent in this regard. National legislature's intention is very clear, but at certain points, the enforcement of the aforementioned common law immediately report it constituting tax law, conversely, on all other aspects, the act is an act of public financial common law, the two areas of law not being able to confuse. From this perspective, we consider it necessary to recall that the tax law is a sub-branch of public finance law, in this sense not being able to be confused with the whole.

Minutes of finding irregularities and establishing budgetary debts from irregularities is given authentic document that is issued by public servants exercising State power under article 2, paragraph 3 of Law 188/1999, republication 2, with subsequent amendments and also prepared the formal and competence established under Government Emergency Ordinance No. 66 of 2011 as amended and supplemented, which is ad solemnity conditions.
Because it can not lead an independent existence depends on the existence of a contract to grant the minutes finding irregularities and establishing budgetary debts from irregularities is legal act issued for non-accessory appropriate by the beneficiary grant contract. Thus, the legal source of the report obligational, of which the claim resulting from irregularities budget is the grant contract, the aforementioned report (the debt) the source of this legal relationship enhancement.

Since the debt resulting from irregularities budget is the manifestation of the will of a single person, is unilateral legal act.

Being a legal source of obligational and issued pursuant to contractual liability, the minutes of finding irregularities and establishing budgetary claims resulting from irregularities constituent is a legal rights claim, which is highly restorative.

Budget debt instrument resulting from irregularities is patrimonial, given that the issue of the legal effect is the birth of one or more rights instruments that are part of the economic rights.

Minutes of finding irregularities and establishing budgetary debts resulting from legal acts irregularities is subjective claim / claims budget established by this act are determined both in existence and in their amount.

Although the minutes of finding irregularities and establishing budgetary debts resulting from legal acts irregularity is strictly personal, Government Emergency Ordinance No. 66 of 2011, imposes a condition on which the trustee group can be delegated powers to issue a such debt instrument, it must be a legal entity of public law itself (not treated in accordance with Law 554/2004 with subsequent amendments or other legal) and have intermediate body quality as defined by Regulation (EC) no. 1083/2006 of the Council, as amended and supplemented. In this respect the report finding irregularities and establishing budgetary debts from irregularities may be prepared by an intermediate body organized as a non-governmental body with public utility status.

Finally, without claiming exhaustive enumeration and analysis of the legal character of the minutes of finding irregularities and establishing budgetary debts from irregularities, obviously this is a legal document called a (typical) enjoying a relatively rigorous regulatory contained mainly in Regulation (EC, Euratom). 2988/1995 of the Council and the Government Emergency Ordinance no. 66/2011 with subsequent amendments and with reference to its implementing rules.
Brief analysis of the aforementioned legal title character finds its full contribution claim given that representatives of the Romanian state judicial authority vested in pending cases although the analysis method of calculation timbrajului administrative action seeking finding Minutes irregularities and establishing budgetary claims resulting from irregularities and hence the grant contract which constitutes the main legal act in question and that the competence ratione materiae, the trial of such cases have settled and grounded in the real unit procedural exceptions.

In this way the need to reiterate this shaping of a coherent jurisprudence and legal concerns timbrajului method of calculation of administrative action seeking minutes of finding irregularities and establishing budgetary debts from irregularities, as Law 554/2004 amended and supplemented, the postage calculation requires the value of the request for summons when administrative action concerns an administrative contract. By doing this we mention that under Article 18 para. (4), lit. e) of Law 554/2004 as amended and supplemented by administrative action whose purpose is administrative contracts, means and legal actions calling into question how the parties have executed or, if appropriate, and they also performed the obligations arising from administrative contracts. Or, as I stated, fiscal debt instrument accessories such administrative contract is issued as a result of the failure to properly beneficiary of the contract grant.

So, this reasoning leads to the conclusion that actions seeking minutes of finding irregularities and establishing budgetary claims of irregularities results timbrează the value, the more because states must timbrării recent judicial practice in contract value funding causes that the annulment decision to terminate the grant contracts with EU funds.

Last but not least, note that the correlation of systemic minutes finding of irregularities and establishing budgetary claims resulting from irregularities and grant agreement, that an administrative action seeking a report finding irregularities and establishing budgetary debts from irregularities is thus the object and corresponding grant agreement. So, given that the legal question to be decided in the spring, mainly from the administrative contract grant, we appreciate that they are solved in the first instance by cutting administrative and fiscal courts of appeal in accordance with Article .10 par. (1) of Law 554/2004 with subsequent amendments in conjunction with the provisions of Article 3 para. (1) of the Code of civil Procedure, as amended and supplemented, the contractual legal relations.

In establishing jurisdiction materials related to the criterion value Art. 10, para. (1) of Law 554/2004 as amended and supplemented refers expressly and exhaustively, acts on taxes, contributions, debt, and accessories. However, the report to which this exposure, not any of the aforementioned categories. These minutes have the effect of finding non-debt tax budget, which is legal imperative defined by Regulation (EC, Euratom). 2988/1995 Council precedence over the rules of national law.

Regarding the budget category of debt resulting from irregularities issued by Intermediate Bodies under the delegation of functions specified that are not issued in their own name but they are signed by an authority competent in the management of EU funds - Authority of central government authority management role by the IB as mandated by the Agreement to delegate functions between central authority and beneficiary agreement has the nature of an agency in which the central competent authorities in managing EU funds has as a principal and as agent IB's. Be noted that the aforementioned feature delegation agreement is governed, inter alia, Article 42, para. (1) reported the Art.2 section 6 of Regulation (EC) no. 1083/2006 laying down general provisions on the Structural Instruments.

In conclusion, the material competence of the trial in first instance administrative cases covering minutes finding irregularities and establishing budgetary debts from irregularities, returns Courts of Appeal and not the courts.

Given that the draft Code of Administrative Procedure of Romania does not come to bring clarification of the legal situation presented in this paper, we consider it appropriate to initiate a legislative measure amending and supplementing Government Emergency

Ordinance no. 66/2011 as amended and supplemented, in order to establish how the stamping of causes that the cancellation or modification of reports finding irregularities and establishing budgetary claims resulting from irregularities and competence of the court of first instance cases covering administrative minutes finding irregularities and establishing budgetary claims resulting from irregularities and not least the establishment of a legal regime which derogates from the provisions of Law no. 85/2006 to facilitate the authorities competent in the management of Community funds enrollment requests a claim resulting from irregularities budget until closure of insolvency proceedings

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5. Law 188/1999, republication 2, as amended and supplemented;
6. Code of Civil Procedure, as amended and supplemented;
7. Civil Code of Romania;
8 Law 85/2006, as amended and supplemented.;
9. Project Administrative Procedure Code of Romania - published on www.mai.gov.ro

REDUCTION OF THE PENALTY CLAUSE

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Abstract

In present, legal provisions which establish the legal institution of the penalty clause are set forth in the New Civil Code and art. 1538 - 1543. Appearance of new, high practical interest is on the possibility created for the court to reduce the penalty clause if it "is manifestly excessive to the damage than can be provided by the parties at the end of the contract".

1. ARGUMNENTS USED BY THE LEGAL DOCTRINE IN THE CIVIL CODE OF 1864.

Under the rule of the Civil Code of 1864, the authors in favor of the theory of the penalty clause amendment brought various arguments in support of their opinion.[315]

Article 969 of the Civil Code of 1864: Although at first glance, this text would not have allowed the judge to intervene and review the penalty clause, however, the legal text, which established in the Civil Code of 1864 the binding principle of the contract, could have justified the intervention of the judge.[316] Agreements have the force of law between the contracting parties as long as they prove to be useful for the parties and as long as they are dominated by the good faith of the contracting parties. If, during the contractual relations it is found that one of the parties has no longer good faith, and the principle of execution in good faith of the agreements is removed, the binding principle is to be understood and applied with flexibility.[317] If the creditor cannot be sanctioned as provided in the penalty clause, when the penalty clause has become too burdensome for the debtor, the penalty clause is no longer useful. In these situations, the intervention of the court in the contract is not only necessary but also legally possible, meaning that it is permitted, by correlating the principle of good faith and the principle of equity.[318]

Good faith principle: This principle was established in article 970 of the Civil Code of 1864, where paragraph (1) provided in a concise manner that "agreements must be performed in good faith". According to Prof. I. Deleanu, this legal text also included, according to its demands, the agreements involving the penalty clause. Good faith requires loyalty and cooperation during the performance of the contractual obligations. Good faith should be present upon the signing of the contract, respectively when the parties take responsibilities, throughout the performance of the contractual relationship, until the full performance of the agreement. When it turns out that good faith was breached in taking and performing obligations, therefore when a principle was violated or breached, the court has the possibility

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[315] For the presentation of the main reasons in the favor of this theory, see: Angheni S., *Consideratii teoretice si practice privind reductibilitatea clauzei penale in dreptul romansi in dreptul comparat*, article published in Revista de Drept Comercial, no. 6/2001, p. 59- 63; Dumitru M., quoted text, p. 133-137; Deleanu I., Deleanu S., "*Consideratii cu privire la clauza penala*", article published in Revista Pandectele Romane- Supplement, no. 1/2003, pag. 122-128; Pop L., quoted text, p.690-693; Zamsa E., *Teoria impreviziunii, Studiu de doctrina si jurisprudenta,* Hamangiu Publishing House, Bucharest, 2006, p. 206;

[316] Dumitru M., quoted text, p. 134;

[317] Pop L., quoted text, p. 690; Zamsa C.E., *Teoria impreviziunii, Studiu de doctrina si jurisprudenta,* Hamangiu Publishing House, Bucharest, 2006, p. 206;

[318] Zamsa C.E., quoted text, p. 206; Dumitru M., quoted text, p. 134;

and the obligation to intervene and remove the violation.[319] Being a principle of public order, a court may invoke, ex officio, the breaching or ignoring of the good faith requirements.[320]

Principle of equity: According to article 970 paragraph (2) of the Civil Code of 1864 "they – the agreements – force not only to what it is expressly mentioned, but also to all the consequences that equity, custom or law of obligation, by its nature". Equity was defined as a means of moralizing contractual relations in order to ensure contractual balance, to be the reason for the judge's intervention to moderate excesses, including in terms of penalty clauses.[321] According to the demands imposed by the principle of equity, the court may thus intervene and adjust the content of the penalty clause.[322]

The legal standard included in article 1087 of the Civil Code is an imperative standard but it is not a public order standard.[323] It was shown that the legal standard included in article 1087 of the Civil Code of 1864 implied, under certain conditions, interventions of the parties, the court and the legislator because this text protected an individual interest and only subsequently, a general interest. Thus, as the protection of a private interest prevailed, the provisions of article 1087 of the Civil Code fall into the category of private mandatory rules and therefore, in certain situations, they may be modified by the jurisdiction authorities.

The imperative of a lawful case: According to article 966 of the Civil Code of 1864 "The obligation without case or founded on a false case, or illicit does not have any effect", while article 968 stipulated that "the case is illicit when it is prohibited by laws, when it is contrary to the good habits and public order". They tried to motivate the legal reassessment of the penalty clause by the imperative of a lawful case, namely in accordance with good habits and public order, the legal doctrine showing that, if the court finds that this command is not fulfilled, it may intervene and correct the agreement of the parties.

Theory of unforeseeability: The intervention of the judge related to the amount of the penalty clause was also motivated by means of the theory of unforeseeability. Although at that time, the legislation did not provide an express regulation for the unforeseeable situation or hardship [324], the regulation of unforeseeability being made only by the New Civil Code, article 1271,[325] the legal doctrine claimed that the problem of adapting the penalty clause can also be raised following the occurrence of events beyond the control of the parties, after the

[319] Dumitru M., quoted text, p. 135;

[320] Deleanu I., Deleanu S., *Consideratii cu privire la clauza penală*, Revista Pandectele Romane-Supplement, no. 1/2003, p. 126;

[321] Pop L., quoted text, p. 691;

[322] Deleanu I., Deleanu S., quoted text, p. 128;

[323] Ibidem;

[324] Costin M.N., Costin C.M., *Dictionar de dreptul afacerilor*, second edition, Hamangiu Publishing House, Bucharest, 2012, p. 184 defines the hardship clause as a contract stipulation belonging to the clauses of adaptation to the new situations, due to which it is possible to amend the contract when, during its performance, without the fault of parties, the events that could not be foreseen upon the conclusion of the legal relationship occur, but which, changing the data and items considered by the parties upon the conlcusion of the contract, creates too burdensome consequences for one of the parties to be fair for him to bear them alone". The same way, the author C.E. Zamsa, in the work "Teoria impreviziunii Studiu de doctrina si jurisprudenta", quoted text, page 2 shows that we are in the presence of excessive burdening of the obligation that, although not impossible to honor, may create a very difficult economic situation for the debtor, even bankruptcy, or a drastic reduction of the benefit to be received by the creditor, with consequent unbalance of the benefits and loss of interest in maintaining *tale quale.*

[325] Article 1271 paragraph 2 of the new Civil Code stipulates that: "*If the performance of the contract has become excessively burdensome because of an exceptional change of circumstances which would clearly unjustly oblige the debtor to perform his obligation, the court may order: a) the amendment of the contract, to equitably distribute the losses and benefits resulting from the changed circumstances between the parties; b) the termination of the contract, at the moment and under the conditions determined".*

signing of the contract, emphasizing that "the unforeseeability must be a circumstance justifying the legal review of the contract, including the review of the penalty clause."[326]

Contractual solidarism theory: This theory was also an argument in the favor of the judge's intervention as related to the reevaluation of the penalty clause.[327] According to the theory of contractual solidarism, the essence of the contract consists not only of the parties' wish, but also of the contractual interest of each of them and to ensure contractual balance, the interests of the contracting parties must always be reconciled. The contractual solidarism requires balance, good faith, precaution, consistency and proportionality.

According to Professor George Piperea[328] the principle of contractual solidarism

- means the intrinsic and deep contractual relation that the contract creates between the contracting parties who are jointly liable to carry out the content of the contract, namely their interests;
- claims the reconciliation of the parties; interests, which implies a fair distribution of tasks, risks and profits generated by the contract;
- justifies the requirement of creating contractual relations on the basis of mutual services rendering, correcting the original contractual imbalance;
- is designed to preserve and save the contract, offering solutions for that purpose, both in the case of difficulties in performing the contract, and in case of failing to fulfill the contract;
- is another kind of individualism, raised from the level of the party to the level of partnership created by the contract between the parties, namely an individualism based not on the individual wish of the parties, but on the interests of the contracting parties, for which the parties are jointly and severally liable;
- is based on concepts such as proportionality, consistency and balance of the contract;
- is the reason of a doctrinal and jurisprudential movement of great amplitude, of rethinking and reshaping the fundamentals of the contract on moral grounds;
- is in opposition to individualism, a concept that says what the contract should be, not what the contract is, opposing consistency and proportionality of abuse of rights and discretionary individualism;
- the key of contractual solidarism is the utility of the contract, which places the interest of the parties in the middle of the legal relations generated by the contract;
- it is not a normative principle, but a demonstrative principle, as it is not mentioned as such in the law, but it logically derives from all regulations.

Thus, it has been shown that based on the principle of contractual solidarism, the judge may intervene and punish the excesses existing in the contract, he may also intervene as related to the penalty clause, in terms of its reevaluation.

Reducible penalty clause based on article 5 of the Civil Code of 1864 and the idea of unjust enrichment. A bill was formulated related to the possibility of the judge's intervention regarding the reduction of excessive penalties based on the provisions of article 5 of the Civil Code of 1864, an article stipulating "no derogation by convention or special provisions to the laws that interest the public order and good habits". In addition, the idea of unjust enrichment[329] was considered a solution allowing the court to intervene on penalty clause[330].

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[326] Deleanu I., Deleanu S., quoted text, p.133;

[327] For a synthesis of the contractual solidarism theory, see L. Pop, *Incercare de sinteza a principalelor teorii referitoare la fundamentele contractului, cu privire speciala asupra teoriei autonomiei de vointa si teoriei solidarismului contractul,* article published in Revista Romana de Drept Privat no. 5/2007 p. 95-116; Pop L., Tratat de drept civil, quoted text, p. 690;

[328] Piperea G., *Introducere in Dreptul contractelor profesionale*, CH Beck Publishing House, Bucharest, 2011, p. 240-245;

[329] Authors Statescu C, Barsan C., in the work *Drept civil. Teoria generala a obligatiilor*. 9th edition,

Law 509/2002 on permanent commercial agents.[331] The legislative act was considered a legislative "flaw" in the system of provisions of article 1087 of the Civil Code of 1864.[332] Article 25 paragraph 3 of Law 509/2002 provided that " upon the request of the agent, the court may reduce the amount of the penalty clause or compensation provided for his breach of non-competition clause, if it considers that it is excessive in relation to the circumstances of the case". It was argued[333] that although this text cannot be considered a common standard, it still has a certain power of suggestion in contractual disputes and the legal status of contractual disputes should be governed by the same principles, so that it cannot be said that only certain contracts are governed by equity and proportionality principles of the services.
As noted [334], the right of the courts to reduce penalty clauses which they consider abusive, not those that violate the principle of autonomy, takes into account the fact that, the "hindering" of the penalty clause is, undoubtedly, in line with the current regulations at European level that highlight the significance of the penalty clause. The European solution on the possibility to reduce penalties by the judge up to the total value of the debit is reasonable and it is based on the principle of unjust enrichment, being a guide for the correct enforcement of the civil law.

The solution to reduce obviously excessive penalties compared to the damage that could be provided by the parties upon the signing of the contract, under the form of a penalty clause, at the same time being abusive clauses in adherence contracts concluded between professionals and consumers, is established by the laws and by the provisions of article 1541 of the new Civil Code, for the purpose of which "the court may reduce the penalty only when: a) the primary obligation has been partly carried out and this benefited the creditor; b) the penalty is manifestly excessive to the damage that could be provided by parties upon the signing of the contract".

2. THE SETTLEMENT OF REDUCTION OF THE PENALTY CLAUSE IN THE NEW CIVIL CODE

From the content of these legal provisions introduced by the new Civil Code, we may conclude that the **obviously excessive penalty** that may be reduced by the court is related to the damage that could have been foreseen by the contracting parties upon the signing of the contract, not to the main obligation stated in the contract including the penalty clause under the form of obviously excessive penalties. This is the reason why the obviously excessive penalty cannot be reduced by the court at the level of the main obligation whose performance remains independent from the performance of the penalty clause.

Based on these reasons explained in the study, in article 1541 paragraph 2 of the new Civil Code, the legislator himself expressly states that obviously excessive penalty reduced this way should remain above the main obligation.

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reviewed and added, Hamangiu Publishing House, Bucharest, 2008, defined the unjust enrichment as "legal act by which the patrimony of one person is made bigger without legal basis. The obligation to give back of the person who has obtained a bigger patrimony to the person who has diminished the patrimony arises from this legal act. The latter is acknowledged the possibility to sue, by which he may claim the restitution, an action called de in rem verso".

330 Angheni S., *"Consideratii teoretice si practice privind reductibilitatea clauzei penale in dreptul roman si in dreptul comparat",* article published in Revista de Drept Comercial, no. 6/2001, pag. 63;

331 Law 509/2002 on permanent commercial agents was published in the Official Gazette of Romania no. 581 of 6 august 2002 and it was annulled by article 230 of Law for the implementation of Law no. 287/2009 on Civil Code published in the Official Gazette of Romania no. 409 of 10 June 2011;

332 Deleanu I., Deleanu S., quoted text, p.129;

333 Ibidem;

334 Ibidem, p. 64.

It results that, for the purposes of the new Civil Code, obviously excessive penalties may be reduced by the court by fulfilling two cumulative conditions, namely the reduction of penalties may be made up to the amount of damage that could be provided by the parties to the contract, but at the same time as penalties reduced to upper primary obligation.

We note that the text of article 1541 paragraph 1 letter b of the new Civil Code, which refers to the foreseeable damage, is consistent with article 1533 of the new Civil Code, which states that the debtor is liable only for damages which he foresaw or could have foreseen as a result of the failure fulfill an obligation, upon the signing of the contract, unless the failure is intentional or if it is due to his serious fault. Even in the latter case, the damages include only that which is a direct and necessary consequence of the failure to fulfill the obligation.

According to a logical - systematic interpretation of the legal provisions mentioned above, we may conclude that, reducing penalties obviously excessive in relation to the damage that could be foreseen by the parties upon the signing of the contract, if the damage that could be foreseen by the parties upon the signing of the contract is lower than the main obligation of the contract, the court may not reduce the penalties to the amount of the damage that could be foreseen by the parties upon the signing of the contract, but at a value higher than the main obligation.

It results that, in the context of the provisions of article 1541 of the new Civil Code, if there is a motion to reduce obviously excessive penalties under the form of a penalty clause, the court is obliged, under the penalty of denial of justice, to rule the reduction of obviously excessive penalties to the limit of the damage that could be foreseen by the parties upon the signing the contract, except for the case when the damage that could be foreseen by the parties upon the signing the contract is lower than the main obligation when, as stated above, in our opinion, the court shall reduce the amount of the penalties at a level higher than the main obligation.

We must also mention that, from the corroborated analysis of the provisions of article 1540 and article 1541 of the new Civil Code, it results that for the situation mentioned in article 1541 paragraph 1 letter b of the new Civil Code, the court may reduce only the penalties obviously excessive in relation to the damage that could be foreseen by the parties upon the signing of the contract, as it is unable to find the invalidity of the penalty clause under the form of obviously excessive penalties, whereas, for the purpose of article 1540 of the new Civil Code, the invalidity of the penalty clause occurs only if the invalidity of the main obligation occurs, but the invalidity of the penalty clause will not bring the invalidity of the main obligation.

Conclusions: In the conclusion, the issue of penal clause reduction remains a challenge, for theorist, but especially for practitioners.

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CONCIL FAMILY IN THE CIVIL CODE

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Abstract

Civil Code entered into force on 01.10.2012 I dedicate the book about people, Title III, Section IV of a new institution, namely the Family Council. By this we intend to do an analysis of this institution, as it regulates the current legislation.

Civil Code establishes a new institution, the Council of the family, an institution designed to control function and exercise guardianship of the guardian. Laws and regulations under Article 124 of the Civil Code, the Family Council can set up to oversee how the guardian shall exercise the rights and fulfill obligations on the person and property of the minor. If child care is by parents, by putting in placement or other special protective measures provided by law, the family council will not put. Institution that has the family council is setting up guardianship court. This can be a family council composed of 3 relatives and in-laws in the light of their relationship and their relations with family child. In case of lack of relatives and in-laws may be appointed under the Code and other people who had friendly relations with the minor's parents or are interested in his situation. Code defines and bans on the appointment of members of the family, stating that husband and wife can not be assigned together members of the same family council, in which case the court will appoint guardianship and 2 alternates. It also can not be a member of the family or guardian.

With reference to Article 113 of the Code is established that can not be members of the family council: minor, the person placed under judicial interdiction or placed under not placed under guardianship; person deprived of the exercise of parental rights, the person against whom the exercise of civil rights restricted or by law or by court order, and at the bad manners that were held by a court, person exposed to insolvency; person with interests adverse to those of the minor; According to Article 120 persons designated by the board of family are obliged to fulfill their tasks. However, the board may refuse designation of family person due to illness, infirmity or how activities, remoteness of residence from where the goods are minor or other reasons, could not fulfill the tasks of the family. Members of the family may be replaced, replacement request must be submitted to the court for guardianship, the determination of an emergency. Pending resolution of the request for replacement, the person requesting the replacement of the family council is obliged to continue exercising incumbent. According to Article 147 of the Code, in the interest of the good faith of the duties of members of the family is prohibited completion of legal documents between a person who is on the board of Families are her husband, a relative straight line or its siblings, on the one hand and on the other hand minor under relative nullity.

Although the Article 147 paragraph 1 shall be provided ban legal acts concluded between the members of the family or relatives and minor in paragraph 2 of the Article-147 itself provides that persons referred to in paragraph 1 may purchase at public auction the property of the minor if you have a security interest in such property or if the minor is held in joint ownership. In what concerns the family council change code states that the composition of the family council can not change during the guardianship, unless the child's interests Thus, you should ask for a change or if the death or disappearance of one of its members would be required filling the council. To establish the council people qualify to be members of the Board shall be convened by the court trustee at the request of the minor if 14 years of age or ex officio and appointed guardian request, to any other person who has knowledge that about minor situation. Appointment of members of the family is in agreement with them.

On the functioning of the family council, the code states that it is called with at least

10 days before the meeting date by the tutor, on its own initiative or at the request of any of its members, at the request of minors under the age of 14 years or the court guardianship.

Convening can be done earlier than the expiry of 10 days before the meeting date, but only with the consent of all members of the family. In all cases, the presence of all members of the family covers irregularity convocation.

Board members are required to appear in person at the place indicated in the notice of convocation. If they can not present may be represented by persons who are relatives and in-laws with the minor's parents, if these people are not designated or called their own family members board. In its proxy authentic representation for members of the family can not be called so appointed as agents affinity than relatives or parents of the minor, if not personally summoned and convened the spouse as a member of the family. Attorney in our view be completed only for a meeting of the Board of Family determined in this proxy agent must be restricted circle. Unlike spouses, where their quality resulting from the act of marriage, others require the completion attorney representatives is authentic a document showing as the representative. In what concerns the powers of the family, it gives advisory opinions at the request of the guardian or guardianship court decisions in cases provided by law.

These opinions and decisions of the Board are taken by majority consent of its members, the board is chaired by the older person. In deciding, the minor has reached the age of 10 years will be heard. According to Article 264 of the Code in administrative or judicial proceedings concerning him listening minor who has attained the age of 10 years is required. Listen and child but can not turned 10 years of guardianship if the court considers it necessary to resolve the case. The right to be heard requires a child can ask and receive any information according to age, to express their views and be informed of the consequences it can have it, if observed, and the consequences of any decisions affecting the child, but the child's opinions will be considered only in relation to the age and maturity of the child. Decisions of the family will be motivated and recorded in a special register established council, held by one of its members as designated by the court for guardianship.

In the interest of protecting the juvenile code provides that the guardian acts concluded without notice Advisory year, attracting only responsible guardian. Code provides that the guardian may request the establishment of a new family council if his complaints made under the Code the court ruled at least twice definitively against the decisions of the family.

Where it is not possible to establish a new family council and in situation of minor vexation of interest and all members of the family may ask the court for guardianship guardian authorization to exercise sole guardianship.

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GUARDIANSHIP OF THE JUVENILE DEFENSE

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Abstract

Through this paper we intend to make a foray into the child care through guardianship, area covered by the Civil Code. According to the Code the primary means child care institution is covered by guardianship, defined doctrine as that means child care that occurs when it is deprived of parental care.

According to the doctrine, guardianship is defined as the legal means child care occurs when it is deprived of parental care. Civil Code came into force in October 2011, guardianship is regulated in Book I, about people, individuals Protection Title III, Chapter II, guardianship of minors, in Articles 110-163. Thus, comparing the provisions of the old Code in force notice that protection is regulated in the same way as the old Civil Code, except that all powers relating to guardianship exercised by the court instead supervisory authority under the old regulation.

So we guardianship appears to be free and compulsory task whereby a person appointed guardian is required to exercise parental responsibility to a minor child whose parents are deceased or permanently unable to perform his duties.

The analysis definitions legal guardianship detach its main characters. Thus, the legality of the first legal guardianship as cases where it is established, the procedure guardian, guardianship termination are governed by mandatory rules of law. Another legal is optional, meaning that the Civil Code provides that the appointment is made with the consent of the guardian. According to Article 119 of the Civil Code 1 and 5 person appointed guardian may refuse this task except as expressly provided by law, namely Article 120 § 2 of the Civil Code. According it can refuse to be guardian: a person who has attained 60 years of age, pregnant woman or mother of a child who has not attained the age of 18, the person who is growing and learning two or more children and person for well could not perform the task based guardianship. According to Article 123 § 2 of the Civil Code, guardianship is a free task, but gratuity is not the essence of nature and guardianship, so that the court may grant guardian remuneration not exceeding 10% of revenues minor and you can modify or suppress. Is a legal personality in the fact that it is established personal and therefore it is exercised personally by the tutor. Also, in principle, guardianship is unique in that guardians assume the guardianship of minors and guardianship property. In analyzing guardianship, the doctrine has been established as guardianship principles: the principle of generality, that guardianship is established whenever a minor is lacking parental care, the principle of separation between the minor and the guardian heritage, the principle of permanent control State on the exercise of guardianship; principle custody exercise in the sole interest of the minor child (art. 133 Civil Code). According to Article 112 § 2 of the Civil Code, the guardian must necessarily an individual. This should be a person capable, not restricted in the exercise thread of his civil rights and obligations, not to be put under prohibition to exercise guardianship. Civil Code in force allows parents to appoint himself the guardian of their child's future (art. 114). If that were two or more tutors, conflict rules are governed by Article 115 of the Code, in whose interpretation that the guardianship court will decide taking account of their material and moral guarantees necessary for their harmonious development minor. In the opening ECAC guardianship, Article 110 of the Civil Code establishes its opening cases, namely: when both parents are deceased, when both parents are deprived of their parental rights, when both parents are placed under judicial interdiction, when both parents are unknown; when both parents are missing or declared dead, when after opening adoption court decides to trusteeship.

Guardianship is established by law by the court in whose jurisdiction the child resides or was found. In order to be appointed guardian an individual must meet the following requirements: be a person living in Romania, are not minor under interdiction deprived of parental rights declared unfit to be a guardian or who has been restricted the exercise of certain civil rights or a person with bad manners and who because of a conflict of interest could guardianship duties, the person or family being assessed Genaral Directorate of Social Assistance and Child Protection.

The court will appoint a guardian regarding these assessments and will take precedence person who is a relative, family friend affine or minor. Opening guardianship is ex officio or upon notice of trustee's court where the child is deprived of parental care. Unlike the previous regulation that the law does not specify the competent authority to notify the court, the new rules of the current Civil Code (Article 111) may apply to the court determine that: people close to the child and administrators and tenants of the house where the child lives; service marital status, on the occasion of a person's death registration and notary public on the occasion of opening the inheritance proceedings, court sentencing a person with the opportunity to criminal punishment prohibition of parental rights, local government bodies, public care and other person. The appointment of the guardian or guardianship court may decide during ex officio or at the request of the family as tutor to give real or personal guarantees if the child's interests require such a guarantee. A novelty is the introduction of the institution of the Family Council to monitor the operation of guardianship. That's the Family Council has several missions under the Code, of which the main one is monitoring how guardian duties, on the person and property of minors (art. 124 Civil Code).

Council must also give opinions and make decisions in the cases provided by law. Advisory opinions and decisions are validly majority vote of its members, the board is chaired by the older person. Documents signed by guardian are canceled without notice, but with the conclusion of the failure opinion only attract liability guardian. Also decisions of the family will be motivated and recorded in a special register set, which is held by one of its members as designated by the court for guardianship.

To oversee minors Council has a number of statutory obligations, including to ensure that its obligations guardian of the person and property of the minor, to ensure that the child is well prepared property inventory, conserve minor archives, etc.. This control is exercised but with guardian and family to Council decision making minor who has attained the age of 10 will be heard. Family council is composed of 3 persons, relatives and in-laws, or lack thereof can be called and others who have contact with the minor's parents.

To note is that the guardian can not be part of the family council. In the absence of relatives and in-laws can be named and others who had ties of friendship with parents who are interested in the minor or the minor's situation. In connection with the exercise of guardianship guardian has the same rights as the father of the child. It must be stated that under Article 134 of the Code guardian is required to care for minor sense in which guardianship is exercised only in the minor.

In light of these provisions that the guardian is obliged to provide child care, health and child's physical and mental health, education, teaching and professional training according to his abilities. In the economic side should particularly as minor lacks legal capacity or has limited legal capacity. As a preliminary measure, the law provides for the establishment of an inventory of minor property that is made by a delegate of the court in the presence of members of the family inventory to be approved by the court trustee will be issued within 10 days of the appointment DEMAX guardian .

Family Council is required to determine the annual amount required for minor maintenance and management of its assets. Maintenance and administration of the juvenile cover of income. So, if minor under 14, guardian manages its assets and represents the

completion of legal documents. In this respect guardian complete documents management and conservation acts alone also reap fruits assets. Annual guardian must submit guardianship court a report on how the child managed assets and how to care for the minor. According to Article 143 of the Code, the guardian has a duty to represent the minor in legal documents until the age of 14. Regarding property is the guardian of the minor legal acts that have up to 14 years if he consents acts is between 14-18 years. In respect of acts done by a tutor from the analysis of the legal provisions that are canceled following documents made by the guardian: donations and acts of security to guarantee the obligations of another. However guardian can alienate without the opinion of the family property subject to destruction, deterioration, alteration or impairment, as well as become useless for minor guardianship established by the court. Action for annulment may be exercised by a guardian, the procurer, family counseling, ex officio or on request of the trustee. Is prohibited without the guardian council to family and guardianship court approval following documents: the alienation of partition, mortgage or other encumbrance of real tasks, documents option succession, acceptance of favors and any other acts beyond the right management. Authorizing guardianship court is always prior to each act separately.

Also, if Merchandise, court determines how the sale and closure of the act (agreement of the parties, auction or otherwise). Regarding guardian consent, declaration of revocation is not regulated. Father can not come back to after a declaration of guardianship court gave the authorization. Guardianship court will exercise effective control and continuous on how to tutor your family council shall perform their duties on the minor and his property. In the control of guardianship court may require collaboration .

The local government, institutions and specialized public services for child protection or care institutions, as appropriate. Annually, the guardian is obliged to provide guardianship court a report on how to care for minor as well as its asset management, report that the guardianship court within 30 days of the calendar year. Guardianship court regarding receipts checkbook checks and minor maintenance costs made it and its asset management, and are accurate and reflect reality will download guardian. Guardianship may be terminated either cause regarding minors or on the guardian. The Civil Code Articles 156-163 states that are cause for termination of guardianship: minor acquisition by full legal capacity, establishing parentage to at least one parent, restoring parental rights by at least one parent; recurrence of at least one parent, the child's death. The quality grounds for termination of guardianship are removed from the turret C. Civil under Article 158, replacement demand tutor, tutor death.

The tutor will respond as appropriate, given that fails to fulfill or improperly fulfills its obligations under the law. So if he refuses to perform their custody he may be punished by the court civil fine that it is impossible to exceed the minimum wage, every seven days, after which it will appoint another guardian. Regarding liability guardian may include: removal guardian guardianship if it commits gross negligence incompatible with the status of guardian, tort, responsibility is engaged when the failure or improper performance of his duties has caused minor injury.

In conclusion, considering the provisions of the old Code in force notice that child care is regulated in the same way as the old Civil Code, with some differences. Thus any power in the court to exercise guardianship in place under the old regulatory supervisory authority. Also another novelty is that current regulations appear new institutions such as family counseling, a legally regulated institution that contributes to a better protection of minors.

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THE JUDICIAL REORGANIZATION PROCEDURE. THE MOMENT OF A PARADIGM SHIFT

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Abstract

This work, with its focus on the place and the function of the judicial reorganization within the insolvency procedure and the perspectives of this procedure, is published in a period of turmoil and economic transformation, but also during a period of legal settlements and crystallization, which calls for analysis and doctrinal clarification.

In the general context of insolvency, the judicial reorganization began to gain a place at the forefront, but the process has not yet been completed, leaving room and premises for future developments. The very evolution of Romanian society in general and of the business environment in particular require further development of the institution of judicial reorganization and the redefinition of the status thereof, for the purposes of imposing it as the mandatory procedure or rule in all insolvency procedures.

In this context, I feel that the time has come for the judicial reorganization procedure, part and essential step of the insolvency procedure, to make a qualitative leap in its natural evolution. In other words, it is time for a true paradigm shift in the judicial reorganization.

I. General aspects concerning the judicial reorganization

1. The notion of judicial reorganization

An alternative solution to the bankruptcy procedure, with the consequent liquidation of patrimony, available to the insolvent debtor consists in the attempt to save the debtors' business by reorganizing it. This attempt is legally substantiated by the judicial reorganization procedure.

Given the fact that the judicial reorganization procedure is a stage of the insolvency procedure, literature avoided or failed to address the issue of defining this procedure separately from the insolvency procedure.

There is however a general characterization of the judicial reorganization procedure, which, without being an authentic synthetic definition of the procedure, refers to its characteristic elements which are essential in defining any notion.

Thus, in a certain paper[335] the judicial reorganization procedure is characterized as a procedure that "… is applied to the debtor, legal entity, for the payment of debtor's debt according to a claims payment program" and that "... involves the elaboration, approval, implementation and enforcement of a reorganization plan."

The previsions of Law no.85/2006, which define the judicial reorganization procedure by referring to its characteristics, convey the same meaning[336].

Based on what has been stated above, we can define the judicial reorganization as a procedure, stage of the general insolvency procedure, which applies to the debtor, legal entity, in the attempt to safeguard the debtor's business and discharge his debt, according to

[335] Stanciu Cărpenaru -„Romanian commercial law" , Universul Juridic Publishing House, Bucharest, 2009.

[336] Article 3, point 20 in the law – "the judicial reorganization is a procedure that is applied to the debtor, legal entity, for the payment of debtor's debt according to a claims payment program. The reorganization procedure involves the preparation, approval, implementation and compliance with a plan, called reorganization plan, which may provide, together or separately:
a) the debtor's operational and/or financial reorganization;
b) corporate restructuring by modifying the structure of the share capital;
c) limitation of the activity by liquidation of assets from the debtor's wealth.

a reorganization plan. This plan consists either in the reorganization of the debtor's business or the liquidation of assets from the debtor's patrimony, or both activities, all in order to satisfy the claim table according to the claim payment program.

The judicial reorganization consists in the restructuration and functional reorganization of the debtor's activity, without excluding liquidation measures of some of the assets from the debtor's patrimony. However, all these measures serve the same purposes, namely the rehabilitation and continuation of the debtor's activity.

2. The reorganization plan.

The ultimate objective of any action of judicial reorganization is the rehabilitation of the legal entity that is temporary unable to pay his debts and saving him from bankruptcy.

The method presenting the way the debtor intends to avoid bankruptcy must be submitted for the creditors' approval in the form of a document called a "reorganization plan".

The reorganization is performed based on the debtor's reorganization plan proposed to the participants, published and voted by creditors and confirmed by the syndic judge[337].

The reorganization plan is a legally binding policy document, which may provide one or more of the following measures: the debtor's operational and / or financial restructuration, corporate restructuring by changing the capital structure and / or liquidation of assets from the debtor's wealth.

After attestation of the reorganization plan, the debtor shall conduct his activities under the supervision of the insolvency administrator and in accordance with the attested plan until the syndic judge will either declare that the reorganization plan was carried out successfully and will declare the insolvency procedure closed and will take the necessary measures for the rehabilitation of the debtor's business and its activities or until the syndic judge will order the termination of the procedure and the transition to bankruptcy.

The drafting the plan and its contents should take into consideration the fact that the execution plan cannot exceed a period of three years, which commences from the date of attestation of the plan and it should also take into account the principle of equal treatment of creditors who belong to the same category. However, differentiations between various categories of claims are allowed.

Essentially, the reorganization plan is an ultimate business plan, with all the features of such a plan and having the same objective, namely the deliverance of the business or economic activity and making profit. Like any business plan, besides a formal, structural and legal coherence, it is subject to an intrinsic condition, namely its viability in economic terms[338]. The main difference from an authentic business plan concerns the recipient of the plan, more precisely, instead of presenting the business plan to a bank or another financial investor, it will be submitted to the creditors, whom the debtor already owes money to.

The reorganization plan has a threefold nature: contractual, judicial, legal.

The reorganization plan has a contractual nature. This implies the creditor's approval for its form and the actual content as sine qva non condition and at the same time as a starting point. The Romanian law does not require the plan to be voted by all creditors but only by the holders of a majority of the total amount of claims within each category of claims. However this does not change the character of agreement of the plan.

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[337] Salaj Court, Civil conclusion number 2688 of November, the 27th, 2006, in E.Lovin- *The Insolvency Procedure. Jurisprudence*, Official Gazette Publishing House, Bucharest, 2008., pages. 267-268, Bucharest Court, Conclusion of the 16th of April 2007 in E.Lovin- works cited., pages. 268-269.

[338] Giurgiu Court, commercial Sentence no. 1621 of December, the 12th, 2006, E.Lovin- works cited, pages 265-267

The judicial or legal nature arises from the fact that the reorganization plan is confirmed by the syndic judge through a ruling. The attested plan is considered to be a final ruling against the debtor and the creditors' claims and rights are modified as specified in the content of the plan[339].

Ultimately, the effects of the reorganization plan do not appear based on the creditors' Convention which can only configure these effects, but based the ruling of the syndic judge, who confirms the legal nature of the plan[340].

II. The role and prospects of the judicial reorganization

1. The role of the judicial reorganization in the context of new economic realities

Traders most likely affected by a possible insolvency are mainly those who experienced uncontrolled growth during the period of economic growth and who, in the absence of coherent development plans and appropriate forecasts of risk are facing a sudden and dramatic drop in activity at the moment.

Unfortunately, most of these economic agents that unnecessarily enter insolvency try to rehabilitate their work through their own means, without resorting to specialized consultants in the field and without using the legal provisions created precisely to protect them. Such attempts are usually followed by a failure so that the company finally enters bankruptcy without the possibility of reviving it.

Financial difficulties are only one aspect of the difficulties faced by professionals, even though, any financial difficulty may virtually lead to their disappearance and, in return, any unresolved difficulties can be translated into financial terms.

All these aspects, put together, have prompted the early intervention of the legislature who has developed a specific legal system. This system has evolved and changed significantly over time, both in terms of purpose and its mechanisms. Therefore, regulation of collective procedures, which target all those who entered a network of interests and obligations by means of their activity, has met a long historical evolution, determined by adapting the law to the economic and social realities of different eras.

As time passed, the legislature sought, through regulation, to achieve different objectives, namely the punishment of the trader who does not honour his commitments, later on, the main objective became to protect unpaid creditors and, in a more recent period, the legislature is concerned with ensuring the survival of businesses that have the resources to recover[341].

This ultimate purpose was also taken into consideration by the Romanian legislature, although not exclusively, in the current regulation of insolvency procedures. Thus, our current legislation tries to satisfy both the interests of creditors and the debtor, so as to cover liabilities, when possible, through the latter's reorganization.

Law no. 85/2006 specifically mentions the judicial reorganization as a measure of recovery of the economic activity of a society in a state of insolvency or impending insolvency.

It must be remembered that, as shown in this paper, the collective proceeding is not an innovation of modern legislation. This proceeding, especially bankruptcy, has been known since antiquity and has been evolving ever since.

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[339] I. Schiau, *The legal condition of commercial insolvency*, All Beck Publishing House, Bucharest, 2001, page 219

[340] Idem, page 220

[341] Yves Guyon -„Droit des affaires. Enterprises en dificultes. Redressement judiciaire - Faillite". Tomes 2, 9e edition, Economica Publishing House, Paris 2003, pg.13.

Therefore legal regulation on collective proceeding presents itself today as a result of a continuous process of evolution, beginning with ancient Roman law, process which is nothing more but an adaptation of the law to the reality of the time.

2. Prospects of the judicial reorganization

In the current economic crisis, some economic agents faced difficulties in conducting their business and even entered the state of insolvency. This phenomenon of massive entry into an insolvency state is far from over.

Estimations regarding the insolvency market specify that its development will be highly dynamic on the medium term, amid several assumptions, such as: experience of players in the field, propose solutions of quick exit from the procedure with restructured debt, solutions that have meanwhile been tested and implemented yet extremely rarely, which once operational, will be applied more widely.

A similar estimation shows that the market will grow and that will focus on using the solution of rapid restructuring of businesses in difficulty and that companies will seek to reduce the risk of entry into bankruptcy, given the direct relation between the length of reorganization and increased risk of failure of the reorganization.

Another estimated perspective is the development of extrajudicial restructuring. Most businesses on the market involved in restructuring (especially banks) prefer this version, including for ensuring a better recovery rate of claims. In this context the development of mechanisms, principles and indices is required.

Insolvency is a potential mechanism for deliverance of a company in difficulty. Therefore the risk of entering into bankruptcy can be managed through extrajudicial restructuring or judicial reorganization in the insolvency procedure.

Bypassing the inherent disadvantages of such a procedure, the reorganization procedure used by merchants can be a real chance of recovery and continuation of a business that would normally be subject to bankruptcy.

In such a situation, the main problem of companies making use of this option (and especially those who act as creditors) is to choose between soliciting the debtor to commence the bankruptcy proceedings, with the irreversible consequences of his disappearance from the market segment or to accept a reorganization of his business.

Clearly, the interest of the creditor participating in the concursual insolvency procedure is to recover the debt. At the same time, it is also true that regardless of the market segment on which he operates, any creditor (which is, by definition, an active participant on that market segment) envisages rapid recovery of the claim.

However, in view of global developments that economy is facing today, we believe that any such creditor should consider a repositioning of his economic priorities.

In a period of exponential growth of the number of traders who use insolvency procedures (whether the debtor or the creditors commence the procedure), any creditor who votes for the debtor's entrance into a state of bankruptcy may risk losing a partner on the market, situation sometimes difficult to overcome.

Even supposing the partner is currently unable to pay outstanding (due) liabilities using the funds available, in the context of minimal positive attitudes and thinking, we think it is preferable and more profitable to elaborate a viable reorganization plan of the debtor's activity (obviously only if the analysis of the economic and financial situation of the debtor reveals a real chance to do so).

We present this aspect all the more so as to emphasize the fact that the amounts for which creditors solicit the commencement of the insolvency proceedings mostly represents small claims, compared to the statement of affairs where they will be mentioned.

Also, most debts are unsecured. Therefore the creditor who would opt for a reorganization plan would recover the debt within a reasonable time. This claim would also be a small part of a whole (the statement of affairs) that would not allow this creditor to be among the members of the Creditors' Committee because of its small value.

That is why we believe that the answer must be yes.

The advantages of such a creditor are obvious: he will be able to recover the amount according to the reorganization plan, on which he can exercise control during the insolvency procedure and, at the same time he continue the his business relation with a partner that is still on the market.

However, in this case, the creditor's disadvantage lies in the fact that the recovery of the claim under the reorganization plan may take a longer period of time.

But given that practical experience clearly demonstrates that there was no claim for many assets for which liquidation procedures have been organized (and thus, these assets which would ensure sufficient funds for payment of claims cannot be capitalized), we consider that the later recovery of the claim is no longer a disadvantage to the creditor, but a real and viable alternative.

From this perspective, it is necessary to reconsider the very notion and importance of the reorganization of the debtor's activity, all the more so as the current financial and economic developments require such an attitude.

The practical experience of the past years shows a relatively small number of reorganizations which have been successfully completed (in relation to all applications for commencement of the insolvency procedures).

Thus, until recently, creditors were reluctant to support a plan to restructure the debtor's business, the reasons being either the absence of a viable reorganization plan (or the proposed reorganization plan was not supported by financial and accounting data) or a reduced interest towards the possibility that the contractual partner may enter bankruptcy and, as a consequence, he would liquidate his business and they would lose a contractual partner.

Currently, such an alternative creates an authentic dilemma among creditors: the number of contractual partners unable to pay outstanding debt is growing; creditors are becoming more interested in supporting the reorganization of a debtor. In other words, creditors have become much more "sensitive" to the eventual disappearance of a trading partner from the market segment where he operates.

In accordance with Law no. 85/2006, the reorganization plan, which can be applied under certain conditions, even by the creditors, must provide in detail the manner in which the debtor is going to continue his activity (including the sources of financing his activities) and the method of payment of claims listed in the statement of affairs.

Also, the reorganization plan will necessarily include the claims payment program. Thus, by adopting a reorganization plan, each creditor can have a preview of the time when they would recover the claim.

The creditors' advantage in such a situation is obvious: by opting for a viable reorganization plan, there are chances for a gradual, but definite recovery (within a reasonable time) of the claim and the chances are even higher as the reorganization plan was based on the actual parameters of the debtor's economic and financial situation.

In other words, the success of a well-structured reorganization plan based on the accounting and financial reality of the debtor determines a successful recovery of a claim.

The more viable the reorganization plan, the higher are the chances of recovery of claims listed in the statement of affairs. Another considerable advantage would be maintaining the debtor in business as an active partner on that market segment.

The prerequisites for a successful reorganization lie in the existence of a coherent and viable reorganization plan that would satisfy the need to maintain the debtor on the market and that would satisfy the creditors' claims.

During the unfolding of the reorganization plan, the debtor's activity would be conducted under the supervision of the insolvency administrator, the creditors benefiting thereby, by the guarantee of legality and that the plan is kept accordingly. Moreover, throughout this period, according to the reorganization plan, the debtor remains an active participant on that market segment, with the possibility to continue, to a greater or lesser extent, the commercial relation with his contractual partners. This can only be applied if the claims to the debtor's creditors are paid during this period.

In this context, one can notice that the creditors exercise a more active role in the adoption and enforcement of a reorganization plan. The creditors' passivity may result in the adoption of an unsustainable reorganization plan, with the direct consequence of the impossibility of enforcing it and the debtor's entry into bankruptcy.

Thus, the reorganization of the debtor's activity became a practical necessity, determined in the current economic climate by the benefits that it has on all participants to the insolvency procedure.

Finally, we also mention that the debtor's incapacity to overcome his outstanding debt with the available money should not be ignored. This may have negative effects on the economic environment which may eventually lead to blocking one of the links of the circuit. This could threaten the activity of more than one participant to the trade operations.

III. Paradigm shift

1. Generalities

The Romanian business environment, which is constantly developing, is clearly affected by insolvency which has spread rapidly during the economic crisis. Its prevention and the remedy to its effects should be among the main concerns of our society and remain a priority area for action.

In the context sketched through this work and summarized above, we consider that the time has come in its natural evolution, judicial reorganization procedure, part and essential step in the insolvency procedure, to make a qualitative leap. In other words, it is time for a real paradigm shift in the field of judicial reorganization.

2. The rule of the judicial reorganization

The concrete form of manifestation of this new paradigm of reorganization would consist primarily in the transformation of the judicial reorganization from exception into rule and from subsidiary procedure in the main and binding procedure.

In other words, judicial reorganization of a legal entity, as a way to safeguard its legal personality and consequently the activity of the entity in question must become a mandatory step in the unfolding of the insolvency procedure, which in effect would mean that the final orientation of the main purpose of insolvency procedure should be the deliverance of the insolvent debtor's activity.

This orientation of the national legislature would not mean anything other than a pragmatic alignment consists in the primary attempt to rescue the business or ongoing activities in terms of the intrinsic, economic or social value that that business or activity has and which should not be lost.

As such, the prospect can only be that of paradigm shift, towards transforming the judicial reorganization procedure into a rule, and thus transforming liquidation into an

exception applicable only in cases where it is obvious and undeniable that the debtor's activity cannot be reorganized and the business cannot be saved.

Saving the debtor's business by restructuring his activity exceeds the strict interests of the debtor and creditors, and needs to be regarded from the social perspective of saving the jobs provided by the debtor. This perspective should not be neglected, especially in the current crisis, and the preservation of any place of employment should represent a major interest for any society.

According to the vision of the new civil code, the same perspective and logical thinking does not apply only to traders and professional, but also persists in the case of non-profit entities such as associations, foundations and unions, whose work is undeniable valuable and has social relevance.

3. Reorganization manager

From a complementary point of view, what has often prevented the success of the reorganization was the judicial administrator's lack of training and managerial perspective, but also his lack of motivation in the success of the reorganization. These causes appear because on the one hand in most cases the judicial administrator has only legal or general economic training, and on the other hand his fee is not conditioned by the success of the reorganization plan.

As such, the emergence of a new profession is required, that of a participant to the insolvency procedure, different from the judicial administrator, namely a reorganization manager. He would be a specialist in crisis management, working as a freelancer, who under a specific agreement, would undertake the development and implementation of a reorganization plan and whose fee or compensation would be closely linked with the success of the reorganization.

The reorganization manager would operate under the syndic judge's supervision and would align himself with the judicial administrator, but he would also have functional autonomy in terms of management decisions, being provided with a budget approved by the creditors. This budget would limit his decisional freedom. The employment of a reorganization manager would be made by the judicial administrator under a special management agreement and his employment would be subject to the creditors' supervision.

The aim of the reorganization manager's activity is the objective set by the employment agreement to which all the decisions would be subsumed. The measures taken would consist in achieving financial and economic performance parameters in a finite period of time and the recovery of the debtor's activity and swift payment of claims, according to the reorganization plan. Correspondingly, the reorganization manager's remuneration would be proportional to the economic performance achieved. There are various methods or concrete variations of materializing such connections.

4. The enactment of preventive legislative measures

4.1.General aspects

Given the negative chain consequences of non-recovery of claims by creditors and the low degree of saving the debtor's business by reorganizing his activity, it is important to take into consideration in the field of reorganization **a principle know in medicine** according to which **it is easier to prevent than to cure** so that the paradigm shift in the field of judicial reorganization could not avoid the stage of insolvency prevention and default judicial reorganization.

4.2.The Increment of the Minimum Limit of the Share Capital of Trading Companies

Legally permissible under-capitalization is one of the causes of the debtor's vulnerability to the risk of insolvency. Not only the size of share capital, but rather the amount of funds provided as contributions to capital or reserves are relevant for the probable short term solvency of an entity which is in the scope of legal provisions concerning the insolvency procedure[342].

The Romanian corporate legal system, according to Company Law No. 31/1991, accepts a legal minimum capital of 200 $ (USD) for S.R.L., and the equivalent of 25 000 Euro for S.A.

By comparison, as shown in literature[343], the minimum share capital (in euros) in fourteen countries of the European Union before the expansion stretched on a large scale from the absence of any minimum limits (France, UK, Sweden), to values close to those provided by our law (Greece -23,477, Germany-25500) to the value of 35,000 set by Austrian law.

Even though it is comparable to European levels of minimum share capital, we consider that, in real terms, this value is exceeded by the social level of the business environment and society in general.

It is clear that an undercapitalized entity or an entity with a very small capital, which lacks such an "anchor" is more exposed to the "financial storm", and the risk of entry into suspension of payments is inversely proportional.

In this context, it is clear that the first and essential measure for consolidating the collective subjects participating in the legal circuit and, hence, the prevention of potential insolvency is the prerogative of the national legislature which should impose a minimum limit for share capital of different associative forms at a level that that can supposedly offer effective protection against predictable financial risks.

4.3.Establishment of reserve funds to cover insolvency risks

The increment of the minimum share capital is not the only tool available to the national legislature in order to secure the civil legal circuit. There is also the possibility of agisting reserve funds specially established to cover the risks of insolvency.

These reserve funds would be created by the accumulation of successive deposits made in an account opened in the name of the legal entity, but which does not serve normal business operations and from which withdrawals may be made only after a decision of the general meeting of mitigation.

The establishment of these special anti-insolvency funds can be determined either in a mandatory manner, either in a stimulating one or in ways that combine the two options.

Thus, a legal situation can be imagined requiring a minimum limit of these funds. Levels of amounts above this limit would be encouraged by classifying entities participating in the judicial circuit in categories of reliability (for example A, B, C, etc. .). Thus the contracting parties would enter into legal relations with that named economic agent informed about its reliability. They would be able to control the extent of commitment and exposure in relation to it. On the other hand, public authorities themselves, having leeway to the categories of reliability, could limit the participation in the public procurement system only to those entities with the highest degree of reliability or condition the participation by imposing a minimum limit of reserve funds.

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[342] I. Turcu, Suspension of payments – the insolvency test – a possible equilibrium solution to the early or late commencement of the procedure, RDC no. 10/2005, p. 9.

[343] I. Turcu, The law of the insolvency procedure, C.H. Beck Publishing House, Bucharest, 2007, page15, quoting F. Lemeunier, *SARL Société a responsabilité limitée, Création, Gestion,Evolution*, 25e édition, Delmas, 2006, page 13.

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THEORETICAL ASPECTS REGARDING THE PARTICULARITIES OF ELECTRONIC CONTRACTS

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Abstract
With the emergence of Internet, a "new industrial revolution" is about to change traditional vision of the diffusion of information and, more broadly, on communication in general. The talk is increasingly about the "Information Society", this concept defining an economy and a society in which the collection, storage, processing, transmission, dissemination and use of knowledge and information, including the development of interactive communication techniques, play an essential role. Information Society represents a new stage of human civilization, a new way of life quality education that involves intensive use of information in all spheres of human activity and existence, with an economic impact and social major. The information allows broad access to information of its members, a new way of working and knowledge, increase the possibility of economic globalization and increasing social cohesion.

Key words: *electronic contract, bidder, efects, confidentiality, electronic payment, consumer*

Electronic contract is an agreement concluded by IT means, and in Romania has been enacted since 2002.

From a legal perspective, recent legislative regulations in the field of electronic conclusion of contracts is nothing new, but an adaptation of the classical theories to new situations. Distance contracts always exist, whether through letters, then phone, fax and e-mail or the Internet.

If the parties have not determined when the contract is concluded, the law considers that this moment is one in which the parties' will gets to an agreement.

According to Law 365/2002, electronic contract is concluded when the acceptance of the offer has reached the offering, unless the parties agree otherwise. It takes so an old theory called "informing theory", applicable to contracts concluded between absent.

If the contract, by its nature or on demand, requires an immediate execution of the characteristic performance, it is considered completed when the debtor began the execution, except where the seller has requested that prior to be communicated the acceptance.

Through the Internet, contracts may be concluded online - using services that allow real-time bidding and acceptance - or offline, via e-mail.

As a result, online contracts will be considered in terms of legal contracts "between present" and the completed offline - contracts "between absent", with all the consequences of this situation.

Electronic contract has undeniable advantages: its costs are minimal, regardless of the distance between the partners completely eliminating transportation costs of persons involved in the negotiation, it can be done quickly and conveniently.

Electronic contract is not much different from its classical counterpart, but with some particularities.

Electronic contract is treated equally to the classical contract in terms of its validity and the effects of being legally qualified as a distance contract, but it is an additional condition regarding evidence of this type of contract.

Contracts concluded by electronic means, subject to Chapter 3 of Law no. 365/2002 on electronic commerce, produce all the effects the law recognizes to traditional contracts validly

concluded but art. 7 sets proving its obligation and the perspective of the law on electronic signature, no. 455/2001.

Sample contracts concluded by electronic means are more difficult due to the lack of sustainable media (paper), but in the event of disputes, they can be used as evidence in court, observing the general rules taking into account the provisions of special law on electronic signature.

Currently, most countries have imposed legal recognition of electronic signatures. European Parliament and Council on 13 December 1999 adopted the Directive 1999/93 / EC establishing a Community framework for electronic signatures, in order to ensure proper functioning of the internal market for electronic signatures, establishing a harmonized legal framework and suitable for use of electronic signatures within the European Community.

Article 5 (1) of Directive enshrines equal legal treatment between the extended electronic signature (advanced) and the handwritten signature, stating that only advanced electronic signatures (advanced) have the same equal effect as handwritten signatures in the Member States, being accepted as legal evidence.

In connection with simple electronic signatures, art. 5 (2) provides that Member States must ensure that such signatures shall not be denied legal effect or are rejected as evidence in trials only on the basis that they are not qualified as advanced electronic signatures (advanced).

Romanian legislation

Government Ordinance no. 130/2000 refers to the regime of distance contracts and Law. 455/2001 refers to the electronic signature. This latter law will be completed in 2004 with a timestamp law (time stamp) which is an electronic seal of time indication, applied over a document. In 2002 appears the Emergency Ordinance. 193/2002 on the introduction of modern means of payment.

In 2001 appears the Law 677/2001 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

On June 13, 2002 appears the important regulation no. 4 of the National Bank of Romania concerning transactions by electronic payment instruments and relations between participants in these transactions. Regulation is addressed to banks and aims to establish principles governing the issuance and use of electronic payment instruments in Romania, especially cards, and the conditions to be met by banks and other participants in carrying out payments with electronic payment instruments, regardless of the currency issued or denominated them.

In 2002 the Electronic Commerce Act No. 365/2002 appears and in 2003 the Order no. 16/2003 on the procedure for approval of MCIT payment instruments with remote access applications such as Internet Banking and Home Banking.

In July 2003 Regulation No. 1/2003 of NBR appears on bilateral clearing of Transfond retail payments system.

It is completed in December 2003 the banking law (Law no. 485/2003) so that the issuance of electronic money can be permitted also to non-banking institutions, called electronic money institutions.

In 2004 it is expected the emergence of a law governing electronic transfers of transborders funds(in line with European Union Directive no. 97/5/EC).

Electronic signature

Before defining the term electronic signature there will be remembered the general characteristics of a classic signatures, handwritten:
True: it is enforced only by the person concerned;
Tamperproof: only that person can sign in that way;
Causes the inalterability of signed document: a document signed can not be altered after the signature;
Non-reusable: the signature made can not be moved by anyone to another document, but each document has its signature;
Non-repudiation: the signer acknowledges his signature and cannot refuse the document on the grounds that it is not signed by him.

Why has the electronic signature been emerged as necessary?

With the development of IT organizations and individuals are increasingly changing documents in electronic format by e-mail, download / upload, by other means of file transfer. The problem that had been issued at one point was this: if all this information is electronically changed why we do not look for a technical solution that can allow us to sign these documents as if they were traditionally changed on paper. Thus we may conclude contracts electronically, we will be able to ensure the authenticity of the recipient, the recipient should be sure that the document is non-repudiating, i.e. we will not be able to refuse on the grounds that it is not ours. So generally we get to an electronic document everything we have to a traditionally signed document on paper. Obviously, to put into practice these ideas, in addition to technical solutions it had to be created the legal framework in which such operations of electronic signature are legally recognized and can be considered legal and with equal status to documents on paper. Suppose that company A wants to sign a contract with company B through which it is obliged to provide a certain product. The agreement in the form of a classic electronic text document, sent by e-mail or other electronic means to company B, looks like this:
"The company A is committed to provide up to date 10.10.2007 to company B a number of 100 roses to the total price of 1000 EUR, plus VAT"

Why this simple document, electronically unsigned, it is better not to be accepted by the company:
As above it has no legal value as a single electronic document (file);
It can mislead company B, it can not be certain that the document comes indeed from company A or even if it comes from company A during sending by email the document has not been altered and changed some data, such as price;
Company A can anytime refuse the contract, invoking that in their original contract dates were different - etc. (issues related to the contract date, any firm can change the date when the file was saved, etc.).

What is the electronic signature?

Electronic signature is simply a sequence of binary data associated to a document regarding clear rules and ensures its authenticity (we know for sure where it comes from it), integrity (we know it was not altered by others) and non-repudiation (origin of the document can not be denied).

Electronic signature does not ensure the confidentiality of the document, normally the information in the document signed is not encrypted, so it is not protected on reading and can be read by anyone.

Advanced electronic signature is a special type of electronic signature equivalent to handwritten signatures (on paper) when based on a digital qualified certificate not suspended.

The effects of electronic signatures types

In Romanian national system, Law no. 455/2001 establishes two categories of electronic signatures: an electronic signature and an advanced electronic signature.

The contract bearing an extended electronic signature - based upon a qualified certificate unsuspended or unrevoked at the time and generated by a secure-signature-creation - is assimilated, in its conditions and effects,to the document under private signature, producing the same consequences as this one.

Simple electronic signature has the same legal effects as traditional paper signature only if it is recognized by the one to whom it opposes.

The document in electronic form that logically associated with an electronic signature is assimilated as regards the conditions and effects, to the document under private signature, as provides the art. 5 of Law no. 455/2001.

The document in electronic form, recognized by the one who opposes, has, among those who have subscribed and between those who are right, the same effects as the authentic, according to art. 6 of the same law.

In commercial matters, simple wills manifested agreement creates the contract so that the document is not required for the birth or contract nor to prove its contents.

However, in exceptional cases, when the written form of contract is required as a condition of form or validity only extended electronic signature can prove the contract, so it is advisable to use the advanced electronic signature.

On secure electronic signatures, some national laws (eg Germany, Italy) establish certain obligations on third parties special bodies called certification authorities with the aim: to use a secure system, to make known the procedures used, to rightly identify the applicant for such a certificate, to suspend or revoke licenses granted under certain conditions and to ensure the receiving persons of digitally signed messages check.

A milestone in the evolution of electronic signature was the electronic signing ceremony of the first international release of two states, an event that took place on February 4, 1998 in Dublin, Ireland. Thus, U.S. and Ireland, represented by U.S. President respectively Irish Prime Minister digitally signed Communication on e-commerce. This special ceremony marked two historic events: the beginning of the era of electronic commerce and acceptance at a high level by heads of state, digital signature as authentication part of electronic documents.

Contracts that can not be concluded electronically

There are some exceptions of the rule that can be concluded by electronic means any contract, among them being placed also the contracts for which the law requires solemn form, or contracts to be authenticated by a notary.

In practice there are very rare cases where the notary activity is carried out through electronic notary, according to Law. 589/2004 on the legal status of electronic notary activity. However, such solemn contracts are atypical to commercial matter, concluding contracts electronically is growing and is often used in international trade.

Electronic contract concluded between traders and consumers that provide products or services must comply with the provisions of Ordinance no. 130/2000 on consumer protection in distance contracts conclusion and execution.

Time and place of conclusion of the contract

Time and place of conclusion raise some issues regarding the applicable law, and regarding the electronic contracts determining these issues presents some particularities.

At any type of contract, classic and electronic, it is important to determine the time of conclusion of the contract for several reasons, such as: the capacity of physical or legal persons to contract is estimated depending on the moment, the possibility to revoke the offer is accepted until the conclusion of the contract, this is the time that report is shifting from the seller to the buyer ownership of the asset, and the risk of destruction of the good due to reasons not attributable to other parties, extinctive limitation of the right to an effective remedy flowing from this time, the contract price shall be assessed again depending on the time and the law applicable to legal relationship born of that contract will be determined also in relation to place and time of conclusion of the contract.

Compared to traditional contracts, electronic transactions raises novel questions about when and where is the contract training.

Regarding the conclusion of electronic contracts through art. 9 para. (1) of Law no. 365/2002 provides that it is considered to be the time the contract conclusion that when the acceptance of the offer has reached the offering.

The rule established by the special legal rule is an application of the classical theory entitled "informing theory".

Where contractual provisions require immediate benefit, the contract is considered concluded when the obligation debtor began the execution, unless the offeror has previously asked that the acceptance is communicated to him in accordance with art. 9 para. 2 of Law no. 365/2002. According to art. 9 para. 4 of Law no. 365/2002, the offer or receiving, and their acknowledgment so made shall be deemed received when the parties to whom they are addressed are able to access.

Given the major feature of electronic contract, ie physical absence of parties when exchanging consent, two problems arise in the case of the contracts where consent is given by a person behind a computer: consent changed with and incapable and the error of the identity of the person.

Contractors identity and validity of the consent

Consent is one of the essential elements of legal acts and expresses the will of the person at the end of that act, will that can produce legal effects only if the author manifestation of will is, by law, able to do so.

The lack of consent sanctions the ended act by absolute nullity. This issue does not raise difficulties in automated space if the parties are able to directly assess people's capacity.

Many servers are equipped with systems permitting the identification of visitors' age and claiming its majority proof, many by requiring a credit card number.

As a result, the visitor receives an identification number and a password that he will use for the performance of contracts, but these methods are cumbersome and unreliable.

For contracts with immediate execution - uno icto - traders are not interested in contractor's capacity as contractual obligation is performed, the risks of action in nullity of the contract remain minimal.

The situation is diametrically opposed to contracts with successive execution or deferred payment obligation in time, risks generated by the contractor's capacity are maximum, which requires taking action for the identification of the contracting party.

Error on the identity of a person is a cause of nullity of the contract only to contracts concluded on the grounds of person's quality - intuitu personae - contracts in which the parties make from the identity of one of the contractors an essential element of the contract. In other types of contracts it can not be applied nullity sanction in case of error on the person's identity.

To avoid such errors, the parties must resort to the use of electronic signatures and certification. They are often used in contractual relations between professionals.A

Electronic payment

Electronic payment presents the risk of forgery of electronic payment instruments. But art. 24, Law no. 365/2002 criminalises the act of falsification of an electronic payment instrument, entry into service, in any manner, of electronic payment instruments forged or stocking them for circulation, which is punishable by imprisonment from 3 to 12 years.

It is also punished with imprisonment the possession of equipment to forge electronic payment instruments, manufacture or possession of equipment, including hardware and software, in order to serve the falsification of electronic payment instruments, for issuing false statements or use electronic payment instruments, conducting and accepting financial operations fraudulently.

Knowledge of and strict adherence to rules imposed by law determine preventing fraud and any unpleasant consequences

Special rules for contracts between traders and consumers

As regards contracts concluded with consumers by traders, via electronic means, the legislation provides some special regulations on the content of contracts, mandatory clauses to be inserted. Order no. 130/2000 on consumer protection in distance contracts conclusion and execution provides that, before concluding the distance contract, the trader must inform the consumer in time, accurately, and completely the following:

the identity of the trader and, for contracts requiring payment in advance, address and how to contact him, phone / fax, e-mail and the unique registration code;

essential characteristics of the product or service;

Retail price of the product or the service charge and applicable taxes;

delivery costs, if applicable;

arrangements for payment, delivery or performance;

right of withdrawal, except as provided in this Ordinance;

cost of using the means of distance communication, where it is calculated other than at the basic rate;

validity period of the offer or the price;

minimum duration of the contract, for contracts providing current or periodic supply of a product or service;

execution deadline obligations under the contract.

The trader must provide the consumer the contract terms and conditions for exercising the right of withdrawal, in writing or on another durable medium of information, available or accessible to him in a timely manner, during performance of the contract.

Consumer is entitled to notice the trader in writing that gives up purchase without penalty and without giving any reason, within 10 working days of receipt of product or, in respect of supplies, from the contract conclusion,written in bold. However, the dealer must provide the information on after-sales service and guarantees, but also the withdrawal conditions when it is for an indefinite period or for a period exceeding one year.

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INDIVIDUALISATION OF PENALTIES UNDER THE NEW CRIMINAL CODE

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Abstract

The sentence is a fundamental principle of criminal law, criminal policy guiding action to prevent and combat crime. In the context of changes in the new Criminal Code, the institution that penalties kept the contents of the current Criminal Code provisions, but has undergone some significant changes, the legislature reaffirmed the importance and usefulness of this operation in order to determine each offender sentence imposed.

Since times immemorial, mankind has been keen on studying the genesis of the criminal phenomenon, as many historians, philosophers, and lawyers have attempted identifying solutions that would ultimately result in the decrease in crime rate, since its eradication would not seem to be a realistic option.

For a punishment to meet its functions and goals, it needs to be well-adjusted to the seriousness of the offence, the offender's personality, as well as to the entirety of objective and subjective circumstances surrounding committal of offence. The operation by which punishments are determined relative to the abstract degree of seriousness of the act and its concrete correspondent, considering all circumstances and data converging into its essence, as well as the individual offender and sentence amendments during serving time, thus factoring in the way in which convicts respond to conditions of detention, is termed individualisation[344].

Sentence individualisation constitutes a fundamental principle of criminal law, gearing criminal policy towards crime prevention and combatting individualisation of penalties[345] is an operation by which punishments are tailored to the needs of social defence. Offences may appear in various ways, revealing diverse degrees of social risk. Concurrently, offenders pose diverse social dangers. Where there is inconsistency and disparity in the severity of an offence and the penalty provided under law, or between dangerousness of the offender and the sentence imposed, sentence fails to serve its purpose, thus leading to conflicting results[346].

To fulfill its functions, a penalty needs to be adjusted to the needs of rehabilitating the offender, under just consideration of the seriousness of the offence committed. The doctrine rightfully postulates that sentence individualisation is a prerequisite for achieving the purpose of punishment[347] ; this is needed, as applying too severe a sentence relative to an offender's need for rehabilitation may be conducive to a negative response, whereas applying a punishment too lenient to a dangerous offender may implicitly encourage this offender to commit further acts in the future.

[344] R. Saleilles, *L'individualisation de la peine* – 1898, Paris, 2-nd Edition, 1909.
[345] Maria Zolyneac, *Drept penal. Parte generală*, Chemarea Foundation Publishing House, Iaşi, 1992, p.890
[346] Mihai Adrian Hotca, *Cod penal, comentarii şi explicaţii,* C.H.Beck Publishing House, Bucharest, 2007, p.681.
[347] Şt.Daneş, Vasile Papadopol, *Individualizarea judiciară a pedepselor*, Scientific and Pedagogic Publishing, Bucharest, 1985, p.66.

Forms and means of individualisation

Sentence individualisation does not solely constitute a fundamental principle under Romanian criminal law, reflective of fundamental guidelines in criminal policy, but is, in addition, one of the major institutions in Romanian criminal law[348].

Individualisation of penalties is an operation manifest accross three distinct stages, namely - the stage of incrimination of criminal offences, the sentencing stage and the serving stage; in this respect, theory makes reference to three stages of individuation, corresponding to the three afore-mentioned three phases[349]. Thus, the first stage takes place at the time of criminal procedures development is termed legal individualisation , the second one, pending penalty administration by the court is termed judicial individualisation, whereas the third phase pending sentence-serving is termed administrative or executive.individualisation[350].

Legal individualisation is the work of the lawmaker[351] , reliant on the principle of legality and punishment; this type of individualisation pertains to creating a regime of punishment that meets the needs of preventing and combatting crime. The lawmaker thereby has created a framework of penalties under art. 53 of Law No.286/2009[352] **9** by providing the types of punishment sans mentioning the amount of (minimum and maximum) time served general penalties provided under special provisions in newly emerged types of offences. In addition to the overall framework, the lawmaker sets up a punishment determined in nature and duration for each individual crime, taking into account the abstract seriousness of the offence. For certain offences, the lawmaker establishes alternative punishments, leaving the court an option therein, relative to the specific gravity of the offence.

A lawmaker's concern for sentence-giving may not only be seen in terms of creating a legal framework for the provision of custodial sentences and their limits in the special provisions, but also in terms of the etiology and circumstances as to aggravation and mitigation of punishment, i.e. situations or circumstances relating to the offence and the individual offender resulting in considerably aggravating or mitigating punishments. Thus, general causes for aggravation of punishment, including relapse, including a.o. the continued offence, general aggravating circumstances as provided under Article 77 in the New Criminal Code., Mitigating circumstances provided under Article 75 General Part, Par. 1 in The New Criminal Code (i.e. instigation, overcoming the limits of self-defence and state of emergency) and mitigating, judiciary circumstances addressed under Article 75, Paragraph 2 in The New Criminal Code. In all said cases, the law provides the extent to which the penalty may be increased or diminished by the court by sanctioning, thus harmonising the principle of legality with that of penal sanctions[353]. Additionally, the lawmaker provides certain legal and administrative means of individualisation of punishment, e.g. suspended, supervised sentence and probation period.

Individualisation takes into account not only legal penalties but also educational and safety measures[354], as provided under The New Criminal Code under Art. 115, types of educational measures that may apply when committed by minors aged 14 to18; in such cases, both custodial and non-custodial educational measures and educational may be applied.

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[348] Costică Bulai , *Manual de drept penal. Partea generală,* All Publishing House, Bucharest, 1997, p.350.

[349] Ion Ristea, *Regimul circumstanţelor în dreptul penal român,* C.H.Beck Publishing House, Bucharest, 2009, p. 42.

[350] Maria Zolyneac, *Drept penal. Parte generală,* vol.III, Chemarea Foundation Publishing House,Iaşi, 1992, p.893.

[351] Constantin Mitrache, Cristian Mitrache*, Drept penal român. Partea generală,* Editura Universul Juridic, 2006, p.373.

[352] *Official Gazette No. 510* of July 24, 2009.

[353] Maria Zolyneak, *Drept penal. Parte generală,* Third Volume, Chemarea" Foundation Publishing House, Iaşi, 1992, p.892

[354] Costică Bulai , *Manual de drept penal. Partea generală,* All Publishing House, Bucharest, 1997, p.351

Legal individualisation of not only legal nature when setting penalties and other sanctions to be applied by the court, are concerned, but also affects their execution phase, when sanctions are adapted relative to the convicted person, the real-life options for rehabilitation, revealed during sentence [355].

Judicial (Court) individualisation is the second stage of individualisation manifest in the process of sentencing by the court. At this point, the court sets an absolutely determined primary punishment and, if required, an additional punishment; both said penalties shall fit with the offence and with the offender, as well as with the entire complex conditions surrounding crime. This type of customization is individualisation proper of criminal liability for the act committed by a determined offender. At this stage, the punishment should be individualized so as to meet functions and purposes as intended by the lawmaker[356].

We may deem that judicial individualisation is the work of a court of law, through whose specific penalty for the offence committed, subject to special limits (minimum and maximum) and even statutory limits applicable in finding the causes of aggravation or mitigation, is determined[357] Judicial individualisation occurs in the context established by the lawmaker in the stage of legal individualisation. Judicial individualisation is concluded by final judgment that is enforceable.

Judicial individualisation of criminalpenalties, although a judge's attribute, is not arbitrary, and is an act of unlimited will, at the same time, it is part of a legal framework in specific contexts set by the lawmaker[358]. When certain conditions, situations or circumstances, alter the sentence, the court is unaware of until the final judgment of conviction, the law allows an individualisation *post judicium* actually a punishment reindividualisation to give effect to the causes of aggravating or mitigating (eg repeated offence, other actions that are part of the continued offence)[359].

Administrative individualisation is the final step that manifest during time serving and carried out by penal administrative bodies. However, at this stage, the lawmaker contributes by setting the Criminal Code and the Law on time serving in criminal penalties by way of a set of rules relative to imprisonment, in determining sentence by gender or age or according to other convict related criteria meant to establish a differentiated regime of enforcement, tailored to all categories of inmates. An important institution in individualisation of the sentence of imprisonment as provided in Criminal Code, is parole[360]. Administrative individualisation of punishment is in accordance with Law 275/2006, on carrying out of punishments and measures imposed by judicial authorities in criminal proceedings[361], as well law amendments under the provisions of the The New Criminal Code shall see a change, along with the other acts and a draft law on execution of punishments and measures ordered by the judicial authorities in criminal proceedings[362].

General criteria for sentences individualisation

Individualisation of punishment is a criminal law enforcement activity, i..e the final stage, that can be achieved only under the conditions and within the limits set by law. The

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[355] Maria Zolyneak, *Drept penal. Parte generală,* Third Volume, Chemarea Foundation Publishing House , Iaşi, 1992, p.892.
[356] *Idem.*
[357] Ion Ristea, *Regimul circumstanţelor în dreptul penal român*, C.H.Beck Publishing House, Bucharest, 2009, p.50.
[358] *Idem.*
[359] *Idem.*
[360] Maria Zolyneak, *Drept penal. Parte generală,* Third Volume, Chemarea Foundation Publishing House,1992, p.895.
[361] Alexandru Boroi, *Drept penal. Partea generală, conform Noului Cod penal*, C.H.Beck Publishing House, Bucharest, 2010, p.459
[362] *See*: www.just.ro.

lawmaker sets a number of coordinates by which judges are to enforce specific criminal penalties[363]. This information constitutes the legal framework of judicial Individualisation, mainly addressed under Article 53 in The New Criminal Code, and accessory penalties provided under Article 54 and additional penalties and the types of sentences provided under law for each offence and their special limits, and causes of mitigation and aggravation of punishment, according to The New Criminal Code[364].

The sentence is seen from the specialised perspective of the court of law, and should not be done arbitrarily, subjectively, but shall, on the contrary, undergo a process of objectively rigorous evidence analysis, all set by clearly defined criteria in relation to their scope of impact, as general and specific criteria of individuation[365].

Provision under the law of general criteria for individualisation of punishment is the core work of regulating judicial individualisation of punishment; their enforcement is mandatory, as the court is mandatorily guided by said criteria in the operation of individuation and establishing a penalty; ignorance of any of these criteria makes the sentence to be groundless and unlawful. Given that the sentence is one of the most important and sensitive legal operations whose accuracy directly reflects the success of the calibration and recovery of the defendant, the content of the Law 286/2009[366] under The New Criminal Code has dropped explicit as criteria for individualisation of provisions in the general part and the special part of the code, that the causes which mitigate and aggravate criminal liability , as they lead to the establishment of limits to which will judicial individualisation and meeting specific regulations occurs. Thus, the content of Article 74[367] under The New Criminal Code sets out general criteria for individualisation of punishment according to the seriousness of the offence and the offender's dangerousness. Given that the lawmaker has provided a plurality of general individualisation criteria in punishments, their use shall occur unabatedly in the light of all these criteria, as the sentence is not effective in the presence of one or several of said criteria[368]. Another feature of the general criteria of individuation is their generality in the area of impact, i.e. said criteria should be considered in all cases including concrete educational measures and safety measures. Also to establishing and penalty legal person who has committed an offence under the criminal law must take account of the provisions of the general part, specific limits of the penalty, the seriousness of the offence, and the circumstances that mitigate or aggravate criminal liability[369].

Circumstances that mitigate or aggravate liability. An offence under the criminal law may be committed in the presence of certain conditions, contexts or circumstances outside the legal content of the offence, relative either to the person or the offence committed, likely to alleviate or aggravate punishment. These circumstances envisaged by the lawmaker are accidental in character and significance to the case and inappropriate punishments exceeding the limits dictated by law for the offence and because of their occurrence, imposing a penalty amount under special minimum if mitigating circumstances, or the special maximum in aggravating circumstances.[370]On the other hand, it must be specified that 'states'

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[363] Ştefan Daneş, Vasile Papadopol, *Individualizarea judiciară a pedepselor*, Scientific and Pedagogic Publishing, Bucharest, 1985, p.64

[364] Alexandru Boroi, *Drept penal. Partea generală, conform Noului Cod penal*, C.H.Beck Publishing House, Bucharest, 2010, p.459

[365] Ştefan Daneş, Vasile Papadopol, *Individualizarea judiciară a pedepselor*, Scientific and Pedagogic Publishing, Bucharest, 1985, p.67.

[366] *The Official Gazette No. 510* of July 24, 2009.

[367] *See Art. 74*, in The New Criminal Code.

[368] Costică Bulai, *Manual de drept penal. Partea generală,* Editura Universul Juridic, Bucharest, 2007, p.362.

[369] Alexandru Boroi, *Drept penal. Partea generală, conform Noului Cod penal,* C.H.Beck Publishing House, Bucharest, 2010, p.460.

[370] Maria Zolyneak, *Drept penal. Parte generală,* Third Volume, Chemarea Foundation Publishing House,1992,

and 'circumstances' must be distinguished, in the sense that aggravation and mitigation work sequentially, each producing effects of punishment, causing only one mitigating circumstances or aggravation of punishment, whether the court noted one or more circumstances[371] In this regard, mention must be made of aggravating states, i.e. in the state of repeated offence, continued crime and cases relative to mitigation of penalties, such as attempts, distinctly addressed in the educational institutions under the New Criminal Code.[372]

In the **general mitigating circumstances**, one may observe that the lawmaker has not significantly changed the rules governing the content of this institution; thus, The New Criminal Code establishes two categories of extenuating circumstances. The first category is represented by mandatory or statutory mitigating circumstances set out in Article 75, Par.1. Thus, the **statutory mitigating circumstances** provided under Article 75, Paragraph 1, state that statutory mitigating circumstances are, as follows: a) an offence governed by a strong or emotional disorder, caused by a challenge from the injured party, triggered by violence, through a serious infringement of personal dignity or other serious illegal act, b) self-defence beyond set boundaries, c) exceeding state of emergency boundaries.

The second category is represented by voluntary or judicial mitigating circumstances, which occur in extenuating circumstances, if the court deems it so, under consideration of to all circumstances surrounding crime committal. These circumstances are mentioned as examples under Article 75, Par. 2[373] of The New Criminal Code. Once sanctioned by the court, they exert same legal effects as distinguishing mitigating circumstances[374].

Under Article 76 of the new Criminal Code concerning extenuating circumstances, special limits for punishments provided under law for an offence shall be reduced by one third, reducing special limits of punishment regardless of the number mitigating circumstances considered. Conversely, if the penalty prescribed by law is life imprisonment, extenuating circumstances shall be applied in imprisonment sentences from 10 to 20 years.

As concernes aggravating circumstances, The New Criminal Code provisions devoted expressly thereto are addressed in Article 77[375], listing following circumstances constituting aggravating circumstances following their analysis; as is the case in mitigating circumstances addressed under Art. 75, the lawmaker did not significantly change their content. If that aggravating circumstance under Art. 78 in The New Criminal Code may apply to special maximum punishment, and if the special maximum is insufficient, an additional imprisonment time up to 2 years, which may not exceed one third of the maximum, and a fine may be imposed not exceeding one third of the maximum amount set. Additionally, special limits increase the punishment, regardless of admitted number of aggravating circumstances. Due to the fact that an offence may occur in conditions of competing aggravating and mitigating circumstances, the lawmaker has indicated the content of Art. 79[376] in The New Criminal Code according to enforcement order, since only following the order set by law can lead to a just individualisation of punishment according to the circumstances of offence committal under the criminal law.

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p.898.

[371] Alexandru Boroi, *Drept penal. Partea generală, conform Noului Cod penal,* C.H.Beck Publishing House, Bucharest, 2010, p.461.

[372] Alexandru Boroi , *Drept penal. Partea generală*, C.H.Beck Publishing House, Bucharest, 2006, p.317

[373] *See* Art.75, Par. 2.

[374] Maria Zolyneak, *Drept penal. Parte generală,* Third Volume, Chemarea Foundation Publishing House, Iaşi, 1992, p.901

[375] *See* Art.77 *(Aggravating Circumstances),* in: The New Criminal Code.

[376] *See* Art. 79 *(Concurrent Mitigating and Aggravating Circumstances),* in: The New Criminal Code.

Conclusions:

The drafting of a new Criminal Code meets the goals of creating a coherent legal framework in criminal matters to streamline regulations in order to apply the law uniformly and expeditiously the work of judicial bodies. On the other hand, the need to harmonize criminal law provisions Roman legal systems of other EU Member States is a prerequisite to judicial cooperation in criminal matters. Therefore we belive that the provisions of the new Criminal Code penalties individualization operation will be in compliance with fundamental committed crimes in the application of a sanction, and injured persons, victims of their.

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THE "STEP-BY-STEP" PRINCIPLE IN THE EUROPEAN UNION LEGISLATION ON GENETICALLY MODIFIED ORGANISM

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Abstract

The "step by step" principle was introduced in the European Union law with the aim to comply with the dubiety regarding the risks which derive from the release of genetically modified organisms into the environment. In recent years, in the process of authorizing the deliberate release, and the placing on the market of GMOs it is to be observed a clear guidance towards a gradual reduction of usage in isolation circumstances of GMOs and a release on a large scale into the environment, but based on a cautious approach regarding the risks that GMOs may represent for the environment. The gradual reduction process of using genetically modified organisms in isolation circumstances is being realized "step-by-step", within each stage, a major part is being played by the environmental risk assessment. The article introduces various aspects regarding the signification, the juridical status and the practical importance of the "step-by-step" principle in the growing process of releasing genetically modified organisms on a large scale into the environment.

Key Words: *genetically modified organism (GMO), release, insert on the market, the step-by-step principle, advisory, competent authority, monitoring.*

The deliberate release into the environment of genetically modified organisms is associated with the risk of generating uncalled for and even irreversible alterations in the flora and fauna of an ecosystem, which can negatively influence both the environment, and the health of people and animals. At large, the risks on the natural environment are conditioned by its interaction with various organisms. Any organism, no matter the type, has a hazard when its presence in the environment represents a possible source or cause for collateral incidents. Most hazards do not imperatively trigger negative results; however, environmental risk assessment is mandatory. "The risk" depends on the probability of appearance of an adverse event and of its seriousness, and its assessment consists in establishing the hazard standards which a certain object may show (of physical, chemical or biological nature). The environmental risk assessment regarding the release of genetically modified organisms is mandatory and implies a quantizing of the exposure, of the mechanisms that may lead to uncalled for results, but also an estimation of the probability for each stage and sequence of incidents which include these mechanisms.

Directive 18/2001/CE of the European Parliament and of the Council of 12 March 2001 regarding the deliberate release into the environment of genetically modified organisms, defines the "ecological risk assessment" in art. 2, as "*environmental risk assessment. means the evaluation of risks to human health and the environment, whether direct or indirect, immediate or delayed, which the deliberate release or the placing on the market of GMOs may pose and carried out in accordance with Annex II.*" (2nd article) Annex II form Directive 2001/18/CE marks the objective of environmental risk assessment as being, "*objective of an e.r.a. is, on a case by case basis, to identify and evaluate potential adverse effects of the GMO, either direct and indirect, immediate or delayed, on human health and the environment which the deliberate release or the placing on the market of GMOs may have.*"

In the context of a cautious approach of the process of deliberate release into the environment of GMOs, the "step-by-step" principle represents a prompt measure for coping with uncertainties regarding the environmental risks. In the European law, the principle was introduced with the Directive no. 90/220/CEE of the Council of 23 April 1990 regarding the deliberate release into the environment of genetically modified organisms and was absorbed within Directive no. 18/2001/CE, which expressly mentions it in the grounds (24) and (25) from the head note:

(24) The introduction of GMOs into the environment should be carried out according to the "step-by-step" principle. This means that the containment of GMOs is reduced and the scale of release increased gradually, step by step, but only if evaluation of the earlier steps in terms of protection of human health and the environment indicates that the next step can be taken.

(25) No GMOs, as or in products, intended for deliberate release are to be considered for placing on the market without first having been subjected to satisfactory field testing at the research and development stage in ecosystems which could be affected by their use.

Furthermore, Regulation (CE) no. 1829/2003 of the European Parliament and of the Council of 22 September 2003 regarding genetically modified food supplies and fodder constitutes a special authorization regime both for food supplies and for animal feed, in art. 6, para. 4 and art. 18 para. 4 with retrospect to the requirements regarding environmental safety, to the ones provided in Directive no. 18/2001/CE, which are governed by the same "step-by-step" principle [2].

The "step-by-step" principle implies a gradual release into the environment of genetically modified organisms, which means a small quantity of genetically modified organisms, followed by a gradual rise in their release, step by step, but only if the assessment of previous stages has shown that it can be proceeded to the next level.

With a very important juridical connotation which is given by its guiding principle in assessing and managing the risks regarding the deliberate release of genetically modified organisms into the environment, the "step-by-step" principle remains unsubstantiated as an autonomous concept at a legislative level. For this reason, the legislator, as it is understood from Directive no. 18/2001/CE gives a broad understanding on the regulation and the appliance of the "step-by-step" principle in the law systems of the member states. Thus, for example, within the national law of some countries, such as Austria or Sweden, is to be found a direct reference to the observance of this principle, which they consider an essential and mandatory requirement for obtaining the authorizations. However, other countries, such as Romania, do not mention directly the incidence of the "step-by-step" principle, which does not mean that it is not present in our legislation, but only in an indirect approach, in the wider picture of the requirements implied regarding the assessment of the risks based on the experiences acquired in various stages.

The "step-by-step" principle is applicable for all the authorization processes concerning genetically modified organisms, regardless it is about the "*deliberate release*" made exclusively for scientific purposes (art. 2 pct. 3 Directive no.18/2001/CE) or about the "*issue on the market*" for commercial purposes (art. 2 pct. 4). The principle's criterion consists in the fact that it explains the entire philosophy on which the release into the environment of genetically modified organisms is based and ensures one of the fundaments of the methodology in the environmental risk assessment. Moreover, the step-by-step approach appears as a reflection of the precautionary principle, according to which, in order to prevent the potential adverse event on both the human and the environmental health it is mandatory

to ensure a proper risk management. Starting from the idea that risk assessment does not always provide final answers to all the questions which occur when data is missing, it is asserted an incorporation within a single assessment process of every relevant research showing results regarding potential risks, but also of every study and similar experiences clearly founded. In view of such an intercession, the "step-by-step" principle has proven to be extremely useful because it allows the introduction within the assessment of all stages, starting with the experiments in isolated circumstances, and continuing with the deliberate release into the environment of genetically modified organisms, and with their placing on the market. The progression of the stages and experiments leads to a better acquirement of information, both regarding the inherent characteristics of GMOs or of organisms derived from these, and regarding the potential risks which may present for the health and for the environment.

Along the authorization process, the "step-by-step" principle applies to the requirements which the notifier has to comply with, and in case of a failure, it allows competent authorities to reject the authorization request. Some of these requirements can be considered real postulates of the "step-by-step" principle, as follows:

– Presenting the information regarding the origin organism, of the host organism and the effects of genetically modified organisms on human, plant, animal and environmental health, thus they are enumerated in art. 5 (3) and in annex III B, from Directive no. 18/2001/CE;
– The deposition of risk evaluation regarding the environment, made according to the requirements exposed in Annex II Directive no. 18/2001/CE. A proper analysis of this type must present the results of the base testes, which allows competent authorities to determine what type of risks can be caused [3];
– Realizing and presenting some supplementary tests if asked by competent authorities, assuming that suspicions regarding potential adverse events on human and environmental health arise. This competence of competent authorities derives from the requirement appointed by art. 4 Directive no. 18/2001/CE of taking all the necessary measures on human and environmental health, for avoiding adverse events on human and environmental health which can occur after the deliberate release or after placing on the market the GMOs.
– The deposition of any other information, such as bibliographical references and directions regarding the methods used when assessing the risks.

In the standard authorization procedure, the basic data and information which accompany the notification, even when they reflect the appliance of the "step-by-step" principle, do not compel, *ipso facto* the competent authority of proceeding to the issue of the authorization regarding the release or the placing on the market of GMOs. On the contrary, it is the task of the notifier to assess potential adverse effects as "direct or indirect", "immediate or delayed" on human and environmental health [4].

The assessment is realized on the strength of the methodological criteria and requirements mentioned in Annex II and III from Directive no. 18/2001/CE, for each particular case, taking into account, *inter alia*, the results of previous releases into the environment of genetically modified organisms. The assessment from case to case is mandatory because the information may vary in terms of the type of the genetically modified organism, of the purpose of its usage and of the characteristics of the environment in which is released. The tests that the notifier must take, unsolicited or if asked by the competent authorities are considered a different stage in the process of integrated risk assessment, in which, the way I presented, the principle of approaching the "step-by-step" principle plays a major part.

Among the actual advantages of applying the "step-by-step" principle, some are to be mentioned. Thus, the notifier has the possibility of including in its own notification data and information regarding the results pertaining to the release of genetically modified organisms made previously by other notifiers, if the named information, data and results are non-confidential and if the advisories in question have given their agreement in written. Moreover, with the notification he can present additional information he considers relevant.

The notifier can claim the absolution from taking various tests, if relevant information are available pursuant to other studies and research, provided that they are realized correctly, scientifically and transparent and can be trusted. Thus, as stated in art. 13 para. 2, final thesis from Directive no.18/2001/CE, "*if on the basis of the results of any release notified under part B, or on other substantive, reasoned scientific grounds, a notifier considers that the placing on the market and use of a GMO as or in a product do not pose a risk to human health and the environment, he may propose to the competent authority not to provide part or all of the information required in Annex IV, section B.*" It is essential for all the studies and research to have been made on the same type of genetically modified organism or any other mixture of GMOs, and the methods and circumstanced of testing to have been similar. The notifier may claim to be absolved from certain risk evaluations, if it is proved that within previous stages there have not been observed adverse events, but, only if the hypothetic risk for which the absolution is asked, he himself was the subject of the assessment.

The appliance of the "step-by-step" principle does not allow the notifier to invoke the impossibility of enacting every safety measure, on the ground that the levels of science in the domain or that technology are not developed enough. The "step-by-step" principle has precisely the function of certifying that the technological and scientific level has developed along previous stages, enough to allow the proper assessment of the risks. Each time, when in the assessment process it is observed that there are needed additional analysis and scientific research, the authorization request regarding deliberate release or the placing on the market of genetically modified organisms will be rejected.

Also, when applying the "step-by-step" principle, the competent authority has the right of claiming the notifier the presentation of all risk information acquired in previous stages. For that purpose, for instance, art. 13, para. (2) from Directive no. 18/2001/CE mentions: "*the notification shall contain: (a) the information required in Annexes III and IV. This information […]include information on data and results obtained from research and developmental releases concerning the impact of the release on human health and the environment".* Likewise, Annex III B, point (D) para. (13) from the same directive makes provision related to the fact that the notifier has to comply with the presentation of notifications linked to the releases of superior genetically modified plants (gymnosperm and angiosperm), notification in which "*information regarding the previous release of the genetically modified plants, according to the case*" needs to be mentioned.

Although presenting information acquired after risk assessments made within previous stages to be for the notifier, the competent authorities are not exonerated by any commitment on this outline. On the contrary, for each risk assessment stage the notified state's authority makes an analysis based on the information and on the knowledge at its disposal, with the aim of forming its own opinion using the so-called investigation principle. With this aim, the competent authority has the right of using the risk information acquired from other applications if the information, data and results are non-confidential and if the notifiers in question have given their agreement in written, under art. 6 para. (3) and art. 13 para. (4) Directive no. 18/2001/CE, but also art 31 from Regulation (CE) no. 1829/2003 [5]

After releasing into the environment a GMO as a product or as part of other product, the notifier has the obligation of ensuring the monitoring and the reference according to the conditions mentioned in the authorization. Monitoring is part of the approach spectrum of the

“step-by-step” principle. The aim of monitoring is to identify the potential effects which genetically modified organisms may have on human and environmental health and cannot be discovered in the environmental risk assessment stage [6]. In the case of deliberate release, the aim of monitoring is formulated in art. 6 para. (2) point (v) form Directive no. 18/2001/18/C where it is mentioned that the notification includes a monitoring plan, in accordance with the relevant parts from annex III, for identifying the effect GMOs could have on human and environmental health. On the supposition that they are placed on the market, monitoring is differentiated in specific monitoring (depending on the case, on the adverse effects identified in the risk assessment stage) and in general surveillance (which means identifying unanticipated adverse effects). Monitoring does not allow competent authorities to transfer the risk assessment from the stages in which they have to be made, to the monitoring stage. On the contrary, whenever it is observed that the risk assessment should have been made in a previous stage, and this step has been omitted, the competent authority is compelled to decline the authorization of releasing into the environment genetically modified organisms.

As a last observation, it is important to emphasize that neither the European Union’s legislation, nor the national legislation confer to competent authorities the right of enforcing the obligation of making risk assessments on the environment in a certain stage, with the aim of providing relevant information for subsequent stages. Nevertheless, nothing would deter competent authorities to enforce as mandatory requirement for a subsequent stage the presentation of risk information which should have been mentioned in the previous stage. This is the reason for which, it would be advisable for competent authorities to develop facultative directions and methodologies which could guide notifiers when establishing risk assessments that need to be made for each stage in part.

Methods: the article is based on researching relevant legal texts from the European Union legislation regarding genetically modified organisms and on their method of approach and implementation.

Conclusions: From the legal point of view, the “”step-by-step” principle represents one of the guiding principle in assessing and managing risks regarding the release of genetically modified organisms into the environment. Within the gradual reduction process of using GMOs in isolation circumstances, together with the encouragement and the growing of their release into the environment, the “step-by-step” principle implies that the information and knowledge regarding the potential risks which GMos may represent for the environment have to be proven in the stages prior to the ones in which the risk can lead to the degradation of the environment.

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PROTECTION OF THE RIGHT OF PROPERTY AND DE FACTO EXPROPRIATION ACCORDING TO THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RITGHTS

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Abstract

The right of property represents one of man's fundamental rights. It is the state that must guarantee and ensure the protection of the fundamental rights; however, it is mostly the state that trespasses these fundamental land rights in the name of the general interest. With the enactment of the Protocol No 1 on the occasion of the European Convention for the Protection of the Human Rights and Fundamental Freedoms, the right of property became a fundamental right at European level. Thus, it emerged a new manner of over controlling of the way the states parties of the Convention understand to protect and respect this fundamental right. The interpreting and the enforcing of the Article 1 of the Protocol 1 referring to the ensuring of the right of property fell under the responsibility of the European Court for Human Rights (ECHR). The decisions of the European Court for Human Rights are mandatory for the member states of the European Union, their analysis being of particular importance in this context, all the more so as, Romania is one of the countries with the highest number of convictions, especially for violating the Article 1 of Protocol No 1regarding the right of property.

INTRODUCTION

The Convention for the Protection of the Human Rights and Fundamental Freedoms represents a real catalogue of the fundamental rights. The Convention was legislated by the European Council with an initial number of 59 articles and was signed at Rome, the 04.11.1950, being enforced three years later, on the 3rd of September 1953. Romania ratified the convention on the 20th of June 1994, when the way towards individual petition towards CEDO/ECHR was open also for the Romanian citizens.

The Convention defined a series of rights and freedoms, considered as being fundamental, and which the member states undertake it to guarantee for the individuals under their jurisdiction. By the convention, not only a declarative mechanism for the protection of the rights and of the fundamental freedoms was instituted, but also a real control system exerted by the European Court for Human Rights, with the headquarters in Strasbourg, and where any individual, regardless of nationality, may refer to the Court if he or she considers that one or more of his or hers rights, guaranteed by the Convention, have been violated.

Initially, the European Court for Human Rights had a rather limited role. The control mechanism comprised two organs: The European Commission for the Human Rights (founded in 1954) that functioned only as filter and the European Court for the Human Rights (founded in 1959) that tried the causes remitted by the European Commission or governments. The role of the Committee of Ministers of the Council of Europe was to monitor the enforcement of the decisions of the court and to pronounce regarding the causes declared as admissible by the Commission, but which had not yet been remitted to the Court.

The European Court for Human Rights was extremely successful among the citizens of the member states, at the beginning of the 80's, as the system was over solicited the proceedings before the Court needing up to five years from the filing of the complaint until it's final decision.

Over soliciting the Court was the result of the increase of the complexity of the demands, as well as of the extension of the European Council who reached, from 23 member

states, 40 member states between 1989 and 1996. Under these circumstances, a reform of the proceedings proved extremely adequate, a situation that led to the signing of the Protocol no 11 to the Convention enforced in 01. 11. 1998, which appointed a permanent Court replacing the two anterior organisms.

Thus, the European Court for Human Rights became directly accessible to the natural and legal persons, without the initial mechanism examination exerted by the European Commission of Human Rights. At present, the Court comprises a number of judges equal to that of the contracting states, elected by the Parliamentary Assembly of the Council of Europe. The judges of the Court benefit from total independence in fulfilling their duties, without representing the state that had nominated them. The causes that do not fulfil one or more of the requirements in order to be accepted (ex: the obligation to have previously exhausted all the appeals at national level) or that are clearly unsubstantiated, after the selection, removed from the system, in a preliminary stage. Regarding the clauses declared accepted the Court shall attempt a procedure of amicable agreement of the parties. In the case the parties do not reach an amicable agreement, the court shall state its decision. The Court pronounces by rules and decisions. A decision is usually stated by a judge, a committee or a Chamber of the Court and refers only to the admissibility, and not the substance of the cause. A decision is pronounced when a Chamber examines simultaneously the admissibility and the substance of a demand.

The control of the carrying into effect of the Court's decisions, where a violation was observed, falls also upon the Cabinet of Ministers, whose responsibility is to control the carrying into effect of the Court's decision where a violation was observed, and who especially ensures, that the states adopt the general measures such as: amending the legislation, adapting the jurisprudence, the regulations and practices required in order to avoid new violations of the Convention. It is still the Cabinet of Ministers that ensures, regarding the effectuation of the payment, by the plaintiff, of the just satisfaction decided by the Court, and in certain instances the enforcing of the concrete measures that guarantee a *restitutio in integrum* (reopening of certain proceedings, lifting of an interdict, etc.).

Chapter 1. THE THREE RULES ESTABLISHED BY THE ARTICLE 1 OF THE ADDITIONAL PROTOCOL NO 1

Article 1 of the Additional Protocol of the European Convention for Human Rights stipulates that:

"*Any natural or legal person has the right to the respect of his/her possessions. Nobody can be deprived of their possessions unless for a cause of public utility according to the conditions stipulated by the law and to the general principles of international law.*

The previous provisions do not prejudice the right of the states to adopt the laws they consider necessary in order to bring under regulation the use of the assets according to the general interest or in order to ensure the payment of taxes, of other contributions or penalties".

The European Court for Human Rights stated by the ordinance adopted for the cause *Sporrong and Lonnroth versus Sweden*, one of the most important decisions of the Court concerning the enforcement of the Article 1 of the Protocol No 1, that the article stipulates three distinct rules;" *This Article (Article 1 of the Protocol No 1) stipulates three distinct rules. The first, being of general nature, states the principle of the observance of the possessions, defined in the first phrase of article 1. The second rule, stated in the second phrase of the same article stipulates the deprivation of the possessions and establishes the circumstances of the enforcement of such a rule, while the third rule, stated in the second article, acknowledges, among others, the right of the States to adopt the laws they deem necessary in order to bring under regulation the use of the possessions."*

First rule

The first rule of the Article 1 of the Protocol No 1 states, according to the Court, the principle of the observance of the possessions. It must be noticed that the text of the article does not specify ”the observance of the possessions”, but uses the phrase "observance of the possessions", with reference to the object of the right not to the right itself. According to this statement, the Court offered an extremely broad interpretation of the notion of possession, beginning with the notion of economic value. The notion of "possession" comprises the movable and immovable property, as well as the tangible and intangible property. The Court also included within the possession category the right of property of the shares of a company. In the case of *Bramelid and Malmstrom versus Sweden*, two natural persons owned shares in a company that owned a store in Stockholm, Sweden. The Swedish state adopted a new law stating that any company that owned more than 90% of the shares and of the voting right in another company was entitled to obligate the minority shareholders to sell their shares for a price, equal to the price of purchase, based on a public offering, that is, for a price established by the arbitrators. The minority shareholders complained that they were forced to remit their shares in favour of the majority shareholders for a lesser price than the market price, fact which represented according to their opinion a violation of Article 1 of Protocol No 1. When studying the demand it was examined, in the first place, if the shares may be considered as “possessions” as stated in the Article 1 of Protocol No 1. It was deemed that the shares represent certificates that give their owner the right of property of a certain part of the company, including the rights pertaining to it (such the voting right). Considering that these mean an indirect claim on the company’s assets, it was deemed, undisputedly, that in this case the shares represented an economic value, thus representing “possessions.”

Another case: *Stran Greek Refineries and Statis Andreadis versus Greece*, the Court had stated that, according to Article 1 of Protocol No 1, an arbitrary decision represented a possession. Mister Andreadis owned a refinery, "Stran", which concluded a contract with the state of Greece, (at the moment of the conclusion of the contract, Greece was controlled by a military dictatorship), worth 76 million dollars with the purpose to build a refinery for crude oil. When the change of political regime occurred, and the country embraced a democratic regime, the state of Greece terminated the contract on account that it no longer suited the priorities of the national economy. Stran Company claimed damages on account of the large amounts of money invested before the termination of the contract. The dispute was brought before an arbitration tribunal where Stran Company won the litigation, the state being ordered to pay damages worth of over 16 million dollars as compensation. The state referred the matter to the Supreme Court of Athens, demanding the arbitral decision be abrogated, and while the case was pending on the courts of law, the state adopted a new law, having as a result the pronouncement of the arbitral decision in favour of the Stran Company as invalid and non-executable. The Company Stran and Mister Andreadis referred the issue to the Court of Strasbourg accusing the violation of the Article 1 of Protocol No 1 of the Convention. The state of Greece stated that it cannot register a violation of the property of any “possession”, due to the fact that a decision of the arbitration cannot be assimilated with the right acknowledged by means of such a decision. The Court stated that if the compensation granted as a consequence of the arbitral decision begot a receivable favourable to Stran Company, with legal effect, only then one can talk about a possession, according to the Convention.

The extent of the concept "possession" according to the interpretation of the European Court of Human Rights proves to become even larger. In the case of *Van Marle versus Holland*, the Court had to establish if the professional reputation may be considered as an possession. The plaintiffs had been working as accountants for a period of time when a new adopted law imposed the mandatory registration of the individuals who wanted to continue to exercise their profession, by an Examination Committee. Their registration was rejected as

was their second appeal against the decision, as the Committee considered that the plaintiffs did not prove to be professionally competent enough. The plaintiffs claimed the decision to be an intrusion of the observance of possessions, and thus a violation of the Article 1 of Protocol No 1. The state asserted that the plaintiffs did not own any "possessions" in accordance with the Article 1, but the Court decided that the right of the plaintiffs "may be compared to the right of property", as due to their work they managed to build a clientele, pertaining to private-law, and representing for them the possession value corresponding to an "possession".

A similar decision was taken in the case of *Iatridis versus Greece*, when the plaintiff built a cinema, in open-air, on a rented land, cinema the manager of which he was. As a result of some disputes between the owners of the land and the state, regarding the right propriety of the land, the plaintiff was evicted, the cinema being transferred to the local administration. The Court ingeminated that the notion of "possession" according to the Article 1 of Protocol No 1 has an autonomous meaning that cannot be limited to tangible possessions: certain rights and interests, representing possessions, may also be deemed "rights of property" and thus, possessions as stated in the Article 1. Consequently, the plaintiff built up a clientele which represented a possession.

Regarding the enforcing the Article 1 in connection to the notion of "possession", the Court decided that the individual's right must be stipulated within the national legislation, *videlicet* to be a legal right, observed and protected as such by the legislation. The Court illustrated this request with the case of *S. versus the United Kingdom*, when it was decided that the taking into possession of a property without a legal right cannot fall under the incidence of the Article 1 of Protocol No 1. The Court also pronounced that the Article 1 of Protocol No 1 relates to real existent rights and not only to simple expectancies or hopes in acquiring a certain right. In other terms the Article 1 of Protocol No 1 may be put into effect only when the lodging of a property complaint, according to the national law, is possible, the protection of the right to acquire a property in the future *(the case of Marckx versus Belgium*) not falling under the incidence of the Article 1 of Protocol. The principle is presented in a very accurate manner in the case of *X versus Federal Republic of Germany*, when the plaintiff, a notary from Germany, complained before the Court because the German legislation had forced him to decrease the charged fees with 80%, in order to finalize contracts, for a certain category of clients such as non-profit organizations and churches. When examining the case it was decided that, according to the Article 1 of Protocol No 1, claiming one's fee may be considered a "possession" only when it is the result of a complaint under the pretext of certain provided real services.

Beside the discussion, extensive enough, concerning the notion of "possession", of the first rule, one must observe that the entire rule is rather general, thus it may be invoked in all the cases where the other two rules do not apply. In other words, it can be enforced when the effect of the measures pertaining to the state is the intervention in the use of the possession or in observing the property, but where it does not exist a deprivation of property or a regulation regarding the use of the property that virtually has the effect of limitation of the right of property. An example concerning the above mentioned is the case of *Stran Greek Refineriy and Stratis Andreadis versus Greece,* when the law enacted by the state had the effect of the cancelling of the arbitral decision

The second rule

The second rule concerns the instances, in which one person may be deprived of one's property, as well as the circumstances in which this kind of deprivation may occur, in other words, the second rule concerns expropriation. The second rule states that: *Nobody can be deprived of their possessions unless for a cause of public utility according to the conditions stipulated by the law and to the general principles of international law.* A few essential

conditions are generated by the above: the existence of a matter of public utility or general interest, under a different statement of the court, and the condition that the expropriation comply with the conditions stated in the national regulations of every country, to which compliance with the general principles of the international law was added as an additional safety measure against arbitrary rules contained by the national laws. We will further analyse all these conditions that an expropriation must comply with according to the jurisprudence of the European Court of Human Rights in order not to violate Article 1 of Protocol 1.

In one of its cases (*The Former King of Greece and Others against Greece*) the Court decided it was necessary to examine not only whether a formal expropriation or the transfer of the right of ownership took place, but also whether the circumstances of the deeds have led to a *de facto* expropriation, therefore the Court introduced the concept of *de facto* expropriation. *De facto* expropriation, according to the Court's jurisprudence refers to a takeover of the actual property without complying with the legal form, namely without a formal takeover of the property. *"In the absence of a formal expropriation, or in other words of a transfer of the right of property, the Court considers it must look beyond the appearances and examine the circumstances of the pleaded deeds… Considering that the Convention protects "precise and effective" rights it is necessary to establish whether the given situation led to a* de facto *expropriation, as the petitioners claimed." (The case of Sporrong and Lonroth versus Sweden).* Therefore, when the Court considers the notion of *de facto* expropriation, it refers to the noncompliance with the legal requirements.

Considering that nowadays all the modern European countries have conditions for protecting the property included in their legislation and stipulate the granting of compensations if the public interest demands assignments of a private property, the Court decided to refer to complying with these requirements, without, however, an intervention in the manner in which every state decides to regulate the notion of general interest or means of compensation. In addition to the requirement of complying with the national laws regarding expropriation, in the context of each State's interpretation of the said regulation, Article 1 of Protocol No 1 also stipulates a set of requirements regarding the complying with the principles of the international law. In the verdict *James against the United Kingdom*, the Court commented on the notion of transfer of property, as it is also adopted in the general international law *"the measures taken by a country can prejudice the right of property to the extent of which this may be interpreted to be so futile that it has to be expropriated, even if the country does not claim to expropriate him and the legal title of property formally remains in the possession of the original owner."* The notion of *de facto* expropriation defines therefore, the situation in which the owner formally keeps the property title; however he is deprived of the possession and of the use of his property, and even of the disposition, considering that practically, he is also deprived of the option of selling that possession.

A very interesting case regarding a *de facto* expropriation is the case of *Papamichalopoulos versus Greece*, this also being the first case in which the Court used the notion of *de facto* expropriation. In this case the Court, after ascertaining the existence of a *de facto* expropriation, did not examine furthermore the case, to see if it had served the general interest and was proportional, stating right from the beginning that the *de facto* expropriation was incompatible with the plaintiff's right of observance of his possession, given the fact that no compensation or other repairs were offered to the plaintiff, this constituting a violation of Article 1 of Protocol No 1. In this case, the plaintiffs were the owners of a land including a portion of the seaside, for which they were given the authorization to build a hotel complex by the Greek Ministry of Tourism. In Greece a military dictatorship was instituted and the plaintiffs' property was transferred to the military fleet. The plaintiffs tried to regain their property, however they were not successful and no compensation was offered to the plaintiffs by the time the Court was notified. The court decided that the violation of the property right

must be treated as a continuous violation starting with 1967, when the land was transferred to the military fleet. According to the Court, the violation of the ownership did not have the purpose of regulating its use; therefore it cannot be subject to the provisions of the third rule from the Article 1 of Protocol No 1. The Court searched for a violation of the second rule and noticed that the abovementioned land had never been formally expropriated; this meaning that the right of property had not been transferred. In this situation, the plaintiffs were deprived of their property by force, moment in which they lost their capacity to use the property.

Romania has been condemned several times by ECHR for violating Article 1 of Protocol No 1, in a series of cases the existence of a *de facto* expropriation being noticed by the Court. In the case *Brumarescu versus Romania,* the Court reiterated that for establishing whether a deprivation of possessions occurred in the context of the second rule (expropriation), it is necessary to look beyond the appearances and examine the pleaded circumstances. In the Brumarescu case, the plaintiff referred the matter to the Court, as he had managed to obtain, from the national courts of law, the cancellation of the nationalizing decree regarding his parents' house, and thus to regain the property previously sold by the state to the two brothers, former tenants of the real estate. The plaintiff obtained the restitution of the real estate and inhabited the house after paying all the property related taxes.
Romania's Prosecutor General, on behalf of the brothers, appealed the sentence through which the plaintiff regained the property. The Supreme Court dismissed the decision of the first court and ruled that the plaintiff did not have rights of property on the real estate, the property having to be returned to the former tenants, who meanwhile became owners. ECHR firstly stated that the plaintiff owned a possession in the form of the decision of the first court regarding the illegally nationalized property. In this situation, the Court ruled that the decision of the first Romanian Court constituted a possession owned by the plaintiff much sooner than the granted right of property, due to the reluctance of contesting the decision of the Supreme Court. Finally, in deciding if the plaintiff was actually deprived of his possessions, the Court ruled there was a violation of the second rule of Article 1 of Protocol No 1, the plaintiff being left without the possibility of using the possession in any way. The lack of a formal transfer of the right of property leads to a *de facto* expropriation, which is a matter of facts and intensity.

The case *Burghelea versus Romania* is the most recent case in which the Court condemned Romania for the existence of a *de facto* expropriation. The plaintiff received through the reconstitution of the right of property a forest land in the neighbourhood of a barrier lake managed by Hidroelectrica. The company solicited to the local authorities an agreement in principle from the owners of the nearby land to execute certain works regarding the expanding of the barrier lake, works which were to flood the aforementioned land. These agreements were obtained in the form of promises of sell and purchase, based on which Hidroelectrica deforested and flooded the plaintiff's land. Later on, the plaintiff took back her agreement and initiated a lawsuit in order to be compensated for the use of her possession. The action was dismissed primarily due to the existence of the promise of sell and purchase, sale which was not possible at the time because of the temporary interdiction of alienation stated by the Law 18/1991. The plaintiff took other courses of action as well, among which an action for recovery of possession and a criminal complaint of prejudice for disturbance of possession, however no positive result being achieved. The European Court sustained the plaintiff's complaint and ruled violation of Article 1 of Protocol No 1. In order to decide this, the Court took note of the fact that the plaintiff could not exercise any of the attributes of her right of property, this way being subject to a *de facto* expropriation, expropriation that could not be justified neither by the agreement in principle for selling the land, considering that the offer did not include a price of sale, nor by the interdiction to sell stated by the Law 18/1991. The Court noticed that even though the state of Romania could have appealed to enforcing the dispositions of the Law of Expropriation, it preferred to gain possession over the land of the

plaintiff without paying any compensation. Under these circumstances, the plaintiff was subject to an excessive burden, to support in an exclusive manner the public utility of a hydroelectric power plant's functionality, as a result her right of property being violated.

CONCLUSIONS

If we were to compare the formal expropriation and the *de facto* expropriation, we would reach the conclusion that the effects of a formal expropriation and of a *de facto* expropriation are equivalent; however, the *de facto* expropriation is not based on a legal procedure.

Article 1 of Protocol No 1, as well as the ECHR jurisprudence, commenced to have effects on our internal law, the first decision of the High Court of Justice and Cassation being recently stated, respectively the decision 1917 of 16 March 2012, through which the Court noticed the existence of a *de facto* expropriation and ruled violation of Article 1 of Protocol No 1, as well as of the ECHR jurisprudence on this matter.

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THE PRIOR ASSESSMENT OF THE EMPLOYEE IN THE CONCEPTION OF LAW NO. 40/2011

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Abstract

This subject examines the issue of 'professional evaluation' of the employee from the conception of Law no. 40/2011 amending and supplementing the Labour Code, based on individual employment breach of contract from the employer if the employee does not correspond professional job to which it belongs (61 d). Amendments to the Labour Code by Law no. 40/2011au to: the right of the employer to establish individual performance objectives and their evaluation CRITERIA (Article 40. (1). F) professional activity evaluation criteria applicable to the employer of the employee (art. Article 17. (3) e) criteria and procedures for evaluating professional employees (art. 242 lit. i). Analysis is to correlate changes with the new collective agreement applicable, or in his absence, with internal regulations, but also with concrete modality to perform preliminary assessment and, as was provided in former collective labor contract at national level for 2007-2010.

Keywords: *individual employment contract, collective labor agreement, performance objectives, evaluation criteria, evaluation procedures.*

According to art. 63 para. (2) of the Labour Code[377], dismiss the employee on the grounds referred to in Article 61 lit. d) (ie, if the employee does not correspond professional job to which it belongs) can be disposed only after the evaluation of the employee, according to the evaluation procedure established by the applicable collective labor contract or in his absence, by internally regulation.

In connection with the 'preliminaryevaluation' of the employee required some clarification. The Labor Code[378] published in 2003, mentioned in Article 63 para. (2) that the preliminary investigation procedure is mandatory if the employee does not correspond professional (ie, situation covered by art. 61 letter d) and if the employee has committed a serious or repeated infringement of the rules of labor discipline, the disciplinary sanction according to Article 61 a).

Term 'preliminary investigation' was substituted for art.61 letters. d) of the Labor Code, the term 'preliminary assessment' of the Government Emergency Ordinance no. 65/2005[379] approved by Law nr.371/2005[380] amending the Labour Code, which in Article 62 para. (2) mention 'employee dismissal on the grounds referred to in Article 61 d) (ie, if the employee is not professionally fit employment which it belongs) can be disposed only after prior evaluation of the employee under evaluation procedure established by the applicable collective labor contract, concluded at national level branch of activity or group of units, and through the internal regulation.'

Therefore, this act amending the Labour Code to remove the term 'preliminary investigation' mandatory dismissal for this reason, replacing the term 'preliminary assessment' evaluation at the discretion of the employer who may or may not dispose to, without the method to determine the actual conduct of the procedure.

Preliminary assessment has been provided in The collective labor contract at national

[377] Adopted by Law nr.53/2003, republished in the Official Gazette nr.345 of 18 May 2012.
[378] Published in the Official Gazette of Romania, Part I no. 72 of 07.feb.2003.
[379] Published in the Official Gazette of Romania, Part I nr.1147 of 19 dec.2005.
[380] Published in the Official Gazette of Romania, Part I nr.1147 of 19 dec.2005.

level for 2007-2010[381] which in Article 77 para. (1) stated that 'the employee may be fired on grounds of professional unsuitability, subject to prior assessment procedure established by this collective labor agreement.'

Established in the same contract Article 77 (2) paragraph that the employee evaluation for professional unsuitability may be made by a committee appointed by the employer, which includes commission and a union representative designated by the union concerned.

As a procedure, the commission was required to call the employee and communicate him in writing at least 15 days before the date, time and place of the meeting and how the examination will be ordered. This review only covered the activities listed in the job description or of the employee[382]. The introduction of new technologies, examining employee will refer to them only to the extent that the employee has been informing professional in this field.

Professional unsuitability may be supported by evidence of the committee non-relevant of professional duties by written examination, oral, practical and other evidence.

In principle, since the employer may (but are not obligated to) order the termination of the legal work for this theme can look at certain moments: occupational mismatch which relate to a specific time (eg, failure to present or failure in a competition certification or promotion), or as long as the individual menus work (eg, lack of concern for raising training, repeatedly rejects challenge low level of training for the introduction of advanced technology) etc.

At the same time the employer is considering the mismatch to intervene in individual employment contract execution, and this inadequacy in report to professional (rather than disciplinary report), as determined by circumstances beyond the of the employee wrongful conduct. As such termination (disposal) individual employment contract is not conditioned by production of damage.

If the employee loses his professional skills for medical reasons, the employer will provide, within available, another vacancy in the unit compatible with training or, where appropriate, work capacity determined by the occupational physician, and if you do not have such a place, the employer will appeal to the local authority for employment for resolution.

In the event that, upon examination, the employee is considered professionally inappropriate by the committee, he has the right to appeal decisions by the Committees within 10 days of notification.

If the employee has not made the appeal within 10 days or if after review the decision of the committee formulating the appeal is maintained, the employer may make and communicate the decision disposing of the employee individual employment contract on grounds of professional unsuitability, which is mentioned decision and preliminary evaluation result of the employee concerned.

An individual employment contract shall be terminated under this theme by issuing the dismissal decision under Article 62 para (1) of the republished Labour Code.

Willing dismissal without having made prior evaluation of the employee is hit by the absolute nullity (under Article 78 of the republished Labour Code).

The formulation of the art.63 para. (2) of the Labour Code and Article 77 of The collective labor contract at national level for 2007-2010 was cumulative, the legal norm referring to evaluation established by 'the collective labor contract national level, the branch level or by the group of units, and through the internal regulation'. Basically, it was unnecessary regulatory duplication. It was logical and reasonable that the same matter is subject to regulatory legal acts for two basically distinct. Thus, it was possible to amend the

[381] Published in the Official Gazette of Romania, Part I no. 5 of 20 January 2007, now repealed.

[382] *Ion Păducel*, 'The individual employment contract termination of the employer, comparative law issues.' Second edition. Romanian Writing Publishing, Craiova, 2010, p.180-181.

Labour Code Law nr.40/2011, is repealed and the provisions of The collective labor contract at national level for 2007-2010.

According to the new regulations amending the Labour Code republished, Article 63 para. (2) states 'of the employee dismissal on the grounds set out in art.61 d) (i.e., the order in which the employee does not correspond the employment professionally framed) may be ordered only after prior evaluation of the employee, according to the evaluation procedure established by the applicable collective labor contract orin his absence, through the internal regulation.'

'Professional assessment' in the concept of the Law nr.40/2011[383] amending the Labour Code is provided in different texts which created some discussion of labor doctrine.

Thus, the evaluation criteria of the employee's professional applicable to the activities are provided by the employer in Article 17. Para (3) e) the right of the employer to establish individual performance objectives and their evaluation criteria are mentioned in Article .40 par. (1) f), and art.242 letter i) of the Code republished by internal rules are shown professional evaluation criteria and procedures for the employees.

Establishment the individual performance objectives and evaluation criteria for their achievement are new concepts not previously covered. Under the new regulations, performance objectives and evaluation criteria for employees of private training are set unilaterally by the employer without the employee's consent and even through the internal regulation, while those in the public sector are made mandatory (usually annually) by order of Resort Ministers.

Law nr.40/2011 brings some new elements wich are, on the one hand expressly establishes the right of the employer to establish the individual performance objectives and evaluation criteria for their performance, establish the employer's obligation to inform to the individual employment contract
completion in connection with the evaluation criteria applicable professional employee to that employer, on the other hand enhances the criteria and procedure for the professional evaluation by internal rules.

Controversial issue in the specialty doctrine is the correlation of texts of the republished Labour Code regarding the right of the employer to establish the individual performance objectives and evaluation criteria for their implementation (Article 40 (1) f), the criteria evaluation of the employee's professional activities applicable to the employer (Article 17 (3) e) criteria and procedures for evaluating professional employees (art.242 letter i) of the Code).

One opinion[384] appreciated that the exclusive right of the employer to unilaterally establish the performance objectives for employees is in obvious conflict with the other provisions of the Labour Code. It is envisaged that the functions of each item is determined bilaterally by individual employment contract according to Article 17 (3) d) of the Labor Code and the framework of individual employment contract Model[385], letter. f). But if any job duties are established by agreement of the parties and materializes in the job description as an annex to the employment contract, it is also normal that the same performance objectives of the post to be established in the same way.

If the performance objectives are set unilaterally by the employer, they may be amended unilaterally at any time during the execution of the individual employment contract;

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[383] Published in the Official Gazette of Romania, Part I No. 225 of 31 March 2011.

[384] *Ion Traian Stefan, Şerban Beligrădeanu*, 'Major theoretical and practical issues arising from the content of Law nr.40/2011 amending and completing Law nr.53/2003 the Labour Code in 'Romanian Journal of Labour Law' nr.3/2011, p.32 -34.

[385] Approved by Order of the Ministry of Labour, Family and Social Protection. 64/2003 published in Official Gazette of Romania, Part I No. 139 of March 4, 2003, as amended and subsequently supplemented.

as such non-compliance or failure of performance objectives established by agreement, the employee will be considered inappropriate for the post to which it belongs and such employer may terminate the employee working individual according to art. 61 letters. d) of the Labor Code republished. Other wise, the employer may not unilaterally modify the individual performance objectives and / or criteria for evaluation of their work established by the contract or by addendum or to the job description. Such a change is possible only by agreement of the parties, according to art. 41 paragraph (1) of the Labour Code republished.

According to another opinion[386], the individual performance objectives are also established unilaterally by the employer after the conclusion of the individual labor contract and the responsibilities of the job description are the result of agreement between the parties to the individual employment contract conclusion. The same situation it is also seen relating to criteria for evaluating individual performance, but the performance objectives are considering only qualitative labor issues which cannot be confused with the individual standard of work that an employee must perform. On the other hand, the performance objectives must be consonant with the job description, with the duties or profession of the respective employee.

Another opinion[387] is that there is a connection between responsibilities included in the job description - annex to the individual employment contract - and employee performance objectives, targets which means a certain quantity and quality level of service tasks.

But, the performance objectives cannot be separated by workload, considering that the working norm - the prerogative of the employer - stems from its right to organize the responsibilities for each employee to determine the individual performance objectives and the individual performance criteria and their evaluation criteria. Therefore, it is logical that the performance objectives to be set initially at individual employment conclusion, and only exceptionally to be modified unilaterally by the employer or by negotiating individual labor contract execution process.

We appreciate as a positive opinion considering that, in the context of the employer's business efficiency, he has the empowerment, *inter alia*, to establish the individual performance objectives and evaluation criteria of his employees tasks accomplish and functions of each position are set bilaterally through negotiation in individual employment contract. This arises from corroborating article 17 para (2) letter d) of the Labor Code republished that refers on the obligation to inform the employee about the general clauses of the individual labor contract (which includes the obligation to inform the respectively employee), with the provisions stipulated in the framework model of the individual employment contract letter f) according to which the job duties are levels forecast in the job description annex to the individual employment contract .

To those mentioned we conclude follows. Establishment of responsibilities for each employee is the exclusive empowerment of the employer because he is able to set out the organization and operation of the respective unit (Article 40. (1) a) and he is also able to exercise control over the job duties fulfilled (Article 40. (1) d) of the Labour Code.

Initial negotiation of attributions can occur on the occasion of information the person selected for employment and may materialize with the conclusion or failure to conclude the individual employment contract. It is envisaged that in the job description duties are set incumbent employee responsibilities establishing obligations assumed individual person

[386] *Ion Traian Stefanescu*, 'Responses to challenges of practice' in 'Romanian Journal of Labour Law' nr.8/2011, p.13-18.
[387] *Alexandru Ticlea*, 'Establishing the individual performance targets - the prerogative of the employer', 'Romanian Journal of Labour Law' nr.7/2011, p.11-14.

selected the contract of employment or the employee in subsequent change of employment. But subsequent modification attributions is nothing more than a specification of the initial or the change of the law. Therefore, we believe that as individual setting performance objectives and assessment criteria are based on their achievement all the prerogative of the employer to establish the organization and functioning of his work because his needs to mobilize and direct labor to achieve unity profit.

Only to infringements or failure of performance objectives established to negotiate (or subsequently during the execution of the employment contract), the employee will be considered inadequate to the post which he belongs, inadequacy that may allow the employer to terminate the individual employment concerned in the art. 61 d) of the Labor Code republished.

But termination of employment under this basis shall be assessed (latitude) of the employer, which means, in our opinion that the individual performance of the employee (full or partial) should not lead to a natural dismissal of the employee. May take further measures prior to actual dismissal. Examples: changing the work labor or type of work with the employee's consent, not promoting, another post etc. denial of bonuses or other facilities.

Regrettably is that the new regulations amending the Labour Code republished does not determine the concrete professional employee evaluation procedure as envisaged by art. 77 of the collective labor contract at national level for 2007-2010 [388](now repealed).

Therefore we consider that the proper way to conduct preliminary evaluation procedure of the employee, pursuant to art. 61 d) of the Labor Code republish, to be established in the applicable collective agreement, or failing that, to the internal regulations taking into account adaptations, the former provisions of art. 77 of the collective labor contract at national level for 2007-2010.

It is also necessary to mention that 'preliminary evaluation' of the employee must be based on a real and serious issue, otherwise it gives rise to an abuse of rights of the employer.

There are differences between the current internal labor legislation and international labor law. Thus, the Recommendation. 166/1992 of the International Labour Organization legal reforms termination of employment of the employer, adopted on June 2, 1982 (not ratified by Romania) shown that a worker could be fired for professional inadequacy unless continue to discharge their duties, for improperly service, although the employer gave necessary instructions and warned in writing about that, after a reasonable period should allow him to be establish operating with the professional requirements.

However, the requirements of the international labor provisions not covered by the national labor law. Therefore, ferenda law it would be necessary that the collective labor contracts applicable or, in their absence, bylaw, to be set such requirements (related to the new amendments to the Labour Code by Law nr.40/2011) since requirements are favorable to employees and one of the parties to the contract are quite the employees.

[388] *Nicolae Voiculescu*, 'Employment law, human resource management rules', Perfect Publishing, Bucharest, 2011, p.126.

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O PERSPECTIVĂ ASUPRA CIBERNETICII DREPTULUI

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Rezumat

Cibernetica juridică este o ştiinţă nouă în arsenalul ştiinţelor apărute după cel de-al doilea război mondial care priveşte dreptul ca un sistem complex, comunicaţional, în care regulile de drept reprezintă pe de-o parte o reflectare a feed-before iar pe de altă parte un sistem de reglaj de tip feedback. Interacţiunea cu logica, informatica şi dreptul, conduce la o nouă perspectivă asupra dreptului şi a juriştilor care devin tehnicieni ai dreptului iar dreptul procesual penal mai apropiat de ştiinţele pozitive.

1. Introducere

Cibernetica este un concept nou al vocabularului ştiinţific actual care a determinat schimbări fundamentale în gândirea ştiinţifică şi metodologică, definită ca disciplină ştiinţifică ce studiază principiile generale ale procesului controlului şi comenzii la fiinţe şi maşini.

Cea de-a doua lucrare a lui Norbert Wiener – *Cibernetica şi societatea* – nu mai are un caracter tehnic, ci reprezintă baza filosofico-metodologică a gândirii sale ştiinţifice şi a unei noi viziuni asupra lumii; societatea este studiată în ansamblul său prin analiza mesajelor şi mijloacelor de comunicare a căror evoluţie se va realiza pe următoarele direcţii:

- mesaje şi mijloace de comunicare între om şi natură;
- mesaje şi mijloace de comunicare între om şi maşină;
- mesaje şi mijloace de comunicare între maşini.

Starea mesajului transmis între om şi maşină nu diferă cu cea a mesajului transmis între oameni, de aceea, teoria conducerii, fie că se referă la fiinţe sau maşini, reprezintă un segment al teoriei comunicaţiei.

Arealul de investigaţie al ciberneticii se întinde începând cu rezolvarea tuturor problemelor nerezolvate ale ştiinţei (salvare sfântă) până la scopurile sale antiumane (vin roboţii); cu toate aceste imprecizii ale domeniului său de investigaţie, rezultate, pe de-o parte, din faptul că ea este o ştiinţă tânără, dar şi din abundenţa realizărilor tehnice şi a rezultatelor ştiinţifice care îmbogăţesc permanent arsenalul noţional, sunt trei categorii care definesc existenţa obiectului ciberneticii, conducerea, comunicarea şi controlul care se regăsesc în teoriile ciberneticii: teoria informaţiei, teoria reglării, teoria algoritmilor, teoria algoritmilor.

Rezultatele fizicianului englez W.Ross Ashby sunt sintetizate în noţiuni ce depăşesc cadrul fizicii, cum ar fi homeostezia sistemului, ceea ce dă ciberneticii un caracter integraţionist, ea ocupându-se de comportamentului sistemului, nu de structura sa, ceea ce evidenţiază relativa independenţă a proprietăţilor structurale de cele funcţionale. După A.Moles, cibernetica are ca obiect organismele înţelese ca sisteme complexe, ea nu studiază natura fizică a subsistemelor care o compun; ea caută ceea ce este comun modurilor de asociere a elementelor. În sens larg, cibernetica este un cadru conceptual-metodologic nou al examinării ştiinţifice; analizată în contextul *teoriei reflectării*, materia primă a ciberneticii este informaţia.

Din perspectivă informaţională, cibernetica se compune din două teorii:

- teoria generală a schimbării informaţiei;
- teoria şi principiile construcţiei schimbătoarelor de informaţie.

Cibernetica este ştiinţa care se ocupă cu prelucrarea informaţiilor, este apropiată informaticii fără să se identifice cu ea.

Cibernetica se ocupă de procesele de conducere şi legătură, ceea ce înseamnă transmiterea, prelucrarea, îngrijirea şi utilizarea informaţiilor.

Cercetătorul britanic F.H.George, în studiile sale despre cibernetică, ajunge la concluzia că ea este ştiinţa ce studiază sistemele autoadministrative şi adaptative (sisteme cu retroacţiune) dinamice, neinteresată de tipul natural sau artificial al sistemului.

G.A.Boulanger, reprezentant al Comunităţii Internaţionale pentru Cibernetică, este de părere că cibernetica este ştiinţa roboţilor, adică ea este ştiinţa ce construieşte maşini cu reflexe condiţionate şi cu capacitate de recunoaştere şi învăţare.

2. Geneza informaticii şi logicii juridice

O succintă analiză a rezultatelor teoretice şi practice care au condus la configurarea ciberneticii juridice ca ştiinţă sunt următoarele:

- Dreptul reprezintă un proces complex de comunicaţii, concept introdus de Norbert Wiener în lucrarea *Cibernetica şi societatea*;
- Aplicarea logicii simbolice în domeniul dreptului, Layman Allen;
- Introducerea metodelor ştiinţifice de măsurare în drept şi configurarea unui nou domeniu al investigaţiei tehnice în drept, jurimetria, Lee Loevinger;
- Studiul raportului jurist-maşină, Colin Topper;
- Gestionarea informatică a informaţiilor juridice, John Horty;
- Aplicarea ciberneticii şi a metodelor sale în drept, Victor Knapp;
- Unificarea tuturor rezultatelor ştiinţifice şi organizarea lor într-o nouă ştiinţă numită cibernetică şi informatică juridică, sau juriscibernetica, Mario Losano.

Chiar dacă studiile de cibernetică juridică au trecut în plan secund lăsând locul celor de informatică juridică, este necesară reevaluarea studiilor de cibernetică juridică din anii ‘45÷’80, datorită nevoii de cuprindere, printr-o ştiinţă a sistemelor, a volumului mare de informaţii acumulat ce trebuie integrat într-un sistem al cărui grad de integralitate determină coerenţa sa. Pătrunderea ciberneticii şi automaticii în toate sferele vieţii sociale provoacă teama de posibila robotizare a juristului şi implicaţiile acestui proces în elaborarea actelor normative ca rezultat al deciziei. Juristul este un specialist, un tehnician a cărui formaţie se apropie de aşa-numita inginerie juridică, ale cărui instrumente investigaţionale sunt legi, teoreme, concepte, axiome, iar sensul metodologic este ipoteză-demonstraţie-concluzie; pe de altă parte, voinţa politică se impune prin acte normative; de aceea, juristul reprezintă şi o interfaţă între domeniul ştiinţific şi cel politic.

Rezultatele ciberneticii au reprezentat posibilităţi pentru rezolvarea complexelor probleme juridice, în special în domeniul dreptului ca proces de conducere prin acte normative. Sunt domenii juridice reductibile la înregistrarea, arhivarea (păstrarea), prelucrarea şi transmiterea informaţiilor juridice. Din acest unghi de vedere, cibernetica juridică nu concurează omul, ci reprezintă instrumentul voinţei lui şi un ajutor coerent care amplifică funcţiile sale.

Nu încape îndoială că implicaţiile ciberneticii şi a metodelor sale în domeniul juridic este de mare utilitate juriştilor, pentru că dreptul reprezintă şi un proces de comunicaţie, în încercarea de a soluţiona problematica reglării sociale.

Abordarea dreptului ca un sistem cibernetic dinamic şi deschis conduce la definirea sa ca un mijloc de supraveghere etică asupra proceselor de comunicare şi asupra limbajului ca mijloc de comunicare, în special când procesul de urmărire a respectării prescripţiilor actelor normative este controlat de o autoritate capabilă să pună în funcţiune sancţiunile sociale (canalul de retroacţiune).

Acesta este un proces de unificare a comportamentului indivizilor, evitându-se sau ameliorându-se litigiile (controversele) din societate.

Din acest unghi de vedere, teoria şi practica dreptului includ două tipuri de probleme:

- probleme ce se referă la conceptul de drept şi la scopul său fundamental;
- probleme ce se referă la tehnica de aplicare a acestor concepte.

Pe lângă problemele ce ţin de esenţa dreptului, actul normativ trebuie să fie atât de clar, încât fiecare cetăţean să poată să-şi aprecieze dinainte drepturile şi obligaţiile, iar subiectivismul autorităţilor ce controlează aplicarea regulilor de drept să fie minim.

Actul normativ trebuie să asigure neinterpretabilitatea drepturilor şi obligaţiilor individuale; prima obligaţie a actului este să aibă un obiectiv clar exprimat şi să fie înţeles atât de specialist, cât şi de cetăţeanul obişnuit. De aceea, se poate considera că procesul de emitere a actului normativ este o problemă de ordin comunicaţional şi cibernetic.

Jurimetria reprezintă ansamblul metodelor ştiinţifice (matematice, statistice) utilizate ca instrument de studiu al corelaţiilor şi proceselor juridice.

Abordarea dreptului ca un sistem dinamic şi deschis este manifestat clar nu numai în literatura juridică contemporană de specialitate, dar se reflectă şi în tendinţa de a depăşi aşa-zisul paternalism al statului.

Dreptul se poate defini ca un control (supraveghere) etic asupra comunicaţiilor şi asupra limbajului ca mijloc de comunicare, mai ales când procesul de emitere a actelor normative este controlat de o putere capabilă să pună în funcţiune sancţiunile sociale. Acesta este un proces de reglare a alianţelor ce unifică indivizii pentru înfăptuirea dreptului, pentru evitarea sau ameliorarea litigiilor (controverselor). Din acest unghi de vedere, teoria şi practica dreptului cuprind două tipuri de probleme: cele care se referă la conceptul de drept şi la scopul său fundamental; cele care se referă la tehnica de aplicare a acestor concepte.

Pe lângă problemele ce ţin de esenţa dreptului, legea trebuie să fie atât de clară, încât fiecare cetăţean să poată să-şi aprecieze dinainte drepturile şi obligaţiile sale, iar subiectivismul autorităţilor ce controlează aplicarea regulilor de drept să fie minim. Dacă nu se poate realiza acest lucru indiferent cât de bine intenţionat este, regulamentul juridic nu va fi scutit de controverse (litigii) şi confuzii. Legea trebuie să asigure, în primul rând, ca drepturile şi obligaţiile individuale să nu fie niciodată interpretabile.

Cu alte cuvinte: prima obligaţie a legii este să aibă un obiectiv clar exprimat. Actele normative trebuie să fie neinterpretabile, să fie înţelese atât de specialist, cât şi de cetăţeanul obişnuit. De aceea, poate considera că problemele legii sunt de ordin comunicaţional şi cibernetic.

3 Jurimetria – Lee Loevinger

Anumite sfere de activităţi juridice se pot înţelege ca şi o elaborare, păstrare, interpretare şi preluare a informaţiilor, în timp ce calculatoarele electronice pot fi de ajutor celor care se ocupă de emiterea şi urmărirea respectării actelor normative. Problema deciziei juridice şi a prelucrării datelor are o importanţă primordială în dreptul contemporan. Se poate spune că cercetările legate de aplicarea ciberneticii în domeniul juridic, într-o oarecare măsură, rămân pe planul al doilea în ceea ce priveşte aplicaţiile lor în alte domenii economico-sociale. În ultimul timp, există preocupări serioase în ceea ce priveşte punerea în aplicare în domeniul juridic a cercetărilor din domeniul informaticii juridice. Epoca automatizării juridice a fost începută de Lee Loevinger, prin lucrarea sa Jurimetria-următorul pas înainte, apărută în 1949, la Universitatea din Minesota (S.U.A.), urmată şi de alte lucrări, cum ar fi: Jurimetria-ştiinţa şi prevederile în domeniul legislativ şi Jurimetria-metodologia cercetării legislative. Chiar dacă aceste lucrări stau la baza ciberneticii şi a informaticii juridice, ele sunt insuficient cunoscute cercetătorilor din ţara noastră. În aceste lucrări, Loevinger militează pentru introducerea metodei ştiinţifice în domeniul elaborării actelor normative.

Cu fiecare zi legislaţia devine mai complicată, cetăţenii devin tot mai dezorientaţi, iar societatea mai puţin integrată. Bineînţeles că oamenii nu pot aprecia ceea ce nu înţeleg. Se propun multe soluţii: trebuie să se introducă o nouă lege care va reglementa respectarea legilor (vechi) existente. Întotdeauna va exista sau se va găsi o teză conform căreia se va susţine orice propunere posibilă, în afară de aceea care spune că legea însăşi trebuie schimbată. Chiar din faptul că jurisprudenţa se află la baza logicii juridice şi din faptul că jurisprudenţa se angajează în căutarea răspunsurilor diferitelor întrebări speculative, dreptul s-a dezvoltat pe bază de presupuneri (apriori), iar adaptarea lui la necesităţile sociale s-a făcut sub anumite presiuni şi foarte încet. Juriştii sunt atât de preocupaţi de cuvinte şi teorii, încât nu au reuşit să realizeze un sistem raţional, care să conducă la realizarea funcţiilor principale, adică la soluţionarea situaţiilor controversate. Majoritatea deciziilor sunt ascunse după aparenţele verbale.

Îndreptarea jurisprudenţei (ca o adevărată speculaţie despre drept) spre jurimetrie va reprezenta un real progres spre abordarea ştiinţifică a problemelor juridice. Şi în drept trebuie să folosim aceleaşi metode care au asigurat dezvoltarea celorlalte domenii. Una din problemele cu care se confruntă societatea secolului XXI este cea legată de metodele socio-juridice neadecvate, rezultate ale modelelor empirice chiar dacă utilizează tehnici moderne. Problema fundamentală a ciberneticii juridice este elaborarea unui nou model al sistemului de drept, pornind nu în mod tradiţional de la observaţii particulare la generalizarea şi extrapolarea la sistem, ci de la conceptul de organism (sistem deschis, dinamic, cu autocontrol) cu capacitatea de autoadaptabilitate caracterizat de parametri generali, ale căror mărimi pot fi controlate în raport de funcţia obiectiv care este o rezultantă a autorităţii politice. Jurisprudenţa se află, fără îndoială, în aceeaşi relaţie cu jurimetria, exact ca şi astrologia cu astronomia, credinţa şi superstiţia – toate acestea punând aceeaşi întrebare semnificativă.

Termenul "jurimetrie" a fost introdus de juristul Lee Loevinger, în 1949 în "Jourimetrics Journal" (Revista de Jurimetrie) din SUA, în încercarea sa de a evidenţia importanţa pentru jurişti a metodelor ştiinţifice, mai precis a metodelor cantitative, deschizând astfel o nouă ramură de studii juridice, aceea careare ca obiect utilizarea calculatoarelor la studiul şi realizarea de aplicaţii în drept.

În Italia, Vittorio Frosini, specialist în filosofia dreptului a publicat în 1968 lucrarea "Cibernetica, dreptul şi societatea".

Principala direcţie în studiile jurimetrice s-au bazat întotdeauna pe activitatea şi lucrările de doctrină juridică nord americană cu orientare profund realistă.

Jurimetria este ştiinţa care se ocupă cu aplicarea rezultatelor ştiinţelor pozitive în domeniul juridic. Domeniul său de investigaţie este descris de:

-Studiul fenomenelor juridice cu ajutorul rezultatelor ştiinţelor pozitive;

-Utilizarea metodelor ştiinţifice pentru studiul dreptului;

-Metodă aplicată pentru modificarea actelor normative şi armonizarea lor într-un sistem utlizând indicatori metrici;

-Modalitate de descriere a ştiinţei dreptului;

-Aplicarea modelelor logicii formale în fundamentarea dreptului şi a raţionamentelor juridice;

-Aplicarea computerului şi a rezultatelor statisticii în activitatea juridică;

-Previzionarea sensului de dezvoltare a fenomenului juridic;

În afara publicaţiei americane "Jourimetrics Journal" (Revista de Jurimetrie), studii semnificative de jurimetrie nu s-au mai elaborat. De curând, a apărut tendinţa de a folosi jurimetria în consultanţa juridică. În acest sens, un aport important îl au Smith şi Deedman, John Zeleznikov şi Dan Hunter.

Un alt pol de dezvoltare a jurimetriei este Olanda, unde nume ca Franken, de Wildt, De Mulder, Van Noortwijk, Piepers, Combrink-Kuiters, Smijders si Malsch au elaborat lucrări importante în ultimul timp.

Jurimetria se ocupă cu studiul actelor normative folosind metode empirice, acoperind atât aspectele pragmatice, cât şi de voinţa internă ale acestor acte.

Actul normativ se defineşte ca o cerere şi autorizare ce izvorăşte din însăşi organizarea statului. Studiile de jurimetrie folosesc modelul, precum ştiinţele pozitive de aceea ea utilizează metodele statisticii matematice şi ale ciberneticii. Acest fapt permite cuantificarea efectelor actelor normative, cerinţă impusă de necesitatea calculului probabilistic. Pratic, această formalizare suportă în determinări de ordin ideologic dar acestea sunt cuantificate prin mărimi cantitative ce studiază efectele şi abaterile de la optim. Se poate discuta, în consecinţă, de predicţia comportamentului uman prin studii jurimetrice, caz în care nu pot fi ignorate realizarile sociologiei şi psihologiei. Modelul de lucru oferă direcţia de cercetare, facând rezultatele mai palpabile şi mai usor de extrapolat în zona oraganizaţiilor moderne, care se centrează pe costuri şi profit.

Jurimetria studiază forma, însemnătatea, precum şi pragmatismul unui act normativ. O parte importantă a rezultatelor sale se regăseşte în analize cantitative şi de sistem ale procesului de luare a unei decizii cu caracter juridic. Acest proces, efectuat iniţial manual, a dat greş, necesitând în cele din urmă intervenţia calculatorului, drept ajutor în aprecierea importanţei faptelor şi estimării propabilităţii deciziei pro şi contra în cazuri viitoare.

Această abordare "tradiţionalistă" a jurimetriei se traduce în studiul pragmatismului şi sensului unui act normativ, pe cale juridică.

Un colectiv olandez studiază fenomenele juridice cu ajutorul cuvintelor cheie, încadrându-le în contexte diferite, spre a îmbunătăţi modul de regăsire a informaţiei, într-un mod mult mai rafinat decât căutarea pe expresii sau grupuri de cuvinte. Aceste studii oferă un sprijin aparte utilizării şi dezvoltării limbajului juridic.

4. Cibernetica şi dreptul

Prima lucrare importantă în domeniul cibernetizării dreptului apare la Praga, scrisă de academicianul Victor Knapp şi se numeşte Despre posibilităţile utilizării metodelor cibernetice în drept.

Ideea fundamentală a lucrării lui Knapp este că maşina cibernetică poate să prelucreze acele informaţii care îi sunt pe înţeles, adică informaţii ale căror relaţii se pot concretiza în funcţii logico-matematice. După teoria lui Knapp în domeniul ciberneticii dreptului, cercetările sunt de domeniul logicii dialectice şi formale, ceea ce are multiple şi profunde implicaţii filosofice.

Logica formală se fundamentează pe principiile identităţii abstracte, în timp ce logica dialectică analizează acordul gândirii cu realitatea obiectivă, iar în plan secund, raportul dintre gândire şi legile logicii formale.

Gândirea dialectică analizează interdependenţa reciprocă a proceselor şi fenomenelor în dinamica lor. Maşina cibernetică trebuie să fie capabilă nu numai de raţionamente logico-formale, ci şi de raţionamente dialectice şi logice.

Maşina cibernetică se găseşte la interfaţa a două categorii de specialişti:

- cercetători în domeniul juridic, filosofic şi logic;
- cercetători în domeniul informatic şi tehnic.

Maşina cibernetică nu va înlocui conştiinţa judecătorului, ci va fi în slujba acestuia, uşurându-i munca.

Pentru prelucrarea informatică a textelor juridice, Layman Allen introduce conceptul de normalizare, care ar reprezenta conceptul fundamental în realizarea de sisteme expert juridice.

Automatizarea dreptului este un concept introdus de Paul Hoffman, care presupune unificarea informaţiilor juridice într-un sistem cu un grad de integralitate accesibil maşinii cibernetice.

John Horty introduce tehnica numită cuvinte cheie, care se asociază textelor juridice, iar ca modalităţi de investigaţie propune utilizarea operatorilor logicii simbolice.

5. Cibernetica şi informatica juridică

Cele mai importante lucrări în domeniul aplicării ciberneticii în drept aparţin profesorului italian Mario Losano, care este considerat, datorită rezultatelor obţinute în determinarea obiectului, conţinutului şi limitelor ciberneticii juridice, părintele ciberneticii juridice.

În lucrările Cibernetica juridică-aplicarea maşinilor cibernetice în drept şi Sistemul juridic-de la tehnică la tehnologie, a fundamentat conceptul de cibernetică juridică, care a constituit baza teoretică a formării informaticii juridice-disciplină al cărei obiect este aplicarea tehnologiei informatice în drept.

M.Losano a introdus termenul juriscibernetica pentru cibernetica juridică, prin care a concretizat un domeniu neomogen, până atunci, pentru cercetarea legată de aplicarea metodelor cibernetice în drept.

Dacă se porneşte de la ideea că cibernetica precede logic dreptul, este necesară rezolvarea posibilităţii introducerii dreptului în schemele determinate logic şi care vor descrie dreptul. De aceea, dacă sunt dificultăţi în aplicarea metodelor cibernetice determinate în drept, dreptul va fi supus schimbării. Cu alte cuvinte dreptul se va adapta modelului cibernetic.

Dacă se porneşte de la ideea că logic dreptul precede ciberneticii, se naşte întrebarea dacă se pot aplica metodele cibernetice în drept. Cu alte cuvinte, dreptul devine criteriul ce determină posibilitatea sau imposibilitatea aplicării metodelor tehnice în practica juridică.

Având în vedere posibilitatea aplicării ciberneticii în drept, prima soluţie porneşte de la neschimbarea ciberneticii, a doua de la neschimbarea dreptului. Totuşi, prima soluţie este mai realistă decât prima, care susţine concepţia juridico-centrică a juristului tradiţionalist.

6. Caracterul metodologic al ciberneticii juridice

Etapa aplicării calculatorului în domeniul juridic a deschis-o Lee Loevinger prin lucrările sale de jurimetrie, care scot în evidenţă necesitatea introducerii metodelor ştiinţifice în drept; ideologia nu reprezintă o disciplină ştiinţifică în sensul contemporan al cuvântului.

Introducerea metodelor ştiinţifice de cuantificare a fenomenelor juridice, cum s-a întâmplat şi în alte domenii (econometria, sociometria) are efecte remarcate de:

-coerenţa crescută a actelor normative;

-creşterea integralităţii sistemului juridic;

-claritatea obiectivelor dreptului.

Juriscibernetica nu este doar o ştiinţă nouă, ci şi o metodologie nouă, care deschide drumul aplicării metodelor ştiinţifice în drept. Sunt cel puţin trei motive pentru care juriscibernetica este un concept benefic studiului dreptului:

a) Termenul drept are un sens multiplu (drept pozitiv, aplicare a dreptului, teoria dreptului); de aceea, era necesară o categorie fundamentală care să cuprindă aceste sensuri. Cibernetica a dat modelele teoretice utilizate în structurarea dreptului în sens abstract, precum şi maşinile (hardul) şi aplicaţiile (softul) necesare aplicării în drept.

b) Juriscibernetica este un termen nou al cărui conţinut se stabileşte în raport de rezultatele cercetărilor efectuate în sistemele de drept.

c) Este un termen pe înţelesul juriştilor, traductibil în principalele limbi naturale.

Înainte de toate, juriscibernetica este un mod nou de analiză a dreptului, o nouă metodă de analiză a dreptului.

7. Ramurile ciberneticii juridice

Cibernetica juridică este compusă din trei domenii:

a) jurimetria;
b) modelarea cibernetico-juridică;
c) informatica juridică.

a) Jurimetria a fost concepută ca o ramură care să prevadă hotărârea judecătorească. La început, rezultatele au fost remarcabile în domeniul documentării juridice, nu a formulării actului normativ ori a prevederii unei hotărâri judecătoreşti pe seama legislaţiei înmagazinată în baze de date juridice.

Pentru introducerea elementelor de inteligenţă artificială şi utilizarea programelor expert, se pune problema realizării de acte normative (*Teoria deciziei*) şi emiterea de sentinţe de către computer.

b) Modelarea cibernetico-juridică (Modelarea jurisciberneticǎ)

Modelarea cibernetico-juridică se ocupă cu formalizarea unei părţi sau a întregului sistem juridic şi realizarea de modele teoretice ale sistemului juridic-sistem cibernetic, dinamic, cu finalitate.

Modelarea cibernetico-juridică are două componente:

b.1. Modelarea în sensul abstract reprezintă un rezultat al filosofiei clasice germane şi este caracteristică teoreticienilor jurişti şi constă în realizarea unui model unitar şi armonios; răspunde concepţiei lui Kant: *"coordonarea reală, multidisciplinară sub un principiu"*.

b.2 Modelarea cu scopuri precise este caracteristică practicienilor jurişti, fiind orientată spre crearea de sisteme limitate la compartimente juridice, cu condiţia să satisfacă cerinţele aplicării dreptului.

b.1 Modelarea cibernetico-juridică din punct de vedere abstract

La baza modelului cibernetico-juridic ca formă abstractă stă analiza domeniului juridic ca sistem, prin care se va ajunge, în cele din urmă, la construirea *sistemului juridic cibernetic*. Acest model al sistemului juridic este, de fapt, o teorie de ordin ştiinţific, chiar dacă se poate transforma într-un *model operativ*, totuşi scopul lui esenţial este să folosească drept bază pentru construcţii teoretice. Având în vedere aceasta, Losano crede că modelarea juridică are tendinţa de a se reduce la doctrinele juridice tradiţionale, dar într-o formă nouă *cibernetica*.

b.2 Modelarea cibernetică cu scopuri concrete. Modelarea cibernetico-juridică, care are scopuri concrete, este orientată spre formarea unor baze ce permit utilizarea tehnologiei informaticii în domeniul dreptului, computerul să fie la dispoziţia juristului. Din acest punct de vedere, calculatorul devine un mijloc "de manevrare a dreptului într-o formă nouă", adică parţial sau în totalitate va înlocui munca juristului. În legătură cu aceasta, se ivesc probleme de ordin logic, politic, social şi, înainte de toate, se pune problema posibilităţii ca aceasta (calculatorul) să-l înlocuiască în totalitate pe jurist.

c. *Informatica juridică* se ocupă de organizarea datelor legate de cercetarea din domeniul aplicării tehnologiei informatice în drept, precum şi cu utilizarea calculatorului şi a programelor în scopul realizării documentelor juridice.

Informatica juridică este ramura ciberneticii juridice compusă din trei tipuri de aplicaţii:

- documentare;
- în sprijinul dreptului;
- de cercetare şi şcolarizare.

Informatica juridică se confruntă cu două tipuri de dificultăţi. Prima se referă la memorarea şi găsirea rapidă a informaţiei, iar cea de-a doua este legată de aplicaţiile informatico-juridice. Problema este de a obţine o informaţie juridică relevantă şi oportună. Primele încercări în acest sens au avut un caracter *documentarist şi bibliografic*. Numărul mare de publicaţii, precum şi utilizarea diferitelor tehnologii informatice care prelucrează automat datele juridice rezolvă cele două probleme invocate.

Metodele şi tehnicile de abordare. Informatica juridică elaborează metodele necesare pentru strângerea, păstrarea, transmiterea şi utilizarea informaţiilor juridice prin intermediul tehnologiei informatice. Metoda de bază pentru prelucrarea documentelor juridice include tehnologia "word processing", adică tehnologia prelucrării textului juridic. În cadrul acestuia, există două tehnici pentru prelucrarea textului: a) "key-word method" (metodal cuvintelor-cheie, adică descriptori) şi b) "full-text method" (metoda textului plin).

Metoda "key-word". Prin metoda "cuvintelor-cheie", se subînţelege că înaintea unui text se pun cuvinte care determină subiectul de bază al textului. Un grup aparte sistematizat al acestor "cuvinte-cheie" alcătuiesc o categorie particulară a "registrului" care se numeşte "tezaur". Tezaurul se formează pentru anumite domenii ale dreptului (de exemplu, pentru codul penal, administrativ, matrimonial etc.) şi acestea se organizează după "ierarhii" şi "relaţii". Important este ca la această tehnică comunicaţia dintre calculator şi cel care-l foloseşte să se efectueze numai cu ajutorul cuvintelor cheie. Computerul nu caută textul în memoria sa în mod direct, ci în mod indirect descriptorul îi procură informaţiile, prin care acesta "identifică" adresa în care se află documentul. Cantitatea textului ce trebuie memorat este rezumat (abstractul) sau integral (*full text*).

Caracterul multidisciplinar al informaticii. Informatica s-a format ca ştiinţă de sine stătătoare, fiind contingentă logicii formale, matematicii, teoriei informaticii şi semioticii, semanticii şi electronicii. Din aceste motive, despre informatică se poate spune că are un caracter multidisciplinar şi interdisciplinar. Astăzi se consideră că informatica nu este posibil să fie considerată o disciplină a cunoaşterii fără a avea la bază o teorie corespunzătoare, legată de teoria sistemului, a informaţiilor şi a comunicaţiilor, adică de cibernetică. Informatica dezvoltă metodologia sa, bazându-se pe rezultatele şi cunoştinţele diferitelor discipline ale ştiinţei şi metodelor contemporane. Ca un cadru general al teoriei şi metodei informaticii, rezultă teoria cunoaşterii, deci a ciberneticii. De aceea, pentru informatică, teoria cunoaşterii este importantă nu doar ca un izvor tehnologic pentru codarea şi decodarea informaţiilor, stabilirea şi structurarea procesului comunicativ, prin receptarea logicii matematice care este folosită în structurarea "limbii" pentru transmiterea informaţiei, ca şi pentru formalizarea procesului logic al transmiterii.

Esenţa teoretică a informaţiilor determină principiile şi componentele disciplinei:

1. cunoaşterea şi organizarea informaţiei;
2. teoria sistemului;
3. teoria probabilităţilor şi statistică matematică;
4. teoria deciziei;
5. teoria comunicării;
6. structurarea şi organizarea informaţiilor;
7. fizionomia bazei de date;
8. organizarea bazei de date documentare;
9. teoria clasificării;
10. semiotica.

Legalizarea statutului informaticii ca ştiinţă nu face decât să accentueze şi să confirme faptul că informatica a apărut şi s-a dezvoltat paralel, dar şi împreună cu alte discipline care studiază aspectele problematicii comunicaţionale, iar dreptul este prin excelenţă o ştiinţă comunicaţională; chiar mai mult decât atât, dreptul are un orgoliu pe care nu-l are nici o altă ştiinţă şi anume de a impune reguli obligatorii pentru alte ştiinţe şi domenii.

8. Concluzii

-Din perspectiva logicii şi a ciberneticii juridice, dreptul devine o ştiinţă tehnică, urmând ca juristul să fie un inginer al dreptului care să utilizeze nu numai tehnica specifică informaticii juridice ci şi arsenalul metodologic al acesteia;

-Rescrierea dreptului din unghiul de vedere al teoriei generale a sistemelor reprezintă o alternativă pe cât de utopică pe atât de tentantă, deoarece sistemul de drept devine un organism cu un grad de integralitate ce-i conferă coerenţă şi autoreglare;

-Tribunalul electronic este o alternativă a viitorului care nu va înlocui judecătorul uman ci îl va sprijini preluându-i toată munca de rutină şi punându-i la dispoziţie un model al sentinţei de la care judecătorul va porni în munca sa.

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RANGE LIMITS OF THE COMPETITION WILL TRADE

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Abstract

Basis and nature of the role will are still debated.

Free trade has suffered along with the development of economic activities. Commercial activity is characterized by dynamism and complexity. Practice often led to the creation of new legal structures that satisfy its requirements.

In commercial autonomy will have the full manifestation land unnamed contracts which may subsequently become due to coding called.

Although the theory of personal autonomy could impose an absolute contractual liberality this has not happened and that he brought limitations at all times.

Key words: *autonomy of the will, the principle of free competition*

Introduction:

Principles of the EC Treaty provides that Member States of the European Community will adopt an economic policy based on "close coordination of Member States' economic policies domestically and on the definition of common objectives, and conducted in accordance with the principle of an open market economy in which competition is free "[389].

Consequently, the policy of free economic competition protection, as guarantor formation, maintenance and development of an open market economy is one of the foundations of the European community.

The first part of the paper emphasizes the paradox of freedom anywhere standardized under the name and doctrine of the Carnatic bestowed and therefore no evidence, but is regarded as self-evident, because indirectly devoted to civil codes with a stretch material which supports the entire contract .

A freedom assuming, as implied by the provisions codificatiilor, multiple powers: the ability to contract or not a contractor to do with their choice, to negotiate and establish the free content of the contract, and to execute exactly as established.

Powers whose classic philosophical foundation of individual freedom of action as a matter of sovereign creator of law, as was imagined political liberalism theory, the individual participant free economic exchanges contractual nature, as was imagined by economic liberalism, and whose right to be bound by the legal relations of this type is given by the power état, but its quality remains inherent in human beings, the state is forced to recognize and guarantee it.

The work includes:

Public policy of freedom of contract and the relative contractual.

Freedom of contract is a relative freedom which, according to legal regulations, sees limited exercise mainly for reasons related to the protection of public order and morality.

Can speak as a public policy that imposes contractual limitations regarding the possibility of termination of certain contracts and by some people, with the aim of ensuring protection of social values (public order protection).

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[389] ART 4 of the European Community Treaty – Consolidated version

To themselves as "public order and contract lead a parallel existence, both find their reason to be in the autonomy of the will, a limiting one, the other pulling and source of it. But even when the contract will be detached from autonomy, continue to control public order contract"[390].

Public policy defense seeks essential institutions of society against violations that may be brought by contractors, translating to the prohibitions imposed by the mandatory rules[391].

Thus we have to do as what was called public order protection consists of all the imperative rules adopted by the legislature to protect a significant part in a situation of weakness in a contractual relationship[392].

It is about ensuring the protection of contractors "are in a position of inferiority exercise their will so can not guarantee contractual justice"[393]", in this sense," to correct this imbalance, the law requires or prohibits certain provisions on that the strongest might contractor without authorization law, to deny or to impose, where appropriate "[394].

Basically, public order protection objective aims to restore balance "strong-weak", this, in relation to contractual freedom, translating to the imperative for the legislature to regulate the content of certain contracts such as insurance contract that meets a constant worry protection of the insured or beneficiary insurance because of lower state of this part in relation to the insurer, the lease contract scenarios of the "weakness" of the tenant vis-a-vis the economic power of the lessor, the contract of employment, which imperative to protect one of the parties, employee-employer, relative to other-he is almost inherent, contract consumption, to prevent and limit the consequences of abuse of power by professionals towards mere consumer.

Morals, public order and freedom of contract

In terms of the legal consequences of this concept that limits contractual freedom, the notion of "morals" seems to encompass two types of rules: the social mores regarding proper (natural skills resulting from constant practice by persons and collectivities, relative to what is good or bad), and the social aspects of public morality (all moral precepts accepted by a certain type society as essential rules of coexistence and social behavior). Need finding a single generic concepts to designate both types of rules that come to life the concept of "morals" determined to use the legal doctrine called "rules of social coexistence" or "social rules[395] of conduct concerning public order"[396].

This should be specified position jurisprudence decided that "if, contrary to the rules of social life, a contractor took advantage of the ignorance or the state constraint was another, to obtain performance benefits disproportionate to that received a, convention, will not be considered valid because it was based on an immoral cause. [397]"

Principle of free competition

A specific application of the principle of autonomy of will in commercial matters is the principle of free competition. Free competition principle as enshrined in Art. 135 of the

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[390] Ph. Malaurie, L'ordre public et le contrat, Ed. Matot-Braine, Paris, 1953, p.19 în Pascal Lokiec, op.cit, p.58
[391] J. Flour, J-L Aubert, Les obligations, Ed. Armand Colin, 6e éd, Paris, 1994, p.203.
[392] J. Mestre, L'ordre public dans les relations économiques, în L'ordre public á la fin du XX éme siécle, dir. T. Revet, 1996, p.34
[393] S. Legac-Pech, La proportionnalité en droit privé des contracts, Ed. L.G.D.J, Paris, 2000, p.30.
[394] J. Flour, J-L Aubert, Les obligations, Ed. Armand Colin, 9e éd, Paris, 2000, p.119
[395] A. Ionaşcu, Drept civil.Partea generală, Ed. Didactică şi Pedagogică, Bucureşti, 1963, p.208-210; C. Stătescu, C. Bârsan, Tratat de drept civil.Teoria generală a obligaţiilor, Ed. Academiei, Bucureşti, 1981, p.34.
[396] Ioan Albu, op.cit., p.35
[397] Tribunalul Suprem, secţia civilă, dec. nr.73/1969

Constitution, lies in the ability of each company to choose and use the funds as it deems best for maintaining and enhancing customer.

We can say that this principle is freedom conferred economic agents to use freely the means and methods of winning and keeping customers[398], such as promotional, advertising, quality, reputation, and price.

Some authors define this attitude to economic agents have used the notion of competitive behavior[399].

Competition is the underlying mechanism of the market economy, involving supply (producers, traders) and demand (intermediate customers, consumers). Manufacturers offer goods or services on the market, in an effort to meet the requirements, to meet a buyer's demands as much as possible, both in terms of quality, diversity, adaptability, and price products that they require. to

become effective competition on the premise (and protect assumption) that the market consists of more independent bidders.

All participants in the market is subject to each of them a competitive pressure. To make the bidders able to exert such pressure on the market, competition regulations require prohibiting any agreements or practices that could effectively reduce this pressure, finally quantified by ensuring consumer interests at both national and European level.

The principles discussed are related to the existence of one without the other is indissoluble, both are based on 'liberty'. They should not be seen clearly, is often limited in scope, or even eliminated. Some limitations to the principle of free competition are[400]:

1. regulating access to certain economic activities

2. maintain the economic equilibrium conditions of enterprises, there are regulations that directly affect economic and external trade balance, credit, etc..

3. legislature by introducing discriminatory conditions in favor of certain undertakings such as tax benefits, rescheduling the payment of taxes etc.

4. dirigisme and economic protectionism, disguised in accordance with the principle of free competition, such as standardization and commercial urbanism[401];

5. conventions of restriction of competition.

In recent years emphasis was placed increasingly greater competition policy because the normal functioning of markets depends largely on the competition and fighting crime in this area has become a common concern and has experienced an upward regulation [402]".

Firms daily sign agreements: these agreements are illegal?

There are certain types[403] of agreements particularly harmful to competition and as a result, they are almost always prohibited.

As cartels and some secret understanding whereby competitors agree to set prices, limit production or to divide markets or customers between them. Agreements[404] (manifestations of will) between a manufacturer and its distributors can also be prohibited, especially if they are established by the sale price.

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[398] R. Houin, M. Pedamon, Droit commercial. Acte de commerce et commerciants. Activite commerciale et concurrence, Dalloz, Paris, 1980, p. 379

[399] C. Barsan, A. Ticlea, V. Dobrinoiu, M. Toma, Societatile comerciale, Casa de Editura si Presa ,,Sansa" SRL, Bucuresti, 1993, p. 198

[400] M. de Juglart, B. Ippolito, Traite de droit commercial, Ed. Montchrestien, Paris, 1988, p. 668

[401] I. Dogaru, Drept civil roman. Idei producatoare de efecte juridice, Ed. All Beck, Bucuresti, 2002, p. 836

[402] O. Pop, Infractiunea de concurenta neoiala, Ed. Mirton, Timisoara , 2002 p. 14

[403] Moşteanu, Tatiana- ,,Concurenţa. Abordări teoretice şi practice'', Editura Economică, Bucureşti, 2000, pag,293;

[404] A. Fuerea, Drept comunitar al afacerilor, Editia a II a, Ed. Universul Juridic, Bucuresti 2006

Not all agreements that restrict competition are illegal. Allowed those agreements which have more positive effects than negative. It is true that agreements may restrict competition between rival companies, but they can be, on the other hand needed to improve products or services, to create new products or find new ways, better to make these products available to consumers .

Other types of agreements that may restrict competition are those between suppliers and retailers. For example, distribution agreements for luxury perfumes retail stores impose certain restrictions on decorations or staff training.

Labor market

At the moment the competition is allowed only about the distribution of labor.

As we have seen, the competition comes and steals from areas such as labor protection, social security, minimum wage, etc. The duration of leave.

Merchant-servant relationship

Servant is person, employer or for Trade or the place where they exercise, or in another place. "Commercial servant is forbidden any act of competition with the employer or. Is prohibited both direct competition committed by himself and by the indirect participation in such acts by third parties.

Persons employed under a labor contract can not commit acts of competition against the employer, as stated in Article 4, paragraph 1 of Law no. 11/1991 which prohibits, offering exclusive services of an employee to a competitor or merchant acceptance of such an offer. "

Commercial areas Convention stolen Competition

There are some situations in which the parties themselves limit the autonomy of the will, by convention consenting to refrain from doing acts competition partner. This is materialized by inserting clauses to force the partner to quit the competition, at least for a while. These clauses are allowed only to the extent not contrary to the principle of freedom of trade.

In practice meet clause prohibiting competition[405] in the following situations:

- In the field of labor relations,
- Rent a commercial space
- Exclusive concession for the distribution of goods.

Is accepted as consistent with the principle of free competition clause whereby the lessor undertakes not to rent a space then near the same destination. Freedom of the will of the lessor is so limited even with his consent.

If exclusive concession for distribution of goods, both the supplier and distributor (if desired) undertake the first in the area to not deliver the product to other firms, and the second to not only supply the provider. And this is an example of the autonomy of the will of the parties is limited by treaty.

A non-competition clause to be valid must meet the following conditions:

- The existence of a legitimate interest of her beneficiary
- Clause should not seriously damage the freedom of the will of the party who assumes.

Non-competition clauses goal is to maintain a fair competition without abuses. The beneficiary this clause has the right to survive in the market. If there is no clause clientele disappears. We believe that there is a legitimate interest of the beneficiary them: winning and keeping customers, survival.

Criteria by which to make the gravity with which the party will be restricted undertakes are temporal and territorial order. The clause requires that the application have limited time, the perpetual being illegal.

[405] O. Capatana, Dreptul concurentei comerciale, Ed. Lumina Lex, Bucuresti, 1992

In France, the validity of such clauses was limited to 10 years. Also consider that duty should concern a limited territory.

Interpretation competition clauses is given real intention of the parties. Through extensive reading, it was decided that the contract of sale clause be implied existence of competition.

In conclusion, the parties have the opportunity to narrow a field of commercial activity. Failure to attract assumed contractual responsibility, unlike the facts of unfair competition[406] sanctioned by law, drawing or tort liability or on the criminal.

Conclusions

I tried in the above work, to increase the need of maintaining the principle of autonomy of will and the freedom of contract in discussion as constantly research topics for lawyers, hoping all personal and fanciful, a more consistent reception of contractual freedom in the legal culture of the Romanian law system, but also in the French legal system, the distances between those current systems in the field of contractual freedom, proved impossible to remove its convergence in the same area as were imposed in a traditional area of legal freedom which have shape and strengthened civil codes and modern constitutions.

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14. O. Pop, Infractiunea de concurenta neoiala, Ed. Mirton, Timisoara , 2002;
15. Tribunalul Suprem, secţia civilă, dec. nr.73/1969.

[406] Y. Eminescu, Concurenta neleala, Ed. Lumina Lex, Bucuresti, 1995

THE DISCIPLINARY RESPONSIBILITY APPROPRIATE TO THE PRE UNIVERSITARIAN TEACHING SYSTEM[407]

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Abstract

The regulations contained in Law no.1/2011[408], complete the common regulations that can be found the Labor Code. This way, the teachers in preuniversity education are going to be penalized disciplinarily for violating their duties according with the labor contract and for violating the behavior rules, as mentioned by the law.

The special law regulations do not refer to any other aspects connected with the disciplinary irregularity concept, in this way being analyzed according with the general directives of the Labor Code[409].

Analyzing the regulations from Law 1/2011, I observed some deficiencies of regulations concerning the disciplinary responsibility of theachers in preuniversity education.

1. THE DISCIPLINARY IRREGULARITY AND THE APPLICABLE SANCTIONS

As the only reason for the disciplinary response, the disciplinary irregularity for the teaching personnel and the auxiliary teaching personnel represent the action done by violating the duties of these people according with the labor contract and the violation of the behavior rules, as mentioned by the law.

According to the art. 280 alin.1 directives, from the 1/2011 Law, the guilty violation of the mentioned rules, causes damage to the teaching' interest and the authority of the institution. From the analysis of the Education Law in art. 280 alin.1 directives, it is not mentioned which are the actions that represent a disciplinary irregularity, this way dealing with the same situation as in the case of the common right concerning it – the Labor Code regulations.

The special law measures do not refer to any other aspects connected with the disciplinary irregularity concept, in this way being analyzed according with the general directives of the Labor Code and with the labor right theory.

Though, there is a difference concerning the origins' specifications that give birth to the duties of the teachers from the preuniversity system.

In this way, while the present regulation of the Labor Code does not anticipate precisely "the behavior rules" as a source of obligations for the employees, this being done by the theory, the Education law does not sets as sources only the Labor contract and the behavior regulations. This aspect does not assume that the other mentioned sources by the Labor code, create obligations for the educational personnel and that their violation does not impose the disciplinary responsibility.

In what matters the elements that constitute the disciplinary violation done by the teachers from the preuniversity system, are the same as the common disciplinary violation, still having some characteristics.

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[407] National education law 1/2011 published in O.M no. 18/2011, modified by Law 166/2011 published in O.M. no. 709/2011 and by OUG no. 21/2012 published in O.M. no. 372/2012, Title IV „Statutul personalului didactic", Chapter I „Statutul personalului didactic din învăţământul preuniversitar", Section 11 „Răspunderea disciplinară şi patrimonială".

[408] For more details regarding the regulations of Law 1/2011 see also Andreea Tabacu, Andreea Drăghici, Daniela Iancu „Legea 1/2011-implicaţii asupra învăţământului superior", in the volume of International Conference The European Union-Establishment and reforms, University of Piteşti, 2011, p.560-564

[409] The Labour Code of Romania is in accordance with European Union law sistem. For more details see Elise Nicoleta Vâlcu, Drept comunitar instituţional, IIIth Edition, rewied and completed Ed. Sitech, Craiova, 2012, pp. 13 and next

The object is represented here by the social work related relations, the order and the discipline at the working place, as by the behavior regulations.

The objective part is represented by the single or continuous action, meaning the action or the inaction of the teacher that contradicts the duties that come from the righteous sources and that cause damages to the teaching system' interest and to the authority of the respective institution.

The subject of the disciplinary violation is represented by the teacher.

The subjective part is represented by the employee's guilty for the : direct intention, indirect intention, the easily or the recklessness guilt.

In what matters the disciplinary irresponsibility' reasons of the preuniversity system' teachers, these are taken from the penology.

The penalties that apply, when it is about disciplinary violations of the teachers from the preuniversity system, are mentioned in the art. 280 alin.2 from the Education Law, nr.1/2011, taking into account the action's gravity:

a) written insight ;
b) warning;
c) the diminishment of the base pay, cumulated, when it is the case, with the leading allowance , of guidance and control, to 15%, for 1 – 6 months;
d) the suspension, for a period of up to 3 years, of the right to participate to a competition in order to occupy a superior position in the superior Education system, or to to obtain an Education degree or a leading position, of guidance and of control;
e) the removal from the leading position, the guidance position and the control position in the Education system;
f) the disciplinary removal of the Labor contract.

Considering the art. 248 alin 2 directives[410], when it is the case of the violation of the disciplinary irregularity acknowledgement by the teacher from the preuniversitary system, the above mentioned sanctions will be applied, set by the 1/2011 Law and not the common right penalties, set by the art. 248 alin.1, from the Labor code.

By waiver from the common right, the penalty of diminishing the base pay is more spirited than the one established by the Labor code. This way, the base pay diminishment will be done up to 15% , for 1 – 6 months' period, as opposed to the art.248 regulation from the Labor code, which provides a base pay cut for 1 to 3 months , by 5 % up to 10 %.

Such a serious sanction that we can not find in the applicable common right is also the suspension, for a period up to 3 years, of the right to join a competition in order to occupy a superior teaching position or in order to obtain the professional education degree, or of a leading, guidance and control position.

For extremely serious actions, the penalty remains the same as in the case of the applicable common right, the conclusion of the individual labor contract.

2. THE INSTITUTIONS THAT CAN PERFORM THE DISCIPLINARY INVESTIGATION

In accordance with the legal regulations[411] in the case of the disciplinary violations done by the preuniversitary teaching personnel, the disciplinary board is formed differently for the teaching staff, for the leadership, for the guidance and control personnel belonging to the Education, Research, Youth and Sport Ministry, as for leadership personnel of the county inspectorate of education or that of the city of Bucharest.

The aspects that are interesting in this work are connected with the creation of the disciplinary board for the teaching staff.

[410] If by professional statutes approved by a special law, it sets a new punitive regime this one will be applied.
[411] art. 280 alin.4 and 5 by Education Law no. 1/2011

The mentioned legal measures stipulate that, for the teaching staff, the boards are formed of 3 – 5 members, of whom one represents the syndicate organization of the debated person or by an employees' representative, and the others having at least the same teaching position with the person that has done the irregularity.

In what matters the representation of the teacher in front of the disciplinary board, the law does not make such an explanation, unlike the missing stipulations of the Labor code which mention in art.251 alin.4 the possibility of representing the employee by a syndicate member, the same syndicate as the employee.

Though, a representative of the syndicate to which belongs the investigated teacher or an employees' representative, is a member of the investigation board, a layout that leads to the conclusion that the legislator wanted for a guarantee of the teacher's rights in the case of the disciplinary investigation.

The disciplinary boards are designated by the Council board of the preuniversity teaching unit[412].

3. THE DISCIPLINARY INVESTIGATION PROCEDURE

The referral regarding the possible doing of a disciplinary violation can be made by any person that is aware of this situation. The referral is made in writing and is registered at the institution's registry or at the teaching unit.

Before the beginning itself of the disciplinary investigation is mandatory the notification of the teacher about the day and time of the investigation. A special importance is given to the time of the beginning of the investigation itself taking into consideration that the notification will be done minimum 48 hours before. For that matter the Education law no.1/2011 is précised, in comparison with the Labor code that does not establish a certain date when the notification will be done, before the beginning of the disciplinary investigation. The notification will be done in writing.

The disciplinary board will investigate the actions committed, their consequences, the circumstances in which they have been committed, the guilt's existence or not, as any other clinching data.

The right of defending the investigated teacher is guaranteed, the hearing and his defending check being mandatory. Also he has the right to know all the investigation actions and to produce defending evidence. These measures are the consequence of the constitutional settlement, as of the Universal declaration of the human rights to defense.

As a consequence, we consider that, if the investigated person is not heard or his defense is not checked, without the existence of any refuse in this matter from him, the investigation procedure and, eventually, the disposed penalty will have an opposition from the total nullity.

If the investigated person is not present at the hearing, although he has been noticed according to the mentioned rules, or if he refuses to offer written statements, this aspect will be mentioned in the summon. This refusal will not detain the act of investigating and the penalty application, if it is the case.

For the entire disciplinary investigation procedure, as for the decision's report, the law provides a 30 days time limit at most. The 30 days' prescription time limit starts with the acknowledgement of the nuisance, recorded in the inspections' book or at the unity's register or at the preuniversity teaching institution.

It is observed that the nuisance date does not determine a prescription time limit for the investigation and the intimation of the decision, as it is the case of the Labor code settlements, which anticipate that the 30 days time limit from the acknowledgment starts with a 6 months term from the nuisance date. The disciplinary investigation result will be noted in a summon.

[412] art. 280 alin. 5 by Education Law no. 1/2011

4 . THE PENALTY PROPOSAL AND THE SANCTIONS' SETTLEMENT

The penalty proposal will be made by the preuniversity teaching institution principal or at least 2/3 of the total number of the Council board members. The sanction's settlement, if it is the case, will be done according to the investigation board report, by the authority that assigned the board, more precisely by the Council board of the unity or of the preuniversity teaching institution.

The penalty will be communicated to the investigated person by a written decision of the preuniversity teaching institution. The approved penalty' application, according to the legal measures, will also be done by the preuniversity teaching institution's principal.

If, as a consequence of the investigation it results that the respective person is not guilty, he or she will be noticed in written by the lack of the facts for which he or she has been investigated.

5. THE IMPUNITY OF THE DISCIPLINARY SANCTION' DECISION

The penalty decision can be challenged in a 15 days' term of the communication date. It is noticed that in the case of the teaching person sanctioned, the challenge time limit is smaller than the common right prevails, as that of 30 days from the communication[413].

Also, in contrast with the Labor code which prevails the competence of solving the appealing against the sanction decisions of the law courts, the 1/2011 Law prevails a competence of the Disciplinary College, attached to the Inspectorate of Education. This competence is not exclusive, the right of the sanctioned person to address to the law courts, being prevailed in alin.10 of the art.280 from the 1/2011 Law.

CONCLUSION

As a result of this study we observed that in many cases the regulation regarding the disciplinary responsibility appropriate to the pre universitarian teaching system are the same as the one included in the Labour Code.

There are also some differences between the two laws. For example, by waiver from the common right, the penalty of diminishing the base pay is more spirited than the one established by the Labor code. This way, the base pay diminishment will be done up to 15% , for 1 – 6 months' period, as opposed to the art.248 regulation from the Labor code, which provides a base pay cut for 1 to 3 months , by 5 % up to 10 %.

Concerning the disciplinary investigation procedure, there are the same steps to make as in the situation regulated by the Labour Code, but the special regulations included in Law 1/2011 are precised, in comparison with the Labor code.

However, there are some aspects that are not cleary regulated by the analized special law.

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[413] art. 252 alin.5 by Labour Code.

REFLECTIONS ON THE PRIOR EVALUATION OF EMPLOYEES IN PROFESSIONAL UNSUITABILITY FROM THE PERSPECTIVE OF THE AMENDMENTS TO THE LABOUR LEGISLATION BROUGHT BY LAW 40/2011 AND LAW 62/2011

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Abstract

2011 was a very significant year for the Romanian labour legislation. The new legislative provisions give a new legal perspective to the institutions of labour law, also taking into consideration the current European and global economic and political environment. To this effect, both individual, and collective labour relations have undergone significant changes. The current study covers the relevant aspects related to the professional evaluation of employees in professional unsuitability in the light of the new legislative changes.

INTRODUCTION

Law 40/2011 amending and supplementing the Labour Code and Law 62/2011 on Social Dialogue have brought significant amendments for the Romanian labour law.

Many institutions of labour law have been reconfigured and acquired a new legal regime aiming at accommodating the current challenges generated by the major economic, political and legal changes.

The Labour Code (Law 53/2003) was essentially amended by Law 40/2011 and has become a Code predominantly focused on the Individual Labour Contract, the collective labour relations being undertaken by the Social Dialogue Law (Law 62/2011).

As a fundamental institution of labour law, the Individual Labour Contract was not spared by the 2011 legislative changes. Amongst the important changes identified from the perspective of the two laws, i.e., Law 40/2011 and Law 62/2011, the matters relating to the prior evaluation of employees in professional unsuitability are to be hereby analysed.

DISMISSAL FOR EMPLOYEES PROFESSIONAL UNSUITABILITY

After the 2011 changes, the Labour Code has continued to maintain the individual and collective perspective for employee dismissal.

The reasons for individual dismissal can be divided into employee-related reasons and non-employee-related reasons[414].

The dismissal for professional unsuitability is a ground for dismissal not based on the employee's fault.

Art. 61 (d) of the Labour Code provides the employer's right to dismiss the employees also 'when he/she is not professionally suited for the workplace where he/she is employed'.

In the legal doctrine, the employee's professional unsuitability was defined as 'the objective or subjective circumstance leading to or being able to lead to professional performances below the ones the employer is reasonable entitled to expect from an employee'[415].

The doctrine also considers the employee's professional unsuitability may occur, in principle, in one of the following cases: the employee no longer has the physical or

[414] See Art. 58-67 of Law 53/2003 (Labour Code), as republished, on the grounds of Art. V of Law 40/2011 amending and supplementing Law 53/2003 (Labour Code) as published in the Official Journal, Par I, no. 225 of the 31st of March 2011.

[415] Raluca Dimitriu, Concedierea salariaţilor, drept românesc şi comparat (*Employee Dismissal. Romanian Comparative Law*), Omnia UNI SA ST Publishing House, Braşov, 1999, p. 192.

intellectual ability he/she had upon the Individual Labour Contract signing; a law came into force providing higher education requirements the employee did not meet upon the employment date; a normative act came into force providing a certain length of service for the position held by the employee and such length of service was not required upon employment date; the condition of the approval/authorisation/certification is provided for the employees holding a specific position, which he/she does not meet; the condition of an examination or test passing by the employee as a precondition for continuing to hold the position is regulated.[416]

Therefore, it can be seen that, for dismissals for professional unsuitability, it is not a matter of employee guilt as in the case of disciplinary dismissal, but of occurrence of objective circumstances invalidating the employee's suitability for the position he/she holds[417].

When he/she was employed, the employee was professionally suited for the position held and subsequently, during the Individual Labour Contract execution, one of the above-mentioned causes occurs.

Moreover, it is worth noticing that there is not any legal obligation for the employee to improve his/her professional training, this obligation being applicable for public servants and therefore allowing the determination of the unsuitability in terms of training for the new position requirements as not being the employee's fault.

Professional improvements is however provided as a right of the employees, as confirmed by Art. 39 (1) (g) of the Labour Code[418].

Professional unsuitability as a ground for Individual Labour Contract termination is not a state of things at the employer's exclusive option. For a definite determination of the employee's professional unsuitability, a prior evaluation must be performed, which to clearly show the employee not being able to hold his/her position anymore.

Article 63 (2) of Labour Code provides the evaluation procedure being governed by the applicable Collective Labour Contract or, in the absence thereof, by the Internal Rules.

However, this text must be corroborated with the provisions of Art. 242 (i), setting-out the Internal Rules also including provisions on the criteria and procedures for employee professional evaluation.

On this background it can be argued that the main specific law stream for employee professional evaluation continues to be the Internal Rules and the applicable Collective Labour Contract for the supplementation thereof[419].

A development brought by Law 40/2011 on this matter was also the provision of individual performance objectives for employees[420].

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[416] Ion Traian Ştefănescu, Tratat teoretic şi practic de Drept al muncii (*Theoretical and Practical Treaty of Labour Law*), Universul Juridic Publishing House, Bucharest, 2012, pp. 414-415.

[417] Constitutional Court Decision no. 1201/2010, as published in the Official Journal no. 727 of 1.11.2010 ordering that 'professional unsuitability is not identified with the disciplinary offence, but it occurs either as a result of the entering into force of normative acts providing conditions additional to the ones initially requested when the employee was hired or of the lack of professional improvement, when the law does not provide such improvement requirement, or event as a result of the labour capacity reduction occurred during labour contract execution.'

[418] See Ion Traian Ştefănescu, op. cit., p. 414.

[419] Also see Alexandru Ţiclea, Tratat de Dreptul Muncii (*Labour Law Treaty*), Universul Juridic Publishing House, Bucharest, 2011, p. 727.

[420] For an analysis of the legal regime of individual performance objectives of employees, see Şerban Beligrădeanu in "Principalele aspecte teoretice şi practice rezultate din cuprinsul Legii nr. 40/2011, pentru modificarea şi completarea Legii nr. 53/2003 (Codul Muncii)" (*Main Theoretical and Practical Matters of Law 40/2011 amending and supplementing Law 53/2003 [Labour Code]*), in Revista Română de Drept al Muncii (*Romanian Labour Law Magazine*), no. 3/2011, pp. 32-35.

They are unilaterally established by the employer and may play an important part in the employee professional evaluation.

The main change consists in the employee not being bound only by the Job Description tasks, but also having to meet the individual performance objectives established by the employer.

Moreover, an essential part in the professional evaluation is also played by the new provisions of Law 62/2011 analysed below[421].

PRIOR EVALUATION OF EMPLOYEES FROM THE PERSPECTIVE OF THE NEW LEGAL PROVISIONS

Among the new controversial legislative provisions of the 2011 labour legislation, the repeal of the provisions on the Sole Collective Labour Contract at national level can be mentioned.

Art. 128 (1) of Law 62/2011 (on social dialogue) details the floors on which collective labour contracts may be bargained, excluding the one at the national level. Therefore, the 'collective labour contracts may be bargained at unit, unit group and activity field levels'.

As a result, these provisions were challenged before the Constitutional Court as being in contradiction with the provisions of the Constitution directly regulating the right to collective bargaining without differentiating the level on which such bargaining is conducted.

Article 41 (5) of the Constitution of Romania provides as follows: 'The right to collective labour bargaining and the binding force of collective agreements shall be guaranteed'.

The Constitutional Court dismissed these pleas of unconstitutionality, stating the legislative provisions that do not allow the conclusion of the Sole Collective Labour Contract at national level are constitutional and were not in contradiction with the Constitution provisions on this matter.

Considering that the Constitutional Court decisions are binding and have general applicability (*erga omnes*), it can be asserted that the legislative provisions that do not regulate the Sole Collective Labour Contract at national level are legal and constitutional[422].

The fact that the provisions of the Sole Collective Labour Contract at national level for 2007-2011 were not maintained and another Sole Collective Labour Contract at national level was no longer concluded has led to the loss of important regulations in the labour relation field.

Fundamental institutions of labour law, such as the disciplinary liability, prior employee evaluations, wage protection for bankruptcy or winding, were no longer legally regulated because the collective labour contract, taking advantage from a legislative void, provided fair legal solutions which included added value in terms of employee rights.

To this effect, with a view to highlighting the relevance of the provisions on the prior employee evaluation as included on the Sole Collective Labour Contract at national level concluded for 2007-2010, we hereunder focus on analysing Article 77 of the above-mentioned Contract[423].

This Article regulates *in extenso* the procedure for employee prior investigation in professional unsuitability.

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[421] See Law 62/2011 (Social Dialogue Law) as published in the Official Journal, Part I, no. 322 of the 10th of May 2011.

[422] Also see Constitutional Court Decision no. 574 of the 4th of May 2011 on the plea of unconstitutionality included in the provisions of the Social Dialogue Law as a whole and mainly of Art. 3 (1) and (2), Art. 4, Art. 41 (1), Title IV on the National Tripartite Council for Social Dialogue, Title V on the Economic and Social Council, Art. 138 (3), Art. 183 (1) and (2), Art. 186 (1), Art. 202, Art. 205, Art. 209 and Art. 224 (a) of the law, as published in the Official Journal no. 368/ 26th of May 2011.

[423] Also see Sole Collective Labour Contract at national level for 2007-2010, as published in the Official Journal Part V, no. 5 of 29/01/2007.

The Sole Collective Labour Contract at national level provided in the above-mentioned Article that the employer had the obligation to appoint a commission, which also included a member of the Trade Union, and which was responsible for performing the prior investigation.

The commission had the obligation to summon the concerned employee and to send to him/her information on the date, exact time and venue for commission meeting as well as the manner of examination, at least 15 days before the date set for investigation.

The commission investigation had the exclusive purpose to analyse the employee's tasks as provided on the Job Description.

When new technologies were used, the employee's assessment concerning such technologies could be performed only if the employee had participated to training courses concerning the use thereof.

The professional unsuitability could be substantiated by the commission through proof of inappropriate performance of professional tasks, by way of written, verbal or practical investigation and by way of other evidence[424].

When the employee lost his/her professional skills because of medical conditions, the employer had the obligation to provide another position, subject to the available ones. When the employer did not have any vacancies, they had the obligation to contact the local competent public authority in the labour field for settlement purposes.

Article 77 provided the employee having the right, when declared by the commission to be unsuitable, to challenge this result within ten days of communication.

When the employee did not challenge the commission decision within the legal timeframe or when the decision continued to be applicable after challenging, the employer had the right to terminate the employee's Individual Labour Contract for professional unsuitability.

The decision issued to this effect included the outcome of the prior investigation of the concerned employee.

It can be noticed that, in Article 77, the term 'prior investigation' is used, not 'prior evaluation', as used on the Labour Code.

On Law 53/2003 the legislator had initially used the term 'prior investigation' and subsequently, when the Emergency Ordinance 65/2005 came into force amending and supplementing Law 53/2003 (Labour Law) and Law 371/2005 approving this Ordinance, the term 'prior evaluation' was provided and was to be used on the collective labour contracts[425].

Nevertheless, the contracting parties to the Sole Collective Labour Contract at national level concluded for 2007-2011 have continued to be loyal to the term 'prior investigation' in terms of employee professional unsuitability.

Since a new Sole Collective Labour Contract at national level was no longer concluded, these provisions were repealed and became inapplicable.

When, at the level of an institution or of a branch of activity, collective labour contracts are not concluded, the procedure of employee prior evaluation is to be established exclusively by Internal Rules.

This solution, obtained from the perspective of the new legal provisions of the labour law appears to be unfair, because it is common knowledge that the Internal Rules are the exclusive production of the employer.

It is true the employees are consulted when the Internal Rules are adopted, but it is the employer that has the fundamental role in this matter, having the right to adopt them without taking the employees' requests into account.

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[424] See Art. 77 (6) of the above-mentioned Sole Collective Labour Contract at national level

[425] See Art. II of GEO 65/2005, amending and supplementing Law 53/2003 (Labour Law), as published in the Official Journal no. 576 of the 5th of July 2005.

On this background, the employer's will becomes sovereign in regard to the procedure for employee evaluation in professional unsuitability and is able to include in the Internal Rules provisions advantageous to them over the employee.

POSSIBILE SOLUTIONS FOR RE-ESTABLISHING THE RIGHTS BETWEEN THE EMPLOYEE AND THE EMPLOYER IN TERMS OF PRIOR EVALUATION

Considering the above-mentioned, a legitimate question would be: 'How could a reasonable legal regime for the parties to the labour legal relation be obtained?' Could the former provisions of the Sole Collective Labour Contract at national level still be applicable in another context? Could there be other legal solutions for re-establishing the balance between employees and employers in the matter of employee prior evaluation? [426]

A). First of all, we would like to refer to the utility of the provisions of the Sole Collective Labour Contract at national level concluded for 2007-2011. As stated before, we consider the provisions of Art. 77 of the Sole Collective Labour Contract at national level to have regulated a balanced legal regime for both parties - both for the employer, and for the employee.

In this framework, the reactivation of these provisions, which are currently repealed, could be taken into consideration.

A first possibility would be to amend the Labour Code and insert these provisions on the prior evaluation, all the more because the legislator remains silent concerning this matter.

Another solution would be to undertake these provisions on the collective contracts concluded at unit, unit group or activity branch level. To this effect, a decisive factor would be the employer accepting these conditions, because the collective labour contracts involve the agreement of both signing parties. In this framework, the parties are free to also include new provisions, which to supplement the ones on the Sole Collective Labour Contract at national level concluded for 2007-2011 or to provide another perspective in relation to them.

Moreover, the provisions of the former Collective Labour Contract may be included in the Internal Rules of the institutions with a view to establishing a fair legal regime of the procedure for employee prior evaluation, but this also involves the agreement of the employer, given the procedure for Internal Rule adoption.

B). Secondly, we consider the most important thing for re-establishing the balance between the rights and obligations of the employer and of the employees in this matter to be the re-introduction of the Sole Collective Labour Contract at national level in the internal legal framework.

Although the legislator chose in 2011 to eliminate the Sole Collective Labour Contract at national level we are of the view that, by the reintroduction thereof, the balance between the legal regime of the parties to the labour legal relations could be re-established and could be obtained by negotiation and by stating jointly agreed solutions.

This way, solutions for the application of fundamental institutions of labour law could be developed given that they are currently applied in a discretionary manner towards the employees[427].

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[426] Also see Ion Traian Ştefănescu, Repere concrete rezultate din recenta modificare şi completare a Codului Muncii (*Concrete Landmarks Resulting from the Recent Amendment and Supplementation of the Labour Code*), Revista Română de Jurisprudenţă (*Romanian Jurisprudence Magazine*), Universul Juridic Publishing House, Bucharest, 2011, p. 26.

[427] For matters on the impact on the disciplinary liability of the lack of regulation of the Sole Collective Labour Contract at national level after 2011, see Radu Ştefan Pătru, Consideraţiuni privind modificările aduse răspunderii disciplinare prin Legile nr. 40/2011 şi 62/2011 (*Considerations on the Changes Brought to the Disciplinary Liability by Laws 40/2011 and 62/2011*) in Tribuna Juridică (*Legal Tribune Magazine*), no. 2/2011, ASE Publishing House , pp. 156-176.

CONCLUSIONS

Following the latest legislative amendments, the collective labour relations are changed both in terms of content, and of form.

The lack of regulation of the Sole Collective Labour Contract at national level is, perhaps, the most controversial legislative development brought by the Romanian legislator in 2011.

The consequences of the limitation of collective bargaining at national level and, as a result, no conclusion of the sole collective contract, reverberate at the level of important institutions of labour law, such as prior employee evaluation in professional unsuitability as detailed in this study, but also of other important institution of labour law.

Considering this framework, we consider the collective labour relations and the collective bargaining at the level of social partners, respectively, as followed by the conclusion of the Collective Labour Contracts at the levels allowed by law, to be able to substitute the legislative voids and the unfair solutions adopted by the legislator, at least until a new legislative reform of the Romanian labour legislation.

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NEW ASPECTS OF THE PROCEDURE OF GOODS SEPARATIONS IN THE NEW CODE OF CIVIL PROCEDURE

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Abstract

Judicial separation procedure of goods is a procedure provided in the Code of Civil Procedure and is applicable whenever is required to share a common property asset, while the special derogations does not provide for any other procedure.

Division of a universality of goods or property right affected by the ways, in other words "that ownership of one or more goods or competitor that belongs simultaneously to two or more persons, whether there property owner's future depends on a current event or circumstance required by law or determined by the will of man. [428]"

General considerations

Common ownership may be terminated, usually by division (or division). Division can be of two types: a) conventional achieved by agreement of all co-owners or will their good agreement and b) legal or judicial, when copărtaşii not understand or in those cases where the law itself requires such a division . In this respect there are new provisions of art. 670 Civil Code. Therefore, division affects only common property. Ownership means that more people own a thing (or several things determined) or even a universality (a mass of things), each having an abstract ideal share of ownership, but having a specified part of the work materiality looked it.

Need for referral to mediation before the trial court

The Law nr.115/2012[429] which amended the provisions relating to mediation, the parties introduced a requirement to use the services of a mediator prior to referral to court. According to article 58 paragraph 4 as amended, "if the conflict concerns mediated transfer of ownership of real property and other real rights, partitions and inheritance cases, under penalty of nullity, written mediation agreement the mediator will be presented to the notary public or court order for them, based on the mediation agreement, to check their content and form through the procedures provided by law and issue an authentic instrument or a judgment, if appropriate , subject to legal proceedings. Mediation agreements will be checked on the conditions of substance and form, notary public or court, if necessary, being able to bring appropriate amendments agreed by the parties."

It is therefore necessary prior to referral public notary or court of law the parties to attempt to resolve any disagreement through mediation, proving by the report that is issued by the mediator and the mediation session will include conclusions. When closing the mediation, the mediator shall, in all cases, to provide competent court mediation agreement and the minutes of conclusion of mediation in the original electronic format if the parties have

[428] L.Pop, Dreptul de proprietate şi dezmembrămintele sale, Editura „Lumina Lex", Bucureşti, 2001, p. 127

[429] Law amending and supplementing Law no. 192/2006 on mediation and the mediator profession published in the Official Gazette, Part I no. 462 of 09.07.2012 and entered into force on 1 October 2012

reached an agreement and only the minutes from conclusion of mediation for situations in which this agreement was not possible.

We appreciate that this new procedure will not relieve previous courts having in mind that in case of agreement, the parties will never reach a court of law. On the contrary, I think that in this situation by increasing the prior notification procedures of the court, it will create damage to both parties in terms of time lost with this procedure and the financial terms given that the mediator services are paid by parties.

Judicial division of can occur whenever co-owners can not agree on how to share the common property, whether or not they addressed prior notary public. In case of disagreement, the heirs may address the court directly, without the need for prior notary proceedings, which is non-contentious character, without having any hindrance as one of the heirs to ask but its division of property by judicial However, judicial separation is required (so the law does not allow parties to enter into a voluntary separation) in the following situations:

a)among owners are people lacking capacity or with limited legal capacity and guardianship no court authorization for voluntary separation (see also Civil Code art.674.)

b) a spouse asks court division of joint property during marriage, for good reasons;

c) personal creditor of one spouse asks court division of joint property during marriage, in order to see uluerior goods will be awarded in its debtor group.

d) a lack of common owners.

Court of law

In terms of material, power always belongs first instance. Although usually working to establish material competence criterion value, the code exempts requests for judicial division of the application of this criterion, according to art.92 lit.k) C.proc.civ. In the local jurisdiction, must be distinguished as it is a division of inheritance, division of common property or division of property acquired through joint purchasing, joint ownership.

In case of division of inheritance, jurisdiction shall be determined in favor of the court of last residence of the deceased (art. 115 C. Proc.. Civ.even if it is the succession to immovable property situated in another jurisdiction courts.

Assuming division of joint property of spouses, the solution should be distinguished according to which recourse applicant procedural path. Thus, when it was a division called the principal, during marriage or after divorce judgment becomes final, the local jurisdiction is given by the common law rules: either you belong to the court of the domicile of the defendant, if the table contains only shared movable (according to article 105 C.proc.civ.) or court in charge of the property, including property subject to partition if there is a building (as applicable C.proc.civ 114.). Where separation is required on accessory pathway (eg, simultaneously with divorce etc.) Or incidental (eg, by counterclaim) jurisdiction is determined according to art. 119 C. Proc. Civ. for the court to settle proceedings, even if the mass goods would be distributed to a property located in the jurisdiction of another court is a case of legal extension of competent actions.

Elements of sharing application.

Application sharing will include, in addition to any request for summons under Article 189 C.proc.civ., the following:

- names of persons who are to take place between division;
- the title of which is required under division, ie at which arose under state ownership: contract, succession, usurpation, acquiring property during the marriage;
- goods subject which are shared;

- value;
- where the goods;
- the persons who hold or manage property which are shared.

We share the view expressed in the literature that emphasized the phrase used that "the claimant is obligated" and that would lead to the conclusion that the text imposed on the applicant a binding obligation, the breach of which attracts nullity demand, not be interpreted in an overly formalistic manner, it is necessary to determine which essential elements and whose absence may result in nullity request[430].

However, we find essential for application sharing, references to persons between separation occurs, the mass of shared property, the title or titles under which / whom to divert goods. The doctrine has shown that the lack of these elements would entail the nullity of sharing demand.

We believe that the proposed solution is excessive given that art. 191 para. (1) C. Proc. Civ.Code only penalizes the lack of absolute nullity of the proceedings of the application name and surname or, where applicable, the names of either party, subject to demand, actually its reasons or signature of the party or its representative and the text art. 966 C.proc.civ., although states that the applicant is required to indicate these items, however, does not indicate a penalty for non-compliance.

Furthermore, the interpretation of article 195 in conjunction with article C.proc.civ 189-192., which provide that court shall order cancellation request no calling in judgments than 191 art terms expressly indicated C.proc.civ. and for not paying court fees. In our opinion, although we agree that these are essential elements in the content of the application if claimant does not comply with this requirement may result in suspension of trial proceedings and at the request of the interested party could possibly obtain compensation for delaying the process. An additional argument would be even subsequent article (967 C.proc.civ.) Which states that the court will inform the majority of these elements, taking part statements.

Who can be an complainant

Standing legitimacy belongs to any of the holders of the common property.

In addition to co-owners and their successors in title, of course, the partition can be asked for their personal creditors or the creditors of the succession, and the prosecutor in the circumstances set out in Art. Article 45. (1) C.proc.civ., however, if the triggering process can be made under the law, and certain persons other than co-owners, this does not mean that all initiating actions and quality of copartner, so that the assets will be divided and not by them .

Also in the third person sharing can occur either on his own initiative or at the request of the original parties. The claimer in the sharing is obligated to brought proceedings against all other co-owners or, where appropriate, the other spouse, if the lawsuit happen acquired the common goods of marriage (which will act as the defendants) as the laws require that sharing made without the participation of all owners is null. In terms of procedure, we consider that, in the event that not all co-owners are called to judgment sharing application, you can invoke the exception to the lack of quality passive . The effect of this exception can be avoided only if the court ex officio put in discussion the other parties opportunity to introduce concerned and copartner missing and at least one party agrees.

New points of admission decision in principle

Where the court has enough elements for the formation of lots will decide, after discussion, direct determination of partition. This solution resulting from art. 969 C.proc.civ.,

[430] *M. Tăbârcă*, Drept procesual civil, vol. II, p. 269-270

Which provides that unless the parties agree, the court will determine the goods subject to sharing, quality of co-owners, each share to be paid and claims arising from joint ownership status on their holders to one others. On that basis, the court will proceed to the formation of lots and their allocation.

If, however, need lots training operations measurement, evaluation and the like, for which the court has sufficient elements, it will give admission decision in principle that will determine the elements to which we have referred above, drawing minutes properly, as it is a judgment, concluding device must be found in the minutes made during deliberations. It seems to me that no minutes of the conclusion entail the nullity and annul the award.

If for the training of batch is necessary an expert measurement, evaluation, and the court does not have enough data to it, will determine by a final admission in principle subject share goods, quality part owner of the parties, the share of everyone claims arising from joint ownership status that they were co-owners each other, and where it is a legacy shared object, the court will establish transmitted by inheritance debts, liabilities and claims common heirs to the deceased, tasks heritage .

When, in addition to the main application sharing and requests were made, in connection with separation and whose solution depends on its performance, or a request for reduction of excessive liberalities report or request for donations and the like, then, court must rule on these requests and also by concluding admission in principle. Text is novelty, however, is naturally what states. How could the court determine the decision to accept in principle the capacity of owner, the share to be paid to each co-owner and state claims or charges arising from common property that their co-owners each other, if not first establish if the donation is reported or not, whether or not excessive Liberties and so on, if not solve these requests in advance and accessories? In fact, the conclusion is all admissions in principle with the legal nature of a decision, basically, I would say that is a partial judgment because, in what order, the court resolves part of requirements on separation.

Also, the decision to accept in principle be also motivated since it is given after administration of evidence and contradictory debates.

Interlocutory nature of admissions in principle conclusion is relative, because, notwithstanding the common law (in relation to interlocutory judgment), that fact does not prevent admission to complete conclusion in principle, by a further end. if, for example, due to linkage, a counterclaim or main intervention is the need to include other goods shared meal or simply in terms referred specifically art. 971 C.proc.civ., Which provides that if, after completion delivery under art. 970 but before pronouncement of division, it appears that there are other co-owners or have been omitted certain goods to be covered împărţelii without, regarding these co-owners or those goods have been a contradictory debate, the court can give a new conclusion, which will include, as appropriate, and co-owners or property omitted. Under the same conditions the court may, with the consent of all co-owners to remove an asset that was included in the error table divided.

Therefore, despite the interlocutory nature of the conclusion of admissions in principle, the text provides for situations in which the decision can be completed on certain goods or certain persons or may be amended by removing certain goods from property table to share.

The decision of sharing and remedies

In principle, sharing decision is subject to the same requirements that are imposed by law, all judgments and follows the same procedural regime. However, under the new regulations, the judgment on the application for sharing has a number of features.

The decision of sharing has a constitutive character, unlike previous legislation which established its declarative nature. Basically, due to the effect of incorporation, each owner is the exclusive owner of property or amounts have been allocated from the date of the final judgment of partition. Moreover, the buildings, partition effects occur from the date of

registration in the land of the final judgment of partition, forcing default rule to such registration.

The signed documents, under the law, a co-owner of the common property shall remain valid and shall be binding on the property which was awarded after separation property.

A final sharing judgment is enforceable, even if the decision was not willing to surrender property owners in the group which they have fallen so that it is not necessary to introduce the co-owner of an action for recovery of possession against co-owners who have given good and refuses to teach him.

Against the sentence handed down at first instance on the main application sharing, it will not be able to exercise only one remedy, namely the call. Only when the call is called indirectly, the decision will follow the same remedies as the main judgment given on request. If, however, the main application as divorce, which attacks only call, according to the new regulations, and there is a counterclaim-defendant husband in seeking and division of joint property, then the judgment is subject to all just call. Only when the main application is subject to appeal and appeal interlocutory application separation property could be resolved into three levels of jurisdiction.

Conclusions

Although at the time of writing this article talks about the entry into force of the Code of Civil Procedure are ongoing, the pros and cons of the new legal provisions in the legal literature occupying currently in material changes to hopefully be beneficial both partition for litigants and the court. Reserved, but in terms of usefulness and effectiveness of mediation as a step introduction preceding procedure addressing the notary public and the court.

THE APPLICATION TO THE COURT IN ORDER FOR PAYMENT

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Abstract

This paper presents the content and conditions of admissibility imposed by payment order

Diversity and extent of civil and commercial legal relations derived from a rapidly growing market economy forced the legislature to create new legal instruments to regulate on the one hand legal emergent situations and stability on the other circuit economic and fluidity to. Recovery of sums due under a commercial or civil relationships require obtaining an enforceable title, that an act may be the request for enforcement of a person, the attachment of bank accounts or third parties holding assets for the debtor or property auction movable property of the debtor. The fact that these situations should be covered in legislation, justify the emergence of a new debt recovery procedures: the order for payment. It is distinguished by simplicity, urgency, efficacy, low cost, all encouraging the lender to seek court order to assert his right.

A prerequisite for admissibility of order for payment is fulfilling the application to the court demand conditions and compliance content.

Because of its importance we will analyze the application to the court in order for payment.

Application to the court. In art. 1 para. 1 of Ordinance no. 5/2001 shows that "sumatiei payment procedure is carried out at the request of the creditor, in order to achieve voluntarily or through enforcement of claims certain, liquid and due (...)". Hence reisese that only creditors are holders petitions summons procedure. Of creditors, may initiate proceedings only those who have outstanding debt, liquid and matured as "represent payment obligations of payment, under the contract found by a registered or determined according to a statute, regulation or other inscribed learned parts by signature or otherwise permitted by law, and the rights and obligations attest the execution of services, papers or any other claims. "

Application content. Request the creditor initiates summons procedure, as shown in art. Article 3. (1) of Government Ordinance no. 5/2001, must contain: a) the name and domicile or, if applicable, the name and place of business, b) the name and address of the debtor, individual, and if the debtor entity, name and address, and, if necessary, certificate of registration number in the Trade Register or the Register of legal entities, tax code and bank account c) the amounts referred to in Art. 1 para. (2) the basis of fact and law the payment obligations, the period to which they relate, which had made the payment period and all the necessary to determine liability.

Reading the requirements of Art. Article 3 (1) of Government Ordinance no. 5/2001 regarding the content of the application which notifies the court, it appears that they are more numerous than those provided for applications in non-contentious matters described in Art. 333 C.proc.civ. It is also observed that the application requirements are similar to those provided by ordinance art. C.proc.civ 720^3.

The text of the ordinance, to which we have referred, mentions signature as part of the application, although it is mentioned in art. 333 C.proc.civ. and art. 112 and Art. C.proc.civ 720^3.

Since we face a special procedure which is completed with the general procedure, to the extent that they are not hostile (as in the present case), consider that art. Article 3. (1) of the Ordinance shall be filled with art. 82-83 C.proc.civ., Therefore, the application must be signed and will be mentioned and the court to which the application.

If the application is made through a representative (conventional, legal) will show this, attaching itself to request the document that proves the quality of the applicant's representative.

Although the provision of art. 3, para. (1) which refers to the content of the application, it appears imperative, starting from the expression used by the legislator "will include" the text does not provide an explicit sanction in case the application does not contain all the required elements simultaneously. In such a situation, the question of nullity request can not just trance during this particular procedure, but the judge must apply the procedural rules of the common law.

Writings on the creditor bases its request on par. (2) of Art. 3 of the Ordinance reads as introductory action is attached Agreement and any other document evidencing the debt, para. (3) imposing as its application and supporting documents to be submitted in copy, one copy for each party, plus one for the court.

The deadline for submitting the request to the court. The Government Ordinance no. 5/2001 is not explicitly set a deadline, within which creditors can bring claims based on the payment order. The legislature did not consider setting a deadline for the introduction of the summons because emergency, as I pointed out, is the essence of this special procedure as in the case of presidential ordinance procedure[431], because the summons procedure is not intended "taking temporary measures in cases of urgent".

Which is essentially the summons procedure is simplified character of the whole procedure required by special conditions must meet claims, which are to be obtained by this procedure and acknowledging their enrolled.

The only condition related term is the action in order for payment before the statute of limitation, general or special.

In this context exposed, but considering that the summons procedure gives creditors obvious advantages (lack of prior concilieiri mandatory fixed stamp duty, simplified procedure of law, limitation of remedies) and eliminating the need of legal uncertainties circuit civilian might call into question a provision in the bill shorter input demand peyment order (eg one year). Not consider that these changes were justified.

Request to issue summons has all the characteristics of a true summons application and how the introduction of such a request to the court (Article 16 of Decree no. 167/1958 not making any distinction as to the nature of the request - special procedure or common law) will interrupt the prescription extinction (the only condition being that the application is likely to complete by an order of admission). If the creditor's request will be denied, interrupted by prescrisptie extinctive effect of demand payment order stop too.

Regarding the prescription right to act on the merits of the legal relationship between the parties, it is an absolute exception and although not mentioned specifically in the text of the ordinance (as stipulated in Art. 2 para. (3) office must verify the competence of materials), the judge summons request owes her question the ex officio as a rule of public policy.

That is, in case the judge has resolved an exception aiming prescription (built by the debtor or of his own motion), special procedure stops and the solution will be to refuse payment order. The reason is that prescription is a defense that the substance of the legal relationship between the parties, a defense fund analysis may be submitted only through common law procedure and not via summons procedure.

Judicial stamp duty request. Initially, the request for issuing the summons is stamped with a court fee stamp set of 300,000 Lei (cf. art. 3 letter. o[432]) of Law 146/1997, as amended

[431] C.proc.civ Article 581 does not provide a time limit for presidential ordinance, but the very situations that justify mandatory denote its introduction in the short term.

[432] Official Monitor no. 511 of 25.08.2001. See also H.G. no. 797/2005 regarding the approval levels for values, local taxes and other similar taxes, applicable in fiscal year 2006 (Official Gazette. No. 725 of 10.08.2005).

and supplemented by Government Ordinance no. 34/2001[3]), judicial stamp duty isn't calculated to amount requested claims[433]. Judicial stamp duty has been updated to fix the amount of 366,000 lei (36.60 RON) in 2005 based on the Government Decision no. 783/2004 regarding the approval levels of taxable values, local taxes and other taxes assimilated, and the fines that are indexed / adjusted / updated annually based on the inflation rate, applicable to fiscal year 2005[434]. Tax adjustment was made in 2006, reaching the amount of 39 RON in the Government Decision no. 797/2005[435].

For the text provides judicial stamp duty fixed without any threshold exists receivable required to be deducted in case the debt would be lower than judicial stamp duty of 39 RON, the amount paid will be the same flat fee, even if judicial stamp duty calculated for common law procedure would be one less than that fixed.

Article 20. (1) of Law no. 146/1997 on judicial stamp duties and by art. Article 35. (1)[436] approval of the Methodological Norms of this law established that judicial stamp duty must be paid in advance, before filing the payment order. Such obligation determined is confirmed by amendments to Law no. 146/1997 by Law. 195/2004 approving Government Emergency Ordinance no. 58/2003 amending and supplementing the Code of Civil Procedure, because as required by art. Article 18. (4), as amended, "If all or part of the request, the stamp duty is returned (...) ". Correspondingly, in art. 114 C.proc.civ., has been provided for the judge to check the judicial stamp fee.

Until the legal stamp duty payment, the judge may question the parties and resolve other issues related to the settlement demand of payment order. There are divergent views of famous authors who consider that it could be invoked objection of lack, even before judicial stamp duty payment. We disagree with this view because we believe that even invoking exception of lack of competence, to be discussed parts, equals at least a minimal investigation of the case, which up to disallowed judicial stamp fee.

There are some exceptions to the rule prepayment judicial stamp duty, legal exceptions in even the above rules. Thus, in art. Article 35. (2) of the Methodological Norms set out verbatim that "courts - quite exceptional, for the reasons mentioned in the resolution - can hold application unpaid or insufficiently stamped, forcing to pay taxes to the first hearing".

This possibility is also mentioned by Law no. 195/2004 that modifying art. 21 of Law no. 146/1997 provides that "the court may award (...) delays to pay court fees", confirming once again that the rules there are exceptions at the discretion of the court. In other words, considering the legal provisions shown, it is up to the court assessing whether the cause is "reasonable" to hold because according to existence proof of submission opportunity for judicial stamp fee until the first hearing on the following give him.

In a practical consequence of general approaches, such as "reasons mentioned in the resolution", "delays", "Mail" was a broad scope of the exceptional cases resulting rule overturns the exception. We believe, along with authors who have shown this situation, that such a solution does not meet fully the aim pursued by the legislature by regulating the obligatory prepayment judicial stamp duty.

Also, the terms "may grant" or "I remember" led to the adoption by courts of various solutions. Thus, if mailed requests when they did not contain evidence proving the judicial stamp fee, the court, considering the "why" the request and ordered detained by resolution,

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[433] According to art. Article 4. (2) of the Methodological Norms for applying Law no. 146/1997 on judicial stamp duties, approved by Ministry of Justice no. 760/1999 (Official Gazette. No. 380 of 10.08.1999), "lump sum fees apply to non-monetary actions and requests, and the evaluable in money that by law to charge a fee in lump sum".

[434] Official Monitor no. 482 of 28.08.2004.

[435] Official Monitor no. 725 of 10.08.2005.

[436] The text states that "advance" means "before receiving (registration), making or issuance or prior taxable services".

with citation and information purposes slopes which entered on the tax to be paid "to the first hearing." Sometimes, in similar situations, demand restitution was ordered to submit proof of payment of stamp duty. Such refunds practice "unfair" believe can not be received, inrucat is without foundation, contrary to the mandatory procedural rules and incunostintarii receipt. But restricts the possibility holder demand unsatisfied by way of determining the duty, to have settled expeditiously and application of review. We are in full agreement with the opinion expressed, noting that in addition, the creditor, in case they are in the period of the statute of limitations, might not be in time with re-application.

For failure to pay court fees, stamp duty, the creditor shall cancel the application for summons as unpaid, as provided in Art. 20 para. (3) of Law no. 146/1997 on judicial stamp duties.

At the request of issuing the summons must be attached judicial stamp that is set in relation to the value of the application according to Art. Article 3. (1) and (2) of Ordinance no. 32/1995 on judicial stamp[437].

Facilities for exemptions, reductions or delays staggering legal fees and stamp duty are not applicable judicial stamp. Also, in the case of a payment demand due to the initiation and continuation of issuing summons in case of non judicial stamp duty is applying the same penalties as are prescribed by art. 20 para. (3) of Law no. 146/1997 on judicial stamp duties - to cancel the request - as with judicial stamp tax.

Conclusions:

In related to those shown from occurring divergent solutions in practice and that the manner in which judges decided on receipt of a payment order without a judicial stamp duty paid, we believe that a statement would be required.

This should explain what could be "reasons" which could register a payment order request not having a judicial stamp duty paid and would be given a term (up to first hearing) for paying them.

This would remove the "practice" in case the courts that receive such requests unpaid, simply return them for the unpaid judicial stamp duty reason .

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1. Deleanu I., Buta Gh./Procedura somatiei de plata, Doctrina si jurisprudenta, Editura C.H. Beck, Bucuresti, 2006,

2. C. Diaconu, Taxele judiciare de timbru, Ed. All Back, Bucuresti, 2004.

[437] Official Monitor no. 201 of 30 August 1995.

CRIMINAL LIABILITY OF JUVENILES IN THE NEW CRIMINAL CODE
- Controversial issues -

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Abstract

The criminal liability of juveniles is one of the most delicate aspects of any criminal law.

The author examined the provisions of the New Criminal Code to highlight the legislator's concept on minority institution: the conditions of criminal liability, the consequences of criminal liability, the plurality of offenses and prescription.

At the same time, the author makes some incursions in comparative law and in the history of preventing and combating juvenile delinquency.

1. Preliminary considerations

Juvenile delinquency has become one of the major social issues of the contemporary world but the theoretical interpretations which considered crime as a marginal concern phenomenon, characteristic only for certain groups or social categories, were abandoned in favour of deeper and more realistic approaches, according to which juvenile delinquency is a social issue closely related to how society manages its resources, its educational processes, the functioning of various structures and social institutions.[438]

Criminal liability of juveniles is always a controversial issue in the doctrine and national laws because, in the case of the juvenile offender, the intervention of the judicial bodies must be as strong and delicate as not to harm the juvenile's personality in development.

Although in the draft of the New Criminal Code it was foreseen the age of 13 years as the beginning of the criminal liability for juveniles, following the discussions of joint legal committees of the Senate and Chamber of Deputies, it was maintained the age of 14 years.

Obviously that between 13 and 14 years there is no essential difference, but participating in the above mentioned discussions, we pleaded two arguments in favour of the current drafting:

a) the premature contact of the juvenile with the judicial bodies is always harmful;

b) the age of criminal responsibility can not fall below the civil liability. The New Civil Code presumes in the article 1365 the lack of discernment for juveniles under the age of 14 years, otherwise said it is unnatural for the juvenile to be held criminally responsible at the age of 13 years as long as he receives an ID card only at the age of 14 years.

As in the current criminal law, in the New Criminal Code it operates a rebuttable presumption of lack of discernment between 14 and 16 years and a presumption of discernment between 16 and 18 years.

The lack of discernment before the age of 14 years, in criminal matter, is an absolute presumption, *juris et de jure*.

Contrary evidence is inadmissible even if the physical and mental development of the child is above his age. The incapacity of the juvenile in criminal matter at the age of 14 years stems from the fact that he has not achieved the necessary degree of maturity of his intellectual and volitional faculties.[439]

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[438] **Maria-Crina Kmen, Ruxandra Rață** – *Criminal liability of the juvenile*, Publishing house - Hamangiu, București, 2007, page 3

[439] **Lavinia Valeria Lefterache** – *Criminal Justice in the case of juveniles*, Publishing House Judicial Universe,

Legislative changes always involve a review of basic principles and rules of criminal law and criminal procedure, which require a new approach to the complex of fundamental principles applicable to this branch of law.[440]

2. *Consequences of criminal liability*
The concept of rehabilitation of the juveniles

Even if at the beginning, the idea of repression and reconciliation remained the base for the admission of juveniles in centres, the treatment methods consisted in changing the behaviour as a result of authority, work and discipline.

The reproaches brought to this system were that it only produced readjustment in appearance.

After 1920, it was introduced the progressive system inspired by the idea that children should be encouraged to truly dominate their flaws and develop their skills.

The progressive system, which allowed switching to a less austere system as well as benefitting from various facilities, went around the world; its influence is observed in the New Criminal Code institutions.

Today, the best rehabilitation centres in the world either tend to replace the progressive regime or to complete it with a combined regime of individual therapy and pedagogy of the group or group therapy.

The goal is the rehabilitation of the child's adjustment disorders to normal life.[441]

While the Criminal Code in force returned to the dual system, educational measure or punishment, after 14 years of interruption in which it was in force Decree no. 218/1977 which punished only by educational measures, the New Criminal Code states that towards the juvenile aged between 14 and 18 years can be taken a non-custodial educational measure.

This is the rule. But the rule has two exceptions:

a) if the juvenile has committed another crime for which it was applied an educational measure that has been executed or it has started before the committing of the offense for which he is convicted;

b) when the penalty provided by the law for the offense is imprisonment for seven years or more, or life detention.

In certain cases, against the minors may be taken custodial educational measures:

a) Admission into an educational centre;

b) Admission into a detention centre.

The question is what the nature of the custodial measures is as long as the article 60 of the New Criminal Code defines prison as deprivation of liberty for a specified period.

If the admission in an educational centre appears questionable, we have no doubt about the admission in a detention centre: it has the nature of a penalty for juveniles.

This belief is reinforced by the provisions of the article 134 paragraph 2, stating that educational measures can be executed in prison if the offender's pronunciation of judgment was after meeting the age of 18.

3. The plurality of offenses

The text of the article 129 of the New Criminal Code, with marginal name << the plurality of offenses >> covers only crimes committed during juvenility by the rule of execution of the most serious penalty.

Bucharest 2011, page 12

[440] **Anastasia Crișu** – *Treatment of the juvenile delinquent in the criminal matter. Aspects of compared law*, Publishing House CH Beck, Bucharest, 2006, page 194

[441] **M. et H. Veillard-Cybolsky** – *Les jeunes délinquants dans le monde*, Delachaux & Niestle, Suisse, page 30

Characteristic for the regulation of offenses committed by a juvenile is that it establishes a single educational measure for all offenses and not one for each crime.

The article 129 makes no reference to relapse, although the article 42 does not exclude that crimes committed during juvenility determine the state of relapse. We do not believe that it was not taken into consideration, but it was a tacit acknowledgment of the possibility of the existence of the state of relapse in juveniles, whether the conditions of the article 41 of the New Criminal Code are met.

Obviously, the risk of a juvenile to commit two or more crimes that meets the state of relapse before reaching the age of 18 is low, but the convictions pronounced during the juvenility may constitute a first term of relapse.

To what extent an offense committed with the juvenile discernment must influence the criminal treatment of the future adult, should, in our opinion, on the one hand be reviewed by criminologists and sociologists and by the doctrine and jurisprudence on the other hand.

4. The prescription of criminal liability

The Criminal Code in force refers in the article 129 only to the prescription of the criminal liability and the execution of the punishment.

Contrary to a point of view expressed by the doctrine, that educational measures are prescribed at the full age[442], from the interpretation of the Criminal Code in force results that only the penalties can be prescribed and not other sanctions (educational measures, safety measures).

That is naturally because educational measures are not penalties, but criminal sanctions that apply to the juvenile without having the retributive component.

However the New Criminal Code provides, in the article 132, that non-custodial educational measures can be prescribed in a period of 2 years from the date of the final pronunciation of judgment.

It is the first time that the prescription extends over some criminal penalties and does not remain an institution exclusively designed for punishment.

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These are just a few aspects that highlight the fact that the whole institution of criminal liability of juveniles should be reviewed and reconnected to the Romanian criminal law traditions as well as to the great principles of European criminal law.

[442] **Teodor Dascăl** – *Juvenility in the Romanian criminal law*, Publishing House CH Beck, Bucharest, 2011, page. 288

PRE-CONTRACT PHASE OF INSURANCE POLICY – A *SINE QUA NON* ELEMENT FOR THE VALIDITY OF THE FUTURE INSURANCE CONTRACT

Ph.D. Manuela TĂBĂRAS

Abstract

Signing an insurance contract means the realization of the agreement of intention between the insurer and the insured on the contract clauses, agreement which is mitigated under the circumstances of the existence of an adhesion option of the insurance policy, which allows a limited negotiation of its clauses.

This process is a complex on in the field of insurance, exactly because of the random character of the insurance contract and the risk assumed to compensate by the insurer.

The negotiation of the insurance contract can be analysed from the point of view of the two stages that ensure the conclusion of the insurance contract: *reciprocal information* of the parties and the *concordant meeting of the proposal with the strict acceptance of it* by the contracting parties (or, according to French doctrine: the information phase[443] and acceptance phase – subsequently taking the shape of signing the policy).[444]

The pre-contract phase or the information phase *does not give rise to rights or obligations for any of the parties* in respect of concluding the contemplated insurance rapport, the parties being entitled to withdraw their contracting proposal at any time, but it is a *sine qua non* phase, on which it depends the validity of the future insurance contract, as it refers to the parties obligation to inform each other of the elements fundamental to the insurance contract, so that the parties can be bound knowingly.[445]

In case of the public institutions, there should be firstly taken into account also the compliance with the public purchase procedures, so that when the value of the subscription exceeds the threshold stated by the lawmaker, the request-proposal procedures or the simplified ones must by followed according to the Public Purchases Law.[446]

Declaration of risk

Declaration of risk represents the modality of informing the insurer by the future insured and it is required both by the nature of the contract and also *expresis verbis* by the lawmaker as per the provisions of art. 13 of law representing also the proposal to contract of the insured.

Thus, according to art. 13 of Law no.136/2005 *the person that concludes the policy is obligated to answer in writing the questions formulated by the insurer and, also, to declare, as at the date of signing the policy, any information or circumstances known to them and that are, objectively essential, to assessing the risk*. This obligation bears with the insured and whenever during the performance of the contract the essential circumstances regarding risk change.

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[443] In espect of the right to be informed, also see F. Maxim - Dreptul la informare şi educare al consumatorilor. Aspecte generale (Consumers' Right to Information and Education), Curierul Judiciar (Judicial Courier) no. 2/2007, pp 82-92.

[444] Faivre – *Droit des assurances,* Editura Dalloz, ediţia a XII-a, 2005, p. 195.

[445] The new Civil Code regulates the pre-contract liability, especially for the negotiation ill-intently, disclosing or unauthorized use of confidential information and sudden withdrawal of the proposal, instating the irrevocability of the proposal to contract.

[446] Emergency Ordinance no. 34 dated 19 April 2006, as revised and completed. The threshold of direct public purchases could be increased from EUR 15,000 to EUR 50,000 for goods and services and from EUR 40,000 to EUR 100,000 in case of works. Also, the maximum ceiling up to which contracts of works can be awarded under the procedure of request for proposal, would increase from EUR 750.000 to date to EUR 4.8 million, according to a draft emergency ordinance prepared by the Government.

The declaration of risk represents in practice a standard questionnaire provided by the insurer, including clear, concise and complete questions regarding the probability and intensity of occurrence especially of the risk, a form to be filled by the potential insured and signed by them. The questionnaire can be accompanied by annexes: charts, photos, medical analyses meant to held the insurer assess the risk.

The insured's good faith upon the signing of the risk statement is essential to the validity of the convention to be concluded, as it forecasts the essential elements of the policy to be concluded[447]. Thus, the insurer will decide whether to concluded or not the insurance policy, often only on the basis of the answers received by the future insured to the standard form, without the possibility of making the risk inspection to verify the authenticity of the declaration.[448]

If the insurer identifies irregularities in filling the declaration of risk only subsequently to the conclusion of the insurance contract, the insurer can unilaterally terminate the policy (art. 19 corroborated with art. 21 of Law no. 136/1995, as revised and completed), refusing to pay the damages requested by the ill intended insured. [449]

In other words, establishing the purpose of the insurance is an initial attribute of the insured to be confirmed by the insurer by accepting the total or partial covering of the insured risk.

Information of the insured by the insurer

"The clients are entitled to be informed correctly, as early as during the pre-contract phase, on all the conditions of the insurance contract".[450]

The obligation of the insurer to inform the insured on the contents and limits of the insurance, the meaning of the specific terms used in the field of insurance to allow the insured to conclude the insurance policy fully in the know has not been included „*ab initio"* in the legislative text, this being stated as imperative obligation of the insurer only as of the year 2003 under Law no. 76/2003 amending and completing Law no. 32/2000 as revised by Law no. 403/2004[451] according to which "*the insurers shall communicate to the insured or potential insured, before the signing of the insurance contract, at least the following information: term of contract, way of performing the contract, suspension or termination of contract, payment means and terms of the premiums, methods of calculation and distribution of bonuses, ways of settling the complaints regarding the contracts, as well as any other information necessary during the performance of the contract, in accordance with the norms issued in respect of the application of this law.*"

Also, "*the insurer is obligated to inform the insured of the consequences of failing to pay the insurance premium within the payment term … and to provide for such consequences in the insurance contract".*

[447] In respect of principles of legal liability in contractual matter, see A. Gîgă - Raspunderea pentru produsele care nu respecta cerintele pentru protectia mediului (The Liability for Products that Do Not Comply with the Environment Requirements),the Intenational Conference "The Intoxicated Planet", 2007, Ed. Curtea Veche, Bucuresti.

[448] This exactly why French doctrine quoted so far has noted the character of the insurance contract as being one of maximum or total good-faith, as only one of the parties, the insured, knows all the essential elements regarding the risk, as necessary to conclude the contract, aspect which triggers the insured's obligation to inform in good-faith and in full the insurer – which often takes over risks that they cannot directly assess due to the distance or technical elements complex or hidden, etc.

[449] For further details, please see Revista Dreptul (Law Magazine), no. 6/2002 – *Risk in Insurance Contract* – Irina Sferdian, p. 44-67.

[450] CSA Norm dated 15.12.2009 approved by Order no. 23/15.12.2009 – art. 1.

[451] Art. 24^1 of Law no.32/2000.

According to art. 3 of the Norms of the Insurance Supervisory Board of 2009 – Before the conclusion of an insurance contract, the insurer are obligated to offer their clients at least the following information on the insurer and the insurance contract[452]:

- name of the insurer and legal status[453];
- order number with the Registry of Insurers, Reinsurers and Insurance and/or Reinsurance Brokers;
- address of the registered office and, if applicable, the address of the branch or agency where the insurance contract is concluded, as well as the telephone number;
- definition of each insurance event, insurance indemnity in case of occurrence of the insured event;
- the exclusions from the insurance;
- the time of starting and of ending the insurance contract;
- ways of performing, suspending or terminating the insurance contract;
- information regarding any rights that the parties might have to foreclose the contract or to unilaterally terminate it, including any penalties imposed by the contract in such cases;
- payment conditions and the payments terms of the insurance premiums;
- payment conditions and terms of the insurance indemnities, of the redeemed amounts and insured amounts;
- information on the grace period;
- procedures of settling any possible litigations resulted from the performance of the contract, respectively information on the ways of amiable settlement of the complaints formulated by the insured or by the beneficiaries of the insurance contracts, as the case mat be, this not being a restriction of the client's rights to resort to legal judiciary procedures;
- general information regarding the deductions provided for by the tax laws applicable to insurance contracts;
- the law applicable to the insurance contract.
- The existence of the Guarantee Fund.

In life insurance[454] *the insurers and their attorneys shall* make available to the insured or insurance contractors information regarding the insurance contracts in Romanian, edited clearly, both before and during the performance of the same, referring to: *optional/supplementary clauses and the benefits resulted from using the technical reserves, the time of starting and of ending the contract, including the payment ways and conditions of the insurance premiums; calculation elements of the insurance indemnities, of the discounted insured amounts, as well as the level by which they are secured; payment conditions of the insurance indemnifications; the laws applicable to the insurance contract, information on the premiums pertaining to each benefit, both the main ones and the supplementary ones, as*

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[452] In respect of the obligation to report, for further details see A. Gîgă - *Consideratii privind spalarea banilor (Considerations Regarding Money Laundering),* Analele Universităţii Titu Maiorescu-Seria Drept, p.171-179, 2003, ISSN 1584-4781.

[453] In respect of the elements of identification and legitimacy of the legal entity, see - V.Slavu -*"Teoria actului juridic civil. Persoanele"(Theory of Civil Legal Act),* course support for the students of Law School, Public Administration specialization, magnetic support, 2006, V.Slavu -*"Dreptul proprietăţi intelectuale"(Intellectual Property Law)* course for distance learning, Prof. Ph.D. Otilia Calmuschi, third edition, revised by Reader PhD Violeta Slavu, Editura Renaissance,ISBN 978-606-8321-31-8, Bucureşti, 2010, V.Slavu -*"Dreptul proprietăţi intelectuale" (Intellectual Property Law)* 3rd year ID Course supports 2008-2009, Prof. PhD. Otilia Calmuschi, second edition, updated by Reader PhD. Violeta Slavu, Editura Renaissance,ISBN 978-606-8002-16-3, Bucureşti, 2008; V.Slavu-*"Dreptul proprietăţi intelectuale" (Intellectual Property Law),* course support for postgraduate students, presented on magnetic support 2008 – 2012, Anca Lucia Rădulescu, Madalina Voiculescu, Luiza Melania Teodorescu – Drept Civil (Civil Law), Titu Maiorescu University Publishing House, Bucureşti, 2005, ISBN 973-7963-44-X, Smaranda Angheni, Madalina Voiculescu – Drept Comercial (Commercial Law) - Titu Maiorescu Publishing House, Bucureşti, 2005, ISBN 973-7963-91-X.

[454] Art. 40^1 din Legea nr. 136/1995 asa cum fost introdus prin art. I pct. 32 din Legea **nr. 172/2004**.

the case may be, information on the grace period, methods of calculation and distribution of bonuses and amounts representing participation in profit, if applicable, information on the cases where the value of redeeming the policy is nil, information on the nature of assets, definition of the units to which the life insurance benefits are related and annuities related to investments funds, a simulation of the progress of the value of the contractor's account, as well as of the total redeeming value at the end of each insured year of the period covered under the life insurance contracts and annuities related to the investment funds; this simulation shall be made maintaining constant the value of the unit throughout the term of performance of the insurance contract, the procedures of settling any possible litigations resulted from the performance of the insurance contract, respectively information on the ways of amiable settlement of the complaints formulated by the insured or by the beneficiaries included in the insurance contracts, as the case may be, this not being a restriction of the client's right to resort to the legal judicial procedures, general information regarding the deductions stated by the tax laws applicable to insurance contracts and at each anniversary of the insurance contract, information on the status of bonuses and the amounts representing participation in profit, as well as other information which the insurers and their attorneys are obligated to make available to the future insured or insurance contractors.

Thus, the information that the insurer is under the law obligated to supply to the insured refers both to the contract that the parties are to conclude, and the aspects related to the financial security that the insurer has to offer to the insured.[455]

Any failure to comply with the information obligation by the insurer is a *contravention* punished by the Insurance Supervisory Board, however, no act or omission of the insurer or its agent[456], consisting in breaching any provision of the law and of the conditions and amount of the insurance premiums, as well as other elements regarding the conclusion of the insurance contract cannot be invoked by the insurer for the cancellation of the insurance contract.[457]

The information must be provided to the potential client *on paper support or on other long lasting support,* prior to the conclusion of the insurance contract by means of a distinct document or several documents. This documents can be sent to the potential client inclusively by using distance communication means, in a way that confirms that they have been informed of the contents of these documents.

The documents described above shall be edited in a legible and easy to read and with the font size used of *minimum 10,* on paper or on other long lasting support, in at least two copies, one original copy for each party. The colour of the paper on which there are printed the informative documents provided for, the contract and the insurance conditions shall be in contrast with the one of the font used.

At the clients' request, the insurers and insurance brokers shall provide the clients with a copy of the draft contract and insurance conditions.

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[455] In French law also, the law maker has provided for this obligation of transparency of the information regarding the solvency of the insurer by the obligation of offering the insured an information sheet on the premiums, guarantees offered and franchise used: C.J. Berr, H. Groutel-*Droit des assurances*, Ed. Dalloz, 2001, p. 56, Y. Lamberet-Faivre, op. cit., p. 173.

[456] *Although the payment of the insurance premium has not been made directly to the insurer's account, but through a broker, this is a payment validly made and, consequently, the insurance company cannot exonerate itself from the payment of damages in case the insured risk occurs, as on the one hand, the attorney has transferred the cost of the insurance policy to the account of the insurance company, and on the other hand, the insured was of good faith in meeting their obligations.* For further details see *C.A. Braşov, commercial ruling no. 5 of 24 January 2006* in M. Tăbăras, M. Constantin, *Asigurări (Insurances)***,** Ed CH Beck, Bucureşti, 2009 p. 75-76.

[457] Art. 37 of Law no. 32/2000 as revised.

Obviously, in order *prove the meeting of this legal obligation of information,* the text of the insurance contract to be concluded shall mention that the insurer or its representative has met the legal obligation of information, according to art. 24^1 of the Law.[458]

The provisions of these special norms are complete with the provisions of Law no. 296/2004 regarding *the field of consumer protection* according to which the insurance consumer is entitled to be informed in full, accurately and correctly of the service offered, being forbidden the insertion in the contract of abusive clauses, as per art. 27 and 77 of the law mentioned above.

If it is proven that the insurer has failed to properly meet its information obligation, the doctrine has identified several *solutions for balancing the contractual positions of the parties:* first of all, the amendment of the insurance contract, and in case of the impossibility to achieve this, the termination of the contract returning the insurance premium and damages, the application enforced by a court, as sanction, of the provisions negotiated by the parties in the pre-contract phase, invoked by the insured or the interpretation of the burdening clauses of the insured from a financial point of view and which have not been presented properly in the contracting proposal, as unenforceable against the insured, even if they have been included in the insurance contract.[459]

The Legal Nature of the Obligation to Inform

The doctrine, especially the foreign one, has ranged from attributing to the obligation to inform the legal nature of the obligation of means, to the obligation of result.[460]

Thus, the supporters of the first theory have claimed that further to the fact that information does not create any rights or obligations to the other party, the recipient of the information being in a position to acknowledge them by signing the insurance contract, or deny them, refusing to sign the contract – the legal nature of this obligation being one of means, not producing any essential result.

The supporters of the second theory have based their arguments on the assumption that information is intended to create the conviction of concluding the insurance rapport and that in essence *the obligation of result* does not involve inherently the creation of a materialized result.

Even from the point of view of the purpose pursued, we appreciate that the legal nature of the obligation to inform is that of ***an obligation of diligence***, or of prudence or of means, as referred to in the doctrine, the target itself not being to obtain the contract, but making all diligences to obtain it, also noting that we cannot accept that exclusively based on this prior obligation to inform is formed the will to contract, that is to say it is effected the result, the debtor of the obligation to inform not being liable if the purpose pursued is not reached: the conclusion of the contract.

If, however, the debtor of the obligation to inform does not meet this obligation in good faith they shall be liable for the guilty attitude, either by depriving of efficiency the legal document concluded, or by damages for the prejudices caused to the co-contractor.[461]

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[458] In the French doctrine, the lawmaker has provided for the obligation of the insurer to make available to the future ensured, an information sheet and a draft of the future contract, without, however, regulating by a distinct and specific sanction the breach of this obligation (art. L. 112-2 Insurance Code).

[459] See V. Nemes - *Dreptul asigurărilor (Insurance Law),* Editura Hamangiu, 2009 p. 223 .

[460] For details I. Sferdian – *op. cit.,* p. 82.

[461] In respect of the liability-prejudice correlation F. Maxim - *Prejudiciul. De la condiţie sine qua non la consecinţă a producerii faptului ilicit (Prejudice. From a sine qua non condition to a consequence of the illicit act),* Curierul Judiciar (Judicial Courier) no.7/2012, pp.421-424. F. Maxim , F. Maxim - ***Răspunderea internaţională a statelor pentru consecinţe prejudiciabile (International Responsibility of the States for Consequences that Might Creat Prejudices)***, Analele Universităţii Titu Maiorescu, Seria Drept, Anul II, 2003, pp.151-170, F. Maxim - ***Răspunderea persoanei fizice în dreptul international (The Liability of Individual in International Law),*** Information Bulletine

Analysis of the declaration of risk

It is obvious that the reciprocal information owed by the parties does not bind either the insured, or the insurer, they being free to accept or not the conclusion of the insurance contract under the conditions stated for information.

The Insurer is usually that one that initially launches to everybody its insurance offer by its own purpose of business and the reason to operate. The insured "*a priori"* selects the potential insurer and accepts to provide to it the information requested under the declaration of risk, after which it is also the insurer that is entitled, within a previously notified term, *to analyse the declaration of risk*[462] and express its option, which may consist in accepting to take over the risk in full, to take over the risk partially, under condition, (or counteroffer), or to refuse to take over the risk or to request further clarifications, technical risk assessments.

The Contract shall not be *concluded* unless as at the time of the *express acceptance of the offer* to contract, that is of the concordant meeting of the offers to contract, with their acceptance, as in this matter silence does never equals acceptance.[463] In other words, establishing the purpose of the insurance is an initial attribute of the insured to be confirmed by the insurer after analysing the declaration of risk by accepting the total or partial coverage of the insured risk.

As we have already mentioned, if the insurer *decides to accepts the offer of the insured, the insurer shall edit a document, called insurance policy or certificate of insurance* whose content shall comply with the requirements of art. 10 of the law and shall include: the name, domicile or registered office of the parties, the purpose of the insurance, the insured risks, the time of commencement and of end of the liability of the insurer, the insurance premiums, the insured amounts and any other elements set by the Insurance Supervisory Board under the Technical Norms.

The issuing of the insurance policy represents the expression of assuming the insured risk by the insurer and, consequently, of the express acceptance of the insured's offer, the insurer's signature on the policy it has edited in accordance with the declaration of risk, proves the acceptance of the offer to contract and represents in the absence of a clause to the contrary the conclusion of the contract.

In conclusion, *therefore the execution of the insurance contract represents a moment of great importance to the subsequent and efficient conduct of the insurance rapport, which, together with keeping the classical elements which are in fact specific to the conclusion of any contract, in respect of the essential and general conditions of validity of a convention, presents numerous elements specific only to this type of contract, so that the reciprocal information of contractors has supreme importance in the insurance contract and can at any time form the object of a more thorough study further to legal consequences of failing to properly meet the obligation to inform.*

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of the scientific communiques session held in April 2004/Fragmentarium-Facultatea de Drept, Universitatea Titu Maiorescu, Editura Universităţii Titu Maiorescu, 2005.

[462] The operation of risk analysis and assuming or not the risk proposed by the potential insured also bears the name of underwriting.

[463] The conclusion is applicable only to our domestic law, because in the legislation of other states it is instated the sanctioning of the insurer for failing to answer within 30 days the insurance proposal of the insured, the sanction being the conclusion of the insurance contract under the conditions negotiated so far under the sanction for paying damages (Belgian Law). It is worth mentioning that according to Decree 471/1971, the insurance contract was legally renewed if the parties had not terminated it – thus operating the ***tacit renewal of the insurance contract***. Although Law no. 136/1995 initially took over these provisions, the amendments made to the law in 2005 removed these provisions, *however, as long as the law does not forbid the tacit renewal of the contract, we appreciate that the parties can agree contractually on this possibility.*

THE LEGAL NORM, CENTRAL INSTITUTION OF LAW[464]

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Abstract

The legal norm, *one of the central institutions of law,* allows intra-and interdisciplinary scientific research. It can be studied both as a fundamental constituent of the positive law system, (through *interdisciplinary* study), but also in terms of law science in general, and theory and philosophy of law, in particular. *Normative legal system*, as a *subsystem of the normative social system* is composed of *legal norms*. The other social rules systems consist of *non-legal norms*.

1. Social Normative System

Human society, interested in keeping order and social balance, in maintaining its organizational and operational structures and forms, develops its activity in an organized manner, according to certain *social rules* and in a normative framework.

The role of the *norm* is to organize social life on rational bases. In the sociological view, the norm derives from unwritten law, tradition, from the authorities, institutions, and aims, consciously or unconsciously, at solving conflicts and its compliance leads to social integration.

Etymologically, the term "*norm*" comes from the Greek "*nomos*", meaning order.

André-Jean Arnaud, in his Encyclopedic Dictionary of Theory and Sociology of law, shows that the term *norm* may relate to *any rule*, accepted or imposed in a social community that *prescribe* or *proscribe* the behavior of individuals or groups. *The essential features* of the norm are:

- The norm is *prescriptive*, offering choices for behavior, including the possibility to be broken.
- The norm *provides* and/or *applies a penalty*, negative or positive, for violation or compliance.

By providing legal force to the pre-existing social norms, the law turns "the normal" into legal and legal norm, "what is legal", serving as a standard for what is socially recognized as normal.

We distinguish between the *normative legal system* and *other regulatory systems* in the society, namely: ethics, social life rules (rules of decency), rules of professional conduct, customs, technical standards and religious norms. We use the concept of system, because there are *interdependencies* between its subsystems and norms as constituents. If we conceive it as a wholeness of social rules, would mean to deny the relations between the components, which is not correct.

Reflecting the social relationships in *interdependence*, the **norms** are, in turn, directly or indirectly interconnected, existing as elements (subsystems) of the system of law.

2. Features of legal normative system in relation to other normative systems

We distinguish between the *law system* and *legislative system*. The first is the organization of law, as normative phenomenon, by branches and institutions, while the second is the legislation of a state. While the system of the law is based on legal norms, the legislative

[464] PhD thesis on ***"Legal Norm"*** was publicly supported in the boardroom of "Acad. Andrei Radulescu" Institute of Legal Research of the Romanian Academy.

system is based on normative deeds. Although the system of the law and the legislative system have as elementary constituents the legal norms, the legislative system refers to sources, normative deeds of origin. The legal norm is the cornerstone of law system and forms the basic legal system. The law system is the general, in relation to the rule of law, which is the individual.

Normative legal system, as a *subsystem of the normative social system* is composed of *legal norms*. The other social rules systems consist of *non-legal norms*. We identify in each component of social (economic, political, demographic, etc.) reality legal normativity as well as non-legal normativity, both interacting to ensure specific order.

Archaic social communities were not delimiting legal norms from other categories of social norms. *Primary norms*, archaic customs *were a syncretism* - a moral, religious, legal mixture[465]. In contemporary societies, "all social fields are found under the guardianship of law ".

Research on the origin of law shows it associated and complementary to ethics. "Ethics - Guy Durand writes - always served as *social proto-legislation*".

The existence of law, in relation to ethics was designed differently in the philosophy and theory of law, the directions of development being two: one direction recognizes that there is a correlation between law and ethics, and the second, rationalist, isolates them absolutely. *Moralist theory* conceived law as minimal ethics ("justice by law and ethics"). Legal positivism considers the state as the sole basis of law ("order of law without ethics").

We can say that legal norms achieve their authority over social order not only by their power of constraint, but especially by *their moral value and their consistency with the fundamental precepts of law*, such as justice, equity, rightfulness, the entire society is interested in.

History of relations between law and religion encounteres alternations. Different positions were identified: dissolution of law into religion, a radical separation or an intermediate approach.

Great families of law as they were mentioned previously, show the importance of religion in current life of some large communities, where religious norm interweaves with the moral norm, and of course with the legal one. At the beginning of their existence, all families of law have suffered religious influences, even though, in their modern law, for some, an almost complete secularization has been reached.

Technical norms are also *social norms* which establish between people in their participation in economic and social life. *Many technical norms have become the object of legal regulation*, given their importance to society. Fields are various, such as labor protection rules, the traffic on public roads, telecommunications, environmental protection. Since their prescriptions compliance is particularly important, these rules are largely *mandatory onerative or prohibitive norms*.

Category of social norms, close to moral norms and habits, *rules of social life* are designed to ensure civilized relations between people in everyday life.

Law can be created not only by representatives but also by community or society. The latter can create the *custom*, i.e. social usage considered legally binding from the legal perspective.

Both traditions and norms require *social learning* of some standard responses that can support an existential strategy. The norm acts with the power of authority as opposed to custom, acting through the authority of community mind, both regulating behavior, conducts, attitudes. Currently, the habit is defined as *a rule of conduct, established in human cohabitation by a long usage.*

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[465] Ghe. C. Mihai, R. Motica, *Bases of Law, Theory and Philosophy of Law*, "All" Publishing House, Bucharest, 1997, p. 87.

The first form of law is *customary* (habitudinal) *law*. Customary law is based on written law, which gave rise to two systems of law: the Anglo-Saxon, by jurisprudence, and the Roman-German law by rules of centralized political power. Source of the order of law, *the jurisprudence* is often understood as a *custom set by judges*.

Ion Ghica thought necessary that "rules of law be developed in light of the country's customs and traditions, of those traditions inherited from the past". Note that the new Romanian Civil Code "legally acknowlwdges" the practices. Thus, they are sources of law, of course, provided that they conform to public order and morality.

Regulation by law of social relations advances specific features. In relation to other regulatory systems, the *normative legal system* have certain *peculiarities*.

- 1. Distinct from non-legal social normativity, *legal normativity does not extend to all social relations*. However, *law has to be an open system*, which periodically renew and receive "orders" of society.
- 2. If *moral normativity* concerns direct regulation of individual relationships with himself, of rights and obligations to himself, if the *religious normativity* concerns the individual reference to his metaexistence (duties in regard to the Creator), legal norm, in its essence, concerns those social relations involving *otherness* (ad alterum), ie human relations: individuals, legal entities, institutions, or society as a system.
- 3. Law has *normative content*: its rules are commands ordering, prohibiting, or allowing a certain behavior or action.

Legal normativity, unlike other forms of social normativities, has as specific feature the *imperativeness* of its regulations. *Chargeability*, (quality of rule of law to be fulfilled by external means), appears as an important feature of legal norm.

Failure to comply with its prescriptions attracts the *penalty*; it takes, in principle, an *official form* being applied by bodies especially invested with power to judge and decide, by resolutions, at need executed by the coercive apparatus of state. But social order is not exclusively a consequence of the authority and control over human behavior.

Often though, people behave in accordance with social / legal norms, no penalties for their failure being the motivation for them, therefore the *norms have been internalized*, each acting for itself, based on legal consciousness.

Violation of rules of conduct establishes, generates the *noncompliance* phenomenon. Forms of behavior characterized by a significant spacing from established social norms for social status, is called *deviance*.

Imperativeness of law is evident in the situation when the recipient of the legal norm is not aware of the legal provision, under the principle that "*no one can claim the incognizance of the law*".

- 4. Legal norm *embodies* moral (rightfulness, freedom, obligation, responsibility, justice, legality, authority, liability, legitimacy, equality), religious, economic, political *values*, in *mandatory rules of conduct*. Law has the availability to ***approach*** other social norms, passing them in juridical sphere.
- 5. *Legal norms* also customize by how they are *developed*, by *their origin* from very specific sources: public authority vested with regulatory powers or judicial authority power. Legislator's will determines what the recipient of the norm "should be" or "should do" in the social context at a time. It is, as noted, the difference introduced by Kant between "*Sein*", which expresses the objective existence ("to be", "to exist") and "*Sollen*" ("must" - obligation imposed by the power of will).
- 6. Another aspect that expresses specific legal normativity, in relation to other types of normativity, is given by the *separate form and content of its rules*. In terms of *development* and drafting *techniques* legal norm is a concise text, made, whether as an item or several items which regulate social relations or human behavior.

➢ 7. There are two ways the *structure of legal norm* can be analysed: *logical-legal*, internal structure showing us how the norm is compiled, *technical-legal*, external structure, referring to wording in the legislation texts.

Logically, traditionally the legal norm is considered to have the following structure: hypothesis, provision and sanction.

In the current legislation we shall not find every time its structural parts as specifically formulated for each rule of law. There are articles in the regulations following the *trichotomic structure*, one norm being contained in one article. For reasons of legislative technique and economy of means, sometimes some parts of the norm are implied or inferred by way of logic interpretation or some elements can be found in another article of the same normative deed or in another normative deed.

Non-overlapping at all time of technical-legal construction of the norm on its logical structure has led some authors to assert that some areas of law are characterized by atypical construction of legal norms. In this respect, it is stated that *criminal law norms* have *dichotomous structure*, containing only provision (prohibition of certain conduct) and sanction (the penalty to be applied in case of infringements).

Even if this typical tripartite structure does not always appear clearly in the content of the legal norm, it nevertheless exists. For example, most criminal procedural norms are divided, meaning that various elements of the norm are found in distinct texts.

Sometimes *punishment may lack in the logical structure of a legal norm*, meaning that there are norms that are unauthorized, or norms with pure device, as they are called by P. Pescatore. Constitutional norms have more the aspect of moral norms generally lacking the sanction, N. Titulescu considered. However, even though, in terms of explicit formulation, sometimes the provision structure lacks the sanction, yet it is default. Violation of any constitutional norm has as a sanction the unconstitutionality of the act.

Finally, underlying the system of law, the LEGAL NORM is the social rule of conduct characterized by generality, impersonality and incumbency, established or recognized by the public authority and whose application is achieved through conscious acceptance by their recipients, its inobservance being sanctioned by the coercive force of the state.

As indicated by Nicolae Popa, legal norms together with the legal relationships they generate form the order of law, part of the social order.

Contemporary legal order recognizes a variety of sources (springs) of law. Domestic legal order is made besides state promulgated norms, from *corporate, autonomous sources*, governing freedom of association, freedom of trade and industry, religious freedom etc. ("acts-norms", "normative contracts", "autonomous law").

It is not enough to deem the legal norm just as an existence in itself, theoretically. It is inevitable to note that *normativity* inherent to legal phenomenon should be examined also as *means of social action*. In order that the norm should not be only a "law which remains in the book", its implementation in the social life is required. *The effectiveness of legal norms* is a necessary condition to achieve the prescription of law.

The transposition of legal norm into life, its effectiveness, the impact on society all depend on the knowledge and dissemination of law, on the acceptance of legal norms by legal subjects.

The problem of legal norm action requires setting: the moment of starting to produce legal effects and duration of these effects over time, the territorial administrative limits they take effect in, the categories of persons covered by them, or are exempted from their effects.

A. Regarding the legal norm activity in time, three points are of interest: norm enforcement, the norm action and the lapsed norm.

B. As regards law, we distinguish the *legal space subject to state sovereignty* and spaces, as the sea, bottom of the ocean, outer expanse, beyond the limits of national jurisdiction,

escaping any form of sovereignty. The latter forms the common good of humanity, governed by legal norms of public international law. Domestic law takes over these rules, recognizes them to be mandatory and part of legal order of the state. *Territoriality principle*, expression of the *state power sovereignty principle*, particularly develops in terms of territorial sovereignty and the relationship between state and people, by citizenship.

C. Scope of legal norms may vary in terms of people they target. *Recipients of the legal norm prescription* can be nationals, foreigners, stateless persons, refugees, people with certain professions, individuals or legal entities, or states, as holders of sovereignty, etc. Within these categories of recipients the *fundamental principle of equality before the law* applies.

Romania's adherence to EU on January 1, 2007, led to the reassessment of the whole national legislation in light of EU requirements, expressed in the numerous normative deeds developed under it to achieve its fundamental objectives.

As a member in this international community, our country, in addition to the obligation to acquire these objectives, must also harmonize legislation with EU legislative assembly, and constantly perfecting the legal instruments of fulfilling the work programs to which it subscribed.

The concept of community legal order is double positioned relative to the domestic legal order:

- *integrated directly* into domestic legal order of the Member States of the European Union, EU rules are "*directly applicable*", no confirmation or constitutional, administrative or procedural measure of the national authorities being needed for this purpose; some norms require further action on their implementation, to produce legal effects (directive);
- *priority applicability* of European law in national legal order of Member States in relation to their domestic law.

Member States cannot unilaterally change the Community provisions addressed to them, they being mandatory.

Individuals are entitled to invoke whenever, within the domestic legal order, the European law, in the statutory conditions of legal regulations of the European Union. Currently, *the same subject of law is subject to pluralism of the legal order*. The *vertical direct application* (invoking Community provisions before the state and its bodies) and the *horizontal applicability* (between individuals) are recognized.

Currently, discusses take place on the phenomenon of globalization of law, on the transnational law. Lawrence Friedman, American sociologist of law, notes that legal practice transcends national borders, jurists becoming aware of the fact that it became increasingly more international. The term transnational is - he explains - a word without a fixed and precise meaning, referring to a law or a norm that expands, is in force and does not apply to one country.

A series of problems related to the European integration within the scope of law are determined by the gaps of "*legal transplant*" theory. I join the opinion of the French author André Jean Arnaud that a number of difficulties related to the European integration within the scope of law are caused by deficiencies of "*legal transplant*" theory. The theory claims that the legal norm can be transplanted in certain circumstances and without much inconvenience, from a system of law to another, in the advantage of that receiving the loan, the only condition being that of the legal order autonomy in which the transplant is operated. In fact, the before mentioned author emphasizes, in order that the graft be successful other conditions which the success of the unification or harmonization action depends upon, are necessary. For the graft to be successful, systems of law between which the operation takes place should meet the characteristics of the postmodern law of the XXI century.

3. Dysfunctions and distorsions of law

Between a society and its law there isn't always a functional correlation. *Dysfunctions* and *distortions* of law can take various forms.

Sudden change and often violent of the political system of a society determines *legislative disorganization* situation.

Between the time the legal norms are drafted and promulgated and the time the law is achieved, a series of inconsistencies, functional mismatch may appear, at the level of the individuals or social groups.

Ineffectiveness refers to the gap between the applicable law and social reality, which is considered to regulate. Sometimes, legal norms have no real capacity to achieve its goal, they are *ineffective*.

The ineffectiveness and inefficiency of law may take in certain social contexts, the form of *non-law*. Its main forms of action concern: self-restraint law, the self-neutralization of legal norms, the resistance of fact to law, lack of validity and effectiveness of law, the unjust law, the aggressive (oppressive) law.

4. State and law in postmodern society

Some *conclusions* are required on the *evolving directions of law*, as reported in the literature.

1. *Legal Pluralism and inter-normativity* are more current than ever phenomena.

Simultaneous polysystemics acknowledge sociologists' opinion that *law*, understood as a more or less coherent system of legal norms, *coexists and interacts* with other regulatory systems acting in society

These phenomena of interaction have aquired, in theory and sociology of law, the "inter-normativity" denomination, defined as "set of phenomena formed of relations that bind and unbind between two categories, orders and systems of norms".

The emergence of law as normative system, did not lead to the exclusion of other regulatory systems. Law is interdependent with them. It happens that the same conduct may be subject to several regulatory systems - for example, marriage, regulated by law, religion and customs - law, accepting the aggregate, reserves its supereminence. Thus, art. 48 para. (2) of the Romanian Constitution states: "The conditions for conclusion, dissolution and nullity of marriage is established by law. Religious wedding may be celebrated only after civil marriage. "

2. *New regulatory requirements*. Practice shows that there are many areas where law proves to be powerless in regulating certain situations and even if it does regulate, it succeeds only in an imperfect way (genetic engineering, molecular biology).

3. *The current crisis of traditional regulation* is caused by the continuous acceleration of economic, media, cultural, social exchanges, by unprecedented scientific discoveries, situation where the main purpose of modern regulations is to ensure at the same time, a sufficient durability of regulatory framework and a permanent accommodation to this growing and changing diversity.

4. *Deregulation* is a way that no longer regulates certain social relations, to be passed within other regulatory systems. Thus, there is an increasing tendency to resort to *alternative and informal ways of regulation* (to non-judicial ways of dispute resolution) such as negotiation, conciliation, mediation, arbitration, replacing the formal ways of dispute regulation after the usual procedure, which is no longer working or proves inadequate.

Excessive deregulation can be dangerous in a globalized world, with no ethics. The rule of law may be ineffective, unless it falls in line with the appropriate morality to ensure its impact

on the individual consciousness of its addressee. The reduction of constraint is possible provided that ethics, or at least professionalism is promoted.

5. In the postmodern period, Colin Sumner noted, one could ascertain the attenuation of some specific trends of modern law development (general and abstract nature of law, viewed as a prerequisite for formal equality), while *the practical purposes of the law are first*.

6. *The revival of natural law takes place in modern times as human rights.*

7. *State and law in postmodern society* registered notable changes. The particularity that should catch our attention is *the change of state normativity*. The term means the developments affecting the legal order of state, of the law state, conventionally understood as the hierarchy of rules issued by the State to regulate situations and human activities: joining national and supra-national legal order, the development of a *soft-law* (*non-imperative legal instruments*), the expansion of normative tissue, the emergence of some forms of inter-normativity.

8. *Normativity and the welfare state*. The term "*welfare state*" reflects the changes of the relationship between state and law and designates the interventionist state, which was attributed to a regulatory function and intervention function in the social relations of any kind.

The legislative power is transferred mainly from the Parliament, to the executive power and thus the law is changing its aspect, "defining a certain policy and establishing certain principles". Government hardens through a huge bureaucratic apparatus, and Parliament's role diminishes, thus changing the nature of legislation that even when it creates substantive rights they are still social rights. Given that politics can sometimes be very distant from the real man, the representation of justice in the legislative act of justice, especially after promulgation, becomes a means to correct the representation. Therefore *the jurisprudential law acquires legitimate authority and becomes principle of binding law*.

Thus, in postmodern societies, *law progressively loses its normative dimension*, by loss of its stability in time and using the techniques of persuasion rather than coercion. We ascertain the increasing share of incentive rules and positive sanctions. The use of constraint to achieve finality of legal norms is intended to be of exceptional nature.

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THE ADMISSION OF GUILT PURSUANT TO THE ROMANIAN CRIMINAL LAW

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Abstract

The paper builds a comparison between the provisions concerning the admission of guilt before Law no. 202/2010 which regulates the new judgment procedure for this case and the old provisions from the Romanian Criminal Procedure Code regulating the mitigating circumstances. It analyzes the advantages and disadvantages of admitting the guilt from the point of view of the conviction and of the limits of the sentence. Also, it reveals the possibilities that Courts have when judging a case of admission of guilt considering the possibility of false admission of guilt. The paper reviews also the expressed opinions in the Romanian doctrine regarding the admission of guilt and it presents specific cases from the jurisprudence.

Keywords**:** *admission of guilt, mitigating circumstances, sentence reduction.*

A.THE ADMISSION OF GUILT IN THE ROMANIAN CRIMINAL LAW BEFORE LAW 202/2010

Before the amendment of the Criminal Procedure Code introduced by Law no. 202/2010 the admission of guilt was regulated as a mitigating circumstance and not as a separated procedure of judgment. Law no. 202/2010 has introduced a new possibility of judgment for the persons willing to admit all charges brought against them (as provided in the indictment). However, the mitigating circumstances still exist for those who are not willing to follow this new procedure for the reasons detailed bellow.

The Romanian Penal Code regulates the mitigating circumstances that Courts will analyze and hold into account when individualizing the punishment that will be applied. Such mitigating circumstances are organized under two categories: the legal mitigating circumstances that are mandatory and the judicial mitigating circumstances that are not mandatory to be held into account but nevertheless not to be neglected.

The legal mitigating circumstances as provided by the Romanian Penal Code

Pursuant to art. 73 from the Penal Code, the legal (therefore mandatory) mitigating circumstances are:

i. Exceeding the limits of self-defense or state of emergency
ii. Committing an offense due to a challenge of the injured person

The judicial mitigating circumstances as provided by the Romanian Penal Code

Pursuant to art. 74 from the Penal Code, the judicial mitigating circumstances are:

i. The good conduct of the offender before committing the offense (including the lack of criminal records)
ii. The persistent attempt of the offender to remove or repair the damage
iii. The conduct of the offender after committing the offense: submission to the authorities, admission of guilt, etc.
iv. Any other mitigating circumstances that can be held into account.

The effect of the mitigating circumstances upon the punishment

Pursuant to art. 76 from the Penal Code, in case there are mitigating circumstances (and no aggravating circumstances) the main punishment for the individual changes as following:

- When the punishment is life imprisonment the punishment that will be applied will be between 10 – 25 years of imprisonment.

- When the minimum limit of the punishment is 10 years of imprisonment or more, the punishment is reduced bellow such limit but not less than 3 years.
- When the minimum limit of the punishment is 5 years of imprisonment or more, the punishment is reduced bellow such limit but not less than 1 year.
- When the minimum limit of the punishment is 3 years of imprisonment or more, the punishment is reduced bellow such limit, but not less than 3 months.
- When the minimum limit of the punishment is 1 year of imprisonment or more, the punishment falls below such limit to the general minimum punishment.
- When the minimum limit of the punishment is 3 months of imprisonment or more, the punishment falls below such limit to the general minimum punishment or a fine is imposed.
- When the minimum limit of the punishment is represented by a fine, such fine falls below its minimum limit.

Such reductions of the punishments will be applied mandatory only if there are no aggravating circumstances. If there are both mitigating and aggravating circumstances, the court won't be obliged to drop the limits of the punishment below their minimum limits.

B.THE ADMISSION OF GUILT IN THE ROMANIAN CRIMINAL LAW PURSUANT TO THE PROVISIONS OF LAW 202/2010

Pursuant to art. 6 parag.3 let. d) from the European Convention of Human Rights (ECHR) the defendant is guaranteed the right to ask directly questions to the witnesses and to request the Court to hear them and to obtain the attendance and examination of the defense witnesses under the same conditions with the prosecution witnesses. This right is a relative one, meaning that the defendant has the right to renounce it in front of an independent court and to choose to have its judgment only based on the evidence gathered in the prosecution phase[466].

Most European countries have simplified procedures of judgment (for example, in France - *la comparution sur reconnaissance prealable de culpabilite, in Italy – patteggiamneto,)* or pleadings of guilt (from the anglo-saxon law, „*plea guilty"*or „*plea barganing*"). Such procedures allow the defendant to have a quick trial upon his expressed wish.

In Romania, before Law no. 202/2010 which was published in the National Gazette of Romania on 26th October 2010, the criminal procedure was the same for both defendants who admitted their guilt and who didn't. Such law amended the Romanian Criminal Procedure Code by implementing certain changes among which also the simplified procedure regarding the admission of guilt.

The new procedure of judgment for the cases of admission of guilt

Pursuant to the provisions of art. 320^1 from the Criminal Procedure Code, the defendant may declare in person or through a written statement given in front of a public notary that he admits all the charges held against him in the indictment and that he requests that the judgment is made in a simplified procedure, based on the evidence gathered in the prosecution phase.

Such decision must be taken any time before the beginning of the inquiry, i.e. before the indictment is being read in public session[467].

For this procedure to be applicable it takes a couple of conditions to be fulfilled:

i. The court must be competent to hear the case and legally invested;

[466] ECHR, Brandstetter vs. Austria, decision from 28 august 1991, par. 49.

[467] Pursuant to the Romanian Criminal Procedure Code, the inquiry begins when the indictment is being read in public session. After this procedural moment, the defendant can be heard and give his statement.

ii. The defendant mustn't be charged with committing a crime punished by the law with life imprisonment – therefore only less severe punishments are being accepted for this procedure. If the defendant is charged with committing a crime punished with life imprisonment and he admits the charges such admission of guilt will be held into account only as a mitigating circumstance as provided by art. 74 from the Penal Code as detailed above;

iii. The admission of guilt must be total, according to the charges from the indictment[468]. If the defendant admits partially the charges from the indictment he will not be able to request the Court to apply the simplified procedure of judgment[469].

The advantages of such procedure are:

a. Having a quick trial

b. Receiving a less severe punishment. Pursuant to art. 320^1 par. 7 from the Criminal Procedure Code, the defendant who admits his guilt is being convicted to a punishment less severe with 1/3 from its legal standard imprisonment limits (and with ¼ less severe in case of fines). For example, a fraud punished with imprisonment between 6 months - 12 years will receive a punishment between 4 months and 8 years maximum.

The Court decision in case of admission of guilt

Pursuant to art. 320^1 par. 7 from the Criminal Procedure Code, when applying the simplified procedure of judgment due to the admission of guilt, the court will sentence the defendant. This means that the only possible solution, in theory, is the conviction. Such situation contradicts the rights and guarantees the defendant has for a fair trial (as regulated by the constitution and by the European Convention of Human Rights which are mandatory), because it is not legal to constrain the court to give a sentence when the court considers that there is a case of acquittal.

In order to remove this issue and to allow the Court to acquit the defendant, although art. 320^1 from the Criminal Procedure Code allows the defendant to choose to be judged pursuant to this simplified procedure, the Court can deny the request to apply such procedure under certain circumstances.

Hence, the court can deny the request made by the defendant pursuant to art. 320^1 Penal Code if the evidence gathered through the prosecution phase are not enough to prove that: (i) the deed exists, (ii) the deed is an offense, and (iii) the deed was committed by the defendant.

Therefore, if the court considers that the admission of guilt is false (meaning that the defendant didn't commit the offense), the court will deny the defendants request and will proceed to the normal procedure of judgment.

Also, if the court considers that the deed is not an offense because it has a low degree of social danger (so it cannot be considered an offense pursuant to art. 18^1 Penal Code), it will deny the request of the defendant and it will proceed to a normal judgment in order to be able to decide to dismiss all charges and to acquit the defendant.

In case the defendant changes his statement and after requesting to be judged pursuant to art. 320^1 he denies committing the offenses, the Court will consider that the defendant has given up his request and will proceed to a normal procedure of judgment. Therefore, a statement of admission of guilt must be not only total but also final.

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[468] The admission of guilt refers to the deeds and not to the legal classification of the offenses. Therefore, after admitting the defendant has the possibility of requesting the court to change the legal classification of the offenses (for example, from a consumed fraud to an attempt of fraud).

[469] For a detailed opinion on this matter view the Constitutional Courts decisions no. 1470/2011 and no. 1483/2011 regarding the constitutionality of art. 320^1 Criminal Procedure Code with different opinion given by judge Iulia Antoanella Motoc, National Gazzette no. 853/2.12.2011

In conclusion, the provisions of art. 320^1 are incompatible with the acquittal of the defendant. Things are different however in the case of cessation of trial[470]. In case the court finds applicable a case of cessation of trial (one of those regulated by art. 10 f-h from the Criminal Procedure Code[471]) will ignore the fact that the defendant has admitted his guilt and will order the cessation of trial.

III. RECENT ISSUES IN THE JURISPRUDENCE FOR CASES OF ADMISSION OF GUILT

Recently, after Law no. 202/2010 has amended the Criminal Procedure Code by decreasing the limits of punishments for the cases of admission of guilt, a new jurisprudence of the prosecutors was born: invoking the admission of guilt as a method of obtaining lower punishments and not as an evidence of regret of having committed the offense.

Such situations occur often when dealing with preventive arrest, when prosecutors submit to the court requests to take or prolong such measure and when the defendant admits entirely his guilt in the prosecution phase of the trial, more precisely by giving a statement of admission of guilt in front of the prosecutors.

Normally, an admission of guilt, as a mitigating circumstance, would diminish the chances of taking the measure of preventive arrest because the attitude of the defendant would show regret and lack of intention to commit new offenses or to influence somehow the evidence.

However, since the admission of guilt is no longer only a mitigating circumstance but also a cause of reduction the sentence, the admission of guilt could appear no longer as a sign of good faith but as a method of bargaining on a lower punishment.

Such argument has started to be used a lot in Courts by prosecutors who request the preventive arrest or a sentence with imprisonment (and not a suspended punishment). The practice is intolerable and infringes the rights of the defendants. When law itself considers the admission of guilt as meritorious (and applies lower punishments for it), it is illegal to qualify it otherwise.

IV. EXAMPLES OF ADMISSION OF GUILT IN THE ROMANIAN JURISPRUDENCE

After Law no. 202/2010 has amended the Criminal Procedure Code many defendants have chosen to apply this possibility. Under these circumstances, the sentences have been decreased:

i. Conviction for false statements, forgery, forgery of identity – 1 year of suspended sentence (Case file no.924/180/2011 – Bacau Court);

ii. Conviction for setting of an organized group, access to an informatics system with right, detention without the right of a device in order to access an informatics system, cause a loss of property to a person by entering, modifying or deleting computer data – 3 years of suspended sentence (Case file no. 46890/3/2011, Bucharest Court);

iii. Conviction for child pornography – 3 years of suspended sentence (Case file no. 16689/299/2012, Bucharest Court of District 1);

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[470] Florin Radu, "The compatibility between the admission of guilt and the cases of acquittal", 11.05.2011, www.juridice.ro

[471] Pursuant to art. 10 let.f-h from the Criminal Procedure Code, the trial terminates when:

f) lacks the complaint of the injured party, the authorization of the competent authority or a any other procedure required by law for that offense

g) it has been a case of amnesty, prescription or the defendant has died

h) the complaint has been withdrawn or the parties have reconciled in the cases when such situations remove the criminal liability of the defendant.

iv. Conviction for attempted murder – 4 years sentence (Case file no. 3408/121/2011, Galați Court);

v. Conviction for theft – 3 years of sentence (Case file no. 2640/116/2011, Calarași Court), etc.

The cases above-mentioned are examples proving the change that has occurred in the Romanian jurisprudence. Before Law no.202/2010 for such offenses the punishments were higher and suspended sentences were not easily given for similar offenses.

V. CONCLUSIONS

The amendment of the Criminal Procedure Code by implementing the procedure of the admission of guilt was definitely a step forward towards solving the cases with celerity. It was also an improvement from the point of view of the sentences which got reduced.

However, *de lege ferenda* the legal provision should be amended in the sense of allowing the courts to give not only convictions but also acquittals after the admission of guilt and not to condition the possibility of acquittal of a classical judgment, without the application of art. 320^1 from the Criminal Procedure Code.

The legal issue is important from the perspective of international criminal law, human rights and the implementation of ECHR in the Romanian legislation. All offenses committed in Romania or against Romanian citizens are judged pursuant the Romanian Criminal Procedure Code, therefore could be subject to a accelerated procedure of judgment – the one pursuant to the admission of guilt as detailed above.

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RELEVANT CONTEMPORARY ASPECTS OF INCRIMINATION AND EXCULPATION OF THE PROSTITUTION IN ROMANIA

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Abstract

Since always, prostitution has enjoyed a special attention from the people, being incriminated in the name of the Christian ethics and often by the laws of the different states of the world. Romania also took sides (either the one condemning this sin, or the one that, on the contrary, would have displayed tolerance and or would have been permissive in the matter of providing sexual favours on payment) according to certain historical periods.

This study is the sequel of a previous one, being part of a project that aims to provide a full perspective of a phenomenon of such amplitude, an attempt to convey as valuable and as complete information as possible, about the prostitution, especially from a legal and institutional point of view. The legal, institutionalized practice of prostitution, within the boundaries of Romania, represents one of the distinct stages of the evolution of the Romanian society between the XIXth – XXth centuries. The previous study – Considerations regarding the practice of prostitution in Romania during the first half of the XXth century[472] – dealt with documents and information pertaining to the norms regarding the practice of the oldest profession in the world in certain cities in Romania, in the beginning of the XXth century (Bucharest, Braila, Cluj and Constanta). This time, I will try to point out and to analyse the main factors pertaining to the incrimination and the exculpation of the practices of these vilified Venuses, as they are stipulated by the criminal law of a contemporary Romania.

The farther we eloign from the period when the practice of paid sex was brought under regulations and institutionalized, one can observe an increase of the pimp's or procurer's role. This material shall be read according to the above mentioned information, concerning the more and more obvious connection of the prostitution to the human trafficking and, implicitly to the organized crime.

Keywords: *prostitution, criminal code, human trafficking, institution, law.*

Introduction

Paraphrasing Constantin Enăchescu's ascertainment that "everything is human"[473], we shall venture to say that everything is social, that all the deeds of negative nature committed by man, from murder to rape, from theft to prostitution, from embezzlement to human trafficking are all part of the society. It is the society that controls, both at informal and formal level, all the feelings, for „virtue and sin, truth and lie, good and evil, mercy and cruelty, love and hate, everything that contributes to man being *pure* or *impure*, from o moral perspective, belong and manifest *within* and *by means of* the same feelings of that person"[474]. If at the feeling level, the fault is punished by means of a moral law, the murder, a fault pertaining exclusively to the society, is sanctioned by law, either pecuniary or by imprisonment. In this category of crimes of society, one finds prostitution, especially in the societies where its practice is forbidden by law. It must be specified, from the start, that providing sexual favours on payment was forbidden, in case the one who practised it was deemed as interloper, even during the times when in Romania, for example, prostitution was accepted and

[472] TINU, A., BOBOC, C., *Unele consideraţii privind practicarea prostituţiei în România în prima jumătate a secolului XX*, presented on the occasion of the International Law Conference, VIth edition, „Agora" University, Oradea, 18-19 October 2012.
[473] ENĂCHESCU, C., *Homo demens: o redefinire a nebuniei*, Editura Polirom, Iaşi, 2008, p. 81.
[474] *Ibidem.*

institutionalized. I shall not insist upon this stage, but we may be able to conclude that prostitution was incriminated and exculpated according to the manner of occurrence of this veritable vice of the society – it was the illegal prostitution that was incriminated, whilst the legal and institutionalized one was exculpated. In the following, I shall try to point out a few elements regarding the incrimination of the prostitution by the Romania legislation during the last century.

Considerations regarding the incrimination of the prostitution under Romanian criminal law

Proscribed by the Healthcare and protection law in 1935[475], the practice of prostitution, within the boundaries of Romania, was to be incriminated by the Criminal Code, at the present moment its statute being unchanged. However, neither the Royalty, nor the "puritan" Antonescu, and not even the communists managed to oppose the *amazons of sex*. Proscribed by the law, but tacitly accepted, the oldest profession would play an important part in the social and political revolution in Romania.

From a sociological perspective, Kingsley Davis suggested that prostitution cannot be eradicated, despite the opposition of the law, feminist organisations or the church, as it is a strictly commercial act based on valid arguments: „institutionalized sex control (even by the awareness regarding it from the part of the Secret Service, being know that prostitution is but the more visible and light form of human trafficking, an essential element of criminality – a.n.), the uneven scale of attraction, the economic and social inequality between sexes and classes".[476] The most exposed , from a media and risk exposure perspective, are the ones that practise prostitution; being divided in three categories: 1. Prostitutes belonging to criminal subcultures; 2. Prostitutes living between two worlds, who have to resort to prostitution out of necessity, and 3. Alienated prostitutes (those without any value aspect).[477] But all of them „are for sale and they assert it. Flesh for sale. One can always negotiate (with them, with the middleman or with the owners, in the case of sexual slaves – a.n.). They depend on hour, looks and on client's civility, on the girl's mood."[478]

The farther we eloign from the period when the practice of paid sex was institutionalized and brought under regulations, the more obvious the closeness towards the human trafficking becomes. Human trafficking represents a form of manifestation pertaining to organized crime, being able to „generate vulnerabilities (…), due to the ineffectiveness of the mechanism of social protection or of public health, by overflowing the permeability of the legal labour market, and implicitly, by disturbing the balance of the forces between the control structures of the law and of public order and the population segment channelled towards criminal activities (my underlining)"[479]. The main element of the human trafficking, necessary for the practise of prostitution, is that of girl and women trafficking, whose sexual exploitation answers to certain needs of the „those willing to pay in order to have sex;

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[475] *Extras din Legea sanitară şi de ocrotire publicată în textul complectat în Monitorul Oficial Nr. 140 din 22 Iunie 1935 şi cu modificări până la 6 Septembrie 1938 inclusiv*, *apud* ZOTTA, C. C. Gr., *Codul legilor penale speciale*, „Cugetarea" Publishing House, Bucharest, 1939, pp. 227 – 249.

[476] DUMITRESCU, F., GABOREAN, I., PRUNĂ, M., VOINEA, M., *Sex şi sancţiune*, Mediauno Publishing House, Bucharest, 2002, p. 166.

[477] *Ibidem*, pp. 165-166.

[478] ADLER, L., *Casele de toleranţă între 1830 şi 1930: viaţa cotidiană*/translation by Irina Cristea, Corint Publishing House, 2004, p. 15.

[479] KARTUSCH, A., 2001, *Reference wide for Anti-Trafficking Legislative Review with Particular Emphasis on South Eastern*, Warsaw: OSCE, p. 3, *apud* ZOANĂ, M. G., *Traficul de persoane: teză de doctorat*, scientific coordinator: prof. univ. dr. Alexandru Boroi, Faculty of Law, „Alexandru Ioan Cuza" Police Academy, Bucharest, 2009, p. 11.

prostituant (Dutch)"[480], of those who benefit physically from these women's services. „The client, the male buyer of sex on the prostitution market, usually remains anonymous or invisible"[481], but „plays a determinant part, the traffickers striving, above all, to answer „the demand""[482]. It is interesting to learn *what drives these sexual treasure hunters*. According to Kartusch, those willing to pay in order to have sex (prostituants) resort to sexual favours from various reasons: curiosity, loneliness, contact issues, variation or commodity.[483] But, mostly because, by being paid, the one providing sexual services satisfies certain needs that surpass the physiological need, needs pertaining to sexual perversions, classified by Vladimir Beliș as follows: 1. Indecent behaviour (exhibitionism); 2. Sodomy and sexual deviances [a) sodomy according to manner (ratione modi), that involves a sexual heterosexual act displayed in a deviant manner (anal coition, reciprocal masturbation, oral coition, felatio, cunnilingus), b) sodomy according to sex (ratione sexus), that consisted in sexual intercourse with persons of the same sex, c) sodomy according to species (ratione generis), consisting in sexual intercourse with animals, d) means perversions or algolagnia, referring to the so-called "physical pleasures accompanied by moral disorder" (sadism, masochism, vampirism/pleasures of sanguinary nature)] and 3. Various perversions.[484]

Prostitution would be castigated by the Criminal Codes of Romania beginning with 1936-1937. The Health care and protection law,[485] already mentioned, stipulated, in chapter III, titled „Fighting venereal disease", article 297, the following: „The whorehouses, as well as, all establishments or public houses where prostitution with women who are lodged or who frequent such places is practised, is entirely forbidden. All the establishments in this category, at the moment of the issuance of this law, are liquidated"[486], those who did not obey the previsions of the law were fined „having to pay 5000 – 100000 lei, and in case of backsliding, they were imprisonment for a period that could last up to 6 months"[487]. The selling and the distribution of pornographic materials was also forbidden, as these were considered to be an incentive to practising prostitution (article 299), whilst the article 298 stipulated as mandatory that the doctors and the clinics with antivenereal profile took all the necessary actions in order to fight these diseases, the article 266 having the doctors declare on a monthly basis, as statistical reference, the cases of gonorrhoea, soft chancre and syphilis.

In 1935-1936 the Criminal Code, did not incriminate prostitution as a crime against *les bonnes moeurs* (Chapter II), pandering being especially castigated, but also the selling of materials that instigated to the practise of prostitution. Article 433 – „ He who, with the purpose of exploiting the debauchery, incites to prostitution with a person, regardless of sex, or excites that person into corruption, commits de crime of sexual corruption and shall be punished with 3 to 5 years in a reformatory accompanied by correctional interdict from 1 to 3 years" –, article 434 (regarding the perpetration of the crime upon a minor), article 435, when a man agrees to be maintained with money earned by a woman's prostitution, articles 46, 437, 438, 439 and 440, concerning the act of pandering, are conclusive in supporting the assertion above.[488] A lot of attention is directed towards public health care and implicitly, to the prevention of the sexually transmitted diseases. The proof is constituted by the articles 375,

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[480] ADLER, L., *op. cit*., p. 15.
[481] ZOANĂ, M.G., *op. cit*., p. 12.
[482] *Ibidem.*
[483] KARTUSCH, A., *op. cit*., p. 3, *apud* ZOANĂ, M. G., *op. cit*., p. 12.
[484] DUMITRESCU, F., GABOREAN, I., PRUNĂ, M., VOINEA, M., *op. cit*., pp. 113-114.
[485] *Supra*, p. 2.
[486] *Extras din Legea sanitară şi de ocrotire publicată în textul complectat în Monitorul Oficial Nr. 140 din 22 Iunie 1935 şi cu modificări până la 6 Septembrie 1938 inclusiv*, *apud* ZOTTA, C. C. Gr., *op. cit*., p. 233.
[487] *Ibidem.*
[488] BAROZZI, Gh., MĂTASE, Gh., *Codul penal „Regele Carol al II-lea" adnotat*, f.ed., Bucharest, 1936, pp. 243-250.

376 and 377 in the Criminal Code concerning the infringement of the measures regarding "the prevention and the location of the contagious diseases", in chapter I – *The spreading of epidemics and of any other contagious diseases*.[489]

After the entering into force of the law of 1935-1936, that completely forbade the practise of prostitution, of any type, either illegal or institutionalized, The Criminal Code „Regele Mihai I"[490] would also comprise the previous references to pandering, the articles being the same, from 433 to 440.[491] The communist Criminal Code too would preserve the reviews of the previous codes, the ones concerning the prostitution and the act of pandering being more definite. The article 328 would refer to prostitution by defining it thus: „The deed of a person who provides for herself/himself means of living or the main means of living, by practising, for this purpose, sexual intercourse with various persons, is punished with imprisonment with a duration ranging from 3 months to 3 years"[492], for the next article, 329, defined pandering as „the advice or the coercion to prostitution, or the easement of practising prostitution or the act of benefitting from practising prostitution by a person, as well as, recruiting a person for prostitution, or the human trafficking to this purpose. "[493]. The punishments stipulated imprisonment from 1 to 5 years accompanied by the denial of certain rights, and if the victim was a minor, the punishments depriving of freedom ranged from 3 years to 10 years, the attempt being also punished.[494]

The revolution in December 1989 brought along a misunderstood freedom by many a man, this being the reason why we are witnessing the increase of the human trafficking, of prostitution and of other phenomena pertaining to organized crime. If in the Criminal Code revisited and amended after 1989, one cannot notice any change of the article 328, regarding prostitution, one can notice changes of the article 329 that incriminates the act of pandering. The punishments are differentiated for advice to prostitution (2-7 years) in regard to person recruitment with the purpose to have them practise prostitution (3-10 years), or are increased in the case of crimes of pandering minors (5-15 years) a new paragraph being introduced (4), stipulating the fact that „money, the values or any other assets destined to serve, in a direct or indirect manner, to perpetrating the crime stipulated by paragraphs (1)-(3), and those acquired by as a result of its perpetration are confiscated, and if these are not to be found, the convicted is forced to pay the equivalent amount"[495]. Other laws that refer to prostitution and pandering are the Law 678/ 2001 regarding the prevention and the fight against human trafficking, the Law 196/ 2003 concerning the fight against pornography, the Law 39/21.03.2003, the Law 161/19.04.2003 and EO (Emergency ordinance) 79/2005.[496]

Conclusions

The practise of prostitution is a habit already ingrained in the collective consciousness, as well as the expression defining it – the oldest profession in the world. Legal or illegal, the practise of providing sexual favours on payment is a complex phenomenon, requiring a special attention from the authorities, researchers, doctors, and in general, an ample debate of

[489] *Ibidem*, pp. 214-215.
[490] CLONȚA, E., *Codul penal „Regele Mihai I"*, Printing house and bindery of the „Văcăreşti" penitentiary, Bucharest, 1943.
[491] *Ibidem,* pp. 244-247.
[492] **** Codul penal al Republicii Socialiste România*, The State Council, Editorial section of the Official Gazette and of other legislative journals, Bucharest, 1973, p. 108.
[493] *Ibidem*, pp. 108-109.
[494] *Ibidem.*
[495] ****Codul penal: Codul de procedură penală*, III[rd] edition reviewed and amended according to the changes of the law and of the decision of the Constitutional Court published until 30 April 2002, work annotated and accurate by Forina Şerban, All Beck Publishing House, Bucharest, 2002, f.p.
[496] ZOANĂ, M.G., *op. cit*., p. 26.

specialists of all fields targeted by this archetypal sin (medicine, law, social sciences, history, management, etc.). The conclusions we have reached are the following:

*prostitution cannot be eradicated while there is demand and supply;

*the criminal laws in Romania stipulate punishments that are more severe for panderers than for the prostitutes, while the clients do not suffer any penalty;

*there are still ambiguous stipulations in the Romanian laws concerning prostitution, stipulations that need be made simpler for a better understanding by a larger stratum of population;

*in Romania the punishment is of more concern than the prevention.

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COMPARATIVE TABLE BETWEEN LAW AND CUSTOM

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Abstract

Law is a system of rules which are based on concepts such as equity, fairness, justice or truth and which coordinates the development of social life.To be able to accomplish this function it must take account the idea of just which exists at a certain moment in society. The connection between these two phenomenoses can best be observed some elements of originality which have influenced the evolution of the formal sources of law in our country.
Keywords: *justice, formal sources, evolution, legal standard, law, customary law, custom, equity, right.*

Sources of Romanian law, especially formal sources, are the legal sciences are nothing but rules of behavior within any community rules without them coexistence is not possible.

We can not know the law and his whole development if we do not know the sources and influences that were exercised on him. The law is the skeleton around which is built the entire social body, whose role is to coordinate and control all aspects of social life. A society without legal rules and these rules are not followed, will be under the rule of chaos, an anarchy that will affect to extinction conditions for good coexistence, poisoning the very idea of humanity. The law is materialize in concrete forms always perfect, always tending towards a better perception of the rules by which it is addressed.

The way to a rational human society in its entirety is perpetual, without a human being accessible destination that will always be dominated by primary instincts. But we can hope for a better efficacy of modalitys in which the legal rule is known to individual, whereby he perceives. Judicially, when we speak about sources of law, which we refer as the rule of law is made known to those whom they are addressed. Some examples: law, custom, jurisprudence, doctrine. Analyzing the classification of law written and unwritten sources, we highlight law as well as a written one and the custom as the unwritten source.

Considering that today the main source of law is the law itself, it seems natural to start with it, but how over time habit preceded the law, we will try to compare the two sources to realize their relations both in time and space.

We have noticed that the law is 'a compulsory social rule set permanently by public authority and sanctioned by material force, usually, the public one[1]', and the habit of law is 'the rule of law established through long practice by the people of the rules that is considered mandatory'[2].

What they have in common and what makes the two sources different? Both of them are social mandatory rules, permanent, its non-compliance is sanctioned by material force. The habit has not a judicial character towards this sanction, but it remains simply a permanent practice entering the morals of a people.

Making a review throughout history, custom existed since the Geto-Dacian period of law, applying only if that do not contrary to Roman public policy provisions knows an important role during feudalism as o 'Jus Valachicum' or 'Jus Valachorum' recognized in the Romanian Principalities regulation, but also in surrounding states.

In Rome, in primitive times, the most important part of law was made by customs law (mores majorum) which gradually stabilized and gained authority as required. That law regulating the organization of family, of property, the procedure was unwritten, still exist in

the memory of human beings. Hence the name 'jus non scriptum' that gave it by Roman jurists to customary law.

Once the establishment of Rome in a democratic and unitary state, the law start to be written, to be more well known by the people and this law is the law 'Jus Scriptum' which according to some authors, etymologically comes from 'Legue' which means 'to read' and therefore the law is 'law steems to be read'[3].

Because of the unwritten origin, the custom start everywhere being unwritten, since its spontaneous, popular origin. Over the time we find him selected in various doctrinal or jurisprudential documents. This does not usually take his custom character as long as it is not established by public authority, which it adopted as a law. True and the most important distinction between the custom and the law is precisely their ancestry characteristic emanation of law as a public authority, hence their difference over time.

To exist, the law implies the presence of a public authority, while the habit may exist in the period of indiscriminate policy when there are no authorities.

The law existed before there was the legislator, as justice existed before there judge. Primitive form of customary law is law, as private justice was a primitive form of justice. The custom evolves in inverse proportion to the development of the state.

To the Romans, under kings and in the first types of monarchy, there were only habits. 'Since the XII Table, was inaugurated rule of law and from now one a customary right gets the secondary importance'[4]. Thus, with with the start of legistation epic, begins the strengthof public authority and expands of a state intervention in areas where the had of the family was an absolute master.

In the Romanian Principalities old romanian customary law has the first statutes by: Pravilniceasca Conde (1780), Calimach Code (1817), Caragea Law (1818) contained customs, and once the decay of feudalism, many ordinary rules were included in the collections of such acts as customary laws land.

During the years 1859-1918 custom was the main source of law. Customary law regulating relations in civil law, the land registry, marriage etc. The adoption of the Civil Code of 1864 begins to restrict common law although there were provisions that refers to legal habits. With the development of economic and social life immediately after the Romanian national state constitution, juridical habit[5] loses its role as a sum of ethical and legal norms and traditional values. Being replaced by written law, custom left behind them ie 'which was born from habits, are straight.[6,]

In contemporary law the role of customary law rules is insignificant compared to the old days, custom losing its importance because it is considered to be too simple, too rudimentary for current requirements. Today custom was preserved in family law, land law, the civil law, administrative practices, commercials, industrials etc.

Currently custom is reflected more in jurisprudence - the relationship between custom and jurisprudence, customary law is invoked. The custom being established by the stateitself, she becomes a positive right.

Customary law even if it can not contradict the law, it is able to fill deficiencies, leading to its fall in desuetitudine or sometimes serve the interpretation of writing.

In conclusion, the law compared to customary requires an act that coverage of a rule of law, throught the authority of the state and therefore the body which holds legislative power and an act of will which firmly established the norm. Moreover, the law has a revolutionary character (changes whenever necessary), while custom is more conservative, tends to constancy[7]. Degree of superiority is much higherwhwn we speak about law,compared to custom.

Most current definitions given to the notion of law by the doctrine presumes that this is a set of rules[8] thus placing the foundation of building to legal norm of the legal order.

If we analyze the history of the French law we find the same situation. Before the French Revolution, France was divided into two parts as a juridical point of view:
- north (coutumes country) where dominate the custom, and southern (country of the written law) which was under the rule of Roman law. This is explained by the fact that Franks is stretched very little to the south, that remained under the rule of Roman law. In northern France after the barbarian invasions was settled the invading peoples habits. After the death of Charles the Great, the caroligian mighty empire crumble into anarchy and falls within the period of feudalism itself, leading to fragmentation of central power. Each region shall have its right and its justice, developing iven a private justice.

During the absolute monarchy, the kings sought to unify the right by ordinance containing an entire field and with character codes. The same phenomenon of custom development in the era of fragmentation of authority existed in Germany where in the Middle Ages formed a common law.

Country where the custom law was developed the most powerful is England. Even today, in the midst civilization ,in England the custom is the source of customary law.

As Hegel specifies, legislative activity is one of the fundamental functions of any rule of law. He believes that the work of enactment is the principle of the rule of law. According to this principle, the law is an authority source, the link between legal norms and social relations under consideration, and its creation involves two steps: first, increasing from particular to general[9], to the concept and then the general suitability to particular. Through establishing norms the state creates overall framework of all interactions between members of the social and coordinate relations between different institutions. This activity is attributed to the state legislature, namely Parliament, the one who, according to the theory of representation is to implement rule of law as social realities faced by governments.

In our country, the first act regulated the way it is made up legislative power and the extent of her powers and how would legislate (in Romanian Principates) was Organic Regulation. Information on the structure and activity of legislative power in Principates, before the adoption of this act, are quite less comprehensive and unclear.

The fact is that both in Moldavia and in the Romanian Country, throughout their historical evolution communal gatherings have been composed to reflect the main interests of the country were consulted by the voivode when he had adopted important measures.

Wallachia adopted on 30 April 1832 Organic Regulation that was the first constitution which gave a form of political organization of the Romanian state[10]. Political context of that time did not allow principalities to develop its own constitution, so that people stay was forced to receive in 1858 the Constitution of foreign (Convention from Paris) as well as in 1831.

The first truly Romanian Constitution was adopted by the Constituent Assembly on 29 June 1866, which imposed a legislative body composed of two chambers, each one with the right of legislative initiative. It is also recognized the right of The Head of the State to sanctioned and promulgated laws and the right to refuse it but only as a suspensive veto and not an absolute one.

Therefore, with the adoption of the Constitution in 1866, in our country the history of the bicameral parliamentarism begins, except the period during comiuniste time when the Grate National Assembly mimic democracy and legislative activity continues nowadays, becoming one of the rooted traditions of the modern Romanian state.

Work the encoding materialized by adopting codes in various fields of law our legal system gave a touch of originality and increased stability, but modernization moving from a customary right to a written law.

One of the most important periods of development for the Romanian law was the legislative unification, caused by the realization of Romanian National Unitary State. With the

completion legislative unification we can really speak of an unitary Romanian state thus walks to modernity.

Revolution of December 1989 and the Constitution of 1991 marking the resumption of positive legal developments in Romania, although we can not speak of a return to constitutional traditions previous communist regime. The law-making is exercised by a bicameral parliament today characterized by a legislative avalanche caused by specific institutional structures to replace the socialist regime with a new legislative framework to enable the transition to a market economy and respect for our country commitments compared international organizations.

Efforts to keep pace with the changing social realities, have had negative effects among which we can mention less comprehensive quality of legal texts and some ineffective enforcement of legal rules, which generates the need for continuous change, which which leads to a vicious circle.

Notes

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[2] Idem

[3] M. Planiol, quoted by A. Valimarescu*, Law Treaty Encyclopedia, Lumina Lex Publishing House, Bucharest 1999*,p.174

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CONSIDERATIONS ON THE EVOLUTION OF THE LEGAL PERSONALITY OF THE EUROPEAN UNION

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Abstract

After nearly sixty years of development, the European Union has become an important actor in international relations and is a benchmark for stability, democracy and human rights. In order to promote these values, the European Union needed effective and coherent tools, adapted not only to the functioning of an enlarged Union of 27 Member States, but also for the rapid changes that the world of today is facing. By adopting the Treaty of Lisbon, the European Union has acquired legal personality, which allows it to work more effectively and consistently worldwide, thus acquired a strengthened position in relations with partner countries and organizations around the world. Considering that until the acquire legal personality the European Union was based on the European Communities that each had separate legal personality and so there were a series of controversies about the legitimacy of the Union's relations with other subjects of national law and international law. Therefore, this article tries to clarify unclear aspects regarding the legal personality of the European Communities / European Union and also to analyze the provisions of the Treaty of Lisbon according that the European Union may exercise its legal personality in the legal order of the Member States and in the international legal order.

Keywords: international agreements, international organizations, legal capacity, legal personality of the European Union, Treaty of Lisbon.

1. General aspects of the legal personality of international organizations

If we want to refer to a definition of an international organization it would be difficult because in doctrine there is no universally accepted definition. Over time were issued several definitions, one of which was proposed in 1956 by the UN International Law Commission, which held that the international organization is "collectivity of States established by the Treaty, endowed with a constitution and common organs, having a legal personality distinct from that of its Member States"[497]. While these basic elements of international organizations were accepted by the doctrine, the definition was not accepted as such by the Vienna Convention on the Law of Treaties of 1969, which provides that the term "international organization" means an "intergovernmental organization", emphasizing thus that members of an international organization are States, as sovereign and independent entities.[498]

Unlike states which are the *original*, *primary* and universal *subjects of international law*, the international organizations are considered derived subjects of international law as they arise by agreement of the states. When creating an international organization, Member States invest the new entity with certain functions and powers to promote common interests. Thus, the international organization acquires legal personality, distinct from the states that have created it and which is opposable *erga omnes*[499]. Regarding opposability of the legal personality of international organization with non-members or of the third states, according to

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[497] Document A/CN.4/101: Report by G. G. Fitzmaurice – Yearbook of the International Law Commission, Volume II, 1956, p. 108.

[498] Article 2 paragraph 1 lit. i) of the Vienna Convention on the Law of Treaties (1969)

[499] For details see Dan Vataman, *European and Euro-Atlantic Organizations*, Bucharest, "C.H. Beck" Publishing House, 2009, pp. 14-18.

the Vienna Convention on the Law of Treaties "a treaty does not create either obligations or rights for a third State without its consent". [500]

Once it acquired the legal personality, the international organization can manifest both in the legal order of the Member States and the international legal order.

Regarding the legal personality in national order of the Member States, to achieve the purposes for which it was created, an international organization has the capacity to have rights and obligations in the legal relations of the national territory of any Member State[501].

Under international legal personality, an international organization has the capacity to have rights and obligations in relations with other subjects of international law in a given area of international relations, in connection with the purposes and objectives for which it was constituted[502].

2. The emergence of the European Communities and evolution of their legal personality

Given the clarifications made above about how an international organization acquires and is exercising legal personality, in continuation of this research an analysis is required on emergence and evolution of the European Communities, focusing in particular on consecration and regulation of their legal personality in founding treaties.

European Communities were created as other international organizations on the basis of multilateral treaties negotiated at international conferences, signed by the plenipotentiaries of the participating states and ratified in accordance with constitutional rules of each Contracting State in part, following to entry into force once all instruments of ratification have been provided.

The first European community was the European Coal and Steel Community (ECSC), established by the Treaty of Paris (signed on 18 April 1951 and entered into force on 25 July 1952), for a period of 50 years.

If you look at the European Coal and Steel Community (ECSC) in terms of the constituent elements proposed by the UN International Law Commission we will find that it meets all four of them, namely: it is an association of states, it is established by a multilateral treaty, it is endowed with its own institutional structure and has a separate legal personality from that of countries that have created it. This fact is stated expressly in ECSC Treaty, which shows that in its international relationship, the Community shall enjoy the juridical capacity necessary to the exercise of its functions and the attainment of its ends. However, in each of the member States, the Community shall enjoy the most extensive juridical capacity which is recognized for legal persons of the nationality of the country in question. Specifically, it may acquire and transfer real and personal property, and may sue and be sued in its own name[503].

The other two European communities namely the European Economic Community (EEC) and European Atomic Energy Community (EAEC) were created by the Treaties of Rome, signed on 25 March 1957 and entered into force on 1 January 1958, for an unlimited period.

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[500] Article 34 of the Vienna Convention on the Law of Treaties (1969)

[501] A case in point is the Article 104 of the UN Charter, which provides that "The Organization shall enjoy in the territory of each of its Members such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes". Moreover, the provisions of the UN Charter (entered into force on 24 October 1945) are found in most of the acts constituting international organizations and contains similar provisions.

[502] Manifestation of the legal personality of international organizations in their quality as subjects of international law involves expressing these quality by distinct acts such as: international agreements, representing among other subjects of international law or their recognition, assuming obligations and international liability - For details see Raluca Miga-Besteliu, *International Intergovernmental Organizations*, Bucharest, "CH Beck" Publishing House, 2006, p 40.

[503] Article 6 of the Treaty establishing the European Coal and Steel Community (ECSC)

Separate legal personality of the two new European communities was established in their constituent documents, these by referring to both international legal personality and the legal personality in national order of the Member States[504].

Articles governing the legal personality of the two communities have similar content; they established that in international relations the communities have the legal capacity necessary to perform its functions and achieve their goals and also in each of the Member States the two communities have the most extensive legal capacity accorded to legal persons under their respective municipal law.

European Communities have retained separate legal personality although, over time there were adopted a series of treaties modifying the founding treaties.

The first is the Treaty establishing a Single Council and a Single Commission of the European Communities in 1965 (known as the Merger Treaty), which aimed to unify the institutions of the three European Communities structure. Although there has been an institutional merger, the newly created institutions performed their duties under each of the three constitutive treaties, the European Communities remaining distinct, each possessing its own legal personality.

Also, the Single European Act (signed in February 1986) focused into a single document the provisions relating to the functioning of the unique institutional structure, however the institutions of the European Communities continued to operate in accordance with the provisions of the treaties establishing the European Coal and Steel Community, the European Economic Community and the European Atomic Energy Community.

Another milestone in the evolution of the European Communities was the signing of Maastricht Treaty on 7 February 1992 (entered into force on 1 November 1993), which established the European Union as a structure based on three pillars: European Communities, Common foreign and security policy (CFSP) and Cooperation in the fields of justice and home affairs (JHA).

Although the Treaty on European Union (TEU) stated that among the objectives of the Union it was "to assert its identity on the international scene" or "introduction of a citizenship of the Union", it was not expressly provided the legal personality of the European Union, stating that it "is founded on the European Communities supplemented by the policies and forms of cooperation introduced by this Treaty"[505].

The problem of assigning legal personality to the European Union concerned Member States during the Intergovernmental Conference which negotiated the Treaty of Amsterdam. Although it made some important amendments to the Treaty on European Union (TEU) and the founding treaties of the European Communities, the Treaty of Amsterdam failed to solve all problems (including related legal personality of the European Union), which is why just one month after entry into force (1 May 1999), it was raised the question of convening an intergovernmental conference to negotiate a new treaty.

Treaty of Nice, signed on 26 February 2001, made some reforms in the composition and functioning of the Community institutions; reforms needed for future enlargements of the European Union, but it did not bring any change in the legal personality of the European Union. However, the "Declaration on the future of the European Union", annexed to the Treaty, established a series of reflection topics including simplification of the Treaties.

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[504] Regarding the European Economic Community (EEC), its international legal personality was established expressly in the Article 210 of EEC Treaty and the legal personality in national order of the Member States in the Article 210 of EEC Treaty. In the case of the European Atomic Energy Community (EAEC), its international legal personality was established expressly in the Article 184 EAEC Treaty and the legal personality in national order of the Member States in the Article 185 of EAEC Treaty.

[505] Article A of the Treaty on European Union (TEU) - Official Journal C 191, 29 July 1992

Laeken Declaration, adopted at the European Council meeting in December 2001, was referring to some challenges and reforms in a "renewed Europe", including simplification and reorganization of existing treaties and the adoption of a constitutional text in the Union. In this sense, it provided to convene an Intergovernmental Conference, which finally completed the draft of Treaty establishing a Constitution for Europe which was signed on 29 October 2004. According to Article IV-447, the Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional requirements and will enter into force after its ratification, but no later than 1 November 2006. This has not happened since the Constitutional Treaty was rejected in referendums in France and the Netherlands in 2005.[506]

Given the failure of the Constitutional Treaty, the European Council held in Brussels, on 16-17 June 2005, decided to launch a "period of reflection" in which the Member States to organize debates involving citizens, civil society, social partners, national parliaments and political parties, to find a solution for the future of the European Union. After a period of political consultations, the European Council agreed to convene an Intergovernmental Conference (IGC) in July 2007, while taking its mandate to provide the particulars of the expected reform.[507]

After a series of discussions and negotiations, the Intergovernmental Conference completed its work on 18 October 2007. European Council, held from 18 to 19 October 2007, has reached an agreement on the text of the Reform Treaty which will be signed during the summit in December 2007 in Lisbon. Consequently, on 13 December 2007 at the summit in Lisbon (Portugal) was signed the Treaty of Lisbon, officially called "Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community"[508]. After ratification in all 27 Member States, the Treaty of Lisbon entered into force on 1 December 2009.

3. Regulation of the legal personality of the European Union following the reform made by the Treaty of Lisbon

Treaty of Lisbon replaced none of the treaties establishing the European Communities and the European Union, but it has changed them. Thus, Article 1 of Treaty of Lisbon modified Treaty on European Union (TEU) and Article 2 of Treaty of Lisbon amended the Treaty which established the European Community (TEC), which was renamed the Treaty on the Functioning of the European Union (TFEU)[509].

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[506] Step of ratification of the Constitutional Treaty was a challenge as important as the Intergovernmental Conference which finalized it. Thus, at the referendums in France (29 May 2005) and the Netherlands (1 June 2005), the Treaty was rejected many voices saying that "European Constitution Treaty died in France and was buried in the Netherlands", not a few are those who believed that the political project of a united Europe died before it was born. Nevertheless, even if it took no effect and thus did not alter in any way the existing treaties, the Treaty establishing a Constitution for Europe has provided a number of innovations including the granting of legal personality of the European Union - For details see Dan Vataman, *History of European Union*, Bucharest, "Pro Universitaria" Publishing House, 2011, p 74.

[507] In the mandate conferred to the Intergovernmental Conference it is shown that constitutional concept is abandoned (which consisted in repealing all existing Treaties and replacing them by a single text called "Constitution") and wanted the new treaty to introduce into the existing Treaties, which remain in force, the innovations resulting from the Intergovernmental Conference which finalized the draft Treaty establishing a Constitution for Europe - Presidency Conclusions of the Brussels European Council (21/22 June 2007)

[508] Official Journal of the European Union C 306/1, 17.12.2007

[509] The Lisbon Treaty has only seven Articles. There are also 11 new Protocols to be annexed to the Treaties; plus a Protocol (to the Lisbon Treaty itself) amending the pre-existing Treaty Protocols. The texts of the Treaties and Protocols have the same legal value. Finally, the Inter-Governmental Conference (IGC) which agreed the Lisbon Treaty also provided for a number of Declarations; these are political acts, but may be relevant to the Treaty's interpretation – For details see Dan Vataman, *History of European Union*, Bucharest, "Pro Universitaria" Publishing House, 2011, pp. 126-130.

Regarding the legal personality of the European Union, the two treaties contain a number of provisions from which derive both the international legal personality and legal personality in the national legal order of the Member States.

According to Article 1 of TEU, the European Union replaces and succeeds the European Community. However, Article 47 of the TEU provides expressly that the European Union shall have legal personality.

If we refer to national legal personality under Article 335 TFEU[510], in each of the Member States, the Union shall enjoy the most extensive legal capacity accorded to legal persons under their laws. As a result, it may, in particular, acquire or dispose of movable and immovable property and may be a party to legal proceedings, to that end being represented by the European Commission. However, the Union shall be represented by each of the institutions, by virtue of their administrative autonomy, in matters relating to their respective operation.

International legal personality of the European Union is clear from the provisions of Article 216 TFEU, which states that the Union may conclude agreements with one or more third countries or international organizations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. According to the same article, the agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. Also, Article 217 TFEU[511] provides that the European Union may conclude agreements with one or more third countries or international organizations to create an association involving reciprocal rights and obligations, common action and special procedures.

Pursuant to Article 218 TFEU[512], the Council shall authorize the opening of negotiations, adopt negotiating directives, authorize the signing of agreements and conclude them.

4. Limits on the exercise of legal personality by the European Union

Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon was accompanied by a statement according to which "the fact that the European Union has a legal personality will not in any way authorise the Union to legislate or to act beyond the competences conferred upon it by the Member States in the Treaties"[513].

In this regard, the Treaty on European Union (TEU) provides that the delimitations of Union competences are governed by the principle of conferral and exercise of these powers is governed by the principles of subsidiary and proportionality. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein and, therefore, competences not conferred upon the Union in the Treaties remain with the Member States[514].

Categories and areas of Union competences are laid down in the Treaty on the Functioning of the European Union (TFEU), that specify the case where the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States able to do so only if so empowered by the Union or for the implementation of Union acts[515].

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[510] ex Article 282 TEC
[511] ex Article 310 TEC
[512] ex Article 300 TEC
[513] Declaration no. 24 concerning the legal personality of the European Union, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon - Official Journal of the European Union C 83/347, 30.3.2010
[514] Article 5 of the Treaty on European Union (TEU)
[515] Article 2 (1) of the Treaty on the Functioning of the European Union (TFEU)

When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence[516].

In certain areas and under conditions laid down in the Treaties, the Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States, without thereby superseding their competence in these areas[517].

Scope and arrangements for exercising the Union's competences are established by the provisions of the Treaties relating to each area.

According to them, the Union shall have exclusive competence in the following areas: a) customs union; b) the establishing competition rules necessary for the functioning of the internal market; c) monetary policy for the Member States whose currency is the euro; d) the conservation of marine biological resources under the common fisheries policy; e) common commercial policy. Also, the Union shall have exclusive competence in terms of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope[518].

Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas where it has exclusive competence or carrying out actions to support, coordinate or supplement the actions of the Member States. Shared competence between the Union and the Member States applies in the following principal areas: a) internal market; b) social policy, for the aspects defined in the TFEU; c) economic, social and territorial cohesion; d) agriculture and fisheries, excluding the conservation of marine biological resources; e) the environment; f) consumer protection; g) transport; h) trans-European networks (TEN); i) energy; j) area of freedom, security and justice; k) common safety concerns in public health matters, for the aspects defined in the TFEU[519].

Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. At European level, these actions are the following: a) protection and improvement of human health; b) industry; c) culture; d) tourism; e) education, vocational training, youth and sport; f) civil protection; g) administrative cooperation[520].

Thus, among the reform introduced by the Lisbon Treaty are included the comprehensive and detailed delimitation of competences between the European Union and its Member States, through changes introduced the treaty managed to overcome the shortcoming of previous regulations, which showed no clearly areas of Community competence, establishing only the general characteristics of Community action in relation to the action of Member States in some areas.

5. Conclusions

Today, after almost sixty years of history and unprecedented achievements, the European Union has become an important actor in international relations and is a benchmark for stability, democracy and respect for human rights.

In order to promote these values, the European Union needed effective and coherent tools, adapted not only to the functioning of an enlarged Union of 27 Member States, but also for the rapid changes that the world of today is facing.

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[516] Article 2 (2) of the Treaty on the Functioning of the European Union (TFEU)
[517] Article 2 (5) of the Treaty on the Functioning of the European Union (TFEU)
[518] Article 3 of the Treaty on the Functioning of the European Union (TFEU)
[519] Article 4 of the Treaty on the Functioning of the European Union (TFEU)
[520] Article 6 of the Treaty on the Functioning of the European Union (TFEU)

By adopting the Treaty of Lisbon, the European Union has acquired legal personality, which allows you to work more effectively and consistently worldwide. Thus, this innovation introduced by the Treaty of Lisbon has significant effects on the Union's external action, creating a single legal entity ensuring better international representation of the Union and also strengthen the role of European Union as a main actor in international relations.

Concluding the above, we can say that by the reform carried out by the Treaty of Lisbon, the European Union has entered in a new phase of its existence as a political, economic and social entity, coupled with effective and consistent tools tailored not only to functioning of a Union with 27 members and with the prospect of continuing its expansion, but also for the new challenges of the 21st century.

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THE EUROPEAN SOCIAL MODEL: A CONCEPT PASSED INTO "CONSERVATION"?

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Abstract

The authors present the concept of a European social model and the essential details of its contents. On this occasion, is stressed the actuality of the observance of social issues, especially since the economic and social crisis and austerity policies promoted in some countries have worsed the social situation of the population. The scientific analysis of the authors points also to a number of legal and social issues specific to Romania.

For several years the European countries face in different degrees of intensity with disastrous effects of a financial and economic crisis that led some of them near collapse. The reactions of the most influential member states of the European Union and of the international financial and economic organizations focused primarily on austerity measures whose outcome has resulted in worsening social indicators, such as chronic increase in unemployment, impoverishment of more wide classes of population, restricted access to education and health services.

In these circumstances, the question if the European Social model, which in past years was heavily promoted and conceptually developed in the European Union, can still be one of its strategic objectives in the particular conditions already mentioned, is naturally raised.

For Romania, the country with the poorest people in the European Union, the answer to this question is of crucial importance, through controversial political decisions that have been translated into legislation adopted in 2010-2011 which substantially increased social instability of Romanian citizens by reducing wages, significant restrictions for health and social security services and limitation of the means of protection for employees against employer abuse.

We believe that the EU will fail in its efforts to redefine its self that we are witnessing today, only to the extent that its citizens will actually feel that the policies adopted by the European institutions take them into consideration, as is normal in a common space defined as an area of freedom and prosperity.

Therefore, in what follows we intend to clarify from the historical and conceptual point of view the notion of European social model, and present some considerations on the case of Romania.

European social law - vector of the European social model

At its beginnings when it was called the European Economic Community, the current European Union, had relatively narrow social objectives, his name itself proving the concern on creating, primarily, a common market from the economic point of view. However, in the Rome Treaty of 1957 there were already provisions on free movement of workers and on non-discrimination. Thus, article 2, on social policy, provides: "promoting a high level of employment and of social protection, raising living standards and life quality, economic and social cohesion" and article 3 (j) provides the obligation to promote a "social policy through a European Social Fund".

In subsequent years the situation has changed substantially. Thus, there have been structured obviously mainly social policies, arguing the emergence of the concept of "European Social Model".

In addition, through specific means of European law there have been embodied these policies through regulations, directives, decisions and which give content to the concept of European social law.

Compared to system of adopted rules in this field by other international organizations, the European Union social law is distinguished by specific features that ensure its obvious superiority.[521]

Thus, the European social law regards not only public authorities, but directly imposes rights and obligations to them and to employees, enterprises, social partners and other social organizations. Instead, social norms adopted by other international organizations such as the International Labor Organization or the Council of Europe are aimed at the states as the sole recipients and become mandatory for them only after they express their consent through ratification or accession.

Also, The Court of Justice of the European Union has an important role in controlling the application of social European provisions and their interpretation, which is not possible either in the International Labour Organisation system, nor in the Council of Europe, where the European Court of Human Rights monitors the compliance with the European Convention on Human Rights which guarantees, with some exceptions, civil and political rights.

Granting through the Lisbon Treaty of a legally binding regime to the Charter of Fundamental Rights of the European Union, as that of the Treaties, has significant consequences for the European social law, which has a number of fundamental principles in the Charter.

European social model - conceptual developments

European social law is a tool through which concept of the European social model is materialized. The concept was structured since 2000 when in **the Nice European Council** conclusions from December **2000**, it was pointed out that "the European social model - characterized particularly by a system that provides a high level of social protection, by the importance of social dialogue and by general interest services that cover vital activities for social cohesion - is based despite the diversity of social systems of the Member States - on a common base of values ".[522]

We identify from these lines a few fundamental characteristics of the European social model:

- A high level of social protection with services of general interest;
- The existence of social dialogue, which involves coordination of policies with collective agreements, negotiated by the social partners;
- A particular emphasis on social cohesion;
- A common set of core values, such as: political pluralism, non-discriminatory policy, tolerance, solidarity and equality between women and men, the most high level of employment, sustainable and non-inflationary growth, economic competitiveness, life and environment quality .

Structured in this way, the European social model covers several areas: from education and vocational training to employment; from ensuring a higher level of life and social protection to the dialogue between trade unions and company management; from health and safety at work to the fight against racism and discrimination.

The objective of social and employment policy is to promote a decent quality and standard of life for all, in an active, healthy and inclusive society.

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[521] In this regard see also Pierre Rodiere, *Droit social de l'Union Europeenne*, L.G.D.J, Paris, 2008, p. 7.

[522] Presidency Conclusions of the Nice European Council, december 2000, Annex 1, Social European Agenda, §11.

One problem mentioned both in theory and received also by European officials was that of creating a fundamental asymmetry between policies promoting market efficiency and those promoting social protection and equality. In European integration, indeed, the relationship became asymmetrical, since economic policies have been progressively Europeanized, while social protection policies were left to the discretion of national states.[523] This was why it was not possible to structure a uniform European legislation on social policy at a relatively minimal standard, which would be accepted by all Member States. As a solution to this difficulty, **the Lisbon European Council (March 2000)** introduced in the social field **"open method of coordination"** which leaves freedom of actual policy decisions at the level of national states, however trying to encourage the adoption of as accurate as possible decisions by promoting common objectives, common indicators and by conducting comparative assessments between national political performances. The newly inserted policy instrument for achieving social collaboration has been successfully applied in the field of employment in combating poverty and social exclusion. Under this new method, the key to progress in social policy and labor market is mutual learning from "good practices" (or "best practices") of the Member States.

The EU Treaty, as amended **by the Treaty of Lisbon (2007)**, established in the content of Article 3 (formerly Article 2) the desire of action towards a social market economy highly competitive, aiming at full employment of the workforce and social progress.

We note in this regard, in addition to clearly indicating *the concept of social market economy*, also the emphasis on the duality economic social-competitiveness. This leads to a certain completion of the traditional methods of social harmonization through directives with lighter tools of convergence of national rights and policies.

In addition, also article 3 states that the Union combats social exclusion and discrimination and promotes justice and social protection, equality between women and men, solidarity between generations and protection of children's rights. The Union also promotes economic, social and territorial cohesion, and solidarity between Member States.

An important role in this respect is of the social dialogue whose recognition and promotion in the development of the social policy has a new consecration in Article 152 of the **Treaty on the Functioning of the European Union**: "The Union recognizes and promotes the role of the social partners at its level, taking into account the diversity of national systems. This facilitates dialogue between the social partners, respecting their autonomy. ". This role given to social dialogue has led some authors to consider that the Lisbon Treaty implicitly enshrines applying the principle "social subsidiarity".[524]

Also Article 152 formalizes also at par. 2, the tripartite social reunion at high level for economic growth and employment, which illustrates the evolution of the European social model.

Significant is also Article 9 of t**he Treaty on the Functioning of the European Union** which provided that "in defining and implementing its policies and activities, the Union takes into account the requirements for promoting a high level of employment, the guarantee of adequate social protection, combating social exclusion and the requirements for a high level of education, training and protection of human health. "This norm is a" horizontal social clause ", which provides incorporation of social dimension in all its policies.

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[523] *European social model, implications for Romania*, study by the European Institute of Romania, coordinator Carmen Beatrice Pauna, 2006, p.15, www.ier.ro.

[524] Mélanie Schmitt, *Le modèle social européen en mouvement: la dynamique des processus normatifs et des normes*, Candidature à l'Habilitation à diriger les recherches, Résumé, http://www.unistra.fr/uploads/media/HDR_M.Schmitt_resume.pdf.

Power increase of fundamental social rights in the European area is the second element, of substantially order, of the renewed European social model and highlighted by the dynamic of European rules. Enshrined in the Charter of Fundamental Rights of the European Union, which gives them a rank equal to that granted to civil, political and economic rights, the social rights will be deepened in their content by the European Union Court of Justice judgment.

All these establish the content of the concept of European social model as it is currently understood.

The current context of financial and economic crisis raises new concept related challenges. There is, in this regard, some concerns about the high social costs of the crisis and those about unfair distribution of them.

It is, in our opinion, a time to reconsider the role of the state in organization of economic and social life towards social cohesion.

Also at EU level it can be seen the tendency to assume by its institutions fundamental some policies within the competence of the institutions from the Member States, including on the control of expenditures. Therefore, it is likely that in the near future, to have the possibility of some coordination at European level of social policies.

European social model concept assimilation. Specific case of Romania

The quality of Romania as an EU member state is an opportunity to structure a modern social system. The doctrine considers that promoting an efficient social model, based on the principles promoted by the EU proves to be a responsible and necessary measure for our country.[525] However, it is considered that the Romanian social model must be the expression of the most responsible approach to national economic and social perspectives, to better capitalize and reward work, to express more adequately the interests of socio-demographic categories the majority, without neglecting on the minority ones - given that currently, a large proportion of the population resides in rural or works outside paid work. Social partnership, employment regulations and labor market policies must show more pragmatism and optimal speed of refocusing compared to relevant socio-economic conditions inside the country, but also from European level.

Legislative changes in labor legislation from Romania in recent years[526] have pursued such goals at declarative level. Unfortunately legal materialization, carried out outside the agreement of the social partners, is not far from any criticism.

On the other hand, internally it is clear that the concept of European social model and its implementation into local socio-economic reality has been subject to few rigorous analyses. There have not lacked declarative denials of this concept[527] or fears concerning its inefficiency in Romania.[528] Even the president of the country considered, even against the

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[525] *European social model- implications for Romania*, study by the European Institute of Romania, coordinator Carmen Beatrice Pauna, 2006 p.30 www.ier.ro.

[526] See, especially, Law no. 40 of 31 March 2011 amending and supplementing Law no. 53/2003- Labor Code (published in the Official Monitor of Romania, Part I, no. 225/31.03.2011) and social dialogue Law no. 62/2011 (Published in the Official Monitor of Romania, Part I, no. 322/10.05.2011)

[527] See "Why is the European social model outdated?" http://balaurentiu.wordpress.com/2011/04/19/de-ce-este-depasit-modelul-social-european/. The author believes in a short matter that "given a choice between efficiency and an illusion of solidarity, Romania is still struggling to render on without chewing a model of socio-economic development, mined by the bomb of social protection expenditure, stuck in bureaucratic regulations, that inhibits labor and suppress the free initiative."

[528] Sabin Cutaş, interpellation in the European Parliament, May 2010: "The present European social model is faulty, no longer able to ensure the welfare of European citizens ... Romania is the member state with the highest risk of poverty after Latvia. Unfortunately, we didn't manage to blur social inequalities produced after

provisions of the Romanian Constitution, that the crisis "has shown us that the social state can not work in Romania, in the sense that we gave to the expression of social state ... Neither Europe can resist in the term "social state" as it was applied until now in the old states of the European Union ".[529]

Obviously that negativist positions can not be accepted, because both European Union and the fundamental law of Romania are based on the fundamental premise that actually characterizes any social organization according to which the coordinated action at economic level aims at increasing living standards of citizens and structuring some means of protection of those in need.

Also, the term itself "society" includes its etymology (in Latin *societas*) the concept of social as a defining characteristic of any human organization that distinguishes it from other associations in the animal world (packs, flocks, herds, etc.). Basically people as social beings, gathered since the beginning in order to help each other, to increase their chances of survival by producing the necessities of life and to support those in need. The way in which these are done also provide the quality of that society.

The European social model, appeared as a counterweight to the American model based on the idea of pure market capitalism and the unbridled promotion of consumption seems to be more appropriate to economic and social conditions currently existing globally. In addition, it is clear that attitudinal paradigms need to be changed in response to challenges such as depletion of traditional energy resources, insufficient food and water resources in large areas of the planet, climate changes with dramatic effects on the social level, absolutely unequal distribution of the benefits of economic globalization.

So, appropriate behaviors will have to be adopted and induced, involving assimilation of concepts such as resource conservation, recycling and environmental accountability.

Exacerbated individualism should be replaced with social and human solidarity perception of as the basis of relations in European societies, in each of them being desirable to seek the broadest possible consensus for finding the most appropriate solutions to the problems above mentioned.

Social objectives in Europe 2020 Strategy

If we analyze the objectives of the Europe 2020 Strategy[530] developed by the European Commission we hope that these ideas will be understood and translated into European policies and rules. Europe 2020 sets out the desire of growth of the inclusion in an economy with a high rate of employment, ensuring economic, social and territorial cohesion, which involves:

• higher rate of employment - better and more jobs , particularly for women, youth and workers over 55 years

• increase of the capacity to anticipate and manage change through investment in training and skills upgrading

• modernizing labor markets and social protection systems

• ensuring access for all to the benefits of economic growth

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the fall of communism, and the European social model, which helped states with precarious economic situation, fails to have the same effects today. "

[529] http://www.politicaromaneasca.ro/traian_basescu_statul_social_nu_mai_este_un_termen_viabil-2748, 18 January 2011.

[530] See Commission Communication Europe 2020 A European strategy for smart, sustainable and inclusive growth, Brussels, 3.3.2010 COM (2010) 2020 .

European Union aims to achieve the objectives related to inclusion growth through two major initiatives:

1. "An agenda for new skills and jobs" through which it aims to:
   - •help people to acquire new skills,
   - •adapt to changes in the labor market and to switch career,
   - •to modernize labor markets, to increase labor productivity and employment rate, to reduce unemployment and to ensure the sustainability of European social models.

To achieve these goals, at European level the defining and implementation of the second phase of the flexicurity agenda will be monitored, together with the European social partners to identify the ways to improve management of economic transitions and to fight unemployment and to increase activity rates.

Also, the legislative framework will be adjusted in accordance with the principles of "smart" regulation, to the development of the models of work organization (e.g. working time, posting of workers) and to the new risks for health and safety at work.

Finally, work will be carried to strengthen the capacity of social partners and fully exploit the potential of problem solving offered by the social dialogue at all levels (EU, national / regional, sectoral and company level).

2. "The European Platform against poverty" by which the European Union intends to:

- ensure economic, social and territorial cohesion
- to guarantee the compliance with the fundamental rights of people suffering from poverty and social exclusion and to ensure them a dignified life and an active role in the society
- to support measures that promote community integration, training and employment and access to social protection

It should be noted that the Europe 2020 strategy proposes measures related to areas under the responsibility of the Member States, such as education and employment. The European Union does not interfere in these important areas, however, because it has an overview, may make recommendations to help the Member States. It wants to get involved because the stakes are high - Europe, which is facing, among other things, the aging population, needs strong economic growth and a high rate of employment in order to ensure the current level of social protection.

In fulfilling these objectives, European labor law rules are of particular importance, as they are a elaborated and coherent system of standards whose proper application in the social life was over the years subject to judicial review by the Court of Justice of the European Union.[531]

[531] See, also, Nicolae Voiculescu, *Community labor law*, Wolters Kluwer Publishing House, Bucharest 2009, Nicolae Voiculescu, *European labor law*, Perfect Publishing House, Bucharest, 2011.

INTERFERENCE BETWEEN TERRORISM AND ORGANIZED CRIME

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Abstract

This article presents some problems about resurgence of terrorism and organized crime. These phenomena are paramount objectives of specialized agencies within the state, both nationally and internationally.

The author presents some aspects regarding the interference between terrorism and organized crime.

Key words: *terrorism, organized crime, nuclear safety, nuclear danger.*

Along the time, there took place important mutations in the international criminality configuration, materialized especially in the recrudescence of terrorism and the transnational organized crime, these being some severe threats to peace, stability and world order.

The dramatic events that took place in the United States of America on September 11th, 2001 followed by the ones in Madrid (2004), London (2005), which shocked the entire world, represents an eloquent proof of the fact that the entire humankind is in front of a fundamental option – respectively to choose between the perennial values of civilization, democracy and humanism and those of obscure forces, of ideological, religious fanatism or of intolerance.

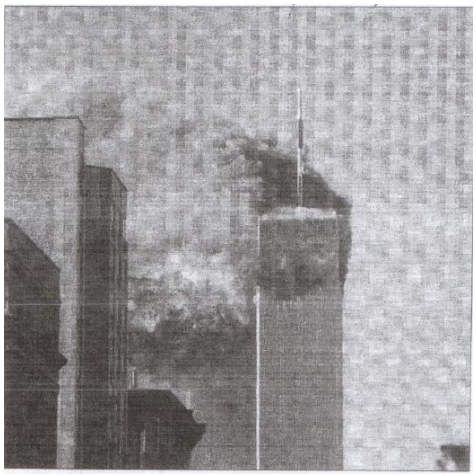
On these conditions, the fight against terrorism and of organized criminality represents objectives of maximum importance of the state specialized institutions, both on national level and on some international alliances level.

Among some of the tendencies of international terrorism is the one of diversification of logistic and financial sources, required for supporting terrorist activities. This change of the world political scene determined that terrorist organization and some terrorist groups to redirect to organized crime, as a main source of financing.

Thus, the financial support of terrorist organizations activities is supported by international activities, such as: smuggling, tax evasion, credit frauds, drug trafficking, armament, ammunition, explosives, false currency, illegal traffic with persons, illegal obtainment of funds by using violence or violent threat.

Life has proved to us that an important source of financing terrorism activities is the organized crime, committed – usually – by persons of the same ethnic group with those from financed terrorist groups. For instance, after the events from September 11th, 2001, specialists of secret services became interested in the detailed identification of the ways through which terrorist organizations obtain financial funds required for applying their plans.

Thus, specialists in the underground economy claimed that the patrimony of Al – Qaeda group is of almost 5 milliard dollars. Its income comes from drug traffic (40%), donation of religious groups, government and private persons (20 – 30%), classical criminality (20%).



The identification of the forms of interference between terrorism and organized crime must start from defining the two notions; I shall try to concisely show the meaning assigned to the two terms, and especially the features that results from these definitions.

In a definition given by some Romanian specialists shows that "Terrorism is about using violence or violent threats to persons or groups for political purpose, regardless if they act for or against established governmental authorities, if these actions follow the influence of the target group which is beyond the victim or immediate victims."

As for the organized crime phenomenon concerns, in our country, through Law no. 39/2003 on the prevention and fighting against organized crime, is defined the organized criminal group but without clearing the notion of organized crime. Nevertheless, considering the meaning given to the organized criminal group, and the forms of manifesting organized crime, in correlation to the evolution on international level, the specialists have defined organized crime as: activities performed by any group formed by at least three persons, group in which there are hierarchic and personal reports, which allow them to directly or indirectly obtain financial or material benefits or to control territories, countries, markets or economical-social sectors, by committing some severe criminal offenses (using blackmail, violence and corruption).

Among the features that characterize the organized criminal group and organized crime, the following can be RETINUTE: organization and hierarchy within the group; objectification of the main criminal activities purpose in order to obtain some high illicit profits, which shall come again in the legal circuit; the use of violence and other forms of intimidation/corruption in order to reach o the established purpose; the provision of a logistic and equipments corresponding to reaching the aim followed; hermetism and conspirativity in order to avoid the entry of some foreign elements within the group.

Analyzing the features of these two notions, results the fact that both the terrorism and organized crime act systematically, and by using violence they seek to reach to their final aim.

The aim of terrorism is to produce fear, intimidation within population in order to force the government or international organization in general, to comply with their opinions.

Unlike terrorism, organized crime is involves violence in economical-financial purposes (for obtaining some illicit earnings).

One of the most worrying challenges of the last year is, without doubt, international terrorism and forms of criminality which derive from here. The symbiosis between terrorism and organized crime is foreshadowed the more and more frequently.

For instance, in Afghanistan the Taliban fighters are financed through drug traffic, the same does FARC in Columbia as well.

In the countries with low developed democratic right structures and limited control possibilities for criminal prosecution authorities, the traffic with human beings and weapons finds a perfect field to form a logistic and financial support for terrorism.

The informational and communication criminality is a form of organized crime manifestation which more and more states of the world that have interferences with terrorism confront with. Thus, Internet is used as a propaganda instrument for political motivated infractions, for instance, in the extreme right or terrorist environment, but also for the infantile pornography dissemination or commerce with fake medicines.

As a result of the cooperation between terrorism and organized crime, a new wave of political terrorism crosses the today's world. It is hard to evaluate how many people perish as a result of the criminal actions of mafia groups or of terrorist organizations. The great number of arrests, police and judicial measures do not succeed in liquidating the contemporary terrorism and organized crime. The fight against them is transformed in a long war, which attracts in its orbit the whole antiterrorist and antimafia repressive apparatus.

In the last period, the number of victims from criminal and terrorist acts increased considering the fact that the arsenal of methods and means of suppression has diversified once with the evolution of science.

Thus, although contemporary terrorist ideology claims that terrorist groups shall continue in using traditional methods of attack, one shall not neglect their possibility to use in the future, for instance, mass destruction weapons. The decision to appeal to these can be based in the end on counting possible gains and risks to which they expose. This imminent and actual danger for the future of humankind is also emphasized by the more and more obvious approach between terrorist organizations and the organized crime spectrum.

Taking into consideration the circumstances of the last decades, we notice that the state is no longer the only power which possesses mass destruction weapons on its territory. Now, one single person or a limited group could own mass destruction means if they have the necessary information to build them, information that is more and more available.

Lately, the organized crime arsenal enriched its panoply with the appearance and proliferation of the so called "nuclear smuggling", which countries with dictatorial regime try to benefit from since they want to develop their own nuclear arsenal, but also some terrorist organizations tempted to make nuclear weapons, especially for threat and blackmail.

In international context, the events of the last period of time reflect the fact that international mafia groups shook hands with Russian mafia, newly born at the beginning of the ninth decade of the 20^{th} century, unusually aggressive, recognized for the special recrudescence of its actions. At one point, you can no longer separate mafia groups and families from terrorist organizations, Both one and the others are meant to follow political purposes but also economical and financial interests.

We can acknowledge that, when we speak about mafia, we refer exclusively to organized crime gangs, closely connected to terrorist groups. While in Western Europe and America can be talked about mafia families, in Russia mafia groups are organized more on ethnic criterion (Ukrainean, Byelorussian, Georgian, Armenian, Cossak, Azerbaidjani, Tajik, etc.) within the communities that were part of the South republics of the former Soviet Union.

I made this short mention to the Russian mafia since this it claims to have connections with international terrorist organizations, representing a possible source for military equipment supply. Considering the nuclear potential of the Russian Federation, the lack of control on this imminent danger for the future of humankind and the favorable conditions determined by the disintegration of the former Soviet Union, the Russian mafia became one of the nuclear threats of the planet.

There are data attesting that the traffic with technology and mass destruction weapons already reached on the hands of organized crime. Currently, it is estimated that almost 30 kg

of fissile material was stolen, which is theoretically enough to produce two-three atomic bombs. These products are obtained, as I've presented, from the former Soviet Union, where the supervision of nuclear installation is weakened each day, especially in the civil sector, and the lack of funds and international support makes the situation insufficient and rapidly deteriorate, which is very serious for the future of humankind. Thus, according to a CIA report on the nuclear security situation of Russia, addressed in February 2002 to the United States Congress, in Russia there are almost 300 plants and over 30 factories which own components for building nuclear arms, but whose security is poor.

In the book "Six Nightmares", the former presidential advisor for national security, Anthony Lake, affirms that from the former Soviet Union more fissile material was stolen than it was produced in the United States of America in the first three years of Manhattan Project.

The head of state and government of over 50 countries of the world, together with many expert delegations, have joined at the end of March 2012 in Seoul in order to debate for two days on the nuclear security in the world.

In April 2010, with the first summit dedicated to the nuclear security, that took place in Washington, the USA president Barack Obama warned that, "two decades after the end of the Cold War, the risk of a nuclear confrontation between nations has gone down, but the risk of nuclear attack has gone up."

An essential issue represents the plutonium reserves – civil and military – estimated to over 200 tons. Quantity which, theoretically, would be enough to build ten thousand atomic bombs. In addition, almost 400 kg of strongly enriched uranium are annually used in the nuclear industry. In some states, these substances are not very good guarded.

The danger represented by nuclear terrorism was for a long time underestimated.

I consider that the Seoul summit will not be the last conference on the nuclear security. There must be an international treaty concerning the protection of nuclear material.

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In conclusion, I appreciate that terrorism and organized crime represent the threats of the beginning of the millennium, and fighting against them is a challenge both for each state, and for the entire humankind. Besides the economical globalization, there is more and more the need for the globalization security, fundamental component, conditioned by the cooperation between the states.

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