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SUMMARY

LAW SECTION

LAW
SECTION

THE ACCEPTANCE OF THE BILL OF EXCHANGE

Răducan OPREA*

Abstract

The acceptance of the bill represents, in fact, the acceptance of this title by the drawee. By this act, the drawee becomes the bill debtor and must pay the bill at maturity. The acceptance must be unconditional and is usually obtained by the drawer who gives the accepted bill to the beneficiary. The bill must be submited for acceptance at the drawee's domicile. The drawer may prohibit the submission of the bill for acceptance. The submission for acceptance may be done on a working day. When the submission of the bill or the protest within prescribed terms are prevented by an obstacle, these terms may be extended.

Keywords: *bill acceptance/submission/withdrawal, drawee/drawer, bill owner/provider.*

The drawee does not take part in preparing the bill, he is a completely foreign person.

He is neither the creditor nor the borrower.

It is true that the drawer gives order to the drawee to pay an amount of money to the beneficiary of the bill.

Only when the drawer declares that he accepts this order does he become the principal debtor because, by accepting, the drawee undertakes to pay the bill at maturity (art. 31 of Law no. 58/1934, with subsequent modifications and completions). From this moment on he is the acceptant. The drawee who has accepted remains liable even if he did not know about the drawer's bankruptcy.

This obligation to pay the bill applies not only to the beneficiary, but also to the drawer.

In the event of default, the holder of the bill, even if he is the drawer, has the bill direct action against the acceptant.

The acceptance must be unconditional; nevertheless, the drawee may restrict it to an amount. Any other change to the acceptance of the bill, introduced in the content, shall be considered as a refusal of acceptance. The acceptant may still be kept within the limits of this acceptance (art. 29 of Law no. 58/1934).

The acceptance only takes effect if the content of the bill is formally perfect. If the bill is formally invalid, this invalidity reaches the acceptance.

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Presentation for acceptance

In practice the drawer obtains the acceptance if he gives the bill to the beneficiary after he has accepted it.

If the drawer handed the unnaccepted bill to the beneficiary, the latter has the obligation to obtain its acceptance. In order to obtain the acceptance, the beneficiary or a simple owner may submit the bill for acceptance.

The bill must be submitted for acceptance to the drawee's residence (art. 24 of Law no. 58/1934) even if the bill would provide another place of payment than the drawee's residence (the place where the drawee lives or has his registered office).

If the bill has more drawers, the submission of the bill for acceptance must be noticed to all those mentioned in the bill. If one of them refuses, the owner is entitled to tame the protest bill of non-acceptance. The submission for acceptance is in principle optional, the beneficiary may submit the bill for acceptance. There are cases when the bill is required for acceptance and there are cases when the owner is not allowed to show the bill for acceptance.

The bill drawer may stipulate in the bill that it must be submitted for acceptance (art. 25 of Bill of Exchange Law). It may set a time limit within which the bill is submitted for acceptance, in which case the owner must submit the bill for acceptance otherwise he will lose the right of recourse for non-acceptance as well as for non-payment.

The bill is submitted for acceptance until maturity. The bill at sight is not submitted for acceptance, but only for payment. If the drawer has set a deadline, the submission for acceptance must be made before the deadline.

If the drawer has not entered the obligativity of the bill's submission for acceptance and if he did not prohibit the submission of the bill for acceptance, any guarantor may stipulate that it must be submitted for acceptance, and he may set a deadline. In this case the lack of submission can be invoked only by the guarantor that inserted the clause.

The drawer may prohibit the submission of the bill of acceptance, or stipulate that the submission will not take place before a certain date. If the owner of the bill will not respect this prohibition and if he submits the bill for acceptance before the set date, he is liable for the caused damage.

The drawer cannot prevent the submission of the bill for acceptance if the bill is payable to a third party or if it is payable in another town than the drawee's (art. 25 of Bill of Exchange Law). The bill of exchange payable at a certain time after sight is required to be submitted for acceptance (art. 26) within one year from date of issuance. The drawer may reduce or extend this period. The guarantors can only reduce the term.

The presentation for acceptance can only be done on a working day (art. 95).

The second presentation

The drawee may require a second submission to be made on the day following the first submission in order to have time to get informed. The bill's holder is not obliged to leave the bill for acceptance to the drawee.

In this case the protest will be made showing the submission for acceptance, and the drawee will demand a new submission on the second day. If the drawee does not accept, the protest of non-acceptance will be introduced. Those interested cannot rely on this application if it is not mentioned in the protest (art. 27).

Extension of submission

When the submission of the bill or the protest within the time prescribed are prevented by unavoidable obstacles (legal provisions, unforeseeable circumstances or *force majeure*), these terms are extended.

The owner is obliged to notify without delay to its guarantor, by letter, the fortuitous event or the *force majeure*, and write it on the bill or on the additional document, dated and signed by him. After the end of the unforeseeable circumstances or of the *force majeure*, the holder must, without delay, submit the bill for acceptance or for payment if it is necessary to protest it. If the *force majeure* or fortuitous event lasts longer than 30 days from the maturity term, the rights of recourse can be exercised without the need for submission and protest.

For the bill on demand or at a certain time to view the 30 day period begins on the date the holder notified the guarantor of its fortuitous event or *force majeure*, even if the notification is made before the submission deadline, a 30-day deadline are added to the view term.

There are not cases of *force majeure* or fortuitous events the personal acts of the owner or the person who has the right to submit the bill or to protest (art. 59).

Form of acceptance

The acceptance of the bill is written and expressed in the word „accepted" or any other equivalent word. The acceptance must be signed by the drawee.

The acceptance can be written on any part of the bill. The drawee's signature affixed to the title is enough to be considered an acceptance (art. 28).

The acceptance of a bill cannot be done through a separate document.

Date of acceptance

The acceptance must be dated only when a bill is payable on demand, when either the drawer or the guarantor have set a deadline, in which case the bill must be submitted for acceptance (art. 28). In other cases the date is optional. The date is necessary because it primarily serves to determine the maturity and secondly to see if the owner has fulfilled the obligation to submit the bill for acceptance. The drawee's refusal to date the acceptance will be determined through a protest within a year when no other term has been fixed.

Withdrawal of acceptance

The acceptance may be withdrawn by the drawee as long as the bill is in his hands. The withdrawal of the acceptance is made by deleting the acceptance and signature of the bill. In this case, the acceptance is deemed denied. If the acceptant surrenders the title, the acceptance becomes irrevocable.

The deletion is valid if it is made before the return of the title. The party who has an interest to establish if the acceptance of the title was removed after the refund, must make proof of this action.

If the acceptant, notified in writing, the bill's holder or any other signatory who has accepted the bill, the acceptance deletion has no effect against those who have been advised.

Refusal to accept

The protest of non-acceptance. If the bill was submitted for acceptance and the drawee refused the acceptance, the refusal is found by the protest of non-acceptance (art. 49 of Bill of Exchange Law). It must be done within the deadline for submission of the bill for acceptance.

If the drawee demanded a second submission to be made following the first day of submission and the first submission took place on the last day of the period, the protest can be done on the next day. The protest of non-acceptance exempts the submission of the bill and the protest of non-payment.

The failure to produce the protest of non-acceptance within the period stipulated by the drawer leads to the holder's loss of any right of recourse, unless it mentions that the drawer intended to be discharged only by the guarantee of acceptance.

The consequences of the refusal of acceptance are very important because the holder can exercise the right of recourse against the endorsers,

the drawer and the others who are obliged before the maturity date, whether the acceptance was denied in whole or in part.

References

Stanciu D. Carpenaru (2009). Commercial Law Treaty, Bucureşti, Universul juridic

S. Lupas (1946). Bill of exchange Law, Cluj, Cartea românească

Law no. 58/1934, The Bill and the Promissory Note, modified

Methodological Rules of RNB regarding the bill and the promissory note

ADMISSION OF GUILT IN THE CRIMINAL TRIAL

Petre BUNECI*

Abstract

The need for this institution was determined, in the second half of the nineteenth century, by the high number of criminal acts trialed in the United States courts, which led to the impossibility of resolving them within a reasonable time and in a proper manner, given that it was mandatory to respect the excessive formalism that was borrowed from Europe.

That is how the institution of guilt admittance was created, as a procedural system, a system which enables a better management of justice by negotiation between the prosecution and defense, in the sense that the latter may plead guilty in exchange for concessions from the prosecutor.

We may affirm that the admission of guilt is a mutually binding contract, of benefit to both parties, ultimately representing a compromise after which the defendant succeeds to minimize the penalty while the prosecution can obtain an optimal level of imposed penalty, at the lowest cost.

Keywords: *admission, guilt, penalty, individualization, negotiation, mutually binding contract.*

The admission of guilt historically appeared in mid nineteenth century in USA due to the high number of criminal acts trialed in courts, given that it was mandatory to respect the excessive formalism regulating their solving, formalism borrowed from across the ocean. This is when the urge of creating a new procedural system appeared, system which enables a better management of justice by creating a negotiation practice between prosecution and defense in the sense that the latter accepts pleading guilty in exchange for some concessions from the prosecution.

At first the admission considered negotiating guilt and negotiating facts and punishment. Thus, in the first situation the prosecutor accepts not to retain certain accusations against the accused and he accepts to plead guilty for the rest of the accusations. Negotiating facts is an agreement between the prosecutor and the defender of the facts that were to be legally indicted, by which the prosecutor accepts not to be retained all facts that could be attributed to the accused, in exchange for the accused to accept to plead guilty.

The negotiation is a normally engaged negotiation after pronouncing the conviction, but after the determination and

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pronouncement of the sentence, by which the prosecutor accepts to ask for a lighter sentence, in the cases where the accused has helped justice or he accepts to be submitted to an accelerated procedure (fast-track program).

Mention must be made that in the US proceedings the rupture between verdict and sentence is formalized and often recognized (as in the case of replacing the death penalty), the verdict and punishment are two distinct processes, even if the penalty process takes place in front of the same jury a little while after the first process of guilt. The penalty negotiation took place especially in the most important and mediatized cases, when the prosecutor did not want to restrain the accusations due to the reaction of the mass media[1].

According to a dictionary definition, the admission of guilt (guilty pleas and bargaining) is "a negotiated agreement between a prosecutor and an accused, in terms of which the accused pleads guilty for a minor crime or for more counts, in exchange of a concession from the prosecutor, usually of a less severe punishment, or of renouncing to other counts"[2]. In another opinion the admission of guilt was defined as "a procedure whereby the accused persons plead guilty for less serious crimes, in exchange for a default charge or for a sentence reduction"[3].

From the foregoing, it is clear that a procedure more or less formal has been followed, consisting in a negotiation conducted by a written agreement presented for approval of the judge in open court, the prosecutor and defense attorney agreeing on a lower penalty from the maximum provided by law in exchange for a surrender of the accused to a trial by jury and rights relating to defense.

In the U.S. the practical ways in which such procedures are varied, depending on the jurisdiction.

Thus, only in some cases the prosecute may be negotiated when the state pursues a policy of fix criminal punishment (mandatory sentencing); the negotiation can be explicit or implicit when the accused is entitled to expect, reasonably, in some cases, some benefits, even if there had been no negotiation[4].

In other situations, the negotiation is aiming at both the facts and the penalty to be applied as shown above.

This procedure bears the seal of the contract model in which individual rights are considered debt to the holder freely available in

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[1] Stephen A. Saltzburg, Daniel J. Capra, *American Criminal Procedure. Cases and commentary*, fifth edition, West Publishing Co. 1996, pp. 816-850.

[2] Bryan A. Garner (ed.), *Black`s Law Dictionary*, 7 ed., St. Paul (Minesota), West Group, 1999.

[3] Anne Deysine, *La justice aux Etats-Units*, Presse Universitaires de France, 1998, p. 109.

[4] Mircea Duțu, *Guilt admission and punishment negotiation*, Bucharest, Economical Publishing, 2005, p. 12.

order to improve his situation. **For the application of this procedure in the sense of guilt recognition by the defendant, the following arguments were formulated:**

- it avoids the delay and increases the likelihood of applying sanctions against other criminals;
- it helps to ensure the prompt and secure correctional measures;
- the defendant admits he is guilty and manifests the desire to agree to answer for his conduct;
- it avoids the public process when the consequences go beyond any legitimate requirement in this regard;
- it makes it possible to ensure concessions for the defendant when cooperating or has offered to cooperate with the prosecution of other offenders;
- it prevents excessive damage to the accused, by the form of condemnation.

The arguments invoked against this procedure are:

- there is a real danger for innocent people to be convicted;
- prosecutors negotiate primarily to accelerate the settlement of the case;
- the negotiation distributes among criminals the inequitably and inadequate opportunity to obtain a transaction to ensure a more favorable decision;
- it may reduce the deterrent effect of law, by applying less conviction;
- it makes correctional rehabilitation more difficult by limiting the conviction;
- those who opt for the ordinary procedure usually receive higher penalties.

The evolution of admitting guilt in the United States of America, especially after the events of September 11, 2001[5], led to the establishment (circulation of September 11, 2003, Minister of Justice) of the six exceptions to the prohibition to negotiate penalties, thus emphasizing the control of the executive in the criminal phenomenon and its repression.

[5] A number of amendments have been adopted to comply with the requirements of the draconian anti-terrorism law USA Patriot Act 2001, approved by the Bush II administration, after and under the influence o the events of 11 September 2001. Zacaris Moussaoui, the only suspect indicted in U.S. attacks on 11 September 2001, pleaded guilty on April 22, 2005, before the Court in Alexandria (Virginia) on all six counts against him detained.

The American procedure took root in Europe, primarily in the United Kingdom. This practice is beneficial to all parties, to the accused, to the police and to the judge, providing English law with a series of measures to encourage the accused to plead guilty. The admission of guilt has either the effect of a reduction of charges, or of the reduction of the penalty that in both cases makes the subject of the negotiations between the parties. The negotiation of the accusations is made between the prosecutor and the defense attorney; allegedly, the two discuss the content and can reach an agreement, in exchange for a promise of the declaration of guilt.

Regarding the reduction of penalty, the attorney shall inform about the reduction of penalty that the judge would be ready to give if his client pleads guilty, or the judge himself takes the initiative to call in his office the prosecutor and the defense attorney for a negotiation on the sentence. The evolution of the English legal system finally went through the Criminal Justice Public Order Act 1994 in recognition of the principle of sentence reductions in exchange for an admission of guilt (art. 48).

In 1988, the Italian Criminal Procedure Code introduced two procedures that were based on the legal recognition of certain effects of the agreement between the prosecution and the accused[6]. In fact, it has formalized an procedure existing since 1981, which established a special procedure based on documents filed without conducting training documents, in which the accused surrendered voluntarily to assume the presumption of innocence under art. 27 of the Constitution of Italy at the fact of challenging the charge in exchange for a reduction of the sentence, the judge ratifying the agreement of the parties (to imprisonment for a term not exceeding two years). If the judge does not accept the agreement of the parties, the application of the procedure continues without the defendant's request to be treated as a confession.

Also in the Italian Criminal Procedure Code the abbreviated trial was established, applicable to all crimes, regardless of their severity, with no limit on the amount of penalty, except for life imprisonment.

In the French law Law no. 204/March 9, 2004 (entered into force on October 1, 2004) on the adaptation of justice to developments in crime has introduced a new criminal procedure, namely that of "appearance on the preliminary recognition of guilt", aimed at speeding up and simplifying the handling of judicial of correctional cases where offenders admit their commitment. In this way, it continues the understanding of criminal procedure existing in the French law since 1999, in which the prosecutor

[6] M. Chiavario, *La justice negociee: une problematique a construire*, APC, nr. 151, 1993, p. 29; D. Siracusano, A. Galati, G. Tranchin, E. Zappala, *Diritto processuale penale*, volume secondo, nuova edizione, Giuffre editore, 2004, pp. 239-261.

suggested to the offender the confession in exchange for serving a lighter sentence approved by a judge in open court. It covers much the same category of offenses and allows the prosecutor to suggest the author who pleads guilty, to implement "measures of criminal agreement" meaning light punishments such as fines, confiscation or working of general interest. If this agreement is accepted by the author of the crime, the prosecutor notifies the court president high court for validation[7]. In terms of persons, this procedure applies only to adults, children under 18 years being excluded.

The procedure concerns primarily misdemeanors punishable by a maximum prison sentence of five years, excluding crimes of voluntary killing, political crimes or those whose follow-up procedure is provided through a special law. From a procedural perspective, the procedure is basically applicable only to persons convened for that purpose, before the prosecutor, or as it is referred to art. 393 of the Criminal Procedure Code, which gives the prosecutor the option to open information or to bring before the tribunal on the road prevented the immediate presentation.

The proceedings of the French law are conducted in two phases:

a) before the prosecutor the procedure involves three main phases:

- prior recognition of the facts by the accused in a statement, in presence of his lawyer;
- a penalty proposal in which the prosecutor has broad discretion, proposing one or more main or additional punishments. The general principle governing the prosecutor's actions of choice regarding the nature and the amount of the punishment is one of punishment customization, depending on the circumstances of the crime and the punishment of the author;
- acceptance (it may require a period of reflection) or refusal of the proposed penalty (in case of refusal the cause resumes by normal procedure). According to art. 495-8 of the Code of Criminal Procedure, the interested party may apply for a respite of 10 days, before expressing their option, noting that the prosecutor will necessarily endorse this possibility.

If the person refuses the punishment proposed by the prosecutor, the special procedure will stop, and the prosecution will be continued using the ordinary procedure.

If the person concerned accepts the penalty, the proceedings will continue before the judge who will be notified by the prosecutor through an application for approval.

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[7] Mircea Duțu, *Guilt admission and punishment negociation*, Bucharest: Economical Publishing, 2005, p. 43

b) in front of the judge, the procedure involves two phases:
- hearing the person concerned (before either the president or the Court of First Instance judge);
- delivery order substantiated by approval must necessarily include references to the consent of the person concerned and the proposed penalty assessment is necessary to judge that it is justified, both to the circumstances of the crime and to the author's personality.

If the application for approval is rejected, the criminal procedure will continue under the common law procedure.

In a similar manner, there are rules in the French procedural law to invite the victim before the judge for approval in conjunction with the facts the author (with counsel or not) having the right to civil claim, to seek compensation and to appeal against the order of approval. That is, unless you can address later, identified by separate application, the correctional tribunal will decide on the civil side of the case.

In Romania, mitigating the inquisitorial nature of the criminal procedure and answering specific dimensions of the accusatory system are ongoing processes, materialized in terms of the present Code of Criminal Procedure, as amended by Law no. 202/2010 regarding some measures to accelerate the settlement process; the court expressly states in art. 3201 the admission of guilt. This piece of legislation was introduced by Section 43 of Law no. XVIII. 202/2010 regarding some measures to accelerate the settlement process.

A precursor of this development was the pre-complaint procedure, as an exception to the principle of formality of the criminal proceedings, under which, for the prosecution of certain offenses, expressly and exhaustively defined, is required prior complaint of the victim. In such cases, criminal proceedings shall be initiated on complaint of the victim, addressing the criminal investigation body or the prosecutor.

The first signs of new trends have come mainly through the introduction of art. 278 of the Criminal Procedure Code on the complaint before the court against the resolutions or ordinances of the prosecutor not to proceed to trial (text introduced by Law no. 281/2003[8]). Drawing on Decision no. 486 of 02.12.1997 of the Constitutional Court, it affords to the victim of a crime indictment power (the right to initiate criminal action and civil claim), and referral (contrary to the wishes of the prosecutor), and a provision (by supporting prosecution by indictment when the prosecutor does not exercise the function of promoting the titular criminal prosecution)[9].

[8] Published in *Monitorul Oficial al României*, Part I, no. 468/ 01.07.2003.
[9] M. Duțu, op. cit, p. 58.

The above regulations are only the excessive attenuation of the inquisitorial system; this way the introduction of the proceedings of admission of guilt in our country completes the process in progress, which meets the needs of Romania's integration into the Euro-Atlantic system. It is a process which can be defined as a decision taken early in a preliminary hearing, which favors the defendant because it provides a reduction of sentence on conviction. **It is anticipated that a real process can lead to the same results as one in which public debates took place**.

Essentially, this procedure involves an agreement between the prosecutor, on the one hand, and the defendant attended by the lawyer, on the other hand, for the purposes of recognition by the accused of the incriminating crime. It was expected that this agreement, recorded in the referral document, to be subject to strict control by the judge who verifies the existence of a factual basis for conviction and free expression (to sound) by the defendant of the recognition position of the act that is subject to such an accusation procedures. The introduction of this institution is doubled, as I noted above, also by the regulation of a legal cause of penalty reducing for that defendant who freely consented to going through this procedure.

Thus, art. 320 of the Criminal Procedure Code makes it clear that „to start the judicial inquiry, the defendant may state personally or in writing that he acknowledges committing the facts found in the document instituting the proceedings and calls for justice to be done on the basis of evidence adduced in the prosecution phase. Judgment can only be based on evidence adduced during the criminal prosecution only when the defendant says that he fully admits to the facts established in the document instituting the proceedings and does not require the use of evidence, except the documents which can be given at this court term.

At the hearings, the court asks the defendant if he demands that the trial take place under the evidence in the prosecution phase, that he meets and appropriates, then proceeds to hearing this and then giving the word to the prosecutor and the other parties. The court resolves the criminal side when, from the evidence adduced, it results that the facts are established and that there are sufficient data regarding his person to allow a sentence.

In the event that, for solving the civil action, should be taking evidence in court, it will necessarily have its severance.

If the defendant admits guilt, the court will reduce the sentence prescribed by law for imprisonment by one third, and the one prescribed by law for punishment by fine by one fourth. The above provisions do not apply if the prosecution is for a crime punishable by life imprisonment.

If the request is rejected, the court proceedings will continue under the common law procedure.

In the new Criminal Procedure Code, adopted by Law no. 135/2010 published in the Official Gazette no. 486/15.07.2010, governing Title IV („Special Procedures"), a plea bargain agreement in the art. 478-488 Criminal Procedure Code brings a number of new provisions to the current rules on the recognition of both the institution and prosecution during the trial stage.

Thus, art. 478 of the new Criminal Procedure Code provides that during the prosecution, after the criminal action, the defendant and the prosecutor may conclude an agreement as a result of the defendant admitting guilt. The effects of a plea bargain agreement are submitted to the Counsel, noting that it can be started both by the prosecutor and the defendant. The limits of the agreement on the recognition of guilt are established by prior written opinion of the superior prosecutor.

If the criminal proceedings were moved to several defendants, one can conclude a plea bargain agreement separately with each of them, without undermining the presumption of innocence of the defendants for which no agreement has been concluded. The juvenile accused can not enter a plea bargain agreement.

The plea bargain agreement may be concluded only for the offenses for which the law provides fine penalties or imprisonment not exceeding seven years, and it ends when, from the evidence adduced, it appears that there is sufficient data on the deed to put in motion criminal proceedings relating to guilt. In a plea bargain agreement, legal assistance is required. The plea bargain agreement is concluded in written form, and, in this situation, for the defendants who have concluded that agreement.

After the proceedings before the prosecutor, what follows is the second phase, **the court referral with plea bargain** agreement governed by the new Code of Criminal Procedure art. 483-488. Thus, after the conclusion of the plea bargain agreement, the prosecutor notifies the court that he would return power to hear the case on the merits and it sends a plea bargain agreement, together with the criminal prosecution.

The court may accept a plea bargain agreement only on some of the defendants. When the agreement is concluded only with regard to some of the facts or only some of the defendants, whereas for other offenses or defendants the prosecution is ordered, the court referral is made separately. The prosecutor submits to the court only the documents relating to criminal acts referring to facts and persons undergoing a plea bargain agreement.

The court rules on a plea bargain agreement by sentence, following non-contradictory proceedings in open court, after hearing the prosecutor, the defendant and his lawyer and also the civil party, if present

In terms of solutions of the court, there may be:

- accepting a plea bargain agreement and sentencing the defendant to a term the limits of which were reduced under art. 480 para. (3) if the conditions laid down in art. 480-482 on all the facts adduced against the defendant who made the agreement;
- rejecting a plea bargain agreement and sending the file to the prosecutor for further criminal prosecution, unless the conditions laid down in art. 480-482.

The foregoing provisions have sometimes significant social and human costs and facilitate a decision process quickly and efficiently in a criminal case.

On the other hand, we consider that this procedure presents some legal drawbacks that, in my opinion, should be more clearly regulated, namely:

- is the victim's participation in the negotiation and / or consent necessary?
- if the judge that verifies the expression of the defendant's recognition finds that it is flawed, will s/he use the testimony on the defendant?
- if the position of the parties changes during the trial, can the agreement be dropped?
- may the defendant be granted a period of reflection to communicate the response? If so, the judge for Liberties can take one of the preventive measures?

However, even under these circumstances, we consider that this procedure is revolutionary for the Romanian criminal law since it addresses a number of crimes of medium social gravity for which the law provides imprisonment not exceeding seven years or a fine, and the Criminal Code confirms this Work setting prison sentences in that amount to much of the crime.

This institution, which is consistent with the practice of European courts, is beneficial because the parties can deal with the civil action, the court being obliged to take note of this agreement. Thus, the within 10 days of notification, as stipulated in art. 488 of the new Code of Criminal Procedure.

The guilt admission agreement may be applied only defendants of legal age, not to under age ones.

In conclusion, we showed that the institution of guilt admission and in Romanian criminal law is, for the defendant, a mitigating circumstance and, on the other hand, an excessive softening of the inquisitorial system exacerbated in the communist period, one trying to gradually open the road to European values, as part of the euroatlantic integration process for our country.

This institution represents a true progressive process that ultimately leads to the same result as if the public debates were held, the judge ruling in accordance with art. 334 and art. 340-344 Criminal Procedure Code.

References

"The Romanian Constitution", published in *Monitorul Oficial* (*The Official Gazette*), Part I, no. 767 of 31.10.2003;

"The Romanian Code of Criminal Procedure", published in *Monitorul Oficial* (*The Official Gazette*), Part I, no. 79 of 30.04.1997, modified version through Law 202/2010, regarding some accelerating measures of case solving;

The Romanian New Code of Criminal Procedure, adopted by Law no 135/2010, published in *Monitorul Oficial* (*The Official Gazette*), no. 486 of 15.07.2010;

Mircea Duțu, *Guilt admission and punishment negociation*, Bucharest: Economical Publishing, 2005;

Stephen A. Saltzburg, Daniel J. Capra, *American Criminal Procedure. Cases and commentary*, fifth edition, West Publishing Co., 1996;

Bryan A. Garner (ed.), *Black`s Law Dictionary*, 7 ed., St. Paul (Minesota), West Group, 1999;

Anne Deysine, *La justice aux Etats-Units*, Presse Universitaires de France, 1998;

Baldwin, M. McConville, *Negotiated Justice*, London, 1977;

M. Chiavario, *La justice negociee: une problematique a construire*, APC, nr. 151, 1993;

D. Siracusano, A. Galati , G. Tranchin, E. Zappala, *Diritto processuale penale,* volume secondo, nuova edizione, Giuffre editore, 2004.

THE BYZANTINE NOMOCANONS, FUNDAMENTAL SOURCES OF OLD ROMANIAN LAW

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Abstract

Byzantine Law has been known and applied in the Romanian Principalities since the XIVth and XVth centuries, especially by means of Nomocanons (Rom. Pravile), which are fundamental sources of the old written (positive) Romanian law.

Getting to know this old Romanian Law, implies, above all, our jurists geting acquainted with the text and content of the Codes of Laws, these being not only monuments of this Law, but also of the Southeast European one. Secondly, to explore their content implies, on the part of our jurists, not only a knowledge of Roman Law, of Byzantine Law and of Greek and Church Slavonic, but also being well grounded in the fields of Eastern Theology and the history of the Byzantine Empire. But, as there are few Romanian jurists or researchers of old Romanian Law to meet these requirements, we could also say that the old written (positive) Law has no chance to become well known, yet. Actually, in the Romanian Law History handbook – being taught for only one semester at the Faculties of Law in our country – the Codes of Laws are only presented on a few pages, that, in addtion, lack much information as regards the knowledge of Byzantine Law, that was also exiled from the Romanian Academic Fortress, once with Canonic Law, around the years 1947-1948.

That is why we consider that the students at our Faculties of Law, Theology, History etc. should also study the text of these Pravile (Nomocanons), that are not only fundamental sources of old written (positive) Romanian Law and monuments of the European legal culture, but also first-hand information sources for the ones who want to know both the history of Byzantine institutions and of Romanian ones, in the XIVth-XIXth centuries.

In order to „facilitate the knowledge and the use" of the Byzantine imperial[1] laws, adopted „ by the Greek-Roman civil power with regard to the Church"[2], their texts were published – since the age of emperor Justinian (527-565) – under the title of „political Laws" (*πολιτικαι Διατάξεις*). Usually, these laws were attached – as a sort of appendix – to the Collections of canons of the respective age.

The first collection of such „political" laws was known under the name *Collectio XXV capitulorum* (the Collection in 25 chapters) and was

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[1] Cf. E. Zachariae von Lingenthal, *Die Griechischen Nomokanon*, Petersburg, 1877, p. 3-4.

[2] N. Milaş, *Dreptul bisericesc oriental (The oriental canon law)*, transl. by D. I. Cornilescu and V. S. Radu, revised by I. Mihălcescu, Bucharest, 1915, p. 100.

made by an unknown author[3]. It includes texts – in the integrality of their contents – from the Codex and the Novels of Emperor Justinian. In the competent opinion of some specialists in the history of this legislation, the texts in the Novels were inserted later and the respective Collection circulated initially as an Appendix to the canonical Collection in 60 titles[4], finished at the beginning of the VIth century and considered to be „the first version of a systematical collection of canons"[5].

Another Collection of „political laws", entitled *Collectio LXXXVII capitulorum*[6] (the Collection of 87 chapters), which included the text of about ten Novels of Emperor Justinian, was made up by John Scholastic, the Patriarch of Constantinople (565-578), and was inserted as an addendum to his canonical Collection (*Συναγωγη κανόνων*) in L titles[7].

A third Collection of civil laws is *Collectio constitutiorum ecclesiasticarum* (the Collection of ecclesiastical constitutions), which was made up by an unknown author in the first half of the VIIth century based on the laws of Justinian (the Codex and the Novels). Made of three parts, with titles and added titles (*παρπτιτλα*), „ that is parallel titles to the text of the Codices and Novels of Justinian, which are attached to the respective titles"[8], the Collection is still known under the title *Collectio tripartita*[9] or *Paratitla*. This Collection of „political" laws was used „for the writing of *The Nomocanon in XIV titles*, in its first version..."[10].

From the VIIth century onwards, the jurists and canonists started – out of practical reasons – to structure the state legislation pertaining to the ecclesiastical matters and the canons in a unique Collection, where their content was exposed in a systematical order, as they took into account the respective juridical-canonical institutions these documents referred to. That is how these Collections appeared and were to circulate under the name of Nomocanons and in the text of which „norms of both legislations"[11] were incorporated, namely those „*νομοι πολιωκοί*" (civil laws) which regard the church life.

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[3] E. Zachariae von Lingenthal, *Historia juris graeco-romanum delineatio*, Heidelberg, 1839, p. 23; Idem, *Jus greaco-romanum*, IV vol., Lipsa, 1856-1877.
[4] Idem, *Die Griechischen Nomokanon*, Petersburg, 1877, p. 3-4.
[5] C. Popovici, *Fontânele şi Codicii dreptului bisericesc ortodox (The Sources and the Codices of the Orthodox Church Law)*, Cernăuți, 1886, p. 48.
[6] J. Pitra, *Juris Ecclesiastici Graecorum historia et monumenta*, vol. II, Roma, 1868, p. 385-405.
[7] See Vl. N. Benesevici, *Ioannis Scholastici Synagoga titulorum caeteraque eiusdem opera iuridica*, München, 1937.
[8] N. Popovici, *Manual de Drept bisericesc oriental (Handbook of Eastern church* Law*)*, Arad, 1925, p. 56.
[9] See *Collectio Tripartita. Justinian on religious and ecclesiastical affairs*. Edited by N. van der Wal and B. H. Stolte, Egbert Forstem Groningen, 1994.
[10] N. Popovici, op. cit., p. 56.
[11] N. Milaş, op. cit., p. 131.

A product of the socio-juridical medieval reality, these mixed collections of laws, namely of the imperial Byzantine laws („*νομοι*"), which refer to aspects of the ecclesiastical life and of laws with a juridical and ecclesiastical content, known under the name of canons, have been applied along the centuries in all Eastern European States, among which the Romanian Principalities (Wallachia, Moldavia and Transilvania).

According to the statement accredited by some historians of Romanian Law, „the written law appeared on the Romanian territory once with the Nomocanons (*pravile*) – codes of written laws – in the XVIIth century, whereas the unwritten laws were called from then on „custom" or „the law of the land"[12]. However, such a statement needs certain corrections, accompanied, of course, by the inherent specifications and completions and this is what we shall do further on.

Starting from the VIth century, in „Respublica christiana", namely in the Christian world of „Pars Orientis" and „Pars Occidentis" of the Roman Empire, the canonical law, according to which both the State and the Church, the two fundamental institutions of the Byzantine, feudal society were governed, shall become preeminent to „imperial laws". This preeminence of the canonical law to the state law is vividly certified by the last Roman Emperor and the first Basileus of the Byzantine Empire, that is Emperor Justinian (525-565) himself, who specified that, in case that a state law, be it even an imperial „Constitution", comes into collision with a canon (*κανόνς*), the canonical law, it shall always have priority (cf. Nov. 123).

Starting from the same century, namely the VIth, they added to this canonical law the laws of the Byzantine State regarding church matters (the clergy, the laymen, the monks, trials, heresies, schisms, metropolitan seats, patriarchate etc.), which were enforced both in the case of the clergy and of the laymen (the seculars), all of them under the law of the respective State.

In the Carpathian-Danubian-Pontic space, the canonical law has been known since the IVth century, since a Church with an organisation of an archiepiscopal and metropolitan nature, such as the one at Tomis[13], had to pick up and apply this canonical, ecumenical legislation starting from the respective century and, more precisely, since the year 325 (acc. to can. 4 I ec.). In fact, in the city of Tomis, the See of the Metropolitan Church of

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[12] I. Chiş, *Istoria Statului şi Dreptului românesc (The history of the Romanian State and Law),* Bucharest, 2002, p. 96.

[13] See, N. V. Dură, *„Scythia Minor" (Dobrogea) şi Biserica ei apostolică. Scaunul arhiepiscopal şi mitropolitan al Tomisului (sec. IV-XIV) („Scythia Mynor" (Dobrudja) and its apostolic Church. The archiepiscopal and metropolitan See of Tomis (the IV-th to XIV-th centuries))*, the Didactic and Pedagogiical Publishing House, Bucharest, 2006, 267 p.).

Scythia Minor, the Father of the western canon law, namely the Proto-Romanian Dyonisius Exiguus († 545)[14], studied the Roman and canon law.

That the Proto-Romanians (the Daco-Romans) were familar with the canonical, ecumenical legislation since the IVth century, is also confirmed by the fact that the hyerarchs of Scythia Minor – starting with Evangelicus, a participant in the first ecumenical Synod (the year 325) – also contributed to the drafting, the reception and publication of this canonical ecumenical legislation. Being present and active participants starting with the first ecumenical Synods (Nicea, 325 and Constantinople, 381), they had surely brought to their country and Church the first canons of the ecumenical Church, which they have applied in the spirit of the evangelical doctrine.

At last, we should mention, specify and keep into our minds the fact that, on the land of the Romanians of today, „the written law" or „*jus scriptum*" has been known not only since the age of the Roman rule (the year 27 B.C. in Scythia Minor and 106 in the Dacia ruled by Traian), but also once with our christianization and, more precisely, once with the taking over of the canonical, ecumenical legislation by the Daco-Romans (Proto-Romanians), a process which started once with the first ecumenical Synod (Nicea, 325), which was in fact also the first Parliament of that Christian „*oekuméne*" (world).

Starting from the VIth century, the same thing happened with the nomocanonical, Byzantine legislation, very well-known to the Tomitan hyerarchs, often present in the capital of the Byzantine empire both on the occasion of the ecumenical synods and of the constantinopolitan ones (the local ones, *endemeussa*).

On the Romanian territory, the nomocanonical legislation was taken over – by means of the Church – before the XIVth to the XVth centuries, when the Rulers of the Romanian Principalities turned the Nomocanons into the „Laws of the Country", that is into the State and Church Law, the two basic institutions of the Romanian medieval society.

Once with the emergence of the Romanian Principalities (the XIVth century), the relations of the Church of the North-Danubian „Vlachs" with the Patriarchate of Constantinople – which had called itself „ecumenical" (universal) since the end of the VIth century – also took shape through the taking over and enforcement of the nomocanonical legislations in the

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[14] Idem, *Strămânul Dionisie Exiguul şi opera sa canonică. O evaluare canonică a contribuției sale la dezvoltarea Dreptului bisericesc* (The *Proto-Romanian Dionysius Exiguus and his canonical work. A canonical evaluation of his contribution to the development of canon Law*), in The Orthodoxy, XLI (1989), no. 4, p. 37-61; Idem, *Un daco-roman, Dionisie Exiguul, părintele dreptului bisericesc apusean* (*A Daco-Roman, Dioyisius Exiguus, the father of Western canon law*), in Theological Studies, XLIII (1991), no. 5-6, p. 84-90; Idem, *Denis Exiguus (Le Petit) (465-545). Précisions et correctifs concernant sa vie et son oeuvre*, in Revista Española de Derecho Canonico (Universidad Pontificia de Salamanca), L (1993), p. 279-290.

Romanian Principalities[15]. We also find out of this reality from the *Pravila* (Nomocanon) published in the age of Alexander the Good (1401-1432), that Dimitrie Cantemir also mentioned.

That is why we can say that the written law by „Romanians" was also an obvious reality in the XIVth century, that is three centuries before the printing of the *Pravile* (Nomocanons) in the XVIIth century (the *Pravila of Govora* (1640), the *Pravila of Iassy* (1646) and the *Pravila of Târgovişte* (1652)), when the nomocanonical law became „the law of the Country".

We also want to specify that „*ius non scriptum*" (unwritten law), which bore the title of „ custom" or „ law of the land" since the Dacian-Roman period, became in the XVIIth century the second source of Romanian law, preceded by the written, nomocanonical law, which served not only to the Church, but to the entire country.

Among the Romanian historians credit was given to the theory that the ecumenical Patriarch Nifon II – who occupied the metropolitan See of Wallachia between 1503-1505 – was the one who required „… the strict enforcement of the Byzantine pravila to the detriment of some local customs, denounced as being worth to be censored by the Church and, implicitly, by the state. This thing – they say – caused the fall of the dynamical priest and his being sent away from the country".[16] In fact, Radu the Great, the Ruler of Wallachia (1495-1508), was the one who asked Patriarch Nifon († 1508) – brought from Adrianopolis, where he lived in exile, in order to take the metropolitan See of the Country – to adapt „all the customs according to the *Pravile* (Nomocanons) and on the constitutions of the Saint Apostles"[17], namely to the Byzantine nomocanonical legislation and to the canonical legislation, of an apostolic origin.

Therefore, the taking over of the Byzantine nomocanonical legislation in the Romanian Principalities was imposed – through the Rulers of the Country – by the stringent necessity to endow the

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[15] See, L. Stan, *Tradiția pravilnică a Bisericii. Însemnătatea şi folosul cunoaşterii legilor după care se conduce Biserica* (*The Church Tradition pertaining to the Nomocanons. The importance and the use of knowing the laws according to which the Church is governed*), in Theological Studies, XIII (1960), no. 5-6); Idem, *Vechile noastre Pravile* (*Our old Nomocanons*), in The Metropolitan See of Moldavia and Suceava, XI (1958), no. 9-10); Idem, *Pravila lui Alexandru cel Bun şi vechea autocefalie a Mitropoliei Moldovei* (*The Nomocanon of Alexander the Good and the old autocephaly of the Metropolitan See of Moldavia*), in The Metropolitan See of Moldavia and Suceava, XIII (1960), no. 3-4.).

[16] V.G. – V.I. – N.I., *Țările Române. Biserică (The Romanian Principalities. The church), in Instituții feudale din Țările Române, Dicționar* (*Feudal institutions from the Romanian Principalities, Dictionary*), The Publishing House of the Academy of the Socialist Republic of Romania, Bucharest, 1988.

[17] Gh. I. Moisescu, Șt. Lupşa and A. Filipaşcu, *Istoria Bisericii Române* (*The history of the Romanian Church*), vol. I, IBMBOR Publishing House, Bucharest, 1957, p. 306.

Principalities and their Churches with the same nomocanonical, ecumenical legislation, which, at that time, was in force in all the States of the South-East European space. Anyhow, through this taking over of the Byzantine nomocanonical legislation, the Romanian Principalities also legitimated their geopolitical belonging to that Byzantine „Commonwealth", without which no State in the Carpathian-Danubian-Pontic space could acquire the institutional recognition of its existence from the part of the imperial power of those times.

As regards the enforcement of this nomocanonical legislation „to the detriment of some local customs", that is of the customary Romanian Law, we should also specify and keep into our mind that the former Patriarch Nifon, Metropolitan Bishop of Wallachia, has left his Metropolitan See because he had come to a misunderstanding with Radu the Great because of the non-observance of the canonical law by the latter, which forbade that a marriage be contracted as long as one of the spouses was already married. Indeed, Radu the Great had approved – against this canonical law – the marriage of his sister Caplea with Bogdan "Vornicul" (chief-in-charge with internal affairs), who came from Moldavia, where he had a legitimate wife. Since Nifon required the separation of the two, cursing „the unlawful action", the Ruler of the country chose to send the former Patriarch away from his Court than to ban his sister's way to happiness. Therefore, that relentless attitude of the former Patriarch – regarding the observance and the enforcement of the ecumenical, canonical law – was the one that led to Metropolitan Nifon's being removed from the See and not the fact that he would have enforced the *Pravila* (Nomocanon) to the detriment of local customs, which – in the respective case (marriage) – were also based on the canonical law.

By source of law one shall understand „that special form taken by the juridical norms depending on the necessities of the society they serve".[18] In this sense, up to the emergence of *Pravile* (the Nomocanons), two formal sources had existed in the Romanian Principalities: the customs and the law, that is the written law, which, in fact, was rather expressed in the form of a customary law, known under the name of „*zakon*" (law) or „ *starîi zakon*" (the old law). In fact, in the documents written in Romanian, the term „*zakon*" has the meaning of unwritten law, that is of custom since, within the village community, the basic norm of the people's living together was „the custom" of the land", which was, in fact, „the law of the Country" up to the emergence of the law of the *Pravile* (the nomocanonical law).

[18] Vl. Hanga, *Izvoarele dreptului feudal, structura generală şi trăsăturile lui stilistice* (*The sources of feudal law, its general structure and its stylistic traits*), in *Istoria Dreptului românesc* (*The history of the Romanian law*), vol. I, Bucharest, 1980, p. 202.

The word *„pravo"* (just) – we encounter in the same documents – refers „not only to the unwritten law, to customs, but also to equity"[19], understood by some researchers and historians as „feudal equity", as „feudal ethics of the time" (Hanga, anul?).

According to the definition of Ulpianus, *„jus est ars boni et aequi"* (law is the art of the good and the equity). Therefore, the law has both an ethical and a philosophical and juridical dimension. However, in the opinion of some historians of Romanian law, the notion of „law" only expresses the idea of equity, of public good, and not that of conformity with the moral law, which in fact precedes the juridical law and exceeds it in its axiological content. „If the juridical law expresses the idea of law and justice, justice – the respective historians of Romanian law wrote – represents the idea of equity, of public good"[20]. Anyhow, for the old Romanian law, the purpose of *„jus"* is the observance of the divine and human law and, *ipso facto*, the accomplishment of public good, whereas equity aims at the fulfillment of lawfullness, both according to the juridical law and to the moral law[21], of a Christian origin.

Some historians of Romanian Law stated that „… the Pravile (Nomocanons) of the Orthodox Church are only made according to the Byzantine canonical sources…"[22] (*sic*). But, as we also specified above, the *Pravila* is a nomocanon, that is a collection of (Byzantine) State laws – regarding the life of the Church – and of canonical laws, namely canons. Therefore, its sources are the Byzantine state legislation and the canonical legislation of the ecumenical Church of the first millenium[23], hence its mixed, nomocanonical character. In fact, the study of these sources gave birth to the juridical discipline known under the name of nomocanonical Law, apart from having been studied in the Byzantine Empire, continues to be a subject of study not only within the Chair of canon law of the Faculties of Theology, but also within the Chair of ecclesiastical law[24] of the Faculties of Law in countries such as, Germany, Italy, Spain, Belgium, Hungary, Bulgaria etc., but not in Romania, where, since 1947, when the two Subjects have been eliminated from the academic world, the Byzantine and canon

[19] I. Chiş, *op. cit*., p. 98.
[20] *Ibidem*.
[21] See, N. V. Dură, *Ideea de Drept. „Dreptul", „Dreptatea" şi „Morala"* (*The ideea of Law. „The Law", „The Justice" and „The Morals"*), in Ovidius University Annuals. The Series: Law and Administrative Sciences, no. 1, 2004, p. 15-46.
[22] Em. Cernea – Em. Molcuț, *Istoria statului şi dreptului românesc* (*The history of the Romanian state and law*), Press Mihaela SRL Publishing House, Bucharest, 2001, p. 127.
[23] See, N. V. Dură, *Le Régime de la synodalité selon la législation canonique, conciliaire, oecuménique, du Ier millénaire*, Bucarest, 1999, 1023 p.
[24] In the context of this subject, the students shall first of all study the State legislation regarding the Church and the religious Cults in general and, afterwards, the history of the relations between the two institutions, the State and the Church.

Law[25], the nomocanonical and canon Law have not merely been mentioned. This is, of course, caused by the lack of specialists in the field of Byzantine and of canon Law among the academic staff from our Faculties of Law who, for almost 50 years (1947-1990) were educated and remained entangled in the spirit of an imported juridical culture, incompatible both with the spirit of „the law of their country" and with the contribution of the great jurists and canonists from among their own people, starting with Dyonisius Exiguus († 545), the father of Western Canon Law[26] and ending with the regretted Professor Liviu Stan[27] († 1973), who has brought a real and efficient contribution to the knowledge of Byzantine and of canon Law in our country.

Competent researchers of nomocanonical Law have observed, with good reason, that within the Byzantine Empire, „the codex of civil (and penal) law, *νόμος πολιτικὸς*, that is the secular, imperial law remains, however, an exception in the theocratical Byzantine Empire, and that is why even the Slavic juridical collections rarely include civil laws independent from the ecclesiastical legislation. In most cases – Mr. Radu Constantinescu – the excerpts from the secular laws were introduced in a canonical context, hence the Byzantine name of nomocanon, which means law and canon in the same context".[28]

In the Byzantine Empire the imperial, secular law was indeed introduced – next to the canon law – in those mixed collections called nomocanons. Moreover, the secular, imperial legislation had not only been introduced „in a canonical context", that is, canonised, but also enforced in the spirit of the canonical doctrine (teachings), the principles of which it had asserted along the centuries, hence its nomocanonical character. The fact that this Byzantine legislation was enforced in the spirit of the Christian doctrine is confirmed, in the highest sense of the word, even by the text from the Foreword to the published Codex Justiniani (in a first edition in the year 529 and in a second edition in the year 533) „*In nomine*

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[25] See, N. V. Dură, *Dreptul Canonic, o disciplină exilată. Pe când o repunere în drepturile ei, adică în rândul disciplinelor de studiu şi cercetare în cadrul Facultăților de Drept?* (*Canon Law, an exiled subject. When, if ever, will it regain its due, namely its place among the study and research subjects of the Faculties of Law?*), in In the Justice, III (2002), no. 14 (4-10 nov.), p. 19; no. 15 (20-26 nov.); Idem, *Dreptul canonic, disciplină de studiu în Facultățile de Drept din prestigioase Universități europene* (*Canon Law, subject of study in the Faculties of Law of famous European Universities*), in the Ovidius University Annuals. The Series: Law and Administrative Sciences, no. 1, 2007, p. 328-332.

[26] Idem, *Străromânul Dionisie Exiguul şi opera sa canonică…*(*The Proto-Romanian Dionysius Exiguus and his canonical work...*), p. 37-61; Idem, *Un daco-roman, Dionisie Exiguul, …*(*A Daco-Roman, Dyonisius Exiguus*, ...), p. 84-90.

[27] The author of the present work has been one of his students and doctoral candidates.

[28] R. Constantinescu, *Vechiul drept românesc scris. Repertoriul izvoarelor. 1340-1640* (*The old Romanian written law. The catalogue of sources. 1340-1640*), Bucharest, 1984, p. 156.

Domini nostri Jesu Christi" (In the name of our Lord Jesus Christ). In fact, the contents of the Foreword to this Codex – which refers to the state laws issued by the Roman Emperors from the year 117 up to the year 533 inclusively – express, in fact, in a vivid manner, the Christian conception of the world and life. In fact, through this conception, they expressed the very ideology of the respective society, which can also be found in the text of the legislation of „*illo tempore*" (of those times).

Since the IVth century, the laws of the Roman State (Western and Eastern) have been material sources for the canon Law, no matter if they have been issued only by the State or at the explicit request of the Church. In fact, since the age of Constantine the Great, the Orthodox, the ecumenical Church has recognised the competence of the State to issue laws regarding the church matters as well. The only condition was that this legislation do not come against the Evangelical principles and precepts. However, during the age of Emperor Justinian the Church asked that this State legislation, regarding the life of the Church be in conformity to the spirit of the Byblical precepts and of the ecclesiological-canonical doctrine.

In 1830, Professor C. Flechtenmacher talked in the „Academy of Vasile Lupu" of Iassy about „The history of Romanian law or of the Romanian Pravile (Nomocanons)". In the perception of the jurists of those times, the Romanian *Pravile* (Nomocanons) „were therefore identifyable with the „History of Romanian Law" itself. In this sense, we should not forget that „this lecture is the first lesson of law printed in the Romanian language and kept"[29].

Therefore, the study of the Romanian *Pravile* (Nomocanons) – which define in an eloquent manner the content of the old Romanian law – has been a major preoccupation for the researchers of Byzantine law in our country, hence the necessity that every student of Law know and become familiar with their text. Finally, we should also not forget the fact that the study of these *Pravile* (Nomocanons) also requires a prior analysis of the nomocanonical sources, of the body of nomocanonical Law, the emergence of which in fact goes back to the VIth-VIIth centuries and ends up in the XVIIIth-XIXth centuries.

The Byzantine law emerged into the Romanian Principalities both through the canonical Collections and through the nomocanonical ones, known under the name of *Pravile* (Nomocanonical). Indeed, starting with the nomocanonical collection, „with a canonical character", atributted to John Nesteutes (John the Faster), from the VIth century, which emerged „… from the beginning in Moldavia and in Wallachia, we shall come to nomocanons in the highest sense of the word, among which the most

[29] N. Popa, *Teoria generală a Dreptului* (*The general theory of Law*), Bucharest, 1994, p. 18.

famous was, for the Romanian Principalities, the Syntagma of Vlastares (1335)"[30].

In the Slavic and Romanian *Pravile* (Nomocanons), in a manuscript and printed form, the text of this *Canonical collection* attributed to John the Faster, Patriarch of Constantinople, is inserted at the end of the *Syntagma* written in Greek by Matei Vlastares, a monk of Salonic, in 1335.

Structured in an alphabetical order – according to the 24 letters of the Greek alphabet – the *Syntagma* of Matei Vlastarea, which is also known under the name of *The Alphabetical Syntagma*, was translated in the Slavic language only three years after it had been published. We refer to the translation that was made in Serbia, in the year 1348, during the rule of Ştefan (Stephen) Duşan. In the Slavic version, the *Syntagm* of Vlastares had circulated – in the form of manuscripts – in all the countries in the area of the Byzantine „Commonwealth" of those times, that is Bulgaria, the Romanian Principalities, Russia, Armenia and Greece.

As regards the text of this Nomocanon we owe to Matei Vlastares – we must mention and keep into our minds the fact that later on „the copysts have also added other pieces, lent from other sources of law and have also appended to some copies a Latin-Greek and also a Latin-Slavic vocabulary of the juridical terms"[31].

In the Carpathian-Danubian-Pontic space, this Nomocanon had enjoyed a large circulation as early as in the XIVth-XVth centuries. The first manuscripts, of Greek origin, came from Thessaloniky and from the Holy Mountain Athos, the same place that „the prototypes of the Slavic ones... brought during the age of the voivode Alexander the Good" also came from „without excluding the possibility that the Syntagma could have been known even earlier, by means of the Bulgarians and Serbians…"[32].

On the Romanian territory, the *Alphabetical Syntagma* – written by Matei Vlastares – has also circulated in the form of Slavo-Romanian manuscripts. Such a Manuscript is the *Pravila* (Nomocanon) *of Târgovişte*, written in 1451 by the copyist Dragomir by the order of Voivode Vladislav of Wallachia. As regards this Pravila, the experts said it is „the first Pravila (Nomocanon), with regard to its age, that is known to exist on the Romanian territory…"[33].

Among other things, the *Syntagma* of Matei Vlastares was also incorporated in the text of a Codex, known as the *Moldavian Pravila* (Nomocanon), manuscript no. 116, the XVIth century, which is kept in the

[30] Valentin Al. Georgescu, *Nomocanon (Nomocanon)*, in *Instituții Feudale din Țările Române. Dicționar (Feudal Institutions from the Romanian Principalities. Dictionary)*, The Publishing House of the Academy of the Socialist Republic of Romania, Bucharest, 1988, p. 320.
[31] I. N. Floca and S. Joantă, *Drept bisericesc (Church Law)*, vol. I, Sibiu, 2006, p. 40.
[32] Ibidem.
[33] Ibidem, p. 41.

Library of the Theological Academy in Kiev. This Manuscript has a very special value „by virtue of the almost 400 Romanian glosses", which „represent the first step in „the Romanization" of the juridical texts"[34]. Indeed, these „glosses" stress the fact that the Byzantine juridical texts had not only been taken over in a tale-quale manner, but also commented upon and adapted to the spirit of the Romanian realities.

This Nomocanon (the *Moldavian Pravila*) is the result of the competent work of those nomocanonologists – contemporary jurists and canonists – educated and trained both in the Schools of the Athonite Monasteries or in the ones of Constantinople and Thessaloniky and in the ones within the diocesan Centres and of the great monasteries of our Country. Anyhow, the presence of these glosses remains an obvious proof both as regards the existence of a School of Romanian Law and a real process of translating the Byzantine, nomocanonical legislation into a Romanian context, also confirmed by the existence, in the Romanian language, starting from the XVIIth century, of some fragments from the din Syntagma of Matei Vlastares.

But what did our medievialists (historians of the institutions, jurists etc.) understand by Nomocanon? According to the definition in *The Dictionary of the feudal institutions in the Romanian Principalities*, edited by the Academy of the Socialist Republic of Romania in 1988, the Nomocanon is a „a collection of norms of law, consisting in a combination of canons with the secular laws. We are talking – V. Al. Georgescu wrote – about a civil law (*nomoi*) with a canonical implication (*sic*), applied both by the church and by the state, in a complicated simbiosis (*sic*) of the two organisms".[35]

As we have also mentioned above, the Nomocanons are collections of state laws, promulgated especially with regard to matters of an ecclesiastical nature and of church laws (canons), and not some rules of law, which would include a so-called combination of canons with secular laws. Anyhow, it is true that this civil law, issued by the Byzantine ruling power has been observed and applied both by the Church and by the State, by virtue of that politics of „simbiosis", or, better said, of „symphony" - as the Byzantines wanted to write in the Collection published in the year 870 by the order of Emperor Basil I the Macedonian, namely in the Prohiron and in the Epanagoga collection, which appeared in the years 884-886 - between the two fundamental institutions of the Byzantine Empire, namely the State (regnum) and the Church (ecclesia), or between „*imperium*" and „*sacerdotium*".

[34] Ibidem, p. 42.
[35]Valentin Al. Georgescu, op. cit, p. 320.

They also said that the „taking over of the nomocanonical law" in the Romanian Countries was „at the same time a political affair of the State"[36]. In fact, this taking over was more than a so-called „political affair", it was a requirement, a necessity of the respective age, also conditioned and intensified by the fact that the Romanian Principalities had belonged – starting with the XIVth century – to that Byzantine „Commonwealth", the only one that legitimated, at that time, the political existence and independence of the States in the South-East European geographical space.

Historians of old Romanian law tell us that in the Romanian Principalities we had been dealing with a „legal regime" defined exactly through the process of taking over the nomocanonic Law since the XVth century. Beyond doubt, „the divine law or the law of God, that the ruler enforced in the XVIth and the XVIIth centuries could not be far from a nomocanon. As early as the XVth century – the same historian and jurist, Valentin Al. Georgescu, wrote – this taking over – nomocanonical or imperial – represented a „legal regime", „a rule of law for the feudal states of Wallachia and Moldavia"[37].

This reality is certified in the most eloquent manner both by the Pravile (Nomocanons) printed in the XVth century and by the Collections of laws that appeared in the Phanariot Age. Indeed, we can observe, beyond any doubt, that the „nomocanonical (direct or extended) structure shall remain dominant in the Romanian law up to the project for a general code of Mihai Fotino (1777) and the *Pravilniceasca Condică* (Nomocanonical Register) from the year 1780"[38]. In fact, not only in the two projects for a general code from the years 1765 and 1766, and, finally, in the one of 1777, „we encounter a modernised nomocanonical structure (two books of secular law, followed by a book of canon law)"[39], but also in the *Pravilniceasca Condică* (Nomocanonical Register) the reference to the nomocanonical text is an obvious reality.

Hence, this „nomocanonical structure" shall remain dominant in the Romanian law up to the XVIIIth century. But we should also not forget that in the Romanian Principalities (Wallachia ansd Moldavia), these Collections of laws with a preeminently nomocanonical structure have been the unique sources of Romanian positive law up to the age of Voivode Cuza and in Transilvania up to the year of the Great Union of 1918.

One of the main branches of Byzantine Law – once studied at the Faculty of Law of the Universities of Constantinople, Beirut, Rome,

[36] *Ibidem*.
[37] *Ibidem*.
[38] *Ibidem*.
[39] *Ibidem*.

Bologna, Sorbonne, Oxford etc., and today in the great Faculties of Law of the European Universities – was nomocanonical Law. Above all, it consisted in the study of the laws of the Roman, Christian state, *recte*, of the Byzantine one, regarding the relations between „*Imperium*" and „*Sacerdotium*", that is between the State and the Church, as well as the matters pertaining to the ecclesiastical life, collected in the Pravile or Nomocanons.

In Romania, up to the present, the nomocanonical legislation has not been approached as a subject of research by the contemporary historians of Romanian Law, hence some eroneous or incongruous statements. For example, for some historians, „the nomocanons" are „church laws"[40]. For others, nomocanons are collections of „juridical rules of the society", at the basis of which lie „the Christian teachings".[41] But, as the term „nomocanon" itself indicates, we are dealing with a state law (*νομος*) and with a church law, called „*κανον*" (canon).

In the opinion of the same historians of Romanian law, „at the time when, in the form of written codes – pravile – from the XVIIth century, they started calling the written norm a law, the old unwritten law has become the custom of the land"[42]. As this unwritten law is concerned, that has become a customary rule of the land, we can identify some narrative sources since the age of Burebista.

The historians of Romanian law are also unfamiliar with the canon Law, hence some statements – in some specialised manuals – which show complete ignorance. For example, in one of the recent manuals we are told that the canon law is „an ensemble of religious norms", „based on the Byzantine Nomocanons…"[43]. Obviously, this wrong definition of the canon law also requires us to make the necessary corrections.

First of all, we want to specify that by Canon Law one should understand „… the Christian religious law or the law of the Christian Church, namely the sum of the principles and norms of law according to which the entire Christian church is organised and led, that is all the Christian denominations"[44].

As a branch of (religious and secular) law, the canon law presents the principles and norms of the law according to which the both divine and human institution, namely the Church of Christ, is organised and led". As

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[40] Ibidem.
[41] I. Chiş, *op. cit.*, p. 8.
[42] Ibidem.
[43] I. Bitoleanu, *Istoria Statului şi Dreptului românesc (The history of the Romanian State and Law*), Constantza, 2003.
[44] I. N. Floca, *Drept canonic ortodox. Legislație şi administrație bisericească* (*Orthodox Canon Law. Church legislation and administration*), vol. I, IBMBOR Publishing House, Bucharest, 1990, p. 55.

a juridical science, the „canon law – as professor Liviu Stan († 1973) specified in his academic course published by I. N. Floca – deals with the research, with the methodical study and analysis and with the systematical presentation, that is with the binding in a logical system of the customs, principles and norms of law according to which the Church is led …"[45].

To that, we must specify and keep into our minds that the Nomocanons only emerged in the Byzantine age, whereas the canons had been written since the pre-Nicene age (year 325). Hence, the statement that the canon law is based on the Byzantine Nomocanons is totally wrong, as in fact these ones only emerged in the VIth century.

Which are these nomocanonical laws, when they appeared, which is their actual content, how valid they still are today, etc. are just as many questions we shall try to answer starting with the very last one, which is not the least important, given that the content of this answer will generate other questions and will suggest other answers and, *ipso facto*, it will also level our path for the answers to the other questions.

In 425, when the famous University of Constantinople became the first Christian University, this one counted 30 professors out of which 15 taught the Greek language and literature and the others the Latin language, law and philosophy. Starting from 425, all these subjects were taught in the spirit of the Christian teaching, based on the Word of the Holy Script and of the testimonies of church Tradition, from the content of which „Theology", the queen of sciences and of academic subjects until the Enlightenment – has legitimated its very reason to exist.

From the age of Emperor Justinian (527-565), the Roman law was already being taught according to the precepts of the Evangelical doctrine. Afterwards, the Roman, Christianised law, known since the time of Basileus under the name of „Byzantine law", was to incorporate in its matters both the canonical and the nomocanonical law. This kind of law was also structured and presented according to the precepts of the ideology of those times regarding the world, life and society, namely with the ones typical of the Christian doctrine.

Apart from the rules and the canonical laws promulgated for its own organisation and administration, the Eastern Church recognises even today the right of the State to issue laws in the field of the external, the church of life. „But – as a well-known Orthodox canonist specified – we should always admit that the power of the State shall recognise, as a rule, the validiy of all church laws; that between the State and the Church there is a reciprocal understanding and that the norms issued by the secular

[45] Ibidem.

legislation on matters of the church are only issued in the spirit of church law and always to the interest of the Church „.[46]

But in what resides the historical and juridical fundament of this recognition of civil laws by the Church as a source of its law on the matters of the external church life?! In order to answer this question, we have to appeal to some of the historical testimonies of the Orthodox ecumenical church.

As it is known, in the year 380, the Christian religion was proclaimed a state religion of the Roman Empire. After that, the Church was „proclaimed as basis of the Roman law", since „the political rights and, to some extent, even the general rights of individuals", were provided in such a manner as „... to depend on the fact of belonging or not belonging to the Church...". Finally, *volens-nolens*, the Church left „to the power of the state the right to enact laws on church matters, too, either by itself or in communion with the clerical authority".[47]

Both in the East and in the West these laws of the Roman, Christian state, especially the ones regarding the interests of the Church, were observed and enforced up to the XIXth century. The Roman pontifs, for example, have appealed to „*leges Justinianeas*" (the laws of Justinian) „*non solum in civili et ecclesiastica administratione, sed praesertim in ordinatione sacri palati lateranensis*..."[48] (not only with regard to the civil and ecclesiastical administration, but especially to the organisation of the Holy Palace of Lateran).

The Byzantine laws therefore served the Papal State and, *ipso facto*, the Papal Court, the first state authority of the West towards the end of the first millenium and the beginning of the second one. In fact, in the Byzantine Empire and in the States of South-Eastern Europe – which were in the area of political and religious influence of that Byzantine Commonwealth – the Byzantine legislation was at home up to the XIXth - XXth centuries. In countries such as Greece, Serbia, Romania etc., this legislation served as a main source, basis and reference both in the courts of the State and in the "*dicasteria*", that is in the Church law courts.

In the old collections of canons they also included laws issued by the Christian, Roman Emperors pertaining to different fields of the Church. This kind of laws, considered an auxiliary (supplementary) source of ecclesiastical law would already appear in the *Canonical Collection* of John the Scholastic, written around the middle of the VIth century. Excerpted from the text of Justinian's Novels (527-565), which regarded the Church,

[46] N. Milaș, *op. cit.*, p. 45.
[47] *Ibidem*, p. 43.
[48] J. P. Pitra, *Juris Ecclesiastici Graecorum historia et monumenta*, vol. II, Roma, 1868, p. XXXIV, n. 6.

they were inserted by John the Scholastic as an appendix to its canonical Collection or *Syntagma*, in the Introduction to which he wanted to specify that these laws had been formulated in accordance with the spirit of the Church laws, namely of Canons and that they had also given the latter a special authority" (*αὐθεντίαν*) within the state for all the subjects of the empire, contributing in this manner to the application of all these laws „according to the divine teachings, to the use of the entire mankind" (Collectio, LXXVII, capitulorum).

The same John the Scholastic (the VIth century) said that the laws of Emperor Justinian „... pursued the spirit of the canons of our Orthodox Fathers… who have gained authority from the part of the imperial power...", and that these ones, namely the laws of the Emperors and the canons of the Fathers pursue „the interests of the entire mankind (*πάση τῇ ἀνθρωπίνῃ κτίσει*)"[49].

Therefore, based on the statement of John the Scholastic we shall keep into our minds not only the fact that these imperial laws had to take into account the spirit of the canonical legislation, but also the fact that the laws of the Church, that is the canons, that had been given the power of a law – for all the subjects of the empire – by the imperial authority, that is by the Christian Emperors of the Roman-Byzantine Empire and later of the Byzantine Empire were – next to the political (civil and penal) ones to the use of the whole mankind, hence the perception of their humanistic and universal character.

As regards the humanistic character of this canonical and nomocanonical legislation, that John the Scholastic explicitly mentions in his *Syntagma* (Collection), we have to specify that this one was evinced in the text of this legislation since the IIIrd-IVth centuries. For example, the text of canon 5 of the first ecumenical Synod (Nicea, 325) explicitly provides that „the canon be observed, which decides that the ones who were put away (cast out, excommunicated) by some should not be received by others. But research should be carried out in order to find out if these ones might have been excommunicated because of the meanness of the soul or because of hate or any other evil deed of this kind of the Bishop" (can. 5 I ec.). In other words, the first ecumenical Synod – the first Parliament of that „Respublica Christiana", namely of the Christian world of the Roman Empire – underlined the major preoccupation of the Christian Church for the observance and assertion of that „*dignitas humana*"[50] (human dignity),

[49] Synagoga în 87 capitole (The Synagogue in 87 chapters), in J.P. Pitra, op. cit., vol. II, p. 390.

[50] See N. V. Dură, *Dreptul la demnitate umană (dignitas humana) şi la libertate religioasă. De la "Jus naturale" la "Jus cogens"* (*The right to human dignity (dignitas humana) and to religious freedom. From "Jus naturale" to "Jus cogens"*), in The Ovidius University Annuals. The Series: Law and Administrative Sciences, no. 1, 2006, p. 86-128.

and, *ipso facto*, of the human rights, that the texts of the Treaties of European Law explicitly mention[51], ending up with the Treaty establishing a Constitution for Europe (cf. Art. 6), published at first in Rome, in September 2004 and then in Lisbon in December 2007.

Also, from the statement of John the Scholastic we shall keep into our minds that, since the age of Justinian, the insertion of state laws regarding problems of an ecclesiastical nature – in the canonical Collections – had become a reality. These Collections – which included canons and state laws – were to be known and to circulate under the generic name of „Nomocanons" (laws and canons), which are, therefore, mixed collections of church laws (canons) and state laws (*νομοί*), with a concrete applicability especially in the field of Church life.

Finally, we should also keep into our minds the fact that, initially, in these Collections or Nomocanons the canons were inserted first, followed by the state laws regarding the same matter or issue.

As regards the word „*νομοκανον*", it was translated by the Slaves through the phrase „the pravila (Nomocanon) of the law"[52], hence the notion of „*pravila*", that was taken over and imposed in the ecclesiastical and juridico-canonical language since the XIVth-XVth centuries.

From the first millenium three Nomocanons were kept and the competent researchers of Byzantine Law studied both their content and the sources that their writers had used. These are: *The Nomocanon in 50 Titles*, *The Nomocanon in XIV Titles* and *The Nomocanon* attributed to Patriarch Fotie.

1. The Nomocanon in 50 Titles (Nomocanon quinquaginta titulorum)

The first Nomocanon mentioned in the specialised literature is *The Nomocanon in 50 Titles*, attributed by its editor (Justel) to a former Antiochian lawyer, who later became the Patriarch of Constantinople (565-577). We are talking about John the Scholastic, who was also attributed a Collection of canons. Anyhow, this title of the Collection, „from the edition of Justel" is eroneous as „in the manuscripts", this one mentions himself „sometimes using the name of Theodoret the Bishop of Cyrrhus and most

[51] See Jean-Françoise Renucci, *Tratat de drept european al drepturilor omului (Treaty of European Law of human rights)*, transl. by C. Constantin et al., Hamangia Publishing House, Bucharest, 2009, p. 704-712.

[52] This is, for example, the case of the Nomocanon „Kormčaya Kniga", in the Russian edition of the XII-th century.

of the times without indicating the name of the author, with the title: *Συναγωγή κανόνων ἐκκλησιασωκῶν εἷς πεντήκοντα τίτλους διηρημένη*"[53].

But, whereas the name of the author is still unknown, in turn we can say that in this Nomocanon - which, in the Byzantine world, has circulated under the paternity of John the Scholastic - „the 50 titles of the Collection of canons of John the Scholastic are kept in their entirety and their titles, too, are literally prescribed"[54], being followed by excerpts from the Novels of Justinian.

Summing up, we can therefore say that the Nomocanon attributed to John the Scholastic[55] is the work of a canonist, who had also been educated as a jurist (Roman and Roman-Byzantine law) from the time of Emperor Justinian (527-565).

However, there are not a few Greek Nomocanons stating that the author of this Nomocanon is considered to have been Theodoret, the Bishop of Cyrrhus[56], some of the great theologians and historians of the Old Oriental (non-Calcedonian) Churches. That is why I personally consider that the true author of this Nomocanon was Theodoret of Cyrrhus, but, being a „non-Calcedonian", he was refused the paternity which was attributed *a posteriori* to the constantinopolitan Patriarch John the Scholastic.

Anyhow, the opinions of the researchers were and are still different not only with regard to the paternity for this Nomocanon, but also with regard to the time it was written. In the opinion of some researchers of this nomocanonical legislation, this Nomocanon was written a little time before Heraclius (610-641)[57] or „in the time of Heraclius or immediately after him"[58]. Finally, in the opinion of the canonist Liviu Stan, *The Nomocanon in 50 Titles* was made up „after the year 565, when he (John the Scholastic) became Patriarch of Constantinople (566-577) and who used as a basis for this Nomocanon the collection of canons in 50 titles itself..."[59], which is the oldest „of the ones kept up to our times…"[60]. Although the hypothesis regarding the existence of other Nomocanons before the one attributed to John the Scholastic cannot be denied, this remains, however, the oldest Nomocanon we have kept.

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[53] I.Berdnikov, *Curs de Drept bisericesc (Course of church Law)*, transl. by S. Bălănescu, Bucharest, 1892, p. 49.
[54] Ibidem.
[55] It was edited and published by Justel in Juris Canonici Library.
[56] C. Popovici, *op. cit*, p. 50.
[57] V. Pocitan, *Compendiu de Drept bisericesc (Compendium of Church Law)*, Bucharest, 1898, p. 34.
[58] C. Popovici, *op. cit.*, p. 51.
[59] Apud I. N. Floca, *op. cit.*, p. 97.
[60] V. Pocitan, op. cit., p. 33.

Later, this *Syntagm* (this canonical Collection) was completed with the state laws issued up to the beginning of the VIIth century, giving therefore consistency to the contents of a true Nomocanon.

As regards the first translation in the old Slavonic language of the Nomocanon of John the Scholastic[61] in „50 titles", experts said that „it is beyond doubt the work of Methodius, made up as a collection for the use of the Slavic Church of Moravia, the Archbishop of which he was".[62] Indeed, the old manuscripts in the Slavic language attribute this Nomocanon to Archbishop Methodius who, next to his brother Cyril is considered the father of the juridico-canonical literature of Slavonic expression. Anyhow, we cannot exclude the hypothesis that this Nomocanon was made by an apprentice of Methodius or, the one that, in the form in which we know it today, his text was reframed or completed by his apprentices. But, no matter who its real author is, it is certain that this one used the *Dionysiana* Collection, namely the canonical Collection written and published in Rome by the Proto-Romanian Dionysius Exiguus[63] (the Humble) by the beginning of the VIth century. That is why we should say and keep into our minds that, in matters of canonical legislation, it is not the Romanians who are tributary to the Slaves, but the latter who are tributary to our ancestors because the Archbishop Methodius or his apprentices, who made up the respective Nomocanon, used the canonical Collection of Dyonisius the Humble for all the canonical texts, references and links[64].

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[61] The Nomocanon was published by V. Beneševici, *Sinagoga v 50 titulu i drughie iuridiceskiie sborniki Ioanna Scholastika*, St. Petersburg, 1914.

[62] A.E.N. Tachiaos, *Sfinții Chiril şi Metodie şi culturalizarea slavilor (The Saints Cyril and Methodius and the culturalization of the Slaves)*, transl. by C. Făgețan, Sofia Publishing House, Bucharest, 2002, p. 106-107.

[63] Dionysius Exiguus was born in Scythia Minor, namely in Dobrudja on the Romanian territory of today. But, there are also erroneous and tendentious statements, lacking any historical basis, according to which our Proto-Romanian was "a monk from Russia" (James A. Veitch, Dionysius and the New Millenium, în The Fourth R, volume 12,6, September/December 1999 – http://www.westarinstitute.org/Periodicals/4R_Articles/4r_articles.html). As regards his Dacian-Roman origin and his birthplace, where he also studied (theology, law, astronomy etc.), see, N. V. Dură, *Străromânul Dionisie Exiguul şi opera sa ...* (*The Proto-Romanian Dionysius Exiguus and his work...*), p. 37-61; Idem, *Dionisie Exiguul şi Papii Romei* (*Dionysius Exiguus and the Popes of Rome*), in The Romanian Orthodox Church, CXXI (2003), no. 7-12; Idem, *Denis Exiguus (Le Petit) (465-545)…*, p. 279-290.

[64] In the Romanian specialised literature, this observation was presented – for the first time, by the author of this paper in the study entitled *350 de ani de la tipărirea Pravilei de la Govora. Contribuții privind identificarea izvoarelor sale* (*350 years from the printing of the Pravila of Govora. Contributions regarding the identification of its sources*), in The Shrine of Banat, I (1990), no. 3-4, p. 58-79.

2. The Nomocanon in XIV Titles

The second Nomocanon, entitled *The Nomocanon in XIV Titles*, was made up during the reign of Emperor Heraclius (610-641), with the approval of the Patriarch Serghei of Constantinople (610-638), by „a clergyman of the Church of Constantinople"[65], who added to the state laws regarding ecclestiastical issues and activities that were issued during the reign of this Emperor some previous ones. Being divided in 14 large chapters, this one bore the name *The Nomocanon in XIV Titles*. The text of this Nomocanon was not kept, but it was used as a basic material by Patriarch Fotie (the IXth century), who has also explicitly mentioned it in the Nomocanon published in 883.

We should also stress and keep into our minds the fact that the author of this *Nomocanon quatordecium titulorum* has used the canonical Collection (version III) made up by the Proto-Romanian Dionysius Exiguus. This reality is also certified by the fact that in the text of this Nomocanon we also find „the canons of the Synod of Cartagena from the year 419 translated into Greek by… Dionysius Exiguus"[66], that cannot be found in the canonical *Syntagma* of John the Scholastic.

Apart from *Codex Africanum* – written and published by the Synod of Cartagena in 419 – in this Nomocanon we find „the canons of Saint Basil and excerpts from the epistles of other Fathers of the church, such as the ones of Dionysius, Peter, Gregory Taumaturg etc...."[67], and, finally, „ a collection of political and church laws lent from the Collectio tripartita"[68].

However, the *Dionysiana* (the third version, 523), that is the canonical Collection made by Dionysius Exiguus in Rome, was used as a basic canonical material – if not as the unique source – not only by the authors of the Nomocanon attributed to Methodius, the Apostle of the Slavs, but even by the Patriarch Fotie of Constantinople (the IXth century) in the Nomocanon written by him.

3. *The Nomocanon* atributted to Patriarch Fotie (883)

In writing the Nomocanon „unjustly attributed to Patriarch Fotie"[69] (858–867, September 23; 867, May 23, 877) – who was, anyhow, a man of high humanistic-encyclopaedic culture (a man of letters, philosopher, jurist, canonist, politologist etc.), he had used all the Nomocanons and the Collections of canons known up to his time but, as a main text and pattern, he used the Nomocanon in XIV Titles in its first version (the VIIth century).

[65] N. Popovici, *op. cit.*, p. 57.
[66] C. Popovici, *op. cit.*, p. 51.
[67] Ibidem.
[68] N. Popovici, op. cit., 57.
[69] Ibidem.

However, the importance of this Nomocanon – also known under the name of *The Syntagma of Fotie*, although its text „also comprises civil and church laws"[70], namely Byzantine state laws regarding the matters of canon law – also resides in the comments which accompany the texts of the canons and of some (Byzantine) state laws.

The *Syntagma* (Collection) of Patriarch Photius has remained up to our days the official Collection of laws of the Orthodox Church. Its consecration and institutionalization were made by the „endemoussa" Synod that gathered in Constantinople in 920, the resolutions of which were adopted by the entire Eastern Church.

The Nomocanon of Fotie, also translated in the Slavonic[71] language, has also circulated in the Romanian Principalities, both in the Greek and the Slavonic languages.

The Syntagma of Patriarch Fotie was also commented upon by the jurist and canonist Theodor Balsamon (the XIIth century). Its text – together with the *Scholia* (the Comments) of Theodore Balsamon – were inserted in the first volume of the famous collection „The Athenian Syntagma" (Athens, 1852), published by G.A. Rhalli and M. Potli in Athens, in 1852.

After the fall of the Byzantine Empire (1453), the state legislation regarding the Church that the Nomocanon of Fotie explicitly refers to, had been applied further on in the Orthodox countries of South-Eastern Europe, in the Romanian Principalities inclusively, by means of the *Pravile* (Nomocanons).

However, the spirit of this Byzantine legislation can be found not only in the nomocanonical legislation – in force up to our days in the Orthodox Church – but also in the juridical legislation and doctrine of some European states which have found in the Roman and Byzantine legislation a model and a referrence (e.g. Greece, Italy, Germany, France etc.).

Following the pattern of the Nomocanon attributed to Patriarch Fotie (the IXth century), other Nomocanons were written along the centuries, often with a heterogeneous content, but they did not enjoy the same circulation and authority as regarded the life of the Byzantine Church and State. Among these Nomocanons the most representative – with regard to their content – are:

1. *The Nomocanon of Gregory Doxapatri* (the XIIth century);

2. *Kormčaya Kniga*" (The book of guidance), which is a systematical Nomocanon derived directly from the great Constantinopolitan patriarchal Nomocanon from the XIIth century, known and used in Romania „in

[70] V. Pocitan, op. cit., p. 36.

[71] Acc. to Br. A. Țisary, *Dreptul bisericesc* (*The Church law*) ((in the Serbian language), vol. II, Belgrade, 1973, p. 47.

several versions, quite different from one another, starting from the middle of the XIVth century and up to the middle of the XVIIth century"[72]. One of these versions – known and used in the Romanian Principalities – was also the Serbian one, written in the time of Sava of Serbia (1208-1220). A copy of the Serbian *Kormčaya* of Vidin was sent to the Metropolitan Bishop Kiril III of the Keevan Russia in 1270.

3. *The Nomocanon of Arsenie Antorian* (monk at Athos and, since 1255, ecumenical Patriarch). His Nomocanon in 141 chapters is based on the legislation of Justinian.

4. *The Nomocanon* of Matthew Vlastares, published in Thessaloniky in 1335, which was made up of 28 large chapters, after the number of the letters of the Greek alphabet, hence its name *The Alphabetical Syntagma*. It enjoyed a large circulation in South-Eastern Europe, on the Romanian territory inclusively, where „… some appendices and glosses have drawn some attention..."[73].

5. *The Nomocanon of Cotelerius*, written by the end of the XVth century or by the beginning of the XVIth century. This nomocanon is called *Cotelerius*, after the name of its editor, Johannes Baptista Cotelerius, who published it in the first volume of his monumental work, *Ecclesiae Graeciae Monumenta* (vol. III, Paris 1667 şi 1686). As regards the Byzantine state legislation, this Nomocanon served as a source for the *Pravila* (Nomocanon) *of Govora*, printed between 1640 and 164l[74].

6. *The Nomocanon of Manuil Malaxos* (†1581), written between 1561 and 1563, comprises 541 chapters.

The Nomocanon of the scrivener of the Metropolitan Church of Theba, Manuil Malaxos of Nauplia, is suggestively entitled „A law made of different useful canons of the divine and Apostle Saints, of the holy ecumenical synods, of the Holy Fathers and of other all-holy bishops; as well as of some Novels of the Byzantine Emperors and of other sources". Therefore, the main sources of this Nomocanon are the canons and the laws of the Byzantine emperors.

The Nomocanon of Manuil Malaxos – considered one of the most comprehensive of the Byzatine Nomocanons – served as a first-hand source for the *Pravila* (Nomocanon) *of Târgovişte* (the Great Pravila), printed in 1652. The same Nomocanon also served as a main source for the Pravila made in 1632 by Eustatius the Chancellor (which remained in the form of a manuscript).

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[72] R. Constantinescu, *op. cit.*, p. 207.
[73] *Ibidem*, p. 235.
[74] Cf. N.V. Dură, *350 de ani de la tipărirea Pravilei de la Govora…* (*350 years from the printing of the Nomocanon of Govora...*), p. 58-79.

7. *Vactiria* (the Rod of the Bishops). This Nomocanon was written between 1645 and 1648 by the monk Jacob of Ianina, by the order of the Patriarch Partenius II of Constantinople (1644-1648), and has 1624 chapters.

8. *The Nomocanon of George of Trapezunt*. Published in 1730, this Nomocanon was mainly used by the students of the Princely Academy of Bucharest. In fact the author, a Greek monk, was one of the scholars of his time and a Professor at the Greek (Princely) Academy of Bucharest.

9. *Very useful book for the soul* – with a preeminently penitential content – was published by the end of the XVIIIth century. Its main source is *The Canonikon* atributted to Patriarch John the Faster (582-595) and it is, in fact, a late work (from the Xth century). This „Book", improperly included among the Nomocanons, was worked out and incorporated in *Exomologhitar* („the Book of the Sacrament of Confession") of the Hagiorite Saint Nicodimus (1748-1809), printed in 1794, also translated in Romanian as early as 1799 and printed afterwards up to our days.[75] In fact, this „very useful book for the soul" – one of the first canonical treaties of the Orthodox Church regarding the holy sacrament of confession – serves to the confessors in the See of Confession, that is during the administration of the Sacrament of the Holy Confession[76].

To sum up, we can say that the Byzantine Law has been known and applied in the Romanian Principalities since the XIVth-XVth centuries by means of the Nomocanons (Pravile) which are fundamental sources of the old Romanian written (positive) Law.

Getting to know this old Romanian Law implies, first of all, our jurists' getting acquainted with the text and the content of the Pravile (Nomocanons) which are not only monuments of this Law but also of the South-East European one. Moreover, the research of their contents requires, on the part of our jurists, not only to have significant knowledge of Roman Law and of Byzantine Law and, *ipso facto*, of Greek and Slavonic, but also a serious training in the field of Eastern Theology and of the history of the Byzantine Empire. In this sense, as there are only few

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[75] See St. Nicodimus the Hagiorite, *Carte foarte folositoare de suflet* (*Very useful book for the soul*), transl. from Greek by Al. Elian, The Printing House of the Archbishopric of Timişoara, Timişoara, 1997, p. 6.

[76] See N. V. Dură, *Taina Sfintei Mărturisiri în lumina dispozițiilor şi normelor canonice ale Bisericii Ortodoxe* (*The Sacrament of the Holy Confession in the light of the canonical provisions and norms of the Orthodox Church*), in the Metropolitan See of Moldavia and Suceava, no. LIX (1983), no. 4-6, p. 248-270; Idem, *Preocupări canonice ale ierarhilor Bisericii Ortodoxe Române de-a lungul secolelor XVII-XIX în lumina Pravilelor mici* (Prăvilioarelor) (*Canonical preoccupations of the hyerarchs of the Romanian Orthodox Church during the XVII-th to XIX-th centuries in the light of the Small Nomocanons)*, in the Romanian Orthodox Church, CII (1984), no. 3-4, p. 217-232; Idem, *Activitatea canonică a mitropolitului Iacob Putneanul (1719-1778)* (*The canonical activity of the Metropolitan Bishop Jacob of Putna (1719-1778*)), in The Voice of the Church, XXXIX (1980), no. 10-12, p. 812-829.

Romanian jurists or researhers of the Old Romanian Law to meet these requirements, we can also say that, for the moment, the old Romanian written (positive) Law has no chance to become well-known. In fact, the Romanian Law History manual – which at the present is only taught for a Semester[77] at the Faculties of Law in Romania – the Pravile, *id est* the Byzantine Nomocanons, are only presented on a few pages that, in addition, lack a lot of information regarding the knowledge of Byzantine law which was also exiled from the Romanian academic city once with the canon law, around 1947-1948[78]. That is why we consider that the students of our Faculties of Law, of Theology, of History etc. must also study and analyse the text of these Pravile (Nomocanons) which are not only fundamental sources of the old Romanian written (positive) Law and monuments of the European juridical culture, but also first-hand information sources for those who want to get acquainted both with the history of the Byzantine institutions and with the history of the Romanian ones from the XIVth-XIXth centuries.

[77] We are talking about a compulsory Course. But there are also some Faculties of Law where the subject "The History of the Romanian Law" is only taught as an optional course. Quod erat demonstrandum!

[78] N. V. Dură, *Dreptul canonic, disciplină de studiu în Facultățile de Drept…(Canon Law, subject of study in the Faculties of Law...)*, p. 328-332; Idem, *Dreptul Canonic, o disciplină exilată …(Canon Law, an exiled subject …*), no. 14 (4-10 nov.), p. 19; no. 15 (20-26 nov.), p. 19; Idem, *Dreptul nomocanonic (Nomocanonical Law)*, in In Justice, year III (2002), no. 16 (Nov. 27 – Dec. 3), p. 19; no. 17 (Dec. 4-10), p. 19; year IV (2003), no. 1 (Jan. 8-14), p. 19; no. 2 (Jan. 22-28), p. 19; no. 3 (Jan. 29 - Feb 4), p. 19; no. 4 (Feb. 5-11), p. 19; no. 5 (Feb. 19-25), p. 19; no. 6 (Feb. 28 – March 4), p. 22; no. 7 (March 5-11), p. 22; no. 8 (March 19-25), p. 22; no. 9 (March-April), p. 22; no. 10 (April 9-15), p. 22; no. 11 (April 16-22), p. 22.

APPROCHE CRITIQUE SUR CERTAINES INSTITUTIONS DU NOUVEAU CODE CIVIL ROUMAIN: LA FIDUCIE

Ioan APOSTU*

Resume

Le nouveau Code Civil roumain représente sans aucune doute une nouvelle loi, moderne, adaptée a des besoins sociaux actuels qui ont imposé un travail sérieux de légiférassions, systématisation et harmonisation de toute la législation civile roumaine.

En principe, le nouveau code adopté par la loi 287/2009, suit l'ancienne systématisation technique , étant divisé dans des « cartes », « titres », « chapitres » et « sections » certains pouvant arriver jusqu'à l'identité, quand on parle par exemple de la Carte I « La personne » ou la Carte III « Les biens ». Bien sur, dans sa nouvelle systématisation, le nouveau code réunit un nombre de sept cartes, certaines cartes représentant des adaptations des anciens textes, comme c'est le cas, par exemple, de la Carte IV « Héritage et libéralités » qui représente les anciens titres I et II de la Carte III. D'autres, présentent un véritable caractère de nouveauté, il s'agit de la Carte V « Les obligations » , la Carte VI « La prescription extinctive, dégradation des droits et le calcule des termes » ou bien la Carte VIII « Dispositions de droit international privé ».

Très riche en prévois nouvelles, les unes bénéfiques, les autres moine inspirées, le nouveau Code civile offre de larges perspectives certaines institutions qui s'imposent par inventivité et originalité. La fiducie est une de ces créations, bien q'elle ne soit pas une très originale, les opérations fiduciaires sont connues a partir du droit romain.

L'article 773 et les suivantes du N.C.civ. donnent la caractérisation générale de la fiducie; c'est l'acte juridique par lequel une personne – fiduciant, transfère la propriété d'un bien corporel ou incorporel, droits de créance, des garanties ou autres droits patrimoniales a une autre personne nommée fiduciaire, soit a titre de garantie d'une créance sous l'obligation de garantie d'une créance sous l'obligation de rétrocéder le bien au constituant de la surette lorsque celle-ci n'a plus lieu de jouer, soit en vue de réaliser une libéralité, sous l'obligation de retransformer le bien a un tiers bénéficiaire après l'avoir gère dans l'intérêt de celui-ci ou d'une autre personne pendant un certain temps, soit afin de gérer le bien dans l'intérêt du fiduciant sous l'obligation de le rétrocéder a ce dernier a une certaine date. Les caractères juridiques, les conditions, les acteurs de la fiducie, la finalité etc., font l'objet de l'analyse de cette étude.

Fiducia

Noul Cod civil reglementează printre alte instituții noi în dreptul românesc fiducia în textele art. 773 – 791.

Originea fiduciei se găseşte în dreptul roman ea reprezentând o

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convenție încheiată între un dispunător şi un dobânditor al unui bun, ultimul asumându-şi obligația de a folosi şi de a restitui bunul dispunătorului sau unui terț.

În sistemul modern ea a fost consacrată de dreptul britanic unde este cunoscută sub denumirea de „*trust*". Prin aceasta se înțelege un raport juridic născut prin acte între vii sau mortis causa la inițiativa unei persoane numită fondator (*settlor*) care transferă unul sau mai multe bunuri sub controlul unui administrator (*trustee)*, în beneficiul unei terțe persoane.

Potrivit noii legislații civile fiducia este definită ca fiind *operațiunea juridică prin care unul sau mai mulți constituitori transferă drepturi reale, drepturi de creanță, garanții ori alte drepturi patrimoniale sau un ansamblu de asemenea drepturi, prezente şi viitoare, către unul sau mai mulți fiduciari care le administrează cu un scop determinat, în folosul unuia sau mai multor beneficiari*.

Drepturile patrimoniale astfel transmise sunt distincte de patrimoniile fiduciarilor, față de care au o situație autonomă.

Ca şi izvoare, Noul cod civil numeşte legea şi contractul, care trebuie încheiat în formă autentică. Dacă în privința contractului lucrurile sunt clare, în privința legii, ca izvor al fiduciei reglementarea este vădit insuficientă atâta vreme cât singurul text din legislația noastră cu referire la fiducie este Codul civil. Fireşte, de lege ferenda, într-o legislație viitoare ar putea fi reglementate şi alte modalități concrete sau generice ce ar putea genera raporturi juridice specifice fiduciei.

Subiectele fiduciei

Aşa cum am precizat mai sus, fiducia implică în mod generic participarea a trei persoane, *dispunătorul*, numit constituitor, dobânditorul numit *fiduciar* şi *beneficiarul*.

Atâta vreme cât în privința *constituitorului* textul nu face nici-o precizare, se deduce că acesta poate fi orice persoană capabilă să contracteze.

În ceea ce priveşte însă *fiduciarul*, textul art. 776 alin. 2 şi 3 din N.c.civ. face trimitere expres şi limitativ la subiecte calificate de drept. În categoria acestora avem în vedere instituțiile de credit, societățile de investiții şi de administrare a societăților de asigurare şi reasigurare legal înființate, avocații şi notarii publici.

Beneficiarul fiduciei nu trebuie nici el să aibă o calificare, el poate fi în egală măsură constituitorul, fiduciarul sau un terț, aşa cum precizează art.777 din N.c.civ. Atâta vreme cât el este un terț față de convenția inițială, nu s-ar cere nici măcar să aibă deplina capacitate de a contracta, în sensul că el poate fi şi minor sau interzis.

Condițiile contractului de fiducie

Urmărind condițiile de validitate ale contractului de fiducie, trebuie să evocăm condițiile de fond, generale şi speciale, precum şi conditiile de formă.

Ca orice contract, acesta trebuie să îndeplinească în primul rând **condițiile generale** de validitate prevăzute de art. 1179 din N.c.civ., privitoare la capacitatea de a contracta, consimțământul valabil exprimat al părții care se obligă, un obiect licit şi o cauză licită.

O primă **condiție specială** în ceea ce priveşte *obiectul contractului*, acesta trebuie să cuprindă **sub sancțiunea nulității absolute**, *individualizarea drepturilor transferate, durata transferului (care nu poate fi mai mare de 30 de ani), identitatea constituitorului, a fiduciarului şi a beneficiarului, scopul fiduciei precum şi întinderea puterilor administrative şi de dispoziție ale fiduciarului* (art. 779 din N.c.civ.). Referindu-se în mod expres la nulitatea absolută, aceasta ar putea fi invocată de oricine, oricând, pe cale de excepție sau acțiune directă. Competența de a constata nulitatea contractului fiduciar aparține judecătoriei în a cărei rază teritorială îşi are domiciliul sau sediul fiduciarul în condițiile art. 5 şi 7 din C. proc. civ.

A doua condiție specială de validitate a contractului de fiducie este prevăzută de art. 780 din N.c.civ. care impune *înregistrarea fiscală*.

Sub sancțiunea nulității absolute, contractul de fiducie şi modificările sale trebuie să fie înregistrate la cererea fiduciarului, în termen de o lună de la data încheierii acestora, la organul fiscal competent să administreze sumele datorate de fiduciar bugetului general consolidat al statului.

De asemenea, dacă masa patrimonială fiduciară cuprinde printre altele sau numai drepturi reale imobiliare, acestea sunt înregistrate, în condițiile prevăzute de lege, sub aceeaşi sancțiune, la compartimentul de specialitate al autorității administrației publice locale competent pentru administrarea sumelor datorate bugetelor locale ale unităților administrativ-teritoriale în raza cărora se află imobilul, dispozițiile de carte funciară rămânând aplicabile.

Şi desemnarea ulterioară a beneficiarului, în cazul în care acesta nu este precizat chiar în contractul de fiducie, trebuie să fie făcută, sub aceeaşi sancțiune, printr-un act scris înregistrat în aceleaşi condiții.

În ceea ce priveşte condițiile de formă, nelipsind convenția de consens, fără de care nu poate fi conceput nici-un contract, legea impune *condiții autentice de formă atât în privința acordului fiduciar cât şi a modificărilor sau adăugirilor ulterioare*.

Prerogativele şi obligațiile fiduciarului

Fiduciarul este îndreptățit să pretindă şi să se bucure de

următoarele prerogative:

1. *Dreptul de a primi în administrare bunul sau bunurile* ce formează obiectul fiduciei.

Acordul fiduciar având un caracter solemn supus unor condiții speciale de publicitate, momentul transmiterii bunurilor este acela al îndeplinirii condițiilor de publicitate. În măsura în care însă obiectul fiduciei îl constituie bunuri generice, momentul transmiterii lor va fi cel al individualizării prin numărare, măsurare, cântărire etc. Acest moment este relevant în privința transmiterii riscului pieirii bunurilor;

2. *Dreptul de a dispune prin acte de administrare şi chiar de dispoziție* asupra bunurilor din masa fiduciară. Toate actele sale sunt opozabile terților, cu excepția cazului prev. de art. 784 alin. 1 din N.c.civ., respectiv atunci când aceştia au avut cunoştință despre limitarea puterilor fiduciarului;

3. *Dreptul de a fi remunerat* potrivit înțelegerii părților, iar în lipsa unei astfel de înțelegeri potrivit regulilor ce cârmuiesc administrarea bunurilor altuia. Legea nu este însă generoasă cu informații în această privință, deoarece şi textul art. 793 alin. 1 din N.c.civ. privitor la remunerația administratorului face în mod generic trimitere la lege, (care încă nu a fost adoptată), sau la obiceiul locului, (inexistent deoarece instituția este încă nouă şi nu a avut timp să creeze o cutumă), ori la valoarea prestațiilor.

Fiduciarul are următoarele obligații:

1. Potrivit art. 783 alin. 1 din N.c.civ. fiduciarul are *obligația de a da socoteală* constituitorului şi beneficiarului cu privire la îndeplinirea obligațiilor sale. Obligația este una periodică, deoarece trebuie adusă la îndeplinire la intervalele precizate în contractul de fiducie, sau ori de câte ori i se va cere de către constituitor, beneficiar sau un reprezentant al acestora;

2. Fiduciarul are obligația de a *răspunde* în condițiile art. 786 alin. 2 din N.c.civ. *pentru o parte sau pentru întregul pasiv al fiduciei*, dacă în acordul fiduciar a fost stabilită o asemenea obligație;

3. Fiduciarul *răspunde pentru prejudiciile cauzate* prin actele sale, prin neîndeplinirea obligațiilor sau punerea în pericol a intereselor ce i-au fost încredințate (art. 787 din N.c.civ.).

Denunțarea şi încetarea contractului de fiducie

Atâta vreme cât nu a fost acceptat de beneficiar, contractul de fiducie poate fi denuntat de către constituitor. După acest moment, contractul nu mai poate fi modificat sau revocat de către părți ori revocat unilateral de către constituitor decât cu acordul beneficiarului sau cu autorizarea instanței judecătoreşti.

Încetarea acordului fiduciar are loc în condițiile arătate de art. 790 din N.c.civ. respectiv:

- prin împlinirea termenului sau prin realizarea scopului urmărit când aceasta intervine înainte de împlinirea termenului.
- în cazul în care toți beneficiarii renunță la fiducie, iar în contract nu s-a precizat cum vor continua raporturile fiduciare într-o asemenea situație. Declarațiile de renunțare sunt supuse aceloraşi formalități de înregistrare ca şi contractul de fiducie. Încetarea se produce la data finalizării formalităților de înregistrare pentru ultima declarație de renunțare.
- în momentul în care s-a dispus deschiderea procedurii insolvenței împotriva fiduciarului;
- în momentul în care se produc, potrivit legii, efectele reorganizării persoanei juridice.

Efectele încetării contractului de fiducie

Când contractul de fiducie încetează, masa patrimonială fiduciară existentă în acel moment se transferă la beneficiar, iar în absența acestuia, la constituitor.

Confuziunea masei patrimoniale fiduciare în patrimoniul beneficiarului sau al constituitorului se va produce numai după plata datoriilor fiduciare.

UTILITÉ DE LA FIDUCIE EN TANT QUE FORME DE CAUTION BANCAIRE DANS LE CONTEXTE DE LA CRISE ECONOMIQUE

Silvia CRISTEA*

Resume

Parmi les institutions juridiques récemment introduites par le Nouvel Code Civil Roumain (Loi 287/2009) la fiducie a sa place bien à part. Pour établir si la fiducie est utile en tant que forme de gestion des biens d'autrui ou en tant que forme de caution, nous l'avons comparée, d'abord aux institutions juridiques préexistantes et ensuite aux institutions juridiques d'autres systèmes de droit et par rapport auxquels nous avons trouvé quelques particularités (à voir le droit français, américain et canadien).

Nous avons fait quelques suggestions dans les conclusions, à partir des particularités de l'institution de la fiducie dans le droit français (où le constituteur ne peut être qu'une personne morale soumise à l'impôt sur société) et dans le droit canadien (où la fiducie peut se constituer sous forme de donation ou de légat).

1. La fiducie dans le Nouvel Code Civil Roumain[1].

Selon l'art. 773 dans la Loi no 287/2009, la fiducie est l'**opération juridique par laquelle un ou plusieurs constituteurs transfèrent des droits réels, des droits de créance, des cautions ou d'autres droits de patrimoine ou un ensemble des droits pareils, actuels ou futurs, à un fiduciaire ou plusieurs fiduciaires qui les gèrent à un but bien déterminé pour le bénéfice d'un bénéficiaire ou plusieurs bénéficiaires.** Ces droits constituent une masse autonome de patrimoine**,** distincte des autres droits et obligations portant sur patrimoine des fiduciaires.

J'ai essayé de superposer cette notion sur le cas réel d'un patrimoine d'affectation constitué selon l'arrêté 44/2008[2], qui définit le patrimoine comme la totalité des biens, droits et obligations d'une personne physique autorisée, du titulaire de l'entreprise individuelle ou des membres de l'entreprise familiale, affectés au but d'une activité économique, et constituée comme une fraction séparée du patrimoine de la personne physique autorisée, du titulaire de l'entreprise individuelle ou

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[1] Publiée dans le M. Of. no 511 de 24 juillet 2009.

[2] Concernant les activités économiques déroulées par les personnes physiques autorisées, entreprises individuelles et entreprises familiales, publiée dans le M. Of. no 328 de 25 avril 2008.

des membres de l'entreprise familiale, séparée du gage général des créditeurs personnels de ceux ci (art. 2 lettre j).

J'ai pris le cas où une personne physique autorisée voudrait limiter sa responsabilité envers les dettes commerciales avec la liste des biens personnels affectés au commerce, en séparant ainsi le patrimoine commercial du patrimoine civil[3] et j'ai supposé que, pour gérer ce patrimoine, elle trouve une institution de crédit (une banque) à laquelle elle donne le mandat de fiduciaire.

Le but de la fiducie dans ce cas là serait de gérer le patrimoine d'affectation ; pour que la situation présente un intérêt pour la banque– fiduciaire, nous avons considéré que la banque – fiduciaire pourrait être désignée dans cette qualité comme personne morale qui octroie déjà des emprunts au constituteur, donc elle connaît déjà les conditions dans lesquelles son activité se déroule.

Nous avons continué le cas hypothétique en désignant le constituteur comme bénéficiaire de la fiducie qui accepte l'opération juridique dans les conditions de l'art. 777 du Nouvel Code Civil.

Nous aurons pu supposer aussi que le fiduciaire ait aussi la qualité de bénéficiaire (surtout si nous supposons que la personne physique autorisée a garanti ses emprunts avec ses biens personnels et dans ce cas là, la banque pourrait être intéressée d'une gestion diligente du patrimoine d'affectation, d'autant plus que, plus tard, le problème du remboursement des crédits apparaitra), en conformité avec le même art. 777 du Nouvel Code Civil.

Après avoir analysé les droits et les obligations des parties selon les dispositions du Nouvel Code Civil, nous avons trouvé:

a) Obligations du constituteur:

- de légaliser l'accord, soumise à la sanction de nullité absolue (conformément à l'art. 774 paragraphe 1);
- de stipuler dans le contrat les droits, les obligations, les biens du patrimoine d'affectation[4], qui soient conformes à la déclaration déposée au Registre du Commerce, conformément à la Loi 26/90 concernant le Registre du Commerce[5], la durée du transfert, l'identité du constituteur, du fiduciaire et du bénéficiaire, ainsi que le but de la fiducie et les pouvoirs de gestion, soumise à la sanction

3 A voir Lucia Herovanu, „Dreptul român şi patrimoniul de afectațiune", dans RDC no 6/2009, p. 67 – 68.

4 Publiée dans le M.Of.no 121 de 7 mars 1990, republiée dans le M. Of. no 49 de 4 février 1998, avec les modifications et complétions ultérieures.

5 Liviu Narcis Pârvu et Ioan Florin Simon ,,Legea privind registrul comertului-comentarii si explicatii", Ed. CH Beck, Bucarest, 2009, p.111.

de la nullité absolue, conformément à l'art. 779 lettre a – f, si ces stipulations y manquent;

- de rémunérer le fiduciaire, même si le caractère onéreux du contrat n'est pas expressément stipulé, notre opinion est que l'énumération comprise dans l'art. 776 paragraphes 2 et 3 ne permet pas une conclusion contraire; tous les fiduciaires demanderont un paiement, que son nom soit commission ou honoraire; en plus, dans le cas où la rémunération n'est pas expressément stipulée, les dispositions du chapitre concernant la gestion des biens d'une autre personne s'appliqueront (art. 784 du Nouvel Code corroboré avec l'art. 793 du Nouvel Code);
- l'obligation d'enregistrer la fiducie dans le Registre National des fiducies sera solutionnée après l'adoption d'un Arrêté dans les conditions de l'art. 781 paragraphe 1 du Nouvel Code;
- l'obligation de faire l'intabulation des droits réels immobiliers qui font l'objet du contrat peut appartenir soit au constituteur, soit au fiduciaire (art. 781 paragraphe 3 du Nouvel Code).

b) Obligations du fiduciaire:

- Enregistrement de la fiducie, soumise à la sanction de la nullité absolue, auprès de l'autorité fiscale compétente de gestion des montants que le fiduciaire doit au budget général consolidé (conformément à l'art. 780 paragraphe 1 du Nouvel Code) et des droits réels immobilières au département spécialisé de l'autorité de l'administration publique locale qui a l'immeuble dans sa compétence (art. 780 paragraphe 2 du Nouvel Code).

Concernant l'obligation stipulée dans l'art. 780 paragraphe 1, nous nous demandons quelle est l'explication pour laquelle les législateurs se sont occupés de l'aspect de l'enregistrement de la fiducie auprès de l'administration fiscale. Nous considérons que la seule explication est le modèle du code civil français qui inclut cette disposition mais nous précisons que les justifications de la loi française sont claires; autant que, dans le droit français, le constituteur ne **peut être qu**'une personne morale, étant donné l'option soumise à l'impôt sur les sociétés, il est normal que la fiducie soit enregistrée auprès de l'administrateur fiscal qui est en même temps le collecteur des impôts.

Selon de Nouvel Code Civil, toute personne morale et juridique peut être un constituteur (conformément à l'art. 776 paragraphe 1), et l'obligation d'enregistrer la fiducie auprès de l'administration fiscale, dans notre opinion, n'est pas la meilleure solution! S'il existe un Registre

National des fiducies, l'enregistrement suffit, dans notre opinion, pour assurer la validité de la fiducie[6].

- de stipuler la qualité de fiduciaire chaque fois qu'il agit dans le compte de la masse de patrimoine fiduciaire (conformément à l'art. 782 paragraphe 1); ainsi que chaque fois quand il fait des communications qui doivent être inscrites dans le registre de publicité (art. 782 paragraphe 2);
- de rendre compte au constituteur, aux bénéficiaires et au représentant du contribuable, sur demande, conformément à l'art. 783 du Nouvel Code Civil.

En ce qui concerne la limitation de la responsabilité du fiduciaire, dans notre opinion, la solution qui existe dans le droit roumain est meilleure que la solution qui existe dans le droit français. Ainsi, selon l'art. 786 du Nouvel Code Civil, si la loi n'en a pas disposé autrement, pour les dettes de la fiducie, que les biens de la mase de patrimoine fiduciaire peuvent être poursuivis, la fortune personnelle du fiduciaire et les autres biens du contributeur sont à l'abri. Si la situation contraire a été prévue par la loi, les actifs de la masse de patrimoine fiduciaire seront poursuivis d'abord et ensuite, s'il s'avère nécessaire, les biens du fiduciaire ou/et du constituteur , dans la limite et dans l'ordre prévues dans le contrat de fiducie (art. 786 paragraphe 2 du Nouvel Code Civil).

L'art. 787 du Nouvel Code Civil doit être interprétée dans notre opinion, dans le sens que pour les préjudices causés pendant la gérance, le fiduciaire sera responsable avec sa fortune personnelle[7].

2. Comparaison avec d'autres institutions juridiques du droit roumain

2.1. Comparaison avec le gage

Le gage est la caution donnée par le débiteur et qui concerne l'un de ses biens, pour assurer qu'à l'échéance, dans le cas où la dette n'est pas payée, le créditeur puisse couvrir le montant de la créance avec le bien donné en gage où avec l'argent fait à la suite de sa vente[8].

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[6] Dans notre opinion, les formes d'enregistrement imposées par la législation roumaine pour les biens mobiles et immobiles étaient suffisantes. Nous interprétons l'enregistrement auprès de l'administration fiscale comme une difficulté imposée au régime juridique de la fiducie.

[7] Les règlements du code civil français ont été pris de Florence Deboissy et Guillaume Wicker, „Code des sociétés – Autres groupements de droit commun", Ed.,

[8] Dans ce sens là, a voir S. Angheni, M. Volonciu et C. Stoica „Drept comercial", 4ème édition, Ed. C.H. Beck, Bucarest, 2008, pp. 66.

Du point de vue de l'**objet,** on observe que le gage et la fiducie se ressemblent puisque les deux se réfèrent aux biens mobiles corporels ou non corporels, tandis que la fiducie se réfère en plus aux biens immobiles, aux cautions ainsi qu'à une masse de patrimoine autonome, distincte. D'un coté, le gage se réfère à un bien déterminé tandis que la fiducie se réfère à une universalité de biens et de l''autre coté, la fiducie se réfère à plusieurs cautions (soit, plusieurs contrats de gage, soit des contrats de gage aussi que des contrats d'hypothèque). La fiducie peut donc inclure le gage tandis que le contraire n'est pas possible.

Tandis que le gage put être conclu avec ou sans la provision de déposséder le débiteur du bien avec lequel il a garanti, en ce qui concerne la fiducie, le Nouvel Code Civil n'en prévoit rien malgré que le modèle, le code français, prévoit la possibilité d'utiliser le fonds de commerce lorsqu'il est l'objet de la fiducie[9].

En ce qui concerne les manières de constitution, si le gage ne peut être que conventionnel, légal ou juridique, nous considérons que la fiducie ne peut être que le résultat d'une convention entre le constituteur et le fiduciaire[10].

De point de vue du **caractère du contrat,** nous trouvons des grandes différences : si le gage a un caractère unilatéral et institue des obligations qui portent sur une seule partie[11], la fiducie a un caractère bilatéral, le constituteur aussi bien que le fiduciaire assument leurs obligations. Le gage aussi bien que la fiducie sont des contrats à titre onéreux.

Si la fiducie est un contrat principal, le gage est un contrat accessoire. La nature de l'objet de la fiducie impose quand même quelques clarifications. Si le fiduciaire gère des droits de créance, des patrimoines distinctes (comme celui d'affectation) ou des cautions, nous nous demandons que-est ce qu'il se passe avec la fiducie si l'objet du transfert disparait: si le droit de créance cesse, est-ce que la caution ou le patrimoine ne seront plus exécutés? Est-ce que ces conséquences affectent la nature même de la fiducie, est-ce qu'elle devient un contrat accessoire?

En ce qui concerne la **forme sous laquelle ils sont rédigés**, si la gage peut être rédigé sous signature privée ou authentique, la fiducie doit être légalisée, soumise à la sanction de la nullité absolue.

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[9] A voir en dessous la section no 3.1 sur les différences de règlement dans le droit français.

[10] Même si, comme la section no 3.2 présente, le droit américain réglemente la version légale ou judiciaire du trust.

[11] Nous considérons que de l'interprétation „per a contrario" de l'art. 775 du Nouvel Code Civil, la fiducie a un caractère onéreux pour toujours. Ainsi, conf. a l'art. 775, „le contrat de fiducie sera soumis à la sanction de nullité absolue s'il réalise une libéralité indirecte dans l'avantage du bénéficiaire".

En ce qui concerne **les personnes** qui peuvent conclure le contrat de gage, le code civil ne prévoit pas des restrictions, tandis que dans le cas de la fiducie, ce n'est pas n'importe quelle personne qui puisse être fiduciaire, le Nouvel Code Civil impose donc des restrictions[12].

La modalité de **publicité et la préférence** ont des solutions différentes: en ce qui concerne le gage, la Loi no 99/1999[13] impose l'obligation d'enregistrer la caution réelle immobilière auprès de l'Archive Electronique des Cautions ; ainsi, le créditeur, soit peut prendre en possession le bien garanti sans conflit, soit, dans le cas où il ne peut pas faire ça sans conflit, il peut faire appel aux exécuteurs juridiques ou à d'autres autorités d'exécution, soit il peut vendre le bien; en ce qui concerne la fiducie, le Nouvel Code Civil prévoit l'enregistrement auprès le Registre National des Fiducies aussi qu'auprès l'autorité fiscale compétente où le fiduciaire paie les impôts au budget d'état consolidé.

2.2. Comparaison avec l'hypothèque

L'hypothèque est un droit réel sur des immeubles affectés jusqu'au paiement d'une obligation[14].

Si on compare l'hypothèque avec la fiducie, de point de vue de **l'objet**, nous observons que les deux ont comme objet des biens immobiles mais la fiducie peut avoir comme objet d'autres droits de patrimoine comme par exemple les droits réels mobilières, les droits de créance, les cautions aussi qu'une masse de patrimoine distincte. C'est que la fiducie qui peut avoir comme objet des biens futurs, pas l'hypothèque. L'hypothèque se constitue sans **déposséder**, tandis que dans le cas de la fiducie, le Nouvel Code Civil ne stipule pas des provisions expresses.

En ce qui concerne l'opposition entre les caractères unilatéral/bilatéral et principal/accessoire, aussi que l'opposition à titre gratuit/à titre onéreux, les commentaires mentionnés dans la section sur le gage restent valables.

La **forme sous laquelle le contrat est rédigé** est identique: la fiducie aussi bien que l'hypothèque doivent être rédigées sous forme authentique, soumises à la sanction de la nullité absolue; en ce qui concerne **l'enregistrement** auprès du Registre National des Fiducies, le Nouvel Code Civil prévoit comme obligatoire l'enregistrement des droits réels immobilières qui font l'objet de la fiducie auprès du département spécialisé de l'autorité publique compétente où l'immeuble se trouve ; les

[12] A voir la section no 4 de l'article.
[13] Publiée dans le M.Of. no 236 de 27 mai 1999.
[14] A voir le collectif du Département de Droit – A.S.E., „Drept civil – pentru învățământul superior economic", Ed. Lumina Lex, Bucarest, 2003, pp. 388-391.

dispositions concernant le registre foncier restent valables aussi dans le cas de la fiducie.

En plus, il est obligatoire, dans le cas de la fiducie, d'enregistrer, auprès de l'autorité fiscale compétente, les montants dues par le fiduciaire au budget général consolidé.

2.3. Conclusion sur la comparaison entre les deux formes de cautions

Même si dans le Nouvel Code Civil, la fiducie n'est pas mentionnée comme une forme de caution, et dans sa propre définition, nous constatons que la fiducie peut avoir comme objet certaines cautions, nous considérons utile d'analyser l'utilité de la fiducie comme forme de caution bancaire.

Si la banque assume une position de fiduciaire par rapport à un client constituteur et elle est désignée comme bénéficiaire, les avantages seraient:

- si le constituteur a lui donné un patrimoine distinct, autonome, pour le gérer, et le contributeur est en même temps débiteur – emprunté par la banque, nous considérons que la fiducie est une forme de caution puisque la bonne gestion du patrimoine accroitra les chances de la banque – créditeur d'encaisser l'emprunt du contributeur à l'échéance. Dans notre opinion, il est possible que la caution de la banque soit double: d'un coté, l'emprunté peut garantir l'exécution de son obligation avec un droit réel sur un bien du patrimoine (gage ou hypothèque), de l'autre coté, le patrimoine donné à la banque – fiduciaire peut inclure non seulement les biens avec lesquels l'emprunté a garanti mais aussi d'autres biens stipulés dans le contrat de fiducie ;
- dans le cas où, à l'échéance, le constituteur – emprunté ne rembourse pas le crédit, la banque a le titre exécutoire conféré par le contrat de crédit aussi que sa qualité de gérant de la fiducie et surtout de bénéficiaire de la fiducie ; la saisie-exécution sera mise en pratique par la banque (dans sa qualité de gérant) et dans son avantage (en tant que bénéficiaire). En plus, la banque recevra un paiement pour cette saisie -exécution (commission) pour des services rendus en tant que fiduciaire.

3. Différents règlements concernant la fiducie dans d'autres systèmes de droit

3.1. Différences dans le droit français

Selon le code civil français, les constituteurs ne peuvent être que des personnes morales soumises à l'impôt sur société, comme effet de la

loi ou de l'option; non seulement que les droits des contributeurs ne peuvent pas être transmis à titre gratuit (interdiction mentionnée aussi dans l'art. 775 du Nouvel Code Civil Roumain), mais il n'est permis de les transférer en cession à titre onéreux qu'à d'autres personnes morales soumises au paiement de l'impôt sur sociétés (art. 2014 du code civil français)[15];

La durée de la fiducie est prolongée jusqu'à 99 ans (à partir de l'an 2009), par la modification de l'art. 2018 du Code Civil français (dans le texte antérieur la durée la plus longue stipulée était de 33 ans et l'art. 779 du Nouvel Code Civil roumain a adopté cette durée);

La possibilité du contributeur de garder l'utilisation du fonds de commerce ou du siège professionnel, prévue par l'art. 2018 – 1 du Code Civil français, n'est plus possible dans le Nouvel Code Civil roumain.

Par opposition avec la solution proposée par le Nouvel Code Civil roumain, le code civil français prévoit, dans l'art. 2025 paragraphe 2, la possibilité, dans le cas où les dettes de la fiducie dépassent les actifs du patrimoine fiduciaire, que les biens des contributeurs constituent le gage général des créditeurs fiduciaires, à l'exception du cas où, par la fiducie, il a été expressément mentionné que le fiduciaire s'oblige à porter une responsabilité, avec ses biens, pour une partie du passif du patrimoine de la fiducie.

Autrement dit, la séparation faite par la fiducie entre un patrimoine civil et un patrimoine commercial est annulée et on revient à la responsabilité avec la fortune, soit du contributeur, soir du fiduciaire. De point de vue de la doctrine, on remarque le retour à la théorie de la séparation des patrimoines, la théorie de l'unicité du patrimoine[16].

3.2. Différences dans le droit américain

Même si admise, comme dans le Nouvel Code Civil roumain (art. 774 paragraphe 1), la possibilité d'instituer la fiducie à la suite de la volonté des parties (express trusts = created voluntarly by the owner) or par l'effet de la loi (implied trusts), dans le cas des fiducies qui ont comme source la loi, deux formes retiennent notre attention: „resulting trusts", lorsque le constituteur fait un transfert incomplet des biens et „constructive trusts" constitué dans le but d'éviter l'enrichissement d'une personne sans une cause juste[17].

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[15] Règlements du code civil français qui ont été pris de Florence Deboissy et Guillaume Wicker, „Code des sociétés – Autres groupements de droit commun", Ed. Pg. 588 – 591.
[16] Dans ce sens là, a voir L. Herovanu, œuvre cit., sect.2 (pg. 67 – 68) et sect.5 (pg. 72 – 74).
[17] Dans ce sens là, a voir Daniel V. Davidron, Brenda E. Knowles, Lyun M. Forsythe, Robert R. Jesperen, „Comprehensive business law – Principles and cases", Kent Publishing Company, Borton – Massachusetts, 1987, p. 1216 et 1232 – 1233.

Le document qui fait la preuve de la fiducie (trust deed) est un document similaire à l'hypothèque par lequel le propriétaire (créateur) d'un bien immobile le transfert vers un fiduciaire (trustee / settlor or trustor), comme caution pour le paiement d'une dette envers un tiers: le bénéficiaire (beneficiary)[18].

Si on corrobore les deux hypothèses en dessus mentionnées, on observe que, par rapport au droit roumain, le fiduciaire (the trustee) est le propriétaire même des biens transférés par la fiducie, et il a des pouvoirs illimités sur le patrimoine fiduciaire ; pour ces raisons, les lois américaines insistent sur les qualités du fiduciaire (surtout parce que, dans le droit américain, toute personne physique ou morale peut assumer cette qualité, contrairement au droit roumain) et les obligations de rendre compte pour les opérations juridiques conclues à la fin de la fiducie[19].

3.3. Différences dans le droit canadien

On observe que beaucoup de dispositions dans le droit canadien (art. 981a – 981n Code civile canadien) sont pris dans le droit roumain mais on observe aussi les différences en ce qui concerne les définitions de l'institution. Ainsi, conformément à l'art. 981a du Code civil canadien[20], toute personne qui peut librement disposer de ses biens peut transférer la propriété des biens mobiles ou immobiles à des fiduciaire, par donation ou par testament, au bénéfice d'autres personnes pour lesquelles elles peuvent conclure de manière valable des donations ou des légats (testamentaires).

Après le modèle du droit anglo-saxon, le droit canadien admet, parmi les qualités du fiduciaire (trustee), la qualité de propriétaire des biens du patrimoine fiduciaire.

Conclusions

Parmi les défis auxquels ceux qui ont rédigé le Nouvel Code Civil roumain ont été confrontés[21], en ce qui concerne la fiducie, nous avons analysé les trois suivants : la définition de l'institution, les personnes qui peuvent constituer des parties, les limitations de la responsabilité pour le passif du patrimoine de la fiducie.

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[18] Idem, pg. 1216 – 1217.
[19] Idem, pg. 1217 – 1232.
[20] Pris de Paul A. Crepéau, Gisèle Laprise, „Les codes civils – édition critique", réalisée par le Centre de recherche en droit privé et comparé de Québec, Montreal, 1986, p. 208 – 212.
[21] Pour des détails sur ces défis, a voir Paul Perju, „Considerații generale asupra Noului Cod civil (titlul preliminar, persoane, familie, bunuri", dans Revista Dreptul no 9/2009, pg. 13 – 30, surtout sect.1, pg. 13 – 15.

Nous considérons que la disposition prévue par l'art 773 du Nouvel Code Civil roumain est un progrès par rapport au droit canadien car le droit roumain ne se limite plus aux documents à titre gratuit (donation et légat), mais institue une nouvelle catégorie de contrat à caractère spécifique[22]. Nous considérons que, en plus de la fonction de servir à la théorie de la séparation des patrimoines stipulée expressément par l'arrêté 44/2008, la fiducie peut être considérée une nouvelle forme de caution; par exemple, la banque octroie un emprunt et conclut un contrat de fiducie par lequel elle se constitue en fiduciaire et bénéficiaire par rapport au client contributeur.

En ce qui concerne les personnes qui participent à la convention – fiducie, nous remarquons que, par rapport au droit français qui limite les catégories des personnes qui peuvent être contributeurs, le droit roumain donne la possibilité à toute personne, qu'elle soit physique ou morale, d'avoir cette qualité (art. 776 paragraphe 1). Nous considérons que cette liberté aurait du avoir une liberté correspondante en ce qui concerne le fiduciaire. Pourquoi avoir des fiduciaires qui ne puissent être que des institutions de crédit, des sociétés d'investissement et de gestion des investissements, des sociétés des services d'investissements financiers et des sociétés d'assurance et réassurance, ou des notaires publiques et des avocats? (art. 776 paragraphes 2 et 3).

Nous considérons que la restriction prévue par le droit français est la conséquence de la qualité spéciale des contributeurs qui implique l'enregistrement spécial de la fiducie auprès des autorités fiscales.

Dans notre opinion, les deux dispositions suivantes sont excessives dans le droit roumain: les restrictions imposées sur les catégories de personnes qui peuvent avoir la qualité de fiduciaires et le caractère obligatoire de l'enregistrement auprès d'une administration fiscale.

Nous apprécions la solution adoptée dans le droit roumain en ce qui concerne la responsabilité limitée envers le patrimoine fiduciaire; la solution française d'une stipulation expresse, dans le sens d'élargir la responsabilité au-delà du patrimoine (soit sur les fortunes des contributeurs, soit sur la fortune du fiduciaire), malgré qu'elle ne soit pas attrayante pour les parties, correspond à la formule adoptée par les législateurs dans le domaine du patrimoine d'affectation. Dans le droit français aussi que dans le droit roumain, l'entreprenant personne physique est responsable pour ses obligations avec son patrimoine d'affectation (s'il a été constitué) et s'il n'est pas suffisant, pour compléter, avec son entier patrimoine.

Tandis que dans le cas du patrimoine d'affectation, on admet le retour à la théorie de l'unicité et de la personnalité patrimoniale, dans le

[22] Présentées dans la sect.1 de cet ouvrage.

cas de la fiducie, les conséquences de la séparation des patrimoines en fonction des buts sont menées à la fin[23].

Il en reste que la pratique montre l'utilité de l'institution de la fiducie et impose les modifications législatives qui s'avèrent nécessaires.

[23] Dans le droit français, les disputes concernant la possibilité de séparer de manière étanche entre le patrimoine civil et le patrimoine commercial continuent après l'entrée en vigueur de la Loi no 2003 – 721 de 1 août 2003 pour l'initiative économique. Dans ce sens là, Lucia Herovanu, œuvre. cit., note no 24, pg. 73.

SPECIAL CRITERIA FOR INDIVIDUALIZATION OF THE FINE AS PUNISHMENT

Gheorghe IVAN*

Abstract

The fine is a financial punishment and the offenders' assets may vary in extent and social and economic duties; therefore when establishing the concrete value of the fine, it is necessary to also take into account certain criteria of individualization, others than the general ones.

With regard to this matter, the provision of art. 63, para. 5 of the Criminal Code in force stipulates special legal criteria which must be considered by the Court when setting out a fine. Thus, according to this provision, when establishing a fine, the general criteria stipulated by art. 72 of the Criminal Code in force must be observed, but at the same time the fee must be set out so that the convict may fulfill his legal duties regarding the support, upbringing, education and professional training of his dependants.

Furthermore, art. 61, para. 3 of the new Criminal Code (Law no. 286/2009) stipulates that the Court establishes the number of days-fine according to the general criteria for the individualization of the punishment. The amount corresponding to a day-fine is to be established also in accordance with the legal obligations of the convict towards his dependants.

Keywords: *fine, general/special criteria for individualization of punishment, days-fine, convict's duties/legal obligations towards his dependants.*

1. The fine is a financial punishment and the offenders' assets may vary in extent and social and economic duties; therefore when establishing the concrete value of the fine, it is necessary to also take into account certain criteria of individualization, others than the general ones. With regard to this matter, the provision of art. 63, para. 5 of the Criminal Code in force (1969) stipulates that special legal criteria must be considered by the Court when setting out a fine. Thus, according to this provision, when establishing a fine, the general criteria stipulated by art. 72 of the Criminal Code in force must be observed, but at the same time the fee must be set out so that the convict may fulfill his legal duties regarding the *support, upbringing, education and professional training of his dependants*. These are in fact legal special criteria for the individualization of the fine, which however apply only to its superior limit. Therefore, while the Court may set out a small fine complying with the special minimum and the general

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minimum with regard to its superior limit, nevertheless the Criminal Code in force stipulates a legal enclosure which the Court must consider when establishing the fine alongside the special and the general maximum[1].

The convict's legal duties, stipulated in the Family Act, are: support duties and upbringing duties, education and professional training. According to the Criminal Code in force, *the material status of the offender* does not represent a criterion which the Court should take into account when establishing the fine; however it may be considered in the field of the general criterion provided by art. 72 of the Criminal Code – "the offender". Within this criterion, the Court must take into consideration the offender's material status so that the fine may represent a real juridical constraint. The judge shall assess the material position of the offender in compliance with various elements, such as the convict's fortune, his income, his family difficulties etc.[2]

2. The first new Criminal Code of Romania (2004) – which did not come into force and was abrogated by the second new Criminal Code (Law no. 286/2009) – did not embrace the ideas of the Criminal Code in force and adopted the system of the days-fine with regard to natural persons. Thus, art. 68 para. 2 stipulates that the fine as punishment is applied as days-fine. In this situation the total amount payable is given by the multiplication of the number of days of punishment established in Court in accordance with the gravity of the offense and the offender with the amount representing the evaluation in cash for each day of punishment, taking into consideration *the financial possibilities of the offender and his obligations towards the dependants,* as a legal special criterion of individualization.

With reference to the two special criteria (the financial possibilities of the offender and his obligations towards the dependants*)* we assess that the lawgiver has abandoned the system of the Criminal Code in force which stipulates that the only duties to be considered when establishing the fine are the defender's legal obligations towards his defendants (art. 63, para. 5) and stipulated expressly the material status of the offender as a legal special criterion for individualization, so that the fine penalty may represent a real juridical constraint.

1. Vintila Dongoroz, Siegfried Kahane, Ion Oancea, Rodica Stanoiu, Iosif Fodor, Nicoleta Iliescu, Constantin Bulai, Victor Rosca, *Theoretical Explanations of the Romanian Criminal Code. General Part,* volume II, Bucharest: Romanian Academy Publishing House, 1970, p. 68; Gh. Ivan, *Individualization of Punishment*, Bucharest: C.H. Beck Publishing House, 2007, pp. 251-252.
2. V. Dongoroz and collab., quoted work, p. 68.

The financial possibilities relate to the offender's income achieved from any economic activity (wages, pensions, dividends, bank interest, income support etc)[3].

3. The second new Criminal Code (Law no. 286/2009[4]) adopted the same system of days-fine. Regarding the *natural person*, article 61, para. 3 stipulates that the Court establishes the number of days-fine in accordance with the general criteria for the individualization of the punishment. The amount corresponding to a day-fine is set out also in compliance with the *convict's legal obligations towards his dependants.*

According to the new criminal law, the individualization of the punishment as days-fine consists of three stages. The first stage determines the number of days of punishment in correlation with the two general criteria of individualization (gravity of offense and the offender threat), and during the second stage is calculated the amount equivalent to each day of punishment in correlation with the two general criteria of individualization but also with a special criterion of individualization (the convict's legal obligations towards his dependants). Finally, the third stage establishes the total amount, by multiplying the number of days obtained in the first stage with the amount obtained in the second stage.[5]

We have to mention that the lawgiver of the new Criminal Code, embracing the pattern of the German Criminal Code[6], stated not only the general main criteria for the individualization of the punishment – gravity of the offense committed and offender threat - but also the general secondary criteria for the individualization of the punishment, which actually are useful in the assessment of the first ones. Therefore, art. 74, para 1 stipulates that the settlement of time or punishment is to be made

3. Gh. Ivan, quoted work, p. 253.

4. Published in *Monitorul Oficial* (*The Official Gazette*), Part I, no. 510 of 24 July 2009. The second new Criminal Code will come into force on the date established by the law referring to its enforcement.

5. Gh. Ivan, idem, pp. 252-253.

6. § 46, para. 2 of the German Criminal Code stipulates that for the determination of punishment both the circumstances in the offender's favour and those against him are considered. For this purpose the following aspects are especially taken into consideration:

a) the offender's mobile and purpose;
b) the offender's behaviour, as it results from his deed and his will referring to the deed;
c) the measure he breached his legal obligations;
d) the way the deed has been committed and its consequences;
e) the offender's antecedents and his personal and material position;
f) the offender's behaviour after having committed the crime, especially his efforts to repair the damage caused, as well as his efforts to reach an understanding with the injured party.

in accordance with the gravity of the offense committed and the offender threat, which are assessed in compliance with the following criteria:

a) circumstances and way of having committed the crime, as well as means used;
b) state of jeopardy created for the protected value;
c) nature and gravity of the result created or of other consequences which have been brought forth;
d) reason for having committed the crime and the purpose which has been aimed at;
e) nature and frequency of offenses which represent the criminal antecedents and previous convictions of the offender;
f) behavior after having committed the crime and during the trial;
g) level of education, age, health condition, family and social status.

We may notice that the elements mentioned from a) to d) are actually useful to assess the gravity of the crime committed while the others [from e) to g)] are useful to assess the offender threat.

With regard to the natural person and referring to the special criteria for the individualization of the fine, we notice that the second new Criminal Code faces a regress from the first new Criminal Code, embracing the system of the Criminal Code in force which stipulates that for the settlement of the fine punishment the only duties that matter are the legal obligations of the offender towards his dependants (art. 63, para. 5), neglecting the idea advanced by the first new Criminal Code according to which the material status of the person convicted should represent a legal special criterion for individualization, so that the punishment may represent indeed a real juridical constraint.

The offender's legal obligations towards his dependants are: the parent's obligation to bring up, educate and support his minor children; the obligation to support his spouse; the obligation to support his blood relatives – brothers and sisters as well as other persons mentioned under the law etc. These obligations are provided for instance by articles 261, 487, 488, 499, 516 of the new Civil Code (Law no. 287/2009).

With regard to the legal person, the second new Criminal Code stipulates in rt. 137, para. 3 that the Court settles the number of the days-fine according to the general criteria for the individualization of the punishment. The amount corresponding to a day-fine is determined in accordance with the turnover, for lucrative purpose legal person, respectively with the value of the assets for other legal persons, as well as in accordance with the other obligations of the legal person. Consequently,

the material status of the legal person is to be considered alongside his legal obligations, such as the reimbursement of debts.

4. Other criminal legislations mention the offender's material status as a special criterion for the individualization of the fine. Art. 132-24, 2nd thesis of the French Criminal Code stipulates that if the Court delivers a fine punishment, the Court shall determine its total value taking into consideration to the same extent both *the offender's income and his obligations.*

Article 50 of the Spanish Criminal Code establishes the system of days-fine, prescribing in the 5th paragraph that the Court shall settle the amount corresponding to the shares taking into account exclusively *the economic position of the person convicted*, deducted from his assets, his family duties and obligations *and his personal circumstances.*

Finally, the Italian Criminal Code stipulates special criteria in art. 133 bis, according to which, when determining the amount of the fine (either "*multa*" for offenses, or "*ammenda*" for contraventions), the judge must take into account the economic conditions of the offender, alongside the general criteria indicated in rt. 133. The 2nd paragraph of the same article adds that the judge may increase the fine ("*multa*" or "*ammenda*") established by law three times at most or reduce it to a third at most if, due to the economic status of the offender, the judge considers that the maximum limit is ineffective or that the minimum limit is excessively hard.

The Italian doctrine criticized the traditional system of the global amount provided by rt. 133 bis of the Criminal Code where the criteria for the settling of the fine are still the general ones (gravity of the offense and delict capacity[7]). In reply it was retorted that the Italian lawgiver had not considered the recommendations of the dominant doctrine which inclined towards the opposite model, of Scandinavian origin, of the "daily rates" which in fact divides the stage of individualization in two autonomous moments: the first moment settles the number of sums based on the general criteria and the second moment determines the daily rate/sum based on the economic status of the offender. If this system had been adopted, it would have constrained the judges to really take into consideration the economic status of the offender; the Italian lawgiver's refusal, as it was claimed by some authors, would be grounded on the hidden intention to elude the delicate problem of verifying the offender's income, besides that the Italian tax administration being unable to provide exact information related to incomes.

Moreover, the Italian lawgiver has been also criticized for the fact that he did not stipulate the criteria that the judge must obey within the

7 See, at large, Gh. Ivan, quoted work, pp. 85-88.

assessment of the offender's economic status. In this situation, the judge must take into consideration the offender's income at the moment he was convicted and his pecuniary obligations (obligations for support, debts made in order to deal with essential needs, such as the purchase of a dwelling house etc)[8].

5. In our judicial practice it has been decided that the fine is settled according to the legal criteria for the individualization of the punishment and not to the offender's possibilities of payment; the latter may be eventually taken into consideration when a criminal fine is enforced[9].

8 G. Fiandaca, E. Musco, *Diritto penale. Parte generale*, Zanichelli Editore S.p.A., Bologna, 2001, pp. 742-744.

9 The Supreme Court, military section, judgment no..77/1985, qtd in *The Romanian Review of Law*, no. 9/1986, p. 75.

THE EDIFICATION OF THE STATE OF LAW

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Abstract

As a concept and as a form of expression of the "modern state", the state governed by the rule of law is not just a simple word association. It expresses a condition on the power, a rationalization movement and its ordering, and also a new outlook on law, on its role and functions. The limiting power of the state of law means an authentic and humanistic conception of democracy. The constitutional state crystallized as a modern one. The theory of the state of law has become a veritable axiom of the public law. The judicial review of administrative acts and the control of the constitutionality of the laws were created as effective tools of its achieving. The state of law includes a strict separation of the state in social life. The essence of the rule of law is normativism.

Keywords: *state, state of law, democracy, political power, jurisdiction, legality, rule of law, freedom.*

In today's democracies the state of law has become the foundation of society. The state of law must be accompanied by a system of guarantees to state as a final limit on the right.

Today Romania is at a further stage in the approach to the state of law. The Romanian Constitution, adopted in 1991 and amended by the national referendum of 2003, referred in article 1 (3) to the fact that „Romania is a democratic and social state, governed by the rule of law". The theory of the state of law is a national, not a global idea. We believe that we must build the national model of the state of law from actual realities of our country, from the times in which we live.

It was noted that the state of law is in theory a concept aimed at integrating the correlation between the political and the legal. Political power is the control of a company driven by social relations which are generated by legal values and fall into the consciousness of the comunities`conditions. One of these conditions is that the law should be applied not only for the governors but also for the government.

The concept of the State law has its roots in antiquity, but there has never been a single conception of the State law and may not ever exist.

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This can be explained by several factors such as: democratic, political, social and legal traditions, historical and cultural evolution, diversity and specificity of the political and legal systems, etc.

The idea of the State law is now something which contemporary civilization aims at. The State law is a specific responsibility towards its citizens and the state, respect for the rule of law by all organs of the state, public organizations and work groups, and it also ensures maximum rights and freedoms.

The state of law or the legal state reflects the coexistence of two social entities, the „state" and the „right", mutual relations and interdependence between power and normativity. In this respect, Duguit said: „The right without force is powerless, but without law is a barbaric force."[1]

The state of law has always supported the idea of the dualism of the state and law and was based on philosophical views about the law as a supreme value. As Aristotel stated, „where the rule of law is absent, there is no way to order such a state." The state should be managed by good laws, as Socrates said, and mentioned as an ideal state in Platon's belief. The equity Platon was talking about, only admitted to the masters of slaves, and Cicero spoke of the state as „a problem of people" and as „a common law order". Cicero believes that the basis of law is actually a characteristic attribute of nature: fairness.

In his *Politics*, Aristotel speaks of the basic ideas of the state of law: the rule of law, the separation of powers and social equity.[2]

The theoretical construction of the state of law is not the work of chance; the theory has advanced the field of natural law and ideological concerns, a set of representations and values known in all European countries. The state of law is an abstract, collective entity, distinct from the civil society. It is a conception of law and expresses the ideal of justice. The state of law, based on a conception of power and individual freedoms, crystallized through the 1789 French Revolution, the 1776 Declaration of Independence and the Constitution of the U.S. In England, the state of law was adopted over centuries, from Magna Charta Libertatum (1215), but as I stated above, the roots of the rule of law are much deeper, reaching the Greek and the Roman antiquity.

The state law theory was born in the late nineteenth century, in defiance of democratic regimes and synchronized with its liberal ideology, giving full meaning. The state of law appears as a social and political organization, designed to put into practice the principles of liberal

[1]Leon Duguit apoud John Ceterchi Ion Craiovan, Bucharest: Ed All, 1996, p. 117.
[2]Aristotel, *Politics*, Book IV, cap.XI, Bucharest: Ed, 1996.

democracy, and the principles of natural law as a substrate. It has a special connotation especially in totalitarian countries, being a reaction against the dictatorial rule, which oppressed people, or against the abuse of legality, or edict and application of unjust laws.

Professor T. Drăganu[3], whose opinions we share, believes that the state of law must be perceived "as a state, which organized the principle of separation of powers, under which justice achieves real independence, and seeking to promote the rights and legislation inherent human freedoms, ensures strict compliance with its regulations by all his work throughout his organs." Regarding the rule of law, one of the most difficult problems, as Professor Tudor Draganu says, is to find the most effective procedural ways to make state institutions, which directly or indirectly, have the force of constraining the citizens to abide by the laws.

Professor Ion Deleanu, referring to the relationship between freedom and constraint, shows that we should be rational, because "freedom without authority alters; authority without freedom degenerates."[4]

Normative power and states are in a mutual conditioning relationship. Thus, the power creates the norms, and these legitimate and limit power. Analysed from this perspective, the state of law is subordinated to the law. Certainly the author adds other specific requirements to this fundamental dimension of the state of law.

A very well-known jurist, Hans Kelsen, speaks about the state of law considering the limit on the state. According to this theory before state law and subject to the law that created it. The rule of law is a relatively centralized legal order with the following features:

- jurisdiction and administration are bound by laws enacted by a parliament elected by people. The courts are independent;

- citizens are guaranteed certain rights and freedoms especially the freedom of conscience and belief, the freedom to express opinions etc.

In a constitutional state the law must prevail, it must govern the state. Thus, the law must not become an arbitrary expression of the will of a minority, but should be a summary of the interests and aspirations of all communities, the general expression of the will. Legitimate law should be consistent with fairness. The lawmaking process and the rule of law are essential to the state of law.

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[3]T. Drăganu, *Introduction to the theory and practice of rule of law*, Cluj-Napoca, 1992, pp. 12-16.

[4]Ion Deleanu, *Constitutional Law and Political Institutions*. A Treatease, vol I, Bucureşti: Europa Nova, 1996, pp. 110-111.

The state of law is defined by the French lawyer Jacques Chevallier as "the type of political regime in which the state power is framed and limited by law".[5]

Professor`s George Babos state theory shows that the name of law which the state wants to suggest is not entirely independent in its work, but is restricted by the law.[6] Professor Babos also argued that the theory which supports the state of law emerged during the nineteenth century, being in close collaboration with the theory of the separation of powers.

In the case of a lack of an international authority that would guarantee human rights, the rule itself should exercise it by means of the separation of powers within the three branches of the government (legislative, executive and judicial), which control each other so that they do not allow abuse. Within these three functional branches the judicial one should have the main role in protecting individual rights. But the legal position is not the same in many different countries. For example, England has printed a great authority of law, subjecting both the state and the citizens to the same authority: the customary law applied by the courts. In European countries, the principle of the separation of powers led to the development of a theory of the individual's subjective rights, their relationship to the state, through the "public law". It is designed as a group of rules that aim to protect the individual against arbitrary administrative bodies.

The state of law precludes any legality instituted otherwise than by a parliament elected by universal suffrage and acting in accord with constitutional principles.

In modern conditions the removal of totalitarian regimes and medical changes have occurred in all structures of society and people's lives. The reorganization of society on democratic principles, especially the updated concept of the state of law as the only alternative for the development of former socialist countries in accordance with authentic social values existing in contemporary societies that developed democratic states.

Considering the state of law, there is not enough to establish a legal mechanism that would ensure strict compliance with the law, but it is also necessary that this law be given a certain content, inspired by the idea of promoting the rights and freedoms, the most genuine human spirit and a

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[5]Jacques Chevallier, *L'Etat de droit*. qtd. by Petru Niculescu, The rule of law, Bucureşti: Lumina Lex, 1998, p. 23.

[6]George Babos, *General Theory of State and Law*, Bucureşti: Editura didactică si pedagogică, 1983, p. 50.

broad liberal democracy. Organic laws and other normative acts have an important role in establishing the state of law; they have shall be so designed as to not violate constitutional principles but rather to meet their attainment.

Regarding the activities of the state, we can act in accordance with the requirements of the state of law but also with its opposite, which reveals the fundamental role the state authorities have in this area. So, in all key positions in areas of state activity professionally skilled, competent persons should be promoted, with political and legal culture and a high conscience to determine their priority to act for the common interest.

The state of law cannot build only through constant struggle and in this sense both the rulers and the governed must fight and not forget that the main opposition resides between the legislative and the executive, but between those who lead and those who are led and both belong to the same companies where the task of building and maintaining the rule of law is coming back to them.

In our opinion, it is not enough to say that the rule of law ensures legal protection of a strict hierarchy of rules and that the Government replaced it with the natural consensus, people at the governance of rules. Structure rules may be more tyrannical than any tyrant, because it makes man a project by setting aside a specific man, that man again, talking about communist regimes.

What distinguishes the state of law from a totalitarian state is that the first is concerned with the content of the structured of the legal order and the second, only with its form. Totalitarian systems are not right for the states that they are the liberal conception antipozii about state law. Totalitarian state denies its inherent rights of the individual, denies the reality autonomous individuality. In a state also other individual is only a social atom, and its rights are state concessions. So totalitarianism is built on the ruins of human rights.

Human rights are provided in the Constitutions of the totalitarian states as formal reality, but are not effective because the state stifles civil society, there is no other initiative that that of the state. In totalitarian states the rights lose any protective dimension, they are just a tool in the hands of the state. The formal structure of rules is used to legitimize the abuse. Changing the nature of the law because its purpose is opposite to that which it has in liberal states. The state of law cannot be confused with the principle of legality because it is more than this. Summarizing, the state of law is key normativism and his character is the judge. Constitutional states as modern form has crystallizedthe ruleoflaw, bypostulatingand implementap propriate mechanismsto sanction the rule of law and primarily of the fundamental.

Conclusions

The idea of "state of law" describes the relationship between the state and the law. The true meaning of this relationship can only be revealed through rigurous research on human activity and the state legal institutions, in the shaping and development of the civil society.

The concept of the "rule of law" is in a continuous evolution in time and space.

For Romania, the state of law is unique, an alternative to totalitarianism and dictatorship. Therefore the rule of law must be not only the constitution, but de facto.

The rule of law is meant to create conditions for the human community and ensure that its representatives will not abuse the privileges granted by law.

Bibliography

Leon Duguit apoud John Ceterchi Ion Craiovan, Introduction to general theory of law Ed All, Bucharest, 1996, p. 11;

Aristotel, Politics, Book IV, cap.XI Ed Bucharest 1996;

Drăganu T., Introduction to the theory and practice of rule of law, Cluj-Napoca, 1992, p.12/16;

Ion Deleanu, Constitutional Law and Political Institutions, Treaty vol I, Ed Europa Nova, Buc.1996, p.110/11;

Jacques Chevallier, Etat. Apoud Petru Niculescu, the rule of law, Ed Lumina Lex, Bucharest 1998, p.23;

George Babos, General Theory of State and Law, Teaching and Pedagogical Publishing House, Bucharest 1983, p.50.

FORENSIC IDENTIFICATION - SIDES OF SETTING THE PROCESS OF FACTUAL CIRCUMSTANCES

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Abstract

Judicial investigation, aimed at establishing the truth out of all the circumstances in which a criminal act was committed, as well as the persons involved, almost always implies the identification of persons and objects.

The most important way to establish judicial identification is forensic identification. Their relationship may be defined as whole-part relation, forensic identification being both a stage and a premise for judicial identification.

The former regards particular individual aspects whereas the latter is comprehensive, as it has to judge all the evidence presented.

Although "identity" and "identification" seem simple words at first sight, jurisprudence proves that in legal proceedings they get different meanings and are sometimes misinterpreted.

"Appearances are a glimpse of the unseen." (ANAXAGORAS)

Setting the truth in justice is done through the evidence.

According to the Romanian Criminal Procedure Code, article 63, it is actually evidence any element used to declare the existence or non-existence of a crime, identify the person who committed it and knowing the circumstances necessary for a fair settlement.

The purpose of probation (*thema probandum*) is thus what must be proved (*factum probandum*): facts, circumstances, conditions or circumstances relating to the existence of the fact prohibited by law and the person's participation in the offense.

The management task of the evidence must concern the prosecution and the court because our legislation enshrines the presumption of innocence of the defendant (art. 66 C of the Code of Criminal Procedure) in the sense that anyone is considered innocent as long as his guilt was not established with certainty.

A suspect initially, then the accused and counted as the possible author, this person will not be convicted unless it is made full proof of *corpus delicti* and committed participation. The special importance of the sample to reach the unknown known, "to shed light on nebulae issues", as

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Traian Pop said, prompted him to call it "the main nerve of the criminal proceedings"[1].

Forensic identification is only one means of proof permitted by law, one of the sides of the process of establishing the facts. In other words, probation include identification as one of its components, not to be confused with it and, moreover, without being reduced to it. The conviction of judicial body is finally formed thereof. The conviction of judicial body is formed, finally, by analyzing the totality of the relevant administrative evidence, which is critically, objectively and unilaterally evaluated.

The main contents of probation with forensic identification is posting the person or object involved in the offense investigation somewhere far from a set of possibly unknown objects or persons. The ultimate goal is the individualization of the person (offender, victim, witness, accomplice, etc.) either directly after traces of body parts, or indirectly, through objects. If the object (such as an instrument which has been used to commit a crime) serves as a means of discovering the owner, forensic identification appears as an intermediate stage of the overall process of legal identification. Evidentiary value can be proved only by correlating the two forms of identification. Therefore, some authors even include the concept of forensic identification, in addition to the concrete object and its connection with the case investigated. We believe that establishing such a connection is beyond the actual act of identification. Expert competence shall be limited to technical findings, and judicial body, owned by the expert's conclusion, is solely responsible and liable to make the link mentioned[2].

Identity is thus from the beginning, one of the fundamental concepts of thinking and at the same time, an important research of the material objects, with the broadest application in various fields of science: forensic science, physics, chemistry, biology, etc.

There is almost no process of thinking that falls outside the principle of identity. Knowledge is not restricted to identification, but includes it as component of a complex process[3].

Identity is the nature of what is identical (single) or "property of an object to be and stay at least for a while as what it is, the capacity to preserve for some time its fundamental characteristics".

Under its most general aspect, identity means that category which expresses consistency, the object equal to itself.

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[1] Colectiv. (1978). **Forensics Practical Treaty**. Bucharest: Editorial Service, IInd vol.
[2]Colectiv. (1978). **Dictionary of Philosophy.** Bucharest: Ed. Politica.
[3]Erikson, S.A., Jorgensen, J. (1979). **Recherches d'Empreintes par Ordinateur,** in « Rev.int.pol.crim. », no. 300.

As a result, forensic investigation is not required to determine the object itself, but to reach an evidentiary identity. Thus, it does not matter that the offender's footwear is identical to itself in a certain moment, but that because of its characteristics from seeking coverage from the scene, it can be identified and serves as evidence. The analysis of the concept of identity would be incomplete if it fails a second aspect, namely the identity between objects[4]. In forensic identification, the main content of examination and assessment is to highlight similarities, a fully sufficient similar individual characteristics leading to the identification of traces and implicitly to distinguish the totality of these characteristics similar to those of other objects. If two objects, signs, events, etc. resemble, we must seek which are identical and which are not, and thus we could say that the similarity is the evidence of a hidden identity[5]. On the other hand, differences may also play a cognitive role, the differences between objects and compared traces contributing to their individualization and delimitation. In the specialized literature this method is even called identification through differentiation. The judgment of similarity such as "it is just like the other" is of great importance in the work of expertise and, generally, in the process of probation, but not to equate identity with thinking.

To identify means to distinguish, to isolate, and to "extract" an object from a set of similar objects or objects that create putative traces in terms of committing the criminal act. Forensic identification is possibly objective by individuality, relative stability and reflectivity of things and beings. Through the individuality of an object it is ontologically understood that the object is determined by its specific properties. Gnosiologically, the term "individual" means the singularity of an object in relation to other objects from its class, the fact that it is unique in itself, enjoys the uniqueness and is different from any other object. Objects and beings suffer in time changes under the action of internal and external factors. Only abstractly they may be overlooked, considering identity as a permanent state. The continue moving and transforming of the material world is not contrary to the property of an object of being individual. For some time intervals identification remains possible when the changes are not essential. In this context personality appears to be relatively stable. Epistemologically speaking, the coverage - inextricably linked to the previous, expresses the essence of cognitive relationship between subject and object, between consciousness and existence. The movement of the material world is achieved through the interaction of objects and beings in a process of mutual influence.

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[4] Gayet, J. (1961). **Manuel de Police Scientifique.**
[5] Gobot, E. (1937). **Traitée de Logique**. Paris: Libraire Armand Colin.

The characteristic of the material world to reflect is more complex as the movement form is more advanced, ranging from the simplest forms of coverage from the world of mechanical and inorganic matter to the intricate processes of organized education, such as the human brain who reflects reality through perceptions, representations, concepts and other ways of knowing. Reflecting bodies through interaction reproduces the outer structure (natural reflection). Multiple forms of coverage outline two distinct types of identification: identification by materially fixed pictures and identification by pictures set in memory. The first is the most common and is obtained mainly by comparing traces of objects believed to have created them or their reflections. The second type of identification is based on the strength of memory of the subject which, in certain spatial and temporal conditions, perceived the characteristics of an object, being or phenomenon.

Identification by material reflections is achieved by scientific research carried out by specialists, and the findings are materialized in a test or technical-scientific report.

Identification by description and recognition is achieved through investigation activities in accordance with procedural rules and recommendations by criminal tactics (hearings, confrontation, and reconstruction) and the results are recorded in various documents such as statements, records, tape, photographic plates, sheets and collections[6]. Of the processes of automatic recognition of digital impressions, you should know the following:

1. The comparing system based on design and staging points, developed by E. Angst, K. Frieden, M.P. Grop and M.W. Frun, is based on classification data as monodactilar coupled. The data is based upon the Dactyloscopic sheet ranked upon Galton-Henry method. For each fingerprint there is a set formula mono-1 and mono-2, recorded in a basic form and then put on punch cards. They receive a serial number, are read and processed by computer and stored on tape. Similarly, traces of offending are classified as fully as possible, the data obtained being written on an array of research. Simultaneously the basic condition of trace is determined using a code. The data are processed into the computer on punch cards and compared with those of the impressions gathered on tape, after an appropriate situation. Comparison results are recorded in an automated minutes.
2. The system proposed by H. Thiebault is based on topographic reveal and envisages schematic representation of fingerprint characteristic points, simply by tracking their relative position on a

[6] Ionescu, L., Sandu, D. (1990). **The Forensic Identification.** Bucureşti: Ed. Ştiinţifică.

plane. Two prints will come from the same finger if images of representative points overlap, i.e. if the configuration of the" cloud" of singular points of fingerprint misconduct can be found in any part of the "cloud" of points, much larger, more complete footprint of the uncertain origin. Selectivity can be significantly increased further by comparing the orientation of the tangent to the papillary line. The fingerprints comprising data bank are obtained by shooting with a camera specially designed for objects with a tumid surface[7].

3. The IMDOC system is based on registration data in a selective access memory. It uses the descriptions of cues, *modus operandi* and cases, but also in dactiloscopy. Information items are called "documents". Information is found by reference to words in documents, so each word is considered a search element. The "word" is defined as an alphanumeric chain of letters. In the field of fingerprints they are operating with nine types of drawings: piniforme springs, simple radial loops, cubital simple loops, special loops, circular designs, ellipsoid drawings, composite drawings, amputations and destroyed drawings. Numbering provides the key code to the various types of drawings, representing their qualitative value. The number of lines representing the quantitative value is determined by three factors: the size of the nucleus, the thickness and spacing ridge crests. Quantitative value is determined according to certain rules and expressed by four figures. As a rule, quantitative value is independent of quality, except for the springs, with the value 0000. Piniforme spring height value is expressed in mm. In computing the quantitative value is split into two parts: the first two digits form section A and the last two, section B. It is added each person's fingerprint registration order, date of birth, civil registration number, and number of tape and of film.
4. The Japanese computer system automatically detects features (stops, and bifurcations of the papillary ridges) which puts them in memory and compares them. To detect features computer considers fingerprint as an image whose X and Y axes have origin in the center of the image, that kernel footprint. Each particular characteristic is defined by the distance from the two axes and the direction indicated by the angle which the axis X forms. The computer then establishes the relationship between the number of features growing between them. The position, direction and relationship features are translated into numerical data. The

[7]Triebault, B. (1970). **Procčde Automatique de Reconnaissance des Empreintes Digitales**, in « Rev.int.pol.crim « , no.234

machine detects an average of 100 features on the image of a finger. Misconduct impressions are subject to automatic reading. Input speed is about 1.5 seconds to a finger, 15 seconds to decadactilar sheet and 6 seconds for a latent trace. The comparing speed between two finger impressions is 1.3 milliseconds. Specifically the device compares the position, direction and reporting features, and when it finds similarities, it selects pairs of identical features. When the number of individuals sighted in the form of pairs exceeds the number prescribed, the owner creates a state according to what is in memory, making it to rotate or move the footprint coordinate axes drawn. Then, it is calculated the degree of similarity between two comparing fingerprints features and it is determined their degree of agreement.

5. The AFIS (Automated Fingerprint Identification Systems) system includes computer equipment that sweeps a finger. Automatically we get a charted geometric representation of papillary ridges (shape, direction, details). Spatial relations are translated into binary code and computer algorithms investigated. The fingerprints of good quality are carefully coded about 90 for each finger. The latent one provides less detail, but the system can work only with a scanning part of the map, establishing correspondence with a definite impression on the average of 15-20 items. An important advantage of the system is the possibility of "cleaning" fragmentary prints by filling gaps due to blood coverage and dirt caused by scarring and burns. On the other hand, the system is able to assess the quality of fingerprints and to "disqualify" those unable to identify.

The computer does not compare the images of fingerprints, but makes a list of mathematical research which shows fingerprints like having a binary code similar to the criminalized one. This research is conducted by an AFIS system component called "matcher" whose capacity is 500-600 fingerprints per second. The matcher can work in parallel so that they can use more matchers, each working with some of the data bank. Time is several minutes at a volume of up to 500,000 clear impressions about half an hour to the latent one. In order to determine the mathematical correspondence, the computer uses a numerical system. A fingerprint technician defines the parameters of research and sets a number of criteria to ensure sufficient input for obtaining the necessary gender identity. Based on search parameters, the system reads the list of equality, i.e. fingerprints (finger) "candidate" to have created the one on issue. A big number indicates identity as possible; to a small number the probability is low. If all candidates are inferior to the number of input, then it is likely that the mark is sought not to be in the system. As a

precaution against mistaken identifications there are provided certain safeguards. Thus for latent prints with few details of value, the comparison will be made mandatory with at least 3-5 clear fingerprints.

Although extremely powerful, the AFIS system, like any other system, does not give the final decision. Only an experienced eye will be able to decide whether there is identity between the mark sought and that proposed by the computer.

On the whole issue of computer forensic use, we must emphasize, without any reservation, the huge benefits offered by up-to-date data storage and their retrieving, for volume, accuracy and speed of operations are far beyond human possibilities.

References

Colectiv. (1978). **Forensics Practical Treaty**. Bucharest: Editorial Service, IInd vol.;

Colectiv. (1978). **Dictionary of Philosophy.** Bucharest: Ed. Politica;

Erikson, S.A., Jorgensen, J. (1979). **Recherches d'Empreintes par Ordinateur,** in « Rev.int.pol.crim. », no. 300 ;

Gayet, J. (1961). **Manuel de Police Scientifique;**

Gobot, E. (1937). **Traitée de Logique**. Paris: Libraire Armand Colin;

Ionescu, L., Sandu, D. (1990). **The Forensic Identification.** Bucureşti: Ed. Ştiinţifică;

Triebault, B. (1970). **Procédé Automatique de Reconnaissance des Empreintes Digitales**, in « Rev.int.pol.crim « , no.234.

UNPREDICTABLE IN THE NEW ROMANIAN CIVIL CODE

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Abstract

Contracts affected by a suspension term and the one with successive execution can be subject during their execution to circumstances which were not foreseen and could not be foreseen by the parties when they have completed and which may affect the value of benefits to which they have been obliged. The unpredictable theory allows a debtor who is in a situation caused by drastically and unpredictable changing of economic circumstances from the execution time of the contract against conclusion time of the will contract of the contracting parties to prevent the loss that would arise if he would be held to perform this obligation.

With the title of novelty, the new Romanian Civil Code consecrates the institution of unpredictable, in art. 1271.

1. THE CONCEPT OF UNPREDICTABILITY

For contracts that require a running time such as successive execution contracts or the one affected by a suspension period, it is possible that the occurrence of certain events prior to the closing of the contract would lead to an imbalance to the detriment of any party of the contract, usually to the detriment of the debtor. The debtor will not be able to perform the obligation under the contract, but not because it is impossible, but because the performance of the obligation will put the debtor in a very difficult economic position, even bankruptcy. Specifically, we are in the presence of an excessive onerous of the debtor's obligation which he has not taken into account when contracting.

Unpredictability or hardship is the contractual stipulation which allows the change of the contents of a contract when, during its execution, some events occur that affect the contractual balance, substantially changing the facts and data that the parties took into account when contracting, creating for one party onerous consequences in carrying out their duties that would be unfair to bear alone. It is essential that these events occur, or occur without fault of any of the contractors, as much as they would have been reasonable and prudent, they would not have been able to foresee at the time of closing the contract.

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The hardship clause is a creation of the Anglo-Saxon practice, its use by the parties joining in the prevailing trend of insurance of the stability of foreign trade contracts by promoting legal mechanisms to enable them to adapt to the dynamic market situation. In the light of new legal techniques, the content of the contract is never final; it may be called into question by the complex process of renegotiation of any disputes, imagined by the parties.

Regarding the concept of unpredictabillity, most authors agree that it is a matter of economic and financial (services offered to the creditor in performing the contract does no longer correspond to the actual value of the counter performance, the unpredictable is related to the currency). The cause of the imbalance is an event external to the debtor's person and will, which does not lead to an impossibility of performing the obligation, but only makes it more onerous, although not being sure it is necessary that the event be unpredictable or meaning that it was unforeseen. A discussion on the unpredictable nature queries if the event itself must have been unpredictable, or just the effects of the economic balance of the contract (the event seems predictable, but its consequences have exceeded the projections), as well as if the unpredictability must be assessed objectively or subjectively (depending on the contractor)[1].

J. Ghestin supports that the theory of the unpredictable is founded on a wrong postulate: it focuses on the cause of a phenomenon, while the effect produced on the balance of the contract must be essentially considered as unbalanced objective of the services question the full maintainance or the contract review and not the occurrence of a new and unpredictable circumstances. In this sense we can say that there is unpredictability if the price of a good or of a service set in an agreement no longer corresponds to its value objectively appreciated by the judge, placing us at the moment of performing the contract.[2]

If the laws of some states are specifically dedicated to the theory of the unpredictable (e.g., Italian[3], Greek[4] or Portuguese[5] law), this institution

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[1] Gabriel Anton, Theory of unpredictable in Romanian law and in the compared law – Law Magazine no.7/2000, p. 25.

[2] J. Ghestin, p. 345, qtd by Gabriel Anton in op. cit., p. 25.

[3] Art. 1467 and Art. 1468 of the Italian Civil Code, which provide that: the continuous or periodic performance contracts, and those with different performance, if the service of a party became too onerous as a result of an extraordinary and unpredictable events, it may request termination of the contract together with the effects provided by art.1468 ("reducing the service or changing the methods of execution, allowing the continuation of such executions according to equity"). Termination shall not be required if new tasks fall in the normal risk of the contract. The party against whom termination is requested can avoid it, offering to accept the equitable amendment of the contract's conditions.

[4] Art. 338 of the *Greek Civil Code* also provides the termination or revision of the contract on change of circumstances, according to the good faith principle.

has not been, until recently, unitary regulated in the Romanian law, with only special legislation authorizing the judge to review an ongoing[6] contract, or which enable updating the damages[7].

In the United Nations Convention on international sale of goods contracts stipulates that:

> A party is not responsible for the failure of any of his obligations if he proves that such failure is due to an impediment independent of its will and that normally was not expected to take it into account when closing the contract, to prevent it, to overcome it or to warn it or overcome the consequences. If the failure of a party is due to the failure of a third party that it has been instructed to execute the contract in whole or in part, this part is not exempt from liability only if: when it is exempt under the preceding paragraph; when the third party would itself be exempt if the provisions of this paragraph would be applicable for him. The exemption provided by this article shall take effect during the duration of the impediment. The party which has not executed its obligation must warn the other party about the impediment and its effects on its ability to perform. If the warning does not reach the destination within a reasonable period, starting from the moment when the party which did not execute knew or should have known the impediment, it is liable for compensation for damage caused by this lack of reception. The provisions of this article shall not prohibit a party from exercising its rights, other than to obtain compensation under this Convention.

2. THE THEORY OF THE UNPREDICTABLE, PRIOR TO THE CIVIL CODE

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[5] Art. 437 of the *Portuguese Civil Code* (1966).

[6] Law no.8/1996 on copyright and related rights, art. 43 para. 3, provides that "if there is a clear disproportion between the remuneration of the author's work and the benefits of the one that has obtained property rights transfer, the author may seek judicial bodies to review the contract or increase the remuneration."

[7] Law no. 112/1995 on the legal situation regulation of properties destined for housing, owned by the state (art.13 para.1), Law no.10/2001 regarding the legal status of properties confiscated during the March 6, 1945 - December 22, 1989 (art.10 para.6, art.11 para.2 and art.12 para.2, art.19 para.1, art.32 para.4 and art.44 para.2 and 4), emergency Government Ordinance no.184/2002 amending and supplementing Law no.10/2001 regarding the legal status of properties unlawfully seized during the March 6, 1945-December 22, 1989, as well as for establishing measures to accelerate its application and the emergency Government Ordinance no.94/2000 regarding the returning of real estates which belonged to religious cults in Romania, approved with amendments and completions by Law no.501/2002 (art.I, para.1 from title II).

Even in the absence of express legal consecration of the unpredictable in the Romanian legislation, its necessity has been stressed by many academic commentators who have attempted to argue forming various theories:

***Rebus sic standibus* theory:** The main argument is set in the grounds of probable will interpretation of the parties who will contract with an implied condition, namely that a certain stability in the economic situation. In any contract must be presumed that there is a clause that the obligations of the parties remain unchanged only for as long as the conditions contemplated by the parties at the closing of the contract remain unchanged. If these conditions change radically, the obligations of the parties can not remain unchanged. As long as socio-economic conditions or the ones that existed in the moment of creation the will agreement have changed drastically, we can say that this is not in accordance with the will of the party at the time of closing the contract.

It is thus assumed, at the time of closing the contract, some economic stability during the performance of the contract, presumption manifested under an implied condition, of an implied clause on which the parties based the will to contract. This clause is called *rebus sic standibus* clause (goods clause, unchanged realities).[8]

The theory of good faith and equity: The obligations must be executed in good faith and in accordance with equity (art. 970 of the Civil Code). The person who claims his contractor a service which became disproportionately large due to unforeseeable causes unrelated to the will of the parties does not lie in the realm of good faith.

There was also an appeal made to the obligation of loyalty that existed between contractors: the creditor must, in the name of good faith, renegotiate the contract which became unbalanced.

In the Romanian law it is considered that you can only appeal to good faith for the interpretation of ambiguous and doubtful contract terms, not in the situation of precise terms, in which is stipulated the contract price[9]. However this opinion should not be extended to cases related to the theory of the unpredictable. In case of contracts to which the theory of the unpredictable applies, although the contract terms are clear they still must be interpreted according to good faith and equity.

The theory of unjust enrichment: Forcing a party to the execution of a service which became more onerous would result in unjust enrichment of the other contracting party. Although the enrichment of the

[8] Radu I. Motica, Ernest Lupan, General theory of civil obligations, LUMINA LEX Publishing, Bucharest, 2005, p. 74.
[9] C. Hamangiu, I. Rosetti – Balanescu, Al. Baicoianu, op. cit., p. 518, quoted by Cristina Zamsa, Theory of unpredictable, Annals of Bucharest University no. 1/2003, p. 95.

other party is due to the terms stipulated at the closing of the will agreement, during the performance of the obligations arises economic and financial circumstances which are in favor of the creditor and in disfavor of the debtor, circumstances leading to the ruin of the debtor and to the enrichment of the creditor.

The theory of the cause: If after the closing of the contract, the service balance was broken, one of the services will not have the cause, because the service is unequivalent.

The theory of the abuse of rights: Although the party has the right to demand the execution of the conditions stipulated in the contract, it improperly exercises its right if in this case it economicaly ruins the contractor.

Theory of *force majeure*: The circumstances that cause serious imbalance between services are objective, unforeseeable, unavoidable and outside the will of the parties so that they can be considered cases of *force majeure*. The cases of *force majeure* may lead to termination for inability to perform the obligation of one party. Fluctuations in prices are the essence of economic life, and closing a contract with execution in the future, the parties have consciously assumed the risk of these fluctuations. Such a risk is more or less random. It ruled out the existence of a *rebus sic stantibus* clause in contracts, which would be implied. It's about the occurrence of events that the parties have not foreseen, so have not shown any willingness regarding them**.**

The *rebus sic stantibus* clause could be presumed at least in the debtor's intention of products and services, but not in the one of the creditor. According to art. 977 of the Civil Code, the interpretation of the contract is the common intention of the parties, and in this case also lacks a common will, because the common intention of the parties is that of existing a balance between counter performance, intention resulting from the contract if we consider the moment when the contract was closed.

Among other authors, we consider that the theory of the unpredictable is to recognize, as implied, in contracts of *omnis conventio intelliguntur rebus sic stantibus* clause according to which, if between the moment of closing the contract and the time of execution, unforeseen events have occurred that have fundamentally changed the economic conditions or when other nature existing in the moment of the initial will agreement of the parties, making noticeably sluggish performance of one of them, the principle of binding force of contract no longer act, judicial body having the right, independently of the existence of a clause in the contract to that effect, to precede to the replacing of the contract,

depending of new circumstances or, alternatively, to terminate the contract and appropriate removal of the debtor's liability.[10]

CURRENT LEGISLATION

Currently, Article 1271 of the new Civil Code, with the marginal name "unpredictable", provides that:

> (1) The parties are required to perform their obligations even if their performance has become more onerous.
> (2) However, the parties are obliged to negotiate in order to adapt or terminate the contract if performance becomes excessively onerous for one party because of a change of circumstances:
> a) which occurred after the closing of the contract;
> b) which could not be reasonably considered when closing the contract, and
> c) regarding to which the aggrieved party shall not bear the risk of occurence.
> (3) If within a reasonable time the parties do not reach an agreement, the court may order:
> a) adapting the contract to distribute equitably between the parties losses and benefits resulting from changing the circumstances;
> b) termination of the contract at the time and the conditions established."

We observe that the Romanian legislature has not indicated the scope of the unpredictable, respectively types of contracts where the contractual balance could be broken. We appreciate that contracts affected by a suspensive term and those with successive execution will fall under this category, and only they can be subjected during their execution to circumstances which were not foreseen and could not be foreseen by the parties when they closed a contract and which may affect the value of services to which they have committed[11]. This assessment is supported by the law's requirements that changing circumstances have occurred after the closing of the contract and that the aggrieved party will not have to bear the risk of occurence.

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[10] Dragos Al. Sitaru, International Trade Law – Treatise vol. II, ACTAMI Publishing, Bucharest, 1996.

[11] For example, a supplier that is committed by contract with successive execution to deliver specific quantities of products in exchange for a fixed price set per unit payable on delivery of product will see increased value of its obligations if an increase in prices is determined by the inflation, without being able to claim the contractor the additional difference in price.

Considering the fact that in case of contracts with immediate execution the obligation must be carried out immediately, we are not under the incidence of the unpredictable. Thus, if the service is performed immediately, there will be no material time in which the events that will lead to breakage of contractual balance can occur. In case the debtor of an obligation is late in performing it, and the adverse consequences of breaking the contractual balance occur in its heritage, he will have to bear this risk due to his fault in executing the contract, according to legal principle *nemo auditur propriam turpitudinem allegans*. Finally, in case the creditor of the obligation will be harmed by the failure of the other party to fulfill its assumed obligation, he may request appropriate default termination of contract or moratory interest on compensation.

As the pre-contract is a contract, an agreement under which the parties establish the essential conditions of the contract, undertaking to conclude at a later date, we appreciate that it may also fall within the scope of the unpredictable.

The clause of the unpredictable does not apply to cases when the parties have inserted indexing terms (binding of an economic value to another economic value while maintaining the real value of contractual obligations) in their contract which will vary in price depending on the evolution of a particular chosen index. Inserting such a clause means the disposition by the parties of the possibility for reviewing the contract in certain circumstances, and the judge approached for this purpose will only apply the contract's dispositions, thus fulfilling its binding force.

Related to the scope of the unpredictable, it imposed the analysis of possibility that under its incidence to enter also the random contracts. At first glance, it might seem that since in this category of contracts are not known with certainty from the moment of closing the contract the existence or extension of rights, the parties have not provided a contractual balance, which makes them not fit to enter in the scope of unpredictable. Closer analysis reveals, however, that the unpredictable exists in cases where the cause of breaking the contractual balance could not reasonably be taken into account, while that element is always considered but it is not known if or when it will intervene.

Consequently it results that the random contracts may fall within the provisions incidence regarding the unpredictable, except the purely speculative contracts such as stock transactions[12], For example, if a life annuity contract, the moment the rentier creditor died is unknown and also the period for which the life annuity is owed, but the amount of regular services is known. If, however, after the closing of the contract and

[12] Gabriel Anton, Theory of unpredictable in Romanian law and in the compared law – Law Magazine no.7/2000, p. 27-28.

after the transfer of ownership, the currency in which the annuity is paid undergoes a rapid and strong depression, we are in the obvious situation of the unpredictable, and the contract has to be modified.

Regarding the importance of the imbalance created, we see that it is necessary that the economic circumstances to create an imbalance of a certain severity, which can be determined by the judge who will determine whether performance has become „excessively onerous". These economic circumstances must put the debtor in a very difficult economic position, even bankruptcy, but we do not consider that the potential failure is the only situation that would attract the application of the theory of unpredictable.

The debtor may be in a position in which the execution of the obligation, even if it would not entail its bankruptcy, would cause great damage. Such situations should attract the application of the theory of unpredictable, the criterion which should be considered is the one relating to the disequilibrium between the parties' services and not the effects which would occur if the debtor executes this excessive onerous obligation.

Although the law does not expressly state, we consider that the parties will be able to stipulate themselves the limit at which it is assessed that the contractual imbalance is broken, as they can, through their will agreement, make inapplicable the provisions relating to the unpredictable, thus supporting with anticipation the fluctuation possibility of the services owed.

Naturally, the contracting parties are first asked to amend the contract, to maintain its goals and economic and social environment or to establish its termination. From article 1271 para. 2 results that they have an obligation of measures, namely to negotiate any failure of the negotiations or their failure to complete „within a reasonable time", causing the possibility of referral to court.

Although the law does not set a maximum time limit on these negotiations, indicating them just as „reasonable", we consider that its establishment should be made in concreto, taking into account issues such as the complexity of the contract to be adapted, the distance between the parties and the means chosen by them for communication.

We observe that legal rules do not require the debtor of the obligation which has become excessively onerous to notify the creditor about the change of the conditions in a specific term, but given the fact that he bears the risk and that the solutions which can be adopted are, primarily, the contract modification or its termination, both with consequences for the future, we consider he will be the first interested to initiate renegotiation, any state of passivity being contrary to his interests.

But if the solution adopted is to terminate the contract, together with repayment of services, according to the dispositions provided by article 1322 of the Civil Code, the creditor held for this repayment will not have to bear the consequences of passive attitude of the debtor.

Although the legal provisions relate only to the possibility that the parties determine the amendment or termination of the contract, we consider that, in fact they may agree, for example, to suspend the contract for a certain period of time or may proceed to a novation by changing a part combined with interest on compensation or with a change of obligations, which clearly exceeds the resolutions given by the legislator, which involves only the contracting parties.

If the parties fail to reach an agreement within a reasonable time, either because they have opposing views, or because of excessive duration of negotiations, the debtor of the obligation which has become excessively onerous, as a person interested in resolving this issue may apply to the court authority, asking either to adapt the contract to distribute equitably between the parties losses and benefits resulting from changing circumstances or termination of the contract.

Typically, the judge's intervention is claimed to redress a contract which, due to the imbalance between the services occurred after its conclusion, could lead to economic bankruptcy of the debtor.

Of course, with the introduction of the action, he will have to prove that he tried to solve the dispute in an amicable manner by inviting the other party to negotiate. We consider that, where necessary, in commercial cases, the notification seeking negotiations or minutes registering the parties' position will be able to replace the evidence of compliance of the prior procedure of conciliation.

Considering the fact that sometimes between the moment of invitation to the negotiations and the time of the action can pass a lot of time, we consider that the applicant may request the modification or termination of the contract from the date of invitation to negotiations.

According to paragraph 3 of the same article, „the judge can decide either to adapt the contract to distribute equitably between the parties losses and benefits resulting from changing circumstances, termination of the contract at the time and conditions established by him". Although the legal text suggests that the judge may decide alternatively for the two measures, being retained only by the principle of availability, we consider that on the principle of legal stability, he could decide the termination of the contract only if the amendment is not possible or when both parties oppose the change.

The modification of the contract that the court ordered will have to take into account the necessity for equitable distribution of losses and

benefits resulting from changing circumstances.This means that they will not be able to modify certain terms and penalties for delay and that the solution will be to consider the amount of duties and obligations set from the beginning. For example, if the change is devaluing the payment currency it might consider the exchange rate to a stable currency from the moment of closing the contract. If breaking the contractual balance was due to excessive growth of raw materials, the price of finished product should be reflected in this growth. Finally, if the cost of goods delivered varied a lot, it should be considered the index of growth as a fraction between the average market price at the moment of closing the contract and from the moment when the settlement of the case took place.

If the court will decide the termination of the contract, depending on the nature of the assumed obligations, it will be able to decide the reparation of the prejudice and reimbursement of the services according to the dispositions of article 1323 in reference to article 1639 and the following of the Civil Code.

CONCLUSIONS

Compared to previous concerns of the doctrine and the need to adjust the contracts to subsequent economic realities that were not envisaged by the parties, the legislator intervention by adopting the new Civil Code rules for the unpredictable is welcome.

However, it would be useful if the drawing of the law text would highlight the need to adapt the contract to new economic conditions, with priority, and only in subsidiary o the termination of the contract.

Of course, it remains as true evidence of how the legal regulation of this legal institution is to be made by jurisprudence after the new Civil Code will enter into force.

THE LOGICAL DYNAMISM OF A JUDICIAL TEXT IN THE DOMAIN OF JUDICIAL INTERPRETATION

Claudia ANDRIȚOI*

Abstract

The sign is subject to any interpretation, with priority emphasis on the word, the "sign of signs", and it can "speak" about all the words in words but also semiotic, because words translate significant relevance to all the other signs. Interpretable are not only books but also gestures, sounds, tastes, tactile impressions, smells, everything that affects intentionally one or another of our senses. Such passages can be found, if taken literally, absurd, unnecessary or contradictory, requiring other methods to complete the interpretation of a text, claiming a specific method of interpretation.

Comparison and interpretation modalities are diverse bringing into light a series of senses: the historical sense, the analogical sense, the etiologic or factitive sense, the typological sense that search for resemblances and analogies between successive events, the parabolic sense involving an update of the text meanings by sending to another referential situation, analogical to the given announced situation and updating the interpreted text, so that it fits to the nature of the legal rule.

Keywords: *judicial arguments, coherence, meaning multiplication, principles, methodology.*

JEL Classification: *K1*

1. INTRODUCTION

The knowledge of sign meanings contained by the legal rule allows the familiarization with the competitive interpretations – acceptable, credible or false in relation with the agreed rule. A proper handling of art interpretation in law, involving deciphering the true meanings of the legal rules, represents the necessary tool for the interpret. The reason disciplines order judgments and arguments, so that the interpretations seem both consistent and persuasive (Djuvara, 1994).

Meaning interpretation may be legal and extension, with a polyvalent; it relies on a combination of an internal text and the infinitely existential situations, which allows an updating of the message. It can multiply and is achieved in different but complementary, not exclusive understandings. It is necessary to have an adjustment between the meanings or levels of interpretation, so that the performer knows that the text definitively established should not be out the significance of its

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simple, through a juxtaposition of hermeneutics with its first interpretation.

In all cases the result of the interpretation must contain answers for justifying the principle according to which the interpretation is made, because even the Constitutional provisions must be justified. Therefore, within the legal doctrine lies the disclosure of its meanings.

2. THE EXIGENCY OF CONTINUITY OF THE JUDICIAL INTERPRETATION EXERCISE

It is necessary to proceed systematically, under certain rules of interpretation, setting a firm methodology for the text to disclose as much as possible of its semantic resources. Mastery of such rules depends on the performance of the legally interpreted text. The capture of the meaning depends decisively on the ability of a performer who is offering the freedom to submit to numerous methodological limitations.

How does success or successful interpretations can be proved? If it resists the "verifying" proof (i.e. one and the same thesis may not be contradicted by one or another passage of the same paper), the interpretation will become lawful and promoted as such. The method, therefore, requires the interpreter to rediscover what they already know. Their competence is apparently repetitive and depends essentially on the way previous themes are problematic, underlined and refined.

It is necessary to discover the diachronic size of the utterance alongside with the history of the discursive events. Interpretation must unearth and also investigate the archaic origins of the meaning of a text. The exegetic approach involves effort, knowledge, method and reflection. The meaning of the text should not be inherited, but found by knowing the doctrine and legal practice, supported by assiduous and intuitive "criticism".

Starting from these expectations, a methodology of legal interpretation in a systematic pattern is setting up. Exegesis of the interpretation text is subject to a hermeneutic frame which regulates the relations between the textual premises and existential conclusions, between prime formulations and semantic translations. It searches into the text for traps and for exploiting all the possibilities. Therefore, there is no genuine autonomy for decoding, but yet no "censorship" that bans the proliferation of interpretation. The method (interpretation) intended to strongly circumscribe the processing ways of hermeneutics, so that the enrichment technology to be accessible without necessarily guarantee the accessibility of the heuristic time.

Interpretation involves four steps:

1. historical investigation to establish what must be learned about the texts (mistakes, copies, involuntary or premeditated errors, the moment of writing, its unit, the veracity of the facts and evidence, authenticity critics, provenance, comprehension and credibility);

2. establishment of the concepts involved in interpretation;

3. discovery and knowledge of previous legal doctrines;

4. general application of the facts to particular situations (e.g. conflict resolution in the text).

In contrast, the hermeneutical text analysis involves seven methodological steps:

1. reading of the legal text submitted to interpretation, first, and then of its summary;

2. reporting to casuistry;

3. research into the historical process of becoming the rule of law on the vertical scale, using the historical method;

4. research using the horizontal comparison with similar texts or with similar rules - prospective research;

5. exegesis of the context is achieved by using the Grammar method involving multidisciplinary research, identification of text meaning and of obscure meanings;

6. investigation of the possible objections to the used judgments, contradictions being clarified using the dialectical method;

7. showing of the arguments and exemptions, with the final observation of the general principles and proposals for ferenda law, which involves reporting to the current text.

The logic of the text is dynamic and can be redefined according to the chosen perspective of interpretation. Normalization is always done in relation to the meaning of the text, so as to limit the approximations and the arbitrary. Exercises of interpretation should be done continuously and without limits in terms of getting results, respecting the principle of accuracy, so that every utterance is clear, exact, without margins of uncertainty. Although interpretation is considered a form of altering original semantic richness, it is intended to give unity and coherence, to combine elements into a well-articulated system, to associate the text with its character and the corresponding existential significance.

3. BASIC PRINCIPLES REPRESENTING THE SOURCE OF POSITIVE LAW

The general theory of interpretation (cf. Emilio Betti) is structured according to three main requirements: developing rules of hermeneutics designed as a general deployment of principles that allow the configuration of a specific methodology in hermeneutics; critical

hermeneutic philosophy inspired by Heidegger's *Sein und Zeit*. One of the merits of the Italian teacher, outlined in this text, is his seeking to bring order in an area seemed doomed to sidestep intentions of any settlement under logic fates and do that systematically.

The objective law in force requires from generic compliance recipients to respect its abstract, general and impersonal rules, which regulates typical behavior, invoking a rational basis for values and principles.

Beyond the specifics of each branch of law and default of particular aspects of legal interpretation, the law has, through its integrative organization, a unitary character which should provide or ensure the uniform application of the principles, techniques and interpretation of the rules, a whole regulatory system. The rule of positive law, private and public, imposes because it is a social rule constituted on an ideal background: order and social peace. However, this ideal is involved in the values and principles made by those who interpret them. Moreover this is foreseen in the legal process of deontology (Millard and Troper, 2000).

Once assumed, the method of legal interpretation stops speculation, pointing at argument demonstration. It is associated with the working perspective drawing principles, policies, strategies, tactics and techniques designed to discipline the effort to shorten the road to an end. It responds to a need for order, to avoid speculative waste, improvisation, and argumentative superficiality or logic incoherence. But is only one good application of the method enough? (Popa, Eremia and Cristea, 2005). Does it support the lack of talent or the depth of the interpreter? Does it ensure on its own the performance of a text? We cannot answer these questions without defining the method as a form of science, knowledge that is systematic, based on firm rules (Kant, 1995). Therefore the stakes are always the emphasis on the critical interpretation of the wording, because if there is no thesis, there is any rationale, any demonstration, any way, any response or resolution. The problem requires at least three issues: how the interpretation is made (the solving), how to reach a result (the demonstration), that is the way to solve (Mihăilă, 2005).

The focus should be placed on reflection in surprising the laws, the internal connections, and not on the inductive generalization, observation and experiment.

The positivism of Auguste Compte and John Stuart Mill leaves room for several assumptions: first, methodological monism or the idea of unity in the diversity of objects of scientific inquiry proposes an ideal or a standard methodology for other sciences, including human rights and science, and finally, the effectiveness of causal explanation that consists of the subordination of individual cases to law, valid including human nature (von Wright, 1995).

The second position is antipositive, called hermeneutics, reclaiming a particular type of intervention in the claimed areas of interest. The methodological function of legal hermeneutics makes this science an art of comprehension, that is differs from the pattern that applied to other law, where an efficient work of causal explanation is done. Whereas other sciences generalize, the legal hermeneutics individualizes.

The difference is the methodology, namely the binder between explanation and understanding (Riedel, 1989). So we have on the one hand, the nomologic science which shall hypothetical and constructively, and, on the other hand, hermeneutic sciences (history-descriptive), oriented towards the interpretation of what happened then, describing events and individual actual states. Meanwhile, there is a methodological awareness of legal hermeneutics articulated under the law system. This relates to the past by using the historical method, so that comprehensive methods can divide its own, but can understand it objectively.

These issues urge us to ask if we can bring into question the foundations of a general theory of interpretation and what that would be? Emilio Betti was the one who first formulated such an ambitious idea and brought the way to shorten the time between legal and validating them. Since 1954, an ambition to be recognized as a „reformer", and the determination to reduce and remove speculative chaos inside an increasingly required discipline urged him to lead a discussion about the fundamentals of a general theory of interpretation. *Zur Grundlegungen einer allgemeiner Auslegungslehre* is presented in a „manifesto" which already announced the main themes of hermeneutics, themes developed a year later in his *Teoria generale della interpretazione* (1990).

Of course, these observations should be considered shaded, on the basis that the positive law is a human product and lies in doubt, in vicissitudes, in precariousness, more or less, to the extent that they rely on natural law passed through the sieve interpretation legislature (Mihai, 2008). The rule of law is involved and leads in turn sociological, psychological and political meanings more or less transparent. These meanings are historic and are revealed through the fundamental principles as the merits of any positive law. The general principles are distinguished by the fundamental principles and legal interpretation, but they all are part of a positive legal order (Bergel, 1989). They are objective rules of law, not of natural law, expressed or not in legal texts, but applied by the practice of law, equipped with a character „*suffisant de généralité*" in order to be considered principles (Bergel, 1999).

What does Bergel refer to when he considers the principle character „*suffisant de généralité*"? Although there are rules of law, principles are principles because of the generally sufficient character distinguishing

them from other rules of law which are not principles because they do not have this character? But if the principles are considered as rules, that would mean they have the same three part structure as those, but no internal logical structure as the rules do. J. Festenbert considers the principle as a body of rules unified by a guiding idea, with a sufficiently precise wording so as to justify a relation of subordination (Festenbert, 1976).

On the contrary, B. Jeanneau says that the general principles cannot be treated as any written law, neither custom nor law practice (Jeanneau, 1954). Other authors consider the principles as binding rules of law, of State, valid and penalty, without stating through what definition the legal principles have these characteristics, but notes that they are subject of this. That means that the principle of equality before the law is subject to the legal issues before the law in order to ensure equality, unlike the standard „if the witness statements are false, it is sanctioned". It says in theory that the principles are of State, as the rules, which are not principles, which means that each state establishes its principles of law, resulting that there are any fundamental principles of law.

If a legal rule is contained in one or more legal texts, then it means that we get it through deductive interpretation, because the rule and its language expression is not the same. Or when we say that a certain principle is involved in regulatory texts, we cannot distinguish it from the rules. In this case, the proximity of the kinship degree between the heirs of the same class is a rule that has exceptions (representation), while if it were a principle, its exemption would not make any sense, while it brings into light, not binds. „In the matters of legal conclusion of the civilian, the rule or principle is the ability to conclude civil acts, incapacity being an exception" - says the doctrine, but it requires the following question: exception of the rule? Or exception of the principle? How can it be a rule and also a principle the capacity to conclude civil legal acts? A similar situation is met in the current legal code where legal proceedings (art. 2, para.1) and truth searching (art. 3) are basic rules, whereas the penal doctrine considers them principles (Pfersmann, 2001).

Nobody says that the law is an idea inferred or induced by someone in a particular circumstance, because it would bring confusion between the statements of a certain reality with reality itself. A statement is lawful if it refers to a necessary, objective and essential relationship which always exists in relationship to other entities. Once the law is called a „principle", the angle on it is changed because a legal statement is based on a principle character only when it guides, brings into light, or directs the actions of people.

The principles of positive law are not necessary or regulatory, but arise as formulated rationality and are considered in the joint that being a guidance of building legislative and case-law rules. Between a principle and its formulation, the distance is always emphasized, because the wording is contingent and related to various socio-historical and political conditions. The principle talks in forms, and this translates it.

Hence the sense principles of interpretation: to serve as a guide in interpreting the law and business orientation legislature. Applying various provisions, the judge reads them in their spirit. Identifying the applied principles and materialized by law, the judge may avoid such inconsistencies, contradictions, indecision in the completion and justifications. In this lies the difference because rules from regulations apply and cable the principles, and researching the rules, we find inside them the principles.

The definition of the term (i.e. legality, fairness, responsibility) as the statement of principle has the purpose to disclose the legal nature. Legal terms are not understood by themselves, do not become available to the good sense of anyone, the statement of principles does not return to what happens as a situation. Defining a term has the legislature authority or has the legislature or the judge, being accepted also the doctrinarian authority that proposes another meaning. In law, things with principles are worse because, it is not a principle what is decided by a legislative or law authority that would be, although in practice such deformities happen as in the phrase „the legal content of principle", given that it could be there are principles with illegal content or from the content of a principle we could detach a legal sense as well an illegal one.

CONCLUSIONS

In reality, the principles of legal interpretation, although based on the principles of logic, kept rationality interpretation, which involves logic but is not limited to it, because it involves complementary and systemic legality. A legislature adopts rules only by virtue of guiding ideas, which gives unity and a systemic character, thus avoiding contradictions, inconsistencies and gaps. Then, in the implementation of the law, the legal case maker does not only appeal, in certain situations, to these principles, but also tries to step over the surface of legality entering justice that supports legality, a fact that increases the responsibility of the judge (Terri, 2001).

Consequently, the most difficult problem for a judge is to establish step by step the case facts that they judge by analyzing and evaluating the evidence given, in order to discover the truth.

The legal truth results from the joined objective law interpretation of normative texts - interpretation of the law - and middle or immediate interpretation of the facts, in their general or concrete/factual interpretation. Therefore, each fact should, according to the rule of truth, be interpreted as much as possible according to the reality of its time of happening, without subjective distortions of those interested or involved in the case.

The interpretation of the positive law as a perspective of justice principle serves the human, on the one hand, and on the other hand, this interpretation may relate to the entirety of a positive law or to one of its components – a legal law (the Constitution, an organic law, an ordinance of Government), a legal act, a legal proceeding (Kelsen, 2000).

The justification is not the same with legitimating the meaning tension between these two terms has decisive practical consequences, containing different intentions and normative action reasons. In any case, the court order has justification, not legitimacy, but the judiciary has the legitimacy to rule the state itself.

The principles of interpretation are transpiring in probation at the courts of law, they could be detected in the substrate of each phase of the legal proceedings and in the decisions of judicial bodies. On the statement of any significant practical principle depends the activity of the establishment of laws (Craiovan, 1998). The decisions of these bodies must be legal, that is be granted to the appropriate formally sense of principles. The judge can issue himself principles in solving cases because the law does not prohibit him to do so. In addition, it is claimed that many principles are found in the substrate of rules, which would be deducted by some analysis. Sometimes these principles are so general that they are qualified as fundamental, essential for the industry, legal body indicated.

Setting the concrete fact on the balance of justice that would mold the law, generic and abstract, and then connecting them means applying the law of which the truth founds and the law justifies. The court of law is an official subject with formal rights and obligations in this regard; it decides the final solution left to express the factual truth and justice law, together establishing what we described by the phrase "legal truth".

REFERENCES

Bergel, J.L., (1989), Methodes du droit. Theorie generale du droit, LGDJ, Paris;

Bergel, J.L., (1999), Theorie generale du droit, LGDJ, Paris;

Betti, E. 1990, L'ermeneutica come metodica generale delle scienze dello spirito. Saggio introduttivo, scelta antologica e

bibliografie a cura di Gaspare Mura, Città Nuova Editrice, Roma;
Djuvara, M., (1994), Teoria generală a dreptului , Editura All Beck , Bucureşti;
Festenbert, J.,(1976), Recherche sur la notion juridique de specialite des personnes publiques, Paris;
Heinrik von Wright, G., (1995), Explicaţie şi înţelegere, Editura Humanitas, Bucureşti;
Jeanneau, B., (1954), Les principes generaux du droit dans la jurisprudence administratif, LGDJ, Paris;
Kant, I., (1995), Logica generală, Editura Ştiinţifică şi Enciclopedică, Bucureşti.
Kelsen, H., (2000), Doctrina pură a dreptului, Bucureşti;
Mihăilă Marian, (2005), Tratat de drept internaţional public; Vol. II, Editura BREN-V.I.S.PRINT; Bucureşti, pp.468;
Mihai, Gh.C., (2008), Fundamentele dreptului. Probarea în dreptul pozitiv, volumul VI, Editura C.H.Beck, Bucureşti;
Millard, E., Troper, M., (2000), Les theories realistes, in Analele Facultăţii de Drept din Strasbourg, seria a IV-a;
Pfersmann, O. (2001), O. Arguments ontologique et argumentation juridique, în Raisonnement juridique et interpretation, Paris;
Popa, N. Eremia, M. C. Cristea, S. (2005), Teoria generală a dreptului, Editura All Beck, Bucureşti;
Riedel, M., (1989), Despre teoria şi istoria ştiinţelor hermeneutice, Editura Dacia, Cluj-Napoca;
Terré, F. (2001), Introduction generale au droit, Paris.

THE COMMUNICATION RIGHT AND THE LEGAL RELATIONSHIP BETWEEN CENTRAL PUBLIC AUTHORITIES AND PUBLIC COMMUNICATION

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Abstract

Communication is the transmission and reception of information between various subjects through certain means. As one of the meanings of social psychology, communication is the mechanism by which human relationships exist and evolve. The communication right plays an important and complex role in relationships. These rules are submitted by the impersonal time and space, messaging to organize social relations and maintaining relations communities organized state. Establishes and guarantees the right of communication content of those messages, mainly service based on the fundamental human rights and freedom of expression and free access to information. This law regulates public aspects of communication, modes and types independent transmitting and receiving. The communication of legal topics is diverse and can be achieved by individuals and legal entities, such as: individual persons, media agencies, public authorities. The study presents central authorities in their capacity as subjects of legal relations of public communication.

Keywords: *communication, public communication, public authority, public interest*

I. General aspects of communication and communication law

Communication is the transmission and reception of information on various topics, by some means. It can take place directly or indirectly, in a public or private space, over a longer or shorter period of time, immediate or for an indefinite period. It is made between more or less determined persons.

The communication process has become very complex and has seen many changes related to the subject, content and quantity of the information, the technical means of transmission and time and space.

The amount of information is very high, the time that they can be transmitted almost instantaneous, the number of subjects transmiting and receiving can be very high and only national borders are barriers to communication.

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Over time more and more aspects of communication were subject to legal provisions that mention them as part of the content, quality and effects of information. Thus, for example, only the message sent by a private letter concerns the right to secrecy whereas the information transmitted by means such as the radio, the television, the press, are regulated by the law in terms of accuracy, objectivity and their effect on the receiver.

Right expresses complex communication relationships. The rules of law are submitted in a diffuse and impersonal messages, time and space, messages that are necessary to structure social relations and to maintain links between organized communities of the state.

Citizens is the kind of behavior must have in certain situations, what to do or not do. The legal relationship is a relationship of communication based on an impersonal message that legal standard forward it as an expression of objective law. However, in terms of time, regardless of the changes that may occur, the right retains a certain autonomy and continuity, ensuring the transmission of messages that are related to the essence.

Along with its strong relationships emphasized transformations under the influence of communication science and technology have emerged, and national and international legal provisions. This is the context in which law necessarily requires the demarcation of a distinct, differentiated from other branches of the legal system.

The communication right is (therefore) a recent right, still in training, both in terms of theory and in terms of principles and rules.

The legal regime of various communication activities, distinct from the beginning, now tend to approach, which allows a gradual configuration of a public law unit.

The communication right is composed of rules and principles governing the relations of public broadcasting and the content of information through written messages, images, audio and other languages, and their receipt at a public indefinitely.

One of the features of this law is represented by the fact that it legislates (governing) public aspects of communication, regardless of the means and ways by which the transmitting and receiving is achieved (printing, Internet, multimedia).

Professor E. Derieux believes that the communication right is to public notice, all activities through writing, picture, sound or any other form of signs contributing to disclosure of facts, ideas, knowledge, feelings, opinions.

The leading content of the principles of public communication is mainly based on the fundamental right to the freedom of communication. These principles are set out in international documents and constitutional

and legislative provisions, and are: 1. pluralism and impartiality; 2. correct, objective and in good faith character; 3. independence and freedom of communication; 4. equal rights of broadcasters to transmit information and of individuals to receive it; 5. transparency in the public dissemination of information; 6. access to justice.

The legal aspects of communication are complex and can be provided for several categories of rules, some from other branches of law.

The subjects of these legal relationships are diverse and can be represented by individuals and legal entities, namely individual persons, groups, organizations, associations, parties, public authorities, agents and the public communication media (which may be, for example, legal status of companies).

The quality of the legal subject of communication is provided and recognized by law as follows: the Romanian Constitution on states in relation to a person's right to freely access public information, public authorities, the mass media (public and private) - among the important social and political groups, public television and radio services; other special laws (the Law on the organization and functioning no. 41/1994, the Romanian Radio Broadcasting Corporation and the Romanian Television Society, republished and amended by Ordinance no. 71/2003 and Law nr. 469/2004) provide those authorities whose public messages must be sent compulsorily and freely, primary public radio and television broadcasting, such as: the Parliament, the president of Romania's Supreme Defense Council , the government.

The Law on free access to public information, 544/2001 as amended by Law no. 371/2006, defines the authority or institution as any authority or institution that uses or manages public financial resources, any independent director, a national company and any company under the authority of a permit or local government and the Romanian state or, as the case may be, an administrative territorial unit as the sole or majority shareholder. All the laws require the authorities to ensure access to information through specialized departments of information and public relations, whose duties are set by laws and regulations on the organization and functioning of those authorities.

The law on transparency in government decision specifically states that public authorities are covered, as: central public administration authorities, ministries, other central government bodies subordinate to the Government or ministries, public services and decentralized their autonomous administrative authorities , local authorities, county councils, local authorities, mayors, institutions and services of local or county public.

Public authorities covered by the disclosure law requirements imposed by some law that requires transparency and public access to information regarding their work.

II. Romanian central public authorities, issues of legal rights and obligations related to communication

The Parliament, in carrying out its functions as the supreme representative body, has a series of legal relationships that impose rights and obligations regulated by both constitutional and administrative laws and communication laws.

Its main function is represented by the law-making activity. However, entry into force is subject to public notification. The Romanian Constitution stipulates in article 78 that "he law is published in the Official Gazette and shall enter into force 30 days after publication or at a later date provided in its text."

The Parliament is the central topic in other areas of regulatory laws relating to public relations communication, because it is the sole authority to issue laws (constitutional, organic or ordinary) and the most important areas of communication, organic laws are adopted. An example is the organization of the public radio and television, which is provided by an organic law. Also, the communication within public relations and regulations are theirs by ordinary laws.

Another function of the parliament is appointing, investing, designating public authorities, and this exercise devolved powers in relation to communication (eg. the 11 members of the National Audiovisual Council, an autonomous public authority under parliamentary control, are appointed by the Parliament).

Generally the Parliament is an institution with open communication, that carries out its work transparently (its meetings are public, with the exception of some which, under certain circumstances established by regulations, are secret).

In fact the Parliament is bound by the constitution to be a democratic institution, to perform its work in a transparent manner; there are provisions to this purpose in the operating rules of the Chamber of Deputies (the preparation of minutes during meetings, drafting of press releases at the end of the meetings, the office of the Commission, a weekly publication in the Official Gazette, Part II, summarizing the issues discussed, the voting on articles and bills).

Representatives of the press, the radio and the television, as well as other guests and citizens (on the basis of passes) may be present at the public meetings of the Board of Deputies.

The Parliament has:

- a direction for press and vision (the Chamber of Deputies), with a duty to present a daily press review by members of the Permanent Bureau, the parliamentary group leaders and chairpersons of the standing committees.

- a direction for public relations (the Chamber of Deputies), which aims to professionally and transparently communicate, real and timely to all interest information for public the actions of legislative activity of the Chamber of Deputies and the General Secretariat to the media, the NGO's, the citizens. This directorate consists of three services and two centers: 1) documentation and imaging service; 2) multimedia service; 3) the service for public information and relationship with the civil society, and 1) educational center; 2) television and publication center.

Of all the components mentioned, the service for public information and relationship with the civil society is a specialized compartment of the Public Relations Department, the one who provides public information on all individuals in the current work of the Chamber of Deputies and of Deputies, according to Law no. 544/2001. It systematically presents information to the public and to the representatives of the civil society, and is intended to enhance effective communication with them.

The President of Romania is a central public authority who has the obligation to ensure the compliance with the requirements of good communication and functioning of public authorities, including those with responsibilities in relation to public communication. The Romanian Constitution stipulates that the president acts as mediator between the state and the society; this role cannot exclude other persons/institutions that are under the obligation to communicate. Among the President's duties is the one to propose candidates for the governing bodies of certain institutions with responsibilities in public communication (e.g. he proposes two members of the National Broadcasting Council, whereas the Chambers of the Parliament propose one candidate for the Board of Directors of the Romanian Company for the Radio and Television Society.

A form by which the President of Romania may require citizens to express their will on matters of national interest is the referendum. However, the decrees of the President are notified by publication in the Official Gazette.

The organizational structure includes the Presidential Administration and a Department of Public Communication. These have a duty to promote the views of the President, to release the documents and messages, media analysis and monitoring, run a page on the Internet, make documentation activities. This department is headed by the President's spokesperson and is divided into three sections: 1) the Department for relations with the media, events, accreditation, 2) the Department for assessment of communication, 3) the Department for web

site management, documentation, library. All these chapters are aimed at efficient and effective communication with the citizens regarding issues that are considered public.

The government is an institution which generally can accomplish tasks in the sphere of communication by regulatory decisions that itself issues, relating to law enforcement and, more rarely, through ordinances (but fewer, given that the communication relations are governed by organic laws for the most part). Its judgments and orders are published in the Official Gazette. In order to achieve a communication with the public, the citizens, the General Secretariat of the government, is set up as a service of public relations and media. It is requested by the public information on, *inter alia*, statements of assets and interests, foundations or associations of public utility, government spending, budgetary allocations, public information requests from other institutions or public authorities, public administration, public finance, matters of the revolutionaries and war veterans.

The judicial authority is formed, according to the Romanian Constitution, of the High Court of Cassation and Justice, the courts, the Public Ministry and the Superior Council of Magistracy. The High Court of Cassation and Justice ensures uniform interpretation of the law, of other courts and appeals in the interest on which it is pronounced, they are collective acts, which may be subject to public access to information or freedom of expression and other problems with public communication. To establish a link with the public and the mass media, to ensure transparency of the judicial work in accordance with legal requirements, the High Court of Cassation and Justice has created an Office of Information and Public Relations, headed by a judge designated by its president, who is also spokesperson for the task. This Office works under the Regulation on the organization and the administrative operation of the High Court of Cassation and Justice, and among them are those related to: receipt and processing of public requests for information, providing information to journalists about the public works of the High Court, ensuring, whenever the work of the High Court of Cassation and Justice regards the immediate public interest, the dissemination of press releases, press conferences, briefings, interviews.

A new structure in the judiciary, also referred to by the Rules of organization and running of the High Court of Cassation and Justice, republished in the Official Gazette, Part I, no. 1076/30.11.2005, is information-documentation of the High Court of Cassation and Justice, which operates within the Office of Information and Public Relations spokesperson's control, under the direct authority of the vice-president of the court. This point supports the time required to solve claims relating to public information.

According to the Rules for the application of Law no. 544/2001 on free access to public information, the Office for Information and Public Relations prepares an annual report on the number of legal requests, their scope, the decisions that the High Court of Cassation and Justice has ruled, on legal advice or interpretation of laws, on personal data of the judges of the High Court, etc.

The Superior Council of Magistrates is a constitutional body with the role of guarantor of judicial independence. It also has an Office for Public Information and Media Relations, whose duties are to respond to requests and complaints made under Law no. 544/2001 in relation to their activity; to inform the President on issues that are significant in terms of justice, communicated through mass media and the President, to the media official points of view. The Chairman is informed about the possibilities of solving those problems posed by those being received in audience by collaborating when appropriate, with other departments, together with information and public relations offices of the courts and prosecutors' offices, or with their carriers on issues of common interest; draft press releases dealing with the issues of interest for the Council and organize press conferences whenever Plenum, departments, or the deputy president deem necessary; make or participate in the completion of studies, evaluation, synthesis papers to highlight the Council's work in the media, make predictions about aspects of Council activity to be shown in the media. The Office for public information and relations with the media carries on business and spokesman of the Council, with certain responsibilities stipulated in Law no. 544/2001.

Also, information and public relations offices are set up within the courts, organized under the Regulations of procedure of those courts. Their role is to maintain the connection with the public and the mass media in order to ensure the transparency of the judicial work, and operate with advisers on information and clerks appointed by the court president. All to fulfill the duties they have as the ratio of public communication issues, the courts and no longer have public relations, which is available to those interested in information material inducement. However, the access of the public in the meeting rooms is strict (30 minutes before the opening of the hearings), the compartments with the public activities working after a particular schedule and hearing hours .

Conclusions

In society, in addition to spontaneous communication that we encounter in the field of human relations, there is a communication to the public for the dissemination of messages that are considered of general interest. The latter form of communication requires a certain mindset and

actions specifically provided by law. This is public communication, whose scope is determined by reference to the term „public interest". Fulfilling the public interest is achieved by the state public institutions the prerogatives and duties of which are determined by legally and constitutionally.

The communication right is one that includes rules and principles relating to public relations for the transmission of information and their reception by the public. Public communication occurs whenever it comes to applying a rule, the conduct of proceedings, a decision public. Satisfying the public interest requires transparency, for which public notice must make known the existence of people, organization, operation , functions of public institutions, legality and appropriateness of decisions. Public communication should help to discover the public interest, the civic education of citizens and public support to carry out actions; it must emphasize the significance of certain actions and attitudes of the public institutions and help establish connections with those for which public action is taken, and the effects of which influence their behavior.

Public authorities, as subjects in the report as a communication, must respect people's fundamental right to freedom of expression, which includes their right to accurate information, provided objectively and in good faith, and transparency in the public dissemination of information.

References:

Victor Duculescu, Legal protection of human rights, Lumina Lex, Publishing House Bucharest, 1994;

Nastase Maria Georgescu, Communication right , University Publishing House, Bucharest, 2009;

European Convention on Human Rights.

UNDERCOVER INVESTIGATORS. THE SCOPE OF CRIMINAL LIABILITY

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Abstract

Article 2241 and the following of the current Criminal Code regulate the use of undercover investigators, the legislator establishing the criminal offences for which undercover investigators may be used, as well as the scope of practice of such investigators.

However, the legal text does not state expressly that the actions and potential offences, performed by an undercover agent while investigating a transgressor, do not constitute offences or contraventions, this fact being only presumed as the investigator acts upon the decree issued by the Prosecutor in charge with the case in question.

This omission has been remedied by the regulations of the new Criminal Code (adopted by Law 135/July 1, 2010) which came into force on October 1, 2011.

Thus, in chapter IV, "Special supervision or investigation techniques", art. 148 and the following stipulate that "the activities for which the undercover investigator receives authorisation shall not be considered contraventions or offences." The legal provisions also include concrete situations which do not constitute offences as long as they are related to the developing investigation, such as the use of certain writs or objects.

Keywords: *undercover investigator, special investigation techniques, scope of criminal liability*

The increasingly diversified practices used by lawbreakers nowadays required a fast response from authorities who had to adopt legal dispositions which entitle police officers to find evidence to be submitted to prosecutors and judges in order to determine the guilt of the transgressor.

Of course, undercover investigators are not used for crimes in which evidence can be found by means of usual methods for research and identification of defining elements which would lead to the ultimate goal of the criminal trial - calling the lawbreaker to account.

The use of an undercover investigator is a special investigation method because in many cases the so-called classical investigation methods are obsolete or can only lead to a partial fulfilment of the goal of

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the criminal trial, the discovery of truth and the involvement of the lawbreaker's criminal liability.

Therefore, acknowledging the special quality of a certain investigation in which undercover investigators are used, the legislator specifically designated the crimes for which undercover investigators can be used in evidence finding.

Consequently, with reference to the preliminary actions performed by undercover investigators, Article 224^1 paragraph 1 of the Code of Criminal Procedure stipulates that: "If there are solid and concrete signs that an offence has been committed or is to be committed against national safety, stipulated in the Criminal Code and in special laws, as well as in the case of drugs or weapons trafficking, human trafficking, terrorism acts, money laundering, counterfeit of currency or other values, or in the case of an offence provided by Law no. 78/2000 for the prevention, discovery and punishment of corruption deeds, with the subsequent amendments and supplements, or in the case of another serious offence which cannot be discovered or whose perpetrators cannot be identified by other means, in order to gather data on the existence of the offence and on the identity of the suspects, investigators may be used under a different identity than the real one."

One can notice that an undercover investigator may be used in the investigation of offences with special impact on the city and strong impact on the citizen, namely, corruption crimes, drugs and weapons trafficking, terrorism acts, money laundering, etc.

Naturally, the safeguarded social values are not essentially different, only the investigation tactics is more difficult to achieve in the case of extremely dangerous crimes and, therefore, investigation techniques require special methods as lawbreakers become more and more specialised, their methods are more sophisticated and their deeds result in significant profits.

However, the question is: which is the scope of action of undercover investigators?

The answer is given by the law: the undercover investigator only acts with the motivated authorisation of the Prosecutor (article 224^2 Code of Criminal Procedure). The individuals regulated by article 224^1 can perform investigations only with the motivated authorisation of the Prosecutor who carries out or monitors prosecution. The authorisation is granted by motivated decision, for a period of 60 days at most and can be renewed for duly justified reasons. Each renewal cannot exceed 30 days and the total duration of authorisation for the same case and regarding the same individual cannot exceed one year. In the application for authorisation addressed to the Prosecutor there shall be specified: the data and the clues concerning the facts and the individuals deemed to have

committed an offence, as well as the dates for which the authorisation is requested.

The Prosecutor's decision authorising the use of the undercover investigator must include, in addition to the mentions stipulated in article 203, the following:

a) solid and concrete signs which justify the measure and the reasons for adopting the measure;
b) the activities that can be performed by the undercover investigator;
c) the individuals deemed to have committed an offence;
d) the identity under which the undercover investigator will develop the authorised activities;
e) the authorisation dates;
f) other mentions provided by the law

In urgent and dully justified cases, authorisation can be requested for other activities than the ones already authorised, the Prosecutor's giving his immediate verdict.

Article 224^3, which refers to the use of data obtained by undercover investigators, stipulates that the data and information obtained by undercover investigators can only be used in the criminal case and in relation to the individuals specified in the authorisation issued by the Prosecutor.

These data and information will be used in other cases or in relation to other individuals provided that they are relevant and useful.

The provisions of article 224^2 paragraph 2, letter b of the Code of Criminal Procedure, which specify the activities to be developed by the undercover investigator, are relevant for the analysis of the scope of practice of the undercover investigator; of course, they are expressly stated in the decree issued by the Prosecutor of the case in question. Therefore, he is the only one who can grant to a police officer the legal "privilege" to consciously engage in criminal activity.

One can notice that the enforceable legal provisions do not state explicitly that the supposed criminal activity of the undercover investigator is allowed and the deed will not be subject to criminal inquiry. It is presumed that the investigator acted upon the order of the prosecutor who monitors case investigation; therefore, a criminal act is only allowed in order to identify and call the real lawbreakers to account.

This omission of the legislator was eliminated by the new Code of Criminal Procedure: Chapter IV "Special supervision or investigation techniques", article 148, regulates the use of undercover investigators and paragraph 6 states that the activities for which the undercover investigator receives authorisation shall not be considered contraventions or offences.

Also, article 150, which regulates "the discovery of a corruption or agreement conclusion crime", stipulates in paragraph 3 that "the activity

of the individual who takes part in the discovery of a corruption or agreement conclusion crime shall not be considered provocation, contravention or offence."

It is also specifically stated that the use of certain writs or objects submitted to an investigator, only for the purpose of the action, does not constitute an offence. This provision refers to special writs or objects which cannot be normally accessed or used by everyone.

We wonder how could be treated the actions of the undercover investigator which exceed the scope of the Prosecutor's decree. We must refer here to the technical and tactical training of the undercover investigator who must always act on the authorisation granted by the prosecutor and for the purpose of the decree, that is, for identifying the evidence and the perpetrators and for involving the criminal liability of the investigated individuals.

If the investigator has not been authorised for a certain criminal activity, he will be held responsible for it because he is not covered by the Prosecutor's authorisation.

However, this matter is subject to interpretation for, in many situations, in order to maintain his cover, the undercover investigator might be forced to commit an offence which presents low social risk in relation to the criminal offence under investigation and to the safeguarded social values and, under these circumstances, his liability will not be involved.

Furthermore, provocation constitutes a situation in which an undercover investigator could obtain evidence by inducing the suspect to commit the offence.

Of course, in such an undesirable situation the judge might cancel the evidence because it was obtained without observing the legal provisions.

The scope of practice of an undercover investigator also takes into account the provisions of article 68 of the Code of Criminal Procedure which states that: "It is forbidden to use violence, threats or other means of constraint, as well as promises or incentives in order to obtain evidence. It is also forbidden to induce someone to commit or to continue the performance of a criminal offence in order to obtain evidence."

We will present certain decision of the European Court of Human Rights concerning the use of undercover investigators in police actions, drawing our attention to instances of provocation. Thus:

- Teixeira de Castro v. Portugal

The use of undercover agents must be limited and guarantees must be granted even in the cases of fighting against drug trafficking, public interest not being a justification for the use of evidence found by means of

provocation. In this case, the Court does not contest that the intervention of police officers took place as part of an operation against drug trafficking, ordered and supervised by a judge, however, the circumstances of the case reveal that the two police officers did not limit themselves to a passive examination of the criminal activity, but exerted a certain influence which led to the perpetration of the crime. The action of the two police officers went beyond the scope of action of an undercover agent and their intervention bereft the plaintiff of a fair trial ab initio and definitely (European Court of Human Rights, Decision of June 9, 1998, www.echr.coe.int)[1];

- Edwards and Lewis v. UK

In order to determine whether the defendant was the victim of an illicit provocation by the police, the national judge had to examine a certain number of aspects, especially the reason for the organisation of the police operation, the nature and extent of police participation to crime perpetration, the determination or pressures made by the police. As the plaintiffs were denied access to certain evidence, they could not prove before the judge that they had been induced by the police to commit the crime. Under these circumstances, the Court appreciates that the procedure which had been followed for establishing aspects related to provocation observed neither the requirements for guaranteeing the contradictory nature of the proceedings, neither the equality of arms, no guarantees being provided for the adequate protection of the plaintiffs' interest and therefore article 6 of the Convention was breached (European Court of Human Rights, Decision of October 27, 2004, § 46, www.echr.coe.int)[2]

- Ludi v. Switzerland

When the undercover agent was not properly confronted with the accused in any stage of the proceedings, neither him, nor his lawyer having the possibility to interrogate the agent or to question his credibility, the Court considers that this fact could have taken into account the legitimate interests of police authorities in complex cases such as the ones concerning drug trafficking, preserving the anonymity of the agent for his protection, and also the defendant's right to a fair trial (European Court of Human Rights, Decision of June 15, 1992, § 28-30 in C. Birsan,

[1] George Antoniu, Adina Vlăşceanu, Alina Barbu, HAMANGIU CODES, CPP, The Code of Criminal Procedure, Hamangiu Publishing House, p. 248
[2] Op.cit., p. 248

European Convention on Human Rights, Comments on articles, Vol. I. Rights and Liberties, All Beck Publishing House, Bucharest, 2005, p. 520)[3].

In our opinion, the foregoing account supports the amendments brought to the Code of Criminal Procedure by Law 135/July 1, 2010, which represent a guarantee for the observance of fundamental rights and liberties of any individual who might be subjected to investigation, the legal proceedings ensuring thus the right of every person to a fair trial.

REFERENCES

The Code of Criminal Procedure of Romania;
The new Code of Criminal Procedure (Law 135 / July 1, 2010);
Law no. 143/2000 on the prevention and control of drug trafficking and illegal consumption, with the subsequent amendments and supplements;
Law no. 78/2000 for the prevention, discovery and punishment of corruption deeds, with the subsequent amendments and supplements;
Law no. 678/2001 on the prevention and control of human trafficking, with the subsequent amendments and supplements;
Law no. 636/2002 for the prevention and punishment of money laundering as well as for the enforcement of certain measures regarding the prevention and control of terrorism financing, with the subsequent amendments and supplements;
Law no. 39/2003 on the prevention and control of organised criminality;
The Criminal Code and the Code of Criminal Procedure, with amendments and supplements, Hamagiu-Bucharest Publishing House, 2007;
The Criminal Code and the Code of Criminal Procedure, with amendments and supplements, Hamagiu-Bucharest Publishing House, 2009;
George Antoniu, Adina Vlăşceanu, Alina Barbu, HAMANGIU CODES, CPP, The Code of Criminal Procedure, Hamangiu Publishing House, 2009.

[3] Op.cit., pp. 248-249

EUROPEAN POLICIES ON HUMAN TRAFFICKING

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Abstract

At European level, the issue of human trafficking is part of the justice and home affairs domain, being a component of combating organized crime. Politically, it can be said that since 1986, human trafficking is a different theme in the domain of justice and internal affairs, ever since the European Parliament began adopting measures regarding women generally speaking, and more particularly regarding women trafficking.

However, the human trafficking became more of an issue for the European Union after a decade, when the Commission publicly announced her first conclusions on the matter. Ever since, at European institutional level a series of policies, legislation and financial schemes have developed, which made the prevention and combating of human beings trafficking a more important theme.

Keywords: *European Union, human beings trafficking, cooperation in the domain of justice and home affairs, The Treaty of Maastricht, European cooperation, Eurojust and Europol.*

The legislation and institutional framework in Justice and Internal Affairs

According to article 249 TEC, the community legislative instruments are the regulations, directives, decisions, recommendations and opinions. Recommendations and opinions are not binding and do not establish rights or obligations to those whom they are addressed. The mandatory community measures are therefore the regulations which are binding on all Member States and are directly applicable, the directives which are binding only on results and leave the Member States the opportunity of chosing the means to achieve results and the decisions which are mandatory on whom they are addressed.

JHA legislative instruments characteristic broad, which, as will be shown below, do not belong to the Community sphere, but to a separate pillar, are different in shape and nature of the formal instruments of the Community. Thus, article 34/2 TEU after the amendments made by the Amsterdam Treaty lists the following tools that the Council may adopt: common positions defining the overall EU approach in one respect, framework decisions which are mandatory as to the outcome, leaving

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Member States the choice of methods to achieve those results, which are adopted solely for the approximation of laws, decisions which are mandatory, but with no direct effect, adopted in other respects than the harmonization of Member States legislations, and conventions that are recommended for approval by Member States in accordance with their constitutional requirements which must be ratified by national parliaments. In addition to these tools, the Council may use the resolutions, recommendations or declarations which are devoid of binding, are informal and flexible, but it is an effective means of expression of political will.

Cooperation on justice and home affairs (JHA) has undergone an interesting evolution, from rather modest beginnings to a more dynamic and complex policy. Cooperation in this area engages Member States in efforts to define the European policy on migration, asylum, police cooperation and judicial cooperation. The sensitive nature of these issues, which together constitute the field of JHA, have made progress and cooperation in this field to be slow and difficult process, often involving political compromises and special arrangements when taking decision.

The **Treaty of Rome (1957)** did not foresee cooperation in the JHA and the institutional issues which further defined the relevant market was an ad hoc working groups represented in areas that would later distinguish themselves as policy JHA.[1]

The **Treaty of Maastricht** (1993), also known as the Treaty on European Union (TEU), introduced the three pillars of the EU structure: the first pillar consists of the two communities (the European Economic Community and the European Atomic Energy Community), the second, of the Common Foreign and Security Policy, and the third, in police and judicial cooperation in criminal matters. Title VI brings JHA under the auspices of the EU treaty, although maintaining a distinct character due to the importance attached by Member States to the JHA issues. Thus, the procedure for making decisions is complex and distinct from the Community method. While the first pillar decision-making process starts with a Commission proposal to the Council, which may adopt it, modify it or ignore it, and approval method is the community one, when it comes to the third pillar, the Commission has no right to proposals, it is the intergovernmental method. JHA institutional framework, as defined by the Maastricht Treaty was the subject of criticism. Due to the sensitivity of

[1] The first group of debate at Community level, less formal nature, the Trevi Group, established in 1975 to jointly discuss the problems of terrorism, especially following the attacks on the territory of Member States in the 70s. It follows the group of judicial cooperation, the Customs Mutual Assistance Group and ad hoc groups on immigration and organized crime.

JHA issues and unwillingness of Member States to cede to the Community any control on decisions regarding internal issues, when it comes to JHA, the Maastricht Treaty provided high priority to Member States and to the EU's institutional structures directly involved. The procedure for decision-making and the allocation of institutional roles, as defined by the Treaty describes a Commission lacking legislative proposal, a parliament with an exclusive advisory role and a Court of Justice which is not recognized any competence in the field of JHA. Moreover, it does not provide for a third pillar legal instruments as directives, binding on results, and regulations, with binding and direct effect, as it does for the community areas of the first pillar. Although it is considered that the most important role is for the Council, it can make decisions only by unanimous decision in this matter, which leads to the risk of blocking the decision/making process. This makes not at all risky, the claim that in reality the Member States are, in part, the main actor.

Without doubt, the first important step in defining the institutional framework of the JHA and the EU's capacity to take collective and binding decisions in this area, is made by the Treaty of Amsterdam (1999) that brings in the first pillar of action Community part of JHA issues, namely immigration, asylum and external border control. Cooperation in criminal matters, including terrorism, organized crime, human trafficking and crimes against children, arms trafficking, corruption and fraud remain in the third pillar. However, the treaty provides for a reallocation of institutional roles, according to which the Commission obtained a right of legislative initiative that is shared with Member States, the Parliament obtained the right to be consulted and the Court of Justice was recognized a limited jurisdiction to give preliminary rulings on questions of the third pillar, being able to rule on important cases brought before national courts.

The Council remains the dominant decision maker, and continues to take decisions unanimously. The Treaty does not alter the logic of intergovernmental of the third pillar, keeping procedures and intergovernmental agreement and unanimity rule. We can say however that the Treaty of Amsterdam opened the way for a more dynamic process for cooperation on JHA. The significance of the Treaty of Amsterdam is, therefore, a double one, in the way of strengthening cooperation between Member States in the JHA area, while generating an image of a fortress Europe type (Fortress Europe), in which the common policies on visas and external borders, asylum and migration would restrict access.

Finally, an additional step to communization and greater flexibility of decision making in the JHA area is achieved by the Treaty of Nice (2001). By a special clause, it states that in areas which the Treaty of Amsterdam has left the third pillar, the Member States which wish to

establish enhanced cooperation may require the Commission to submit a proposal.

If it refuses, the Member States concerned may themselves develop a proposal that they submit to the Council for approval. This is provided by a qualified majority after consulting the Parliament. Enhanced cooperation procedure, as introduced by the Treaty, is intrinsically linked to the theoretical acceptance of several speeds and diversity of EU Member States. Moreover, the reformulation of article 31, redefines the common action on judicial cooperation in criminal as follows:

(1) Common action on judicial cooperation in criminal matters involves among others:(a) facilitating and accelerating cooperation between competent ministries and judicial or equivalent authorities of the Member States on matters of procedure and enforcement of decisions, including, where appropriate, cooperation through Eurojust; (b) facilitating extradition between Member States; (c) ensuring compatibility in rules applicable in the Member States to the extent necessary to improve such cooperation; (d) preventing conflicts of jurisdiction between Member States; (e) progressively adopting measures establishing minimum rules relating to the constituent elements of criminal acts and penalties in the field of organized crime, terrorism and drug trafficking.

Allowing Member States to achieve closer cooperation between them, the treaty not only solves downtime decision making, since unanimity proved most difficult times, but also more flexible rules of decision making, especially in view EU enlargement, which would follow the entry into force of the Treaty, with the admission of 10 new Member States on 1 May 2004.

Legal instruments and institutional framework at EU level

Existing EU legislative instruments are determined by the institutional framework for this area and focus mainly on police and judicial cooperation in criminal matters. As oted above, criminal law is one which has remained tributary to national sovereignty, and cooperation between EU countries is only at the beginning, compared community policies. However, for Member States to improve cooperation in criminal matters several rules, agreements and treaties were adopted.

The most important legal instrument for controlling human beings trafficking is article 29 of the Treaty on European Union (TEU). Creating a space of freedom, security and justice, which will be achieved by tackling crime, has become the main focus of the third pillar. Under article 29, *the Union is to provide citizens with a high level of safety within an area of freedom, security and justice by developing common action among Member States in police*

and judicial cooperation in criminal matters.

The Treaty explicitly states that this will be done including through the prevention of human trafficking and provides for a closer cooperation between police and judicial authorities. Likewise, it is explicitly mentioned uniform penal provisions of the Member States.

Mention of human trafficking in article 29 of the Treaty, makes all other legal instruments adopted to be based on this article of the TEU.

In the prevention and combating trafficking of human beings, the most important legislative steps are represented by adopting the Council Framework Decision of 19 July on combating human trafficking[2], the approximation of criminal laws of Member States, Council Directive of 29 April 2004 on the permit of temporary residence for victims of trafficking or who have been subjected to actions facilitating illegal immigration and who cooperate with authorities[3] and the Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography[4], relating only in certain respects to human beings trafficking. At Community level have been adopted also other regulations, of horizontal importance, matters relevant to human trafficking, as far as they enable and facilitate the implementation of legislation on this matter[5].

Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third country nationals who are victims of human beings trafficking or who have been subject to an action to facilitate illegal immigration, who cooperate with authorities[6] is an important measure in the context of acceptance of special measures for persons who are victims of the phenomenon. The Directive seeks to define the conditions and terms of issuance of a temporary residence permit for third country nationals who cooperate in the fight against human trafficking and illegal immigration (article 1). With regard to victims of crimes related to trafficking in a broader sense, the directive provides that the measure of issuing a residence permit to be made including those who have illegally entered the territory of Member States (article 3 paragraph 1). Recognizing the fundamental rights of the European Charter of Fundamental Rights, stated in the preamble, is translated by the existence of a period of reflection to allow victims to recover somewhat after the traumatic experience and escape from the influence of traffickers (article 6) and also assistance measures to victims before the issue of a residence, such as access to health care, language assistance and free legal assistance (article

[2] OJ L 203 of 1 August 2002, p. 1.
[3] OJ L 261 of 6 August 2004, p. 19.
[4] OJ L 13, 20 January 2003 p. 1.
[5] For example, the Council Framework Decision of 13 June 2002 on the European arrest warrant and transfer procedures between Member States, OJ L 190, July 18, 2002, p. 1.
[6] OJ L 261 of 6 August 2004, p. 19-23.

7).

2002/629/ JHA Council Framework Decision of 19 July 2002 on combating human beings trafficking[7] is the most important instrument in this field. As shown, the framework decision is binding, although no direct effect, and can be an effective tool to combat the phenomenon at European level. The act is adopted after the implementation of joint action in 1997 failed, the main reason being, according to the Comision the absence of a common denominator in the definitions and penalties in the Union[8]. The text of the Framework Decision is largely based on the UN Convention Protocol, without completely taking the approach of that protocol as it does not provide protection and assistance for victims.

In conclusion, it appears that the Framework Decision fails to regulate in a balanced manner on the one hand the obligations of protection and victim assistance in respect of which the decision is silent, and the other hand requirements of criminal liability of offenders. A possible argument is that there should be a separate law governing the standing of victims in criminal proceedings, but the frame is a much too general[9] for the needs and special vulnerabilities of victims of human trafficking. In addition, the Framework Decision does not address the main causes of the phenomenon of human trafficking such as poverty, social instability and marginalization, without which the anti-trafficking area is only one segment and does not have a prevention role, as there refers to cooperation with third countries of origin or transit.

In the same context of combating all forms of trafficking and exploitation of persons, **2000/375/JHA Council Decision of 9 June 2000 to combat child pornography on the Internet**[10] is an important tool for child protection.

It should also be mentioned **the Council Decision 2001/87/EC of 4 December 2000** regarding the signing, on behalf of the European United Nations Convention against Transnational Organized Crime and its Protocol on combating human beings trafficking, especially women and children and smuggling of migrants by land, air or sea[11].

At the institutional level, through Council acts, have been created specialized structures of police and judicial cooperation, which have been

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[7] OJ L 203 of 1 August 2002, p. 1-4.

[8] Joint action to eliminate human trafficking and sexual exploitation of children, OJ L 063 of 4 March 1997.

[9] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings, OJ L 182 of 22 March 2001, p. 1. In the same vein, see and then act, Directive 2004/80/EC of 29 April 2004 on compensation for victims of crime, OJ L 261of 6 August 2004, p.15.

[10] OJ L 138 of 9 June 2000, p. 1-4.

[11] OJ L 030 of 1 February 2001, p. 44.

given specific powers to combat human trafficking, in view of strengthening at European level these types of cooperation in criminal matters. The first European efforts to institutionalize cooperation in the police forces and discussion, although at an early stage, the joint discussion of issues related primarily to terrorism, are embodied in the Trevi Group, followed by the creation of a anti-Office Operations Europol drug in 1994. By Act of July 1995 the Council adopted the Convention establishing the European Police Office[12], **Europol**, as amended by the Council Act of November 2003[13], which extends the powers of materials other than drug trafficking crime. Important is that the annex of the Europol Convention contains the first definition of human trafficking as a form of crime. Human trafficking is defined as: "...submitting a person to a real and illegal sway of other persons by using violence or threats or reports of abuse of authority or manipulation, in particular its exploitation of prostitution, forms of sexual exploitation and violence on to minors or trade-related abandonment of children. These forms of exploitation include also activities of the production, sale or distribution of pornographic materials involving minors. "

According to article 1 and Annex 2 of the Europol Convention, it aims to "improve [...] the police cooperation between Member States, the effectiveness of the authorities of Member States and cooperation between them in terms of prevention and fight against serious forms of international crime, [...] when two or more countries are affected in such a way that Member States common action is essential [...]."

Among the offenses specifically listed in that article, for which Europol is competent under the conditions described above, is included human trafficking, also forms of exploitation and sexual assault and trafficking of children abandoned when the offense is transnational and, therefore, are involved two or more Member States.

Tampere European Council[14] recommended the establishment of a European structure for the coordination of judicial cooperation against organized crime. A Council decision in June 2000 decided to establish Eurojust, which is ultimately established by Council decision in February 2002[15] after its importance is mentioned in article 31 TEU amended the Treaty of Nice:

(2) The Council shall encourage cooperation through Eurojust like this:

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[12] OJ C 316 of 27 November 1995, p.1.

[13] OJ C 002 of 6 January 2004.

[14] European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition should become the cornerstone of judicial cooperation in both civil and criminal matters within the Union.

[15] Decision of 28 February 2002 establishing Eurojust Council to strengthen the fightagainst organized crime, OJ L 063 of 6 March 2002, p.1.

(a) enabling Eurojust to facilitate a good coordination between national prosecuting authorities of the Member States;

(b) promoting support by Eurojust serious research on cross-border crime, particularly in cases involving organized crime, particularly in view of the analysis carried out by Europol;

(c) facilitating close cooperation between Eurojust and the European Judicial Network in particular to facilitate the execution of letters rogatory and the implementation of extradition requests. "

Eurojust groups one representative of each Member State which is judge, prosecutor or police officer or has an equivalent professional competence and in accordance with article 2 of Decision in 2002, is mandated to assist in the investigation of serious crime, in which the legal assistance is needed. Eurojust objectives defined in article 3 of that decision, are to stimulate and improve cooperation between Member States in the prosecution and punishment of crimes, and to facilitate international mutual legal assistance and extradition requests settlement. In the unlimited jurisdiction, in article 4 of the decision is noted that Eurojust is competent in all types of crime and crime in which Europol is competent, so various companies including human beings trafficking. In the competence of Eurojust in May should be noted that in accordance with article 3, it is limited by the fact that it may act only at the request of a Member State and provided that the potential offense involves, besides the State making the request, another Member State.

The fact that Eurojust and Europol have no power to initiate criminal procedures greatly reduces their chances of being effective in areas such as human beings trafficking, which is a cross-border crime phenomenon.

A common feature of both police and judicial structures is that cooperation will depend on Member States and their willingness to send them the information they hold. This can be a problem for the functional efficiency of the two structures.

WITHDRAWAL OF AGGRIEVED PARTY'S PREVIOUS COMPLAINT

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Abstract

According to legal provisions, in case of offences for which putting to motion the penal action is performed following to the previous complaint of the aggrieved party, the dismissal of criminal responsibility effects not only due to the lack of complaint, but also due to its withdrawal.

The withdrawal of previous complaint therefore dismisses the penal responsibility, being regulated in the provisions of article 131 paragraph 2 of the Penal Code. The withdrawal represents the unilateral document of will of the aggrieved party that comes back to the complaint performed, according to the law, until the conviction decision remains final. Accordingly, the right to give up the exercise of penal action of the aggrieved party in these cases (ius abdicandi) can be exercised in any phase of the penal case until the moment shown.

The withdrawal of previous complaint has the same legal nature, the same grounds of penal politics and the same consequences as the lack of previous complaint.

Keywords: *previous complaint, penal action, withdrawal of previous complaint, aggrieved party..*

According to the legal provisions, in case of offences for which putting to motion the penal action is performed following the previous complaint of the aggrieved party, the dismissal of criminal responsibility effects not only due to the lack of complaint, but also due to its withdrawal.

The withdrawal of previous complaint therefore dismisses the penal responsibility, being regulated in the provisions of article 131 paragraph 2 of the Penal Code. The withdrawal represents the unilateral act of will of the aggrieved party that comes back to the complaint performed, according to the law, until the conviction decision remains final. Accordingly, the right to give up the exercise of penal action of the aggrieved party in these cases (*ius abdicandi*) can be exercised in any phase of the penal case until the moment shown.

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The withdrawal of previous complaint has the same legal nature, the same grounds of penal politics and the same consequences as the lack of previous complaint.

The other cause that dismisses the penal responsibility – the reconciliation of the parties – is a bilateral legal act that consists in the settlement between the aggrieved party and the offender for the penal process not to start, or in case it began, to end it (art. 132 of the Penal Code).

Although the withdrawal of previous complaint, as well as the reconciliation of the parties, are causes which dismiss the penal responsibility for offences that set to motion the penal action by the previous complaint of the aggrieved party, actually between those two institutions there are significant differences. A first difference is that while the withdrawal of previous complaint produces effects *in rem,* the reconciliation of the parties produces effects *in personam*. Also, the withdrawal of previous complaint is a unilateral manifestation of will, while the reconciliation of the parties presupposes a bilateral manifestation of will between the aggrieved party and the offender.

The withdrawal of previous complaint will produce legal effects only if the manifestation of will is *real, unequivocal and undetermined through vices (*false pretence or violence). In judiciary practice[1], it is considered that the manifestation of will was obtained through false pretence as long as, in case of a breach of trust, the defendant promised to return the goods previously possessed and later on s/he did not keep her/his promise. Also, it must be *formally declared*; it was admitted that it should be detached from the assembly of the proofs administrated, even though it is not explicit.

Moreover, the withdrawal of previous complaint made through an authentic declaration to this extent, and expressed with unconstrained will is also admissible (Bulai & Bulai, 2007).

Previous to the changes brought to the Code of Criminal Procedure by Law no. 356/2006, the withdrawal of complaint could be also implicit if the person who made the complaint groundlessly missed two consecutive court hearings in front of the Court of the First Instance (art. 284[1] of the Code of Criminal Procedure). These dispositions did not apply when the aggrieved party was present at the trial, and his/her representative was legitimately missing two consecutive court hearings in the front of the Court of the First Instance.[2]

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[1] Bucharest city Court, *First Criminal Division*, dec. no. 1905/1983, in R.R.D. no.7/1985, p. 63.

[2] S. Court, *Penal decision* no. 332/1985, in R.R.D. nr. 12/1986, p. 75.

Any unequivocal manifestation of will of the aggrieved party (i.e. it does not follow to convict the defendant and, consequently, the solution that imposes is ceasing the criminal prosecution charges or ceasing the penal trial) is assimilated to a withdrawal of previous complaint [3].

The withdrawal of previous complaint must be *total* and *unconditioned*, i.e. with regard to both the penal and the civil parts, and takes place before the decision of conviction becomes final.

If, in a penal case, the aggrieved party withdraws his/her complaint but asks to solve the civil action, the withdrawal of previous complaint is conditioned and consequently, the court should not decide to cease the penal trial and to reject as inadmissible the request to bind over the defendant to civil compensations[4].

In specialized literature (Paicu, 1998; Elian, 1965), it was shown that the Court cannot acknowledge the withdrawal of previous complaint in another case but the one submitted to trial; this was also stated by the judiciary practice.[5]

A previous complaint represents a special manner to notify the criminal prosecution authorities that condition only the criminal action; symmetrically, the withdrawal of previous complaint, even in the hypothesis that civil claims were formulated, has in view only the penal action. As a consequence, having in view the provision of article 131 paragraph 2 of the Penal Code, which expressly provides that the withdrawal of previous complaint dismisses only the penal responsibility, the aggrieved party can further address to the civil court, due to the fact that, by withdrawing the previous complaint, it is not considered that he/she also gave up to the civil action. This is the reason why, in actual law, according to article 346 paragraph 4 of the Code of Criminal Procedure, the withdrawal of previous complaint justifies letting the civil action unsolved by the penal court, with the possibility that, later on, the prejudiced person can address to the civil court through a separate civil action.

The withdrawal of previous complaint for removal of penal responsibility must take place *regarding all participants,* and not only regarding some, due to the fact that the previous complaint has an indivisible character and produces effects regarding all persons and not the declaration of its withdrawal[6]. In case the aggrieved party wishes to give up the complaint regarding one or some participant(s), he/she has at his/her disposal the institution of the reconciliation of the parties,

[3] Suceava county Court, *Penal decision* no. 375/1983, in R.R.D. no. 7/1984, p. 69.
[4] Sighetu Marmației Court, *Penal sentence* no. 262-1974, in R.R.D. no.5/1976, p. 60.
[5] S. Court, *Penal decision* no. 1174/1982, in R.R.D. no. 5/1983, p. 77.
[6] To the same extent, C.S.J. (Supreme Court of Justice), Criminal Division, Decision no. 1889/1995, in Law magazine no. 6/1996, p. 114-115.

operating *in personam.* Also, in order to produce the effects provided by the law, the withdrawal of previous complaint must be performed by *all aggrieved parties* that introduced the complaint, because even if a single complaint is maintained, the penal responsibility is not dismissed (Bulai & Bulai, 2007).

In case the withdrawal of previous complaint had intervened in due course – until the decision of conviction remained final – it produces irrevocable effects, i.e. the aggrieved party cannot revert it or formulate a new previous complaint for the same deed.

In what concerns the proceedings, in case of withdrawal of previous complaint, it is decided to cease the prosecution charges or the penal trial. According to article 13 of the Code of Criminal Procedure, modified by Law no. 281/2003, in case of amnesty, prescription or withdrawal of previous complaint, as well as in case of existing an unsanctionable cause, the accused or defendant can ask to continue the penal trial and, according to article 13 paragraph 3, in case it is not observed any of the cases provided in art.10 letters a-e, the prosecutor must decide the ceasing of the prosecution charges, except for the case provided in art.10 paragraph 1 letter i, when the court must decide the ceasing of the penal trial.

In case the aggrieved party withdraws his/her previous complaint and the defendant requires, according to article 13, paragraph 1 of the Code of Criminal Procedure, to continue to penal trial, if it is found that he/she committed the deed, the court cannot pronounce the conviction, but it must decide to cease the penal trial, according to paragraph 3 of the same article[7] (Volonciu & Vasiliu, 2007).

As against the previous complaint of the aggrieved party and its withdrawal, in case of other trial impediments (authorizing or notifying the competent authority or another condition provided by the law, necessary in order to put to motion the penal action), its further withdrawal does not remove the penal responsibility, this not being provided by the law as cause of this nature (Theodoru, 2008).

Bibliography

Bulai, C., & Bulai, B. N. (2007). *Criminal law handbook, General Part.* Bucharest: Universul Juridic Press;

Elian, G. (1965). *The aggrieved party in the penal trial.* Bucharest: Scientific Press;

[7] S. Court, Penal section, dec. no. 2810/1982, in R.R.D. no. 12/1983, p. 104

Paicu, A. (1998). The authority of the case law in case of two identical previous complaints, forming two penal cases, not connected to the same court. *Law magazine no. 9*, p. p.128;

Theodoru, G. (2008). *Treaty of Criminal Proceedings Law, 2nd edition*. Bucharest: Hamangiu Press;

N. Volonciu, & Al. Vasiliu. (2007). Code of Criminal Procedure with comments. Art. 1-611. Basic rules and actions in penal trial. Competence. Bucharest: Hamangiu Press.

INTERNATIONAL AND INTERNAL SYSTEMS FOR PROTECTION OF THE RIGHT TO LIFE

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Abstract

The protection of human rights in general and of the right to life in particular is obtained on the one hand internally through legal provisions contained in the fundamental laws and other regulations, and on the other hand internationally through the protection system established by the United Nations for the entire planet as well as through regional protection systems.

On the European continent the protection of the right to life is obtained through the system of the European Convention on Human Rights with an important contribution from the European Court of Human Rights; similar systems work on other continents having a regional calling and being stimulated by continental courts such as the African Court on Human and Peoples' Rights whose first decision was pronounced on December 15th, 2009 or the Inter-American Court of Human Rights established in 1979.

Keywords: *protection of human rights, right to life, ECHR, UN.*

The idea of the existence and protection of the fundamental rights of the individual occurred centuries ago, first without having an international calling.

According to some opinions, the first document compared with a charte of human rights is the Cylinder of Cirus, issued by the Persian king Cir the 2nd the Greatest, after the Persians conquered the Babylon in the year 539 B.C.[1]

As documents that stated human rights we point out: *Magna Charta Libertatatum* (1215 – England), *Petition of Rights* (1628 – England), *Habeas*

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[1] The document has the shape of a clay cylinder, inscribed with cuneiform writing and it was discovered in 1879 in the ruins of Esagila, the temple of Marduk of Babylon. It is at present in the possession of the British Museum. The site of the British Museum dates the document from 539-530 BC and points out the opinion according to which this cylinder was described as "the first Charte on human rights", but states that in fact it highlights a long tradition in Mesopotamia where even from the 3rd millennium BC the kings began their kingship with declarations of reform.
(*http://www.britishmuseum.org/explore/highlight_objects/me/c/cyrus_cylinder.aspx*)
At the beginning of the year 2010 this document was the object of a diplomatic dispute between Iran and the Great Britain since the British Museum postponed the rendering of the document to Iran in accordance with a previous agreement regarding lending it to the Asian state.

Corpus (1679 – England), *Bill of Rights* (1689 – England), *Virginia Bill of Rights and the Declaration of Independence of the United States* (1776 – U.S.A), *Declaration on the Rights of Man and of the Citizen* (1789 – France).

The bourgeois revolutions had an essential contribution in recognizing the idea of the natural, inherent rights of the individual.

In the 19th century the first elements occurred regarding the internationalization of the issue of the human rights, especially as a result of the interests of certain important states to protect their nationals and their rights abroad. Also the protection of certain human rights was achieved through the human law, more exactly the protection of the war victims; in 1864 in Geneva the first International Convention was adopted and was destined to improve the situation of soldiers wounded on the battlefield, later amended by other acts which had in view the protection of the civilians and the prisoners of war[2].

The confirmation and the valuation of the human rights were realized in the 20th century mainly starting from 1945 when the following were adopted: *the Charter of the United Nations* (1945), *the Universal Declaration of Human Rights* (1948), *the European Convention on Human Rights* (1950), *the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights* (1966), *the American Convention on Human Rights* (1969), *the Helsinki Final Acts OSCE* (1975), *the African Charter of Human and Peoples' Rights* (1981), *the Universal Islamic Declaration of Human Rights* (1981), *the Rio Declaration on Environment and Development* (1992) *as well as the Vienna World Conference on Human Rights* (1993).

At present the protection of human rights in general and of the right to life in particular is accomplished internally by generalizing the democratic regimes in more countries of the world as well as internationally through the protection system established by the United Nations on the entire planet; on the European continent the protection is accomplished through the system of the European Convention on Human Rights.

The universal protection system of the human rights is made of the documents that form the "International Charter of Human Rights": the UN Charter, the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights.

As regards the protection of the right to life in the UN system, according to article 3 of the Universal Declaration on Human Rights, every human being has the right to life and article 6 of the International

[2] B. Selejan-Gutan, "*Protectia europeana a drepturilor omului. Editia 3*"[European protection of human rights. 3rd edition], Editura C.H.Beck, Bucuresti, 2008, p.3.

Covenant on Civil and Political Rights states that the right to life is inherent to the human being, that no one may be arbitrarily deprived of the right to life and that this right must be protected by law.

The European convention however chooses another approach: article 2 paragraph 1 states that every person's right to life is protected by law and that death cannot be inflicted to someone intentionally unless it involves the execution of a capital sentence ruled by a court of law in case the crime is sanctioned with this punishment by law.

Despite the fact that the texts issued under the aegis of the UN benefit from a more complete wording than article 2 of the European Convention, expressly stating the right to life itself (article 3 of the Declaration), then instituting the nations' obligation to protect this right by law (article 6 paragraph 1 of the Covenant), it must be specified that the system for protection of the right to life established by the European Convention is much more efficient than the one of the United Nations.

First, the control over the way the states fulfill their obligations regarding the protection of the right to life is different in the case of the two systems. On the one hand, the Universal Declaration (as the name itself shows) is missing the power of constraint not providing any legal mechanism to watch over its enforcement; at the same time the efficiency of the United Nations Human Rights Committee as mechanism of control of enforcement of the provisions of the United Nations Covenant has more of a declarative character. On the other hand, the European Convention on Human Rights disposes of an efficient legal mechanism which controls the way the right to life is protected in the signatory states through article 2 of the Convention[3].

As an element of novelty we point out the interest for increasing the efficiency of the system for protection of the European human rights by the enforcement as from June 1st 2010 of the Protocol 14 to the Convention for the Protection of the Human Rights and Fundamental Freedoms regarding the amendment of the control system of the Convention; in its preamble it is mentioned that "it is necessary and urgent to amend some of the provisions of the Convention with the purpose of maintaining and strengthening on the long-run the control system especially due to the constant increase of the tasks of the European Court of Human Rights and of the Committee of Ministers of the Council of Europe; it is necessary to

[3] C. Birsan, "*Protectia dreptului la viata in Conventia europeana a drepturilor omului*" [Protection of the right to life in the European Convention on Human Rights], Curierul Judiciar, nr. 9/2002, p.2.

watch over the fact that it would continue its preeminent role in protecting the human rights in Europe"[4].

Secondly, the jurisprudence of the former Commission and especially of the European Court drew up the principles that give a complete content to the obligation to protect the right to life established by article 2 of the European Convention on Human Rights[5].

The regional systems for protection of human rights exist in other continents as well: the African Court of Human and Peoples' Rights[6] whose primary decision was pronounced on December 15th 2009[7] or the

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[4] For the complete text of the Protocol 14, see C.Birsa, M. Eftimie, "*Conventia europeana a drepturilor omului in vigoare de la 1 iunie 2010"* [European Convention on Human Rights in force as from June 1st, 2010], editura Hamangiu, Bucuresti, 2010.

[5] C. Birsan,"*Conventia europeana a drepturilor omului. Comentariu pe article. Vol I. Drepturi si libertati*" [European Convention on human rights. Comments on articles. Volume I. Rights and freedoms], Editura All Beck, Bucuresti, 2005, p. 157-158.

[6] The idea of an African court of human rights occurred ever since 1961 when, during the Conference of the African legal councilors in Lagos, Nigeria it was agreed that it was necessary the adoption of a charte if human rights and the establishment of a Court. Together with the adoption of the African Charte on Human and Peoples' Rights in 1981, the proposal of establishing a Court was replaced with that of establishing a Commission whose jurisdiction would consist of promoting and guaranteeing the protection of human rights (the Commission started its activity in 1987). However the Commission did not stand out through a high level of efficiency and for that reason in 1994 they began the process of establishing a Court. Starting with 2004, the date of entering into force of the Protocol of Establishing the African Court on Human and Peoples' Rights, it may be discussed about a new organism for protection of human rights in Africa. The African Court has the jurisdiction to trial the claims filed by the African Commission, the states parties concerned in the matter and by the intergovernmental African organizations. In exchange, the African Court cannot receive claims directly from private bodies and the non-profit organizations which have the statute observant to the African Commission, unless the state party concerned previously declared that it admits this right. Practically the private bodies and the non-profit organizations with the statute of observant to the African Commission may notify directly the African Court if the state concerned, party of the Protocol, made a statement based on article 34.6 of the Protocol thus authorizing such a procedure as a result of accepting the jurisdiction of the Court to trial such claims (A. M. Rosu, "*Curtea Africana a Drepturilor Omului – intre teorie si realitate" [The African Court of human rights –between theory and reality], Revista A.E.P.A.D.O. – Asociatia europeana pentru apararea drepturilor omului, nr. 11/ ianuarie 2009, [A.E.P.A.D.O. Magazine – European association for protection of human rights, no 11/ January 2009],* http://www.aepado.ro/revista/nr_11/index.php?page=06). The regulations regarding the jurisdiction and the functionality of the African Court can be found at http://www.corteidh.or.cr/.

[7] S. Belhassen, president of I.F.H.R. – International Federation of Human Rights is enthusiastic towards this event: "The African Court of Human and Peoples' Rights is eventually operational. It gave its first ruling on December 15th, 2009. It is a memorable occasion for all supporters of the fight against impunity in Africa and for the victims of violation of the human rights. The actual establishment of the Court was slow taking over 5 years. Indeed the Protocol came into force in January 2004 and the Court became fully

Inter-American Court of Human Rights with its headquarters in San Jose, Costa Rica, a judicial independent institution of the Organization of the American States, established in 1979, whose aim is the application and interpretation of the American Convention on Human Rights and other treaties in the field of human rights, formed of legal counselors of the highest moral standards and competence recognized worldwide in the field of human rights[8].

Besides these there are the internal systems for protection of the right to life; in the legislation of numerous states from all continents the right to life is stipulated, protected and guaranteed by fundamental law as well as by other normative acts.

Section 7 of Chapter 2 of the Constitution of Finland stipulated that: "every person has the right to life, personal freedom, integrity and security. No one can be sentenced to death, tortured or treated in a manner that violates the human dignity"; also the old Constitution of Finland, in force until the year 2000, guaranteed by article 6 paragraph 1 the assurance of life[9].

Article 24 of the Constitution of Portugal states that "the human life is inviolable", also forbidding the death penalty. Article 15 of the Constitution of the other iberian state, Spain, stipulates that everyone has the right to life and physical and moral integrity and in no case may be subjected to torture or inhuman or degrading treatment; also the death penalty is abolished except in situations of war.

Also in Germany the right to life enjoys constitutional protection, article 2 stating that every person has the right to life and physical integrity, these rights not being restrained unless otherwise provided by the law[10].

Switzerland also proclaims at constitutional level the right to life of every human being, equally forbidding the capital punishment (article 10 paragraph 10 of the Federal Constitution).

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operational only starting with 2009". ("*Guide practique – La Cour africaine des droits de l'homme et des peoples vers la Cour africaine de justice et des droits de l'homme – Preface") [Practical guide – The African Court on human and peoples' rights to the African Court of justice and the human rights – Preface*], (*http:/www.fidh.org/IMG/odg/GuideCourAfricaine.pdf)*.

[8] The detailed description of the jurisdiction and the Court's functionality is found on *http:/www.corteidh.or.cr/*.

[9] C. Calinoiu, V.Duculescu, G.Duculescu, "*Drept constitutional comparat. Tratat. EditiA A IV-A. Vol.I"* [Compared constitutional law. Treaty. 4th Edition. Volume I.], Editura Lumina Lex, Bucuresti, 2007, p.295.

[10] Ibidem, p.396 .

Also the central and east European countries constitutionally turn to best account this right: Poland, Hungary, Ukraine or Moldavia[11].

It is important to mention that as regards the moment the protection of human rights starts, the constitutional provisions of Czech Republic (article 6) and Slovakia (article 15 paragraph 1) stipulate that the human life is protected from the moment of conception while the Constitution of Ireland establishes the rule of protection of the right to life from the moment of conception, abortion being permitted only in case of severe endanger of the mother's health[12].

In Africa, countries like South Africa, Tanzania or Nigeria include in their fundamental law provisions regarding the right to life[13] while on the Asian continent, article 13 of the Constitution of Japan stipulates that every citizen is respected as a person and his right to life must be considered at the highest level in the legislation and other government acts, provided that it does not contravene with the public welfare[14].

As regards the Constitution of Romania, according to article 22, the right to life, as well as the right to physical and mental integrity of the individual is guaranteed and no one may be subjected to torture or any type of punishment and inhuman or degrading treatment. Also the death penalty is forbidden. We mention that article 18 of the 1866 Constitution forbade the death penalty except in situations of war, provision also resumed in article 16 of the 1923 Fundamental Law.

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[11] C. Calinoiu, V.Duculescu, G.Duculescu, "*Drept constitutional comparat. Tratat. EditiA a IV-A. Vol.I*"[Compared constitutional law. Treaty. 4th Edition. Volume I.], Editura Lumina Lex, Bucuresti, 2007, p.256, 274, 150, 175.

[12] N.M.Vladoiu, op. cit., p.87, 132.

[13] C. Calinoiu, V.Duculescu, G.Duculescu, "*Drept constitutional comparat. Tratat. EditiA A IV-A. Vol.I*"[Compared constitutional law. Treaty. 4th Edition. Volume I.], cit.supra., p.291, 328, 325.

[14] C. Calinoiu, V.Duculescu, G.Duculescu, "*Drept constitutional comparat. Tratat. EditiA A IV-A. Vol.I*" [Compared constitutional law. Treaty. 4th Edition. Volume I.], cit.supra., p.467.

MEDIATION AND OTHER SIMILAR PROCESSES

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Abstract

In the absence of legal definitions of the concept of mediation, the quite difficult task to propose definitions went to the legal doctrine. According to one of these definitions, mediation is a way of settling disputes, through which a person, chosen by the opposing parties, proposed them a draft resolution, without trying to approach them and without being invested with the power to impose a judicial decision.

It was considered that this definition is useful because most of the laws governing mediation as a way of settling disputes prefer to use the operational description and to avoid the legal concept.

To better specify the nature of mediation it is useful to indicate what it is not, in relation to similar concepts that are sometimes confused.

Thus, in this study we will show that, although mediation has many common elements with other methods of settling disputes (such as negotiation, arbitration, conciliation), it cannot be concluded that these concepts are identical. In this respect, we will identify the differences that make these concepts clearly distinguishable.

The most difficult seems to be to draw a distinction between mediation and conciliation, a real concern for the legal literature.

1. Definition

The term "mediation" is derived from the Latin *mediare* which is explained in several ways, all having in common the involvement of a third person[1]. According to the Romanian Explanatory Dictionary, to mediate means "to interpose an agreement between two or more adverse parties, to make formal approaches to prevent or end hostilities between two or more states".

Explaining the term confirms its membership in public international law[2], where mediation is defined in the legal sense, as the

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[1] See http://www.dex.online ro.ro / search / media.htm 12k.

[2] In international law, though peaceful means of resolving disputes have been used since antiquity, Briand Pact - Kellogg in 1928 established for the first time in international relations duties of the parties to resolve any disputes between them by peaceful means only. Much later, the Hague Conferences of 1899 and 1907 performed by

action of a third party (a state, international organization or personality) which participates directly in the negotiations and proposes solutions to the parties, following their positions near reach agreement.

The Code of ethics and professional conduct for mediators[3] defines mediation as a voluntary means of resolving conflicts between two or more persons, amicably, with the assistance of a neutral third party, qualified and independent, through an activity in accordance with the laws of field and rules of the Code of Conduct.

The European Code of Conduct for Mediators also proposes a definition of mediation: any structured process, regardless of how it is named or referred thereto, in which two or more parties to a dispute try themselves on their own initiative, to reach an agreement on the settlement of their dispute with the assistance of a third person called a "mediator".

Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters[4] provided in art. 3 (a) that "mediation is a structured process, however it is named or referred to it as, in which two or more parties to a dispute attempt, on their own initiative, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process can be initiated by the parties, recommended or imposed by the court or required by law of a Member State".

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encoding peaceful means, without the obligation to establish peaceful resolution of disputes. Thus, the Hague Convention of 18 October 1907 rules that it is clear that no weapons will be used to attempt mediation before the conflict. UN Charter (1945) enshrined the principle of resolving international disputes by peaceful means in art. 2 (3) which provides that "All Members shall settle their international disputes by peaceful means so that international peace and security, and justice are not endangered." Another chapter of the Charter (Chapter VI) deals with peaceful settlement of disputes, establishing the art. 33 both the obligation and the means of peaceful settlement of disputes. In this respect, it requires the parties to any dispute, the continuance of which may threaten international peace and security to seek, above all, to settle it by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement recourse to regional agencies or arrangements or other peaceful means of their choice. In fact, mediation was used in the practice of the UN, for example in 1948 when he was appointed a mediator in the Palestinian problem and in 1958 the Cyprus problem.

[3] This was adopted by Council of mediation on 02/17/2007.

[4] This directive was published in the Official Journal of the European Union L 136 / 3. This directive applies to cross-border disputes in civil and commercial matters except those rights and obligations of the parties may have under the relevant applicable legislation. It does not apply, in particular for taxation, customs or administrative or State liability for acts or omissions in the exercise of public authority.

According to art. 1 of Law 192/2006 on mediation and the profession of mediator[5], mediation is a way of resolving conflicts amicably through a third party as mediator specializing in conditions of neutrality, impartiality, confidentiality and having the free consent of parties.

2. Delineation of similar procedures

To better specify the nature of mediation it is useful to indicate what it is not in relation to similar concepts that is sometimes confused.

a. Negotiation

If the parties do not need the interposition of a third party to enter into negotiations, their dialogue is conducted in a negotiation and not mediation, even if this dialogue is worn through counselors/ lawyers. Negotiation by the parties directly involves the parties to resolve the dispute without the intervention of a third party.

Thus, we can see that what distinguishes mediation from negotiation is the autonomy of the parties in their attempt to reach an agreement without the intervention of a third party. The absence of a third party in this way of fighting conflicting reports concluded that the negotiation is not a real alternative dispute resolution, ADR being characterized by the intervention of a third party[6].

The similarity between the two methods concerns the voluntary nature of dispute resolution procedures, mediation and negotiation involving the willingness of both parties to find a mutually acceptable solution to the problem of what is at issue.

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[5] This law was published in the Official Gazette of Romania, Part I no. 441/2006. Law no. 192/2006 have been changes and additions made by the Law no. 370 of 26 November 2009 amending and supplementing Law no. 192/2006 on mediation and the profession of mediator (Official Gazette of Romania, Part I, no. 831 / 3 December 2009), as amended and the article stated, GO no. 13/2010 for amending and completing certain normative acts in justice to transpose Directive 2006/123/EC of the European Parliament and the Council of 12 December 2006 on services in the domestic market (Official Gazette of Romania, Part I, no. 70 / 30 January 2010), Law no. 202/2010 regarding some measures to accelerate the settlement process (Official Gazette of Romania, Part I, no. 714/26 October 2010). In the original settlement, mediation was defined as "a voluntary method of settling disputes amicably through a third party as mediator specializing in conditions of neutrality, impartiality and confidentiality."

[6] Dennis Campbell, *Dispute Resolution Methods. The Comparative Law Yearbook of International Business Special Issue*, published under the auspices of the Center for International Legal Studies, London, 1994, p. 91.

It is also possible to settle the case by both methods, regardless of whether a court or an arbitral tribunal has already been submitted with this resolution.

b. Arbitration

Mediation and arbitration are concepts that have common elements, but in any case they not allow the conclusion that these concepts could be considered identical.

As the similarities of the two forms of dispute resolution states, first, whether voluntary (contract). In fact, no arbitration or mediation can be conceived in the absence of an agreement between the parties. This agreement relates to the option for one of these ways, whether this agreement was expressed with the commercial contract or thereafter.

Also, both methods of settling dispute involve the intervention of a neutral and impartial third party, because in its absence we cannot speak about any mediation or arbitration.

However, in terms of when they may occur (before or after the court was notified), we see that in the Romanian law there is no difference between the two means of settling disputes. This is because nothing prevents the mutual agreement[7] of the parties to request the court to suspend proceedings until the resolution of the dispute through mediation or arbitration. It follows that the parties may opt for one of two ways, both before referral to court, or after that.

Both arbitration and mediation is conducted according to predetermined rules.

There are enough distinguishing features that make the two concepts clearly distinguishable. In arbitration, the third party's interposed mission received from the parties is to resolve their dispute. Therefore, the third party's solution is required, whereas, in the case of mediation, the third party merely, at most, proposes a solution.

Because the mediator has no judicial power, they just try to get the parties together, allow the expression of each point of view and determine hearing from the other party, facilitating the search for an agreement by both litigant parties.

A successful mediation thus results in a mutually beneficial agreement to end the dispute in part or in full, the terms of which the parties discussed and accepted.

Nevertheless, this is not the only difference between mediation and arbitration. Although both methods involve procedural rules

[7] According to art. 242 par. (1) item 1 of Civil Procedure Code., "The court will suspend proceedings when both parties so require."

(established by law, the parties or by the institutions organizing such procedures), the mediation procedure excels in flexibility and conventionality[8].

Furthermore, although the decision of the arbitrator may be dissolved by the action for annulment, if communicated to the parties, it is effective as a final decision. On the contrary, the agreement resulting from mediation is not *res judicata*[9]. In addition, mediation a larger area than arbitration as the parties may have turned to mediation regarding non-property litigation.

c. Expertise

Mediation is also different from expertise. Although both concepts involve the intervention of a third party, the expert is not a mediator, but a person trained to draw the necessary views for the clarification of factual circumstances[10]. The findings of the expert may lead to a solution that will be accepted by the parties or that can show to a party that its position, technically fragile, will weaken the argument before a judge or arbitrator. Thus, the opinion of the expert may lead to an amicable settlement, whereas the expert's work can be considered a driver for it. But even if such a result is often desirable, it is only the fruit of a "happy concurrence of circumstances"[11], because the nature of the expert's mission is not aimed at reaching an agreement between the parties.

d. Transaction

Mediation and settlement transaction are also terms that might be mistaken. Both are alternative forms of voluntary, non-judicial or judicial resolution of a dispute, and the transaction does not exclude the participation of a conciliator or mediator.

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[8] Another distinction made between the two institutions was made on the criterion regarding the effects that that mediation clauses and arbitration clauses produce. The first does not imply lack of jurisdiction of the court in connection with the dispute that is subject to the Convention, while arbitration clauses have such an "effect". See I. Deleanu, *Medierea în procesul civil*, în *Dreptul* nr. 10/2006, p. 73.

[9] But parties can ask the court to render a decision according to Art. 271 Civil Procedure Code.

[10] The subject of an expertise is represented by the factual circumstances that require expertise, because of circumstances related to, and not legal matters. However, for the determination of foreign law, according to Romanian law, the court may take into account the opinion of an expert. See M. Tăbârcă, Ghe. Buta, *Codul de procedură civilă comentat şi adnotat*, Editura Universul Juridic, 2007, p. 582.

[11] H., J., Nougein, Y., Reinhard, P., Ancel, M., C., Rivier, A., Boyer, Ph., Genin, *Guide pratique de l'arbitage et de la mediation commerciale,* Litec, Paris, 2004, p. 142.

We point out, however, some differences: mediation necessarily involves a third party as mediator, while the participation of third parties in the transaction is not required but may be the result of direct agreement between the parties; the mediation involves a contract for mediation or the existence of a mediation clause, whereas the transaction does not involve a commitment in advance although we can say that the parties at least tacitly master a trading hypothesis[12]; according to some authors, the transaction always involves mutual concessions, while the solution reached at in mediation can develop into an acknowledgment of the claims of the opposing party, a waiver of law, a discontinuance.

e. Early Trial Evaluation

What Americans call "Early Evaluation Trial" (prior assessment of the process) cannot be described as mediation. The parties in dispute merely require a third opinion about the solution that should be given to their dispute, opinion that they are free to follow or not.

In fact, this method of resolving a dispute between the parties does not create any dialogue, each trying hard to convince a third party that its position is closer to the eventual outcome that would have a process as required to view and be favorable.

f. Conciliation

The most difficult to draw seems to be the boundary between mediation and conciliation, which is a real concern for literature.

We emphasize that until the UNCITRAL law on international commercial conciliation, no regulatory text proposed a precise definition for conciliation. It appears that neither the Romanian Code of Civil Procedure or any laws of other states give a definition to that proceeding *stricto sensu*[13]. However, we can identify various definitions offered by academics or dictionaries.

According to the Explanatory Dictionary of the Romanian language, "to reconcile = to eliminate differences, contradictions between two or more opinions, ideas, doctrines", and retaining the legal sense of the word = "to try settling or avoid a dispute through reconciliation" (French = "*concilier*", Latin = "*conciliare*").

[12] I. Deleanu, *op.cit.*, p. 72.

[13] To note however, that if we consider that the transaction is a particular form of appeasement, its Civil Code gives a definition art.1704, see also art. 2044 of French Civil Code.

From the legal definitions of reference dictionaries[14] we note that the conciliation procedure is "an agreement by which two people put an end to its proceedings (whether by settlement or by abandonment of any claim unilaterally or reciprocally), the solution of the dispute does not arising from a decision justice (not that of a referee), but from the agreement of the parties".

Given these general definitions, it can be seen that the concept of reconciliation has specific features, has not a legal origin, and its legal connotation stems from the fact that the current judicial practice has assigned it[15].

The French doctrinal discourse illustrates the two definitions of both concepts, trying to highlight their differences: "Conciliation is an informal procedure in which a third is trying to lead the parties toward an agreement, settling tensions, providing technical assistance, seeking a path to resolution is through informal negotiation or through a subsequent mediation.[16]"; "Mediation is a structured procedure in which the mediator assists the parties to achieve a negotiated settlement. Mediation is usually a voluntary process initiated following the signature of an agreement that defines the future conduct of the parties. Mediator uses a variety of tools and techniques to help parties reach an agreement, but he has no power to decide. [17]."

It is stressed that the degree of intervention of the third party or the manner in which it occurs become of crucial theoretical importance in the effort to distinguish between conciliation and mediation[18] in that the third party acts as mediator turns conciliator as soon as, beyond the role of seeking a rapprochement between the parties, they propose a solution[19].

Also, the Romanian doctrine of the Civil Procedural Law has indicated as essential to distinguish between the two concepts, the possibility that the mediator has to propose a formula for agreement: "The conciliator seeks to engage the parties to an agreement, organizing

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[14] G. Cornu, *Vocabulaire juridique*, Association Henri Capitant, PUF, Paris, 2005, see „concilier".

[15] See also A. Roşu, *Concilierea – mijloc alternativ de soluționare a litigiilor comerciale internaționale*, RDC nr. 12/2005, p. 85-90.

[16] L. Richer, *Les modes alternatifs de règlement des litiges et le droit administratif*, *L'actualité juridique- Droit administratif*, in F. Baias, V. Belegante, *Medierea, un alt fel de justiție*, RDC nr.7-8/2000, p. 74-75.

[17] *Idem,* p. 75.

[18] In this regard, see R. W. Jagtenberg, General Report of the Workshop on Alternative multilateral dispute settlement, organized by the Council of Europe, Strasbourg, 29 November 1 December 1999, p. 3 unpublished.

[19] A.Baudoin-Mazand, *La conciliation et la médiation: deux modes amiables de règlement des différends commerciaux,* Petites Affiches, 6 août 1993, p.31.

and directing the negotiations; the mediator is even something more, providing a reconciliation project that is subject to agreement of the parties."[20]

Without ruling out the doctrinal controversies, the UNCITRAL Model Law on international commercial conciliation formulates a definition in Article 1 point 3. According to this definition, "conciliation means a process, whether referred to by the expression conciliation, mediation or an expression of similar import, whereby parties request a third person or persons ("the conciliator") to assist them in their attempt to reach an amicable settlement of their dispute arising out of or relating to a contractual or other legal relationship. The conciliator does not have the authority to impose upon the parties a solution to the dispute".

We note, in the sense of the UNCITRAL Model Law, the broad interpretation of the notion of conciliation. The intention of the Commission that drafted this law was to embrace in the notion of international commercial conciliation all alternative dispute resolution in which parties ask a neutral third party to assist them in resolving their dispute. These methods may vary depending on the techniques used or the third party involvement (which is limited to facilitating dialogue, or propose solutions to the dispute). According to art. 6 section 4 of the UNCITRAL Model Law, the conciliator may forward proposals to resolve the dispute.

Directive 2008/52/EC stipulates in art. 3 that the mediation is a structured process, however it is named or referred to it as, in which two or more parties to a dispute attempt on their own initiative, to reach an agreement on the settlement of their dispute with the assistance of a mediator. Writing the article can lead to the conclusion that, for the purposes of European Union law, the mediator can propose a solution. This is because it shows that the parties attempt on his own initiative to reach an agreement, with the assistance (support) of a mediator.

So, we can characterize mediation based on two essential elements: the interposition of a third party unless the decision-making power and free negotiation between the parties to resolve their dispute. But these traits are also reflected in the concept of the conciliation. On the other hand, we see that international regulations also include conciliation in the definition of the concept of mediation.

In conclusion, in an effort to clarify the two concepts, we consider that mediation is a peaceful means of dispute resolution where a neutral third party, who has no decision-making power, assists parties in finding

[20] I. Deleanu, *Tratat de procedură civilă*, Volumul II, Editura All Beck, Bucureşti, 2005, p.332.

a solution to the problem at issue. The mediator cannot propose an agreement formula to the parties, whereas the conciliator can.

BIBLIOGRAPHY:

A. Baudoin-Mazand, La conciliation et la médiation: deux modes amiables de règlement des différends commerciaux, Petites Affiches, 6 août 1993;

F. Baias, V. Belegante, Medierea, un alt fel de justiție, RDC nr.7-8/2000;

Dennis Campbell, Dispute Resolution Methods. The Comparative Law Yearbook of International Business Special Issue, published under the auspices of the Center for International Legal Studies, London, 1994;

G. Cornu, Vocabulaire juridique, Association Henri Capitant, PUF, Paris, 2005;

I. Deleanu, Medierea în procesul civil, în Dreptul nr. 10/2006;

I. Deleanu, Tratat de procedură civilă, Volumul II, Editura All Beck, Bucureşti, 2005;

H., J., Nougein, Y., Reinhard, P., Ancel, M., C., Rivier, A., Boyer, Ph., Genin, Guide pratique de l'arbitage et de la mediation commerciale, Litec, Paris, 2004;

A. Roşu, Concilierea – mijloc alternativ de soluționare a litigiilor comerciale internaționale, RDC nr. 12/2005;

M. Tăbârcă, Ghe. Buta, Codul de procedură civilă comentat şi adnotat, Editura Universul Juridic, 2007.

THE EU COMMON CONCEPT FOR INTEGRATED EXTERNAL BORDER MANAGEMENT

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Abstract

In recent years, the concept of Integrated Border Management (IBM) has been developed to tackle this neuralgic point in border mechanisms in the perspective of reconciling facilitation and security needs, both vital for the functioning of modern societies. In accordance with its specific needs, the EU established its own IBM concept which pays particular tribute to the incomplete state of the Union and the multitude of competent authorities involved at national and EU level. While the US based on its established status of a sovereign nation state and a set of fixed and clear borders has been able to adapt its concepts rather rapidly to changing global challenges including those of post-9/11, the EU still finds itself hampered by institutional inconsistencies when trying to react to such situations. Enlargement of the Schengen area had been a deliberate choice of the European Union to focus more on the free movement of persons than on security aspects.

Keywords: *Integrated Border Management, Schengen Area, SIS, Eurosur, Frontex, US borders.*

1. The development of a new EU concept for border management

According to Andrew Geddes, land borders are usually understood as those key points where the state exercises its sovereign authority to exclude third country nationals[1]. However, land borders must not be regarded as a barrier for free movement of persons and goods, but assimilated to the notion that defines national security and all the convergent fields.

Starting from the integration of the Schengen Acquis, following the conclusions of the European Council in Tampere (15-16 October 1999), EU has stepped forward towards an integrated management at the border. On 7 December 2001 the Council issued the European Concept of Border

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[1] Geddes, A., *Europe's Border Relationship and International Migration Relations,* Journal of Common Market Studies, 43(4), 2005, p. 787-806.

Control Management[2] which is a starting point for future cooperation between Member Sates.

At the Laeken meeting (14-15 December 2001) the European Council stated that a better management for external border control will help the fight against terrorism, illegal migration networks and trafficking in human beings. Pursuant to this conclusion, on 7 May 2002, the European Commission sent to the Council and Parliament a document regarding the integrated management at external borders of the member states, which comprises an analysis of the operational and normative situation and proposes a set of measures to be implemented within EU[3]. After adopting this Plan, there have been taken measures at operational and legislative level to gradually develop a common integrated management system by creating the Schengen Catalogue regarding border control, by adopting the Schengen Border Code, by writing a Manual of practice for border guards, by setting up a Fund for External Borders and Frontex Agency as a specialized structure for risk analysis.

At the 4-5 December 2006 meeting, the Council for Justice and Home Affairs gave a definition for the border integrated management. A set of recommendations and best practices has been developed and included in the Ist Part of the Schengen Catalogue.

A successful initiative of the Member Sates regarding police cooperation is represented by the signing of the Treaty between Belgium and the Federal Republic of Germany, Spain, France, Luxemburg, the Netherlands, and Austria, on enhancing cooperation regarding cross border crime and illegal migration, signed at Prüm on 27 May 2005[4].

In June 2007 the Commission has presented to the Member Sates a plan for setting up a European system for border surveillance – Eurosur. This concept will be implemented in three phases, between 2008 and 2013. On 13 February 2008, the Commission released three documents under the name of Border Package: 1. Evaluation Report and setting up the Frontex agency; 2. European System for border surveillance – Eurosur; 3. Future challenges regarding external border management.

The first edition of the Schengen Catalogue – External border control, Extradition and Readmission: Best Practices and Recommendations was published on February 2002 but it was modified in 2009, according to the European documents on border security.

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[2] European Concept for Border Control Management, **Doc. 14570/01 FRONT 69** from December the 7th, 2001.

[3] **COM (2002) 233 final** of the Commission for the Council and the European Parliament regarding external border integrated management.

[4] Romania signed the Prum Treaty by enforcing the Law no. 146/2008, and the international document has been enforced starting with March the 3rd 2009.

2. The inequities of abolishing internal borders within EU

The wisdom of the minor powers is to go towards the power that best fits their interests, regardless of morale. In this context, the Convention for Implementing the Schengen Agreement makes the difference between external borders of the Schengen area and its internal borders. Internal borders[5] are common to the contracting parties as well as airports for internal flights, maritime harbors for passengers that have as a departing point or exclusive destination other harbors placed on the contracting parties territories, without any stops outside this area.

External borders are land or maritime borders as well as airports and ports of the contracting parties, unless they are internal borders. The Schengen space is a free movement area. A country that adheres to this area has to eliminate controls at the external borders and to enforce the Schengen Acquis. There is only one external border where controls are carried out according to a set of rules for visas, migration, asylum as well as police and judicial cooperation.

Schengen internal borders can be crossed anytime and anywhere, without control. This also applies to third country citizens. However, any partner state has the right to re-introduce control, for a limited period of time if this is necessary for protecting public order and national security and only after the partner states have been consulted on[6]. This privilege offered for the citizens of the Schengen states is also a big disadvantage from a strategic point of view because we are loosing an important instrument in pursuing and analyzing the illegal migration routes and cross border crime in Europe[7].

This statement contrasts with the optimism of the EU officials who said that there are not any reasons of concern. Losing control within the internal borders should be balanced by other security instruments. When comparing the effectiveness of the border controls carried out with the full responsibility of the representative authorities at the external borders, one cannot be sure that the breach at the security level has been solved.

3. Integrated border management (EU-IBM)

External borders management is a security function for which the member and associated states have a common interest. EU Acquis

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[5] Art. 1, Title I, The Convention from 19 June 1990 for implementing the Schengen Agreement from 14 June 1985 regarding the gradual abolishing of border checks, Schengen, 19 June 1990.

[6] Art. 2, Title I from the Convention from 19 June 1990 for implementing the Schengen Agreement from 14 June 1985 regarding the gradual abolishing of border checks, Schengen, 19 June 1990.

[7] **Ilka Laitinen**, Frontex, an interview for Reuters.

regarding border control represents a standard for the third countries which are assisted in their process to develop the integrated border management concept. This concept is based on the principles of solidarity, mutual trust and responsibility, stated between Member Sates and complies with the human rights.

In the last two years the concept of integrated border management (IBM) has been developed in order to strengthen the border mechanism by aiding instruments and security solutions, two important aspects in a modern society. According to its specific needs, EU has established its own IBM concept, which concentrates especially on the incomplete statute of the Union and the number of competent authorities at national and Union level[8]. EU-IBM approach ahs been successfully exported beyond its limits, in the Western Balkan countries[9] and Central Asia[10].

International organizations like UN and ICMPD have assisted in the process of implementing this advanced model in the field of trade and traffic control, while NATO and OSCE have appreciated the reforms as an important contribution to demilitarizing the activities at the border, carried out by the armed forces in the ex-Soviet Union[11].

From the same point of view, EU-IBM standards have been introduced in the CESS training courses under the title "Democratic governing in the security field", organized by the Black Sea countries and Southern Caucasus in 2006-2007[12]. Apart from the member states encouragement to use the manuals above mentioned[13]

EU does not have any authority to ensure the implementation of this concept at the local level. On the contrary, there are statements that these manuals and guides do not create any obligation for the member states[14] and reaffirm the national supremacy. This aspect is confirmed by the fact that the document for EU-IBM has been presented as part of the conclusions of the JHA Reunion and is not legally binding. Despite all the positive aspects, the main sensitive points continue to exist, for instance the existence of a unique central authority.

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[8] **Hobbing, P.,** *Management of External EU Borders: Enlargement and the European Guard Issue,* DCAF Conferenceon Managing International and Inter-Agency Cooperation at the Border, held in Geneva 13-15 March 2003.

[9] Guide for Border Integrated Management in the West Balkan Countries, January 2007.

[10] Mannual for implementing the EU-IBM Concept in Central Asia, December 2006.

[11] ICMPD – International Centre for Migration Policy Development.

[12] See NATO and OSCE Ministerial Conference, The concept of border security management, Ljubljana 2005, http://www.osce.org/documents/mcs/2005/12/17436_en.pdf, 22.05.2010, ora 16.00.

[13] Guide for Border Guards (Schengen Manual), see EU Commission, 2006.

[14] Communication of the European Commission, 12.09.2006, p. 6.

4. Specific aspects regarding the EU external borders

4.1. Security of the EU land borders

Land borders are an important part of the Frontex activity, and we refer here to the borders of the EU member states which are not the same with the Schengen states. These do not include the border between Russia and Norway. Also, we have not included the external borders of Romania and Bulgaria, EU Member Sates but not Schengen states. Until May 2004, Finland, Germany, Austria and Italy secured the main eastern border of the EU, measuring 4,095 Km (2,545 miles).

Land borders until 1 May 2004		
Finland	Russia	1,340
Germany	Poland	454
Germany	Czechoslovakia	810
Austria	Czechoslovakia	466
Austria	Slovakia	107
Austria	Hungary	356
Austria	Slovenia	330
Italy	Slovenia	232
Total		**4,095 km**

After ten new member states adhered, on 1 May 2004, the external border has been secured by Estonia, Lithuania, Latvia, Poland, Slovakia, Hungary and Slovenia. When Frontex began its activity, the external land border measured 6,220km (3,866 miles).

Land borders after 1 May 2004		
Finland	Russia	1,340
Estonia	Russia	455
Latvia	Russia	276
Latvia	Belarus	161
Lithuania	Belarus	651
Lithuania	Russia (Kaliningrad)	272
Poland	Russia (Kaliningrad)	232
Poland	Belarus	418

Poland	Ukraine	535
Slovakia	Ukraine	98
Hungary	Ukraine	136
Hungary	Romania	448
Hungary	Serbia	174
Hungary	Croatia	344
Slovenia	Croatia	680
Total		**6,220 km**

None of the two tables above include Greece. Although a member state, it was not geographically part of the main group of states and its borders with Albania, Macedonia, Bulgaria and Turkey were external, thus coming under the Frontex responsibility. However, after Romania and Bulgaria adhered, the situation has completely changed. Greece came under the main continental group and its eastern external land border lays now from the Arctic to the Black Sea and the Aegean Sea, measuring 6,378 km (3,964 miles). After that, the western Balkan states became an enclave whose land borders become a sensible part of the EU external borders, and a new border of 1,580 km (982 miles) is added to the total of 7,958 km (4,946 miles).

External land borders after 1 January 2007		
Finland	Russia	1,340
Estonia	Russia	455
Latvia	Russia	276
Latvia	Belarus	161
Latvia	Belarus	651
Lithuania	Russia (Kaliningrad)	272
Poland	Russia (Kaliningrad)	232
Poland	Belarus	418
Poland	Ukraine	535
Slovakia	Ukraine	98
Hungary	Ukraine	136
Romania	Ukraine (East and West of Moldova)	649
Romania	Moldova	681

Bulgaria	Turkey	259
Greece	Turkey	215
Greece	Albania	282
Greece	Macedonia	246
Bulgaria	Macedonia	165
Bulgaria	Serbia	341
Romania	Serbia	546
Total		**7,958 km**

At the moment, the EU has nine neighbors exposed to the migration phenomenon and a transit route made of CIS[15] and Asia[16]. This is also common to the southern part of the maritime borders, much more exposed to the migration flows coming from Africa. If Turkey, which has been struggling for many years, will become a EU member state, the external border will include fourteen neighbors and conflictual international areas like Iraq, Iran and the Caucasian region[17].

The land border sector between Greece and Albania has recorded the highest rate of illegal crossings (38600) but comparing to 2008, it has decreased by 10%. Most of the illegal migrants are Albanian citizens who are sent back in accordance with a long term and effective readmission agreement. However, despite this good cooperation these persons try again, sooner or later, to cross the border.

The land border between Greece and Turkey has reported 14500 illegal border crossings. Comparing to 2008, the percentage has decreased by 14%, due to the joint operation Poseidon in 2008. At the eastern borders there have been reported 6200 illegal crossings. Out of the total number, Poland reported 3298, Slovakia 978, Hungary 877, Romania 756, and the whole amount represents 95% of the total of illegal border crossings reported at the eastern land borders. Joint operations Adriane, Five borders, Gordius and Lynx 2008 have concentrated on the eastern land borders.

4.2. Maritime borders – the EU vulnerable point

[15] CIS, Commonwealth of Independent States.

[16] IOM 2008, About Migration: Facts and Figures, http://www.iom.int/jahia/Jahia/lang/en/pid, 25.06.2010.

[17] **Hobbing, P.**, *Uniforms without Uniformity: A Critical Look at European Standards in Policing, in* E. Guild and F. Geyer, Security versus Justice. Police and Judicial Cooperation in the European Union, Ashgate, 2008, p. 243-263.

The EU maritime borders have a length of about 80,000 km (50,000 miles) and more than half of that area (34,109 km or 21,199 miles) is the southern maritime border, the weak link of the European Union18. „The Schengen area is as strong, as vulnerable is its weakest link", a Frontex official commented for Reuters referring to the Greek islands.

EU Southern Maritime Border	
Portugal (including Côte d'Azur Madeira)	2,555
Spain (including the Canary Islands)	4,964
France	4,720
Slovenia	48
Italy	7,600
Greece (including over 3,000 islands)	13,676
Malta (including Gozo)	253
Cyprus	293
Total	34,109

Greece, with over 3,000 islands, has the longest maritime border of all the member states, even longer than that of the UK. Most of the islands are very close to Turkey, a fact exploited by criminal gangs. The borders of the Black Sea in Romania and Bulgaria measure 572 km (358 miles) and also have a high degree of risk for the criminal gangs in Turkey due to migratory flows.

At the maritime borders, most detections were reported in the light of the evaluation and analysis made by Italy (37,000 or 41% of the total at the maritime border), mainly the island of Lampedusa (31,300), but also the main Sicilian island (3,300), Sardinia (1,600) and the mainland (800). In the island of Lampedusa, the arrivals of illegal immigrants have almost doubled between 2008 and 2009. Following the growth of Lampedusa, the arrivals from Malta, the neighboring state, have also increased from 1,700 in 2008 to 2,800 in 2000 (55%). Joint operations coordinated by Frontex, Nautilus and EPN-Hermes, were deployed in the central Mediterranean area[19].

[18] **Georgi, F.,** *Bordering on a Nightmare? A commentary on the 2008 Vision for an EU Border Management System,* MCP Prague, 2008.

[19] **External evaluation of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the EU,** Final Report, 15 January 2009, Parallelvej 2 DK-2800 Kongens, Denmark, www.cowi.com.

In Greece, the detection at the maritime border along the Turkish coast has also doubled between 2008 and 2009, reaching up to 29,100 illegal border crossings. Detections were reported in particular in six islands located near the coast of Turkey: Lesvos, Chios, Samos, Patmos, Leros and Kos.

Spain has reported 16,200 illegal border crossings at its maritime borders. The number of arrivals in the Canary Islands fell to 9,200 (26%), and detection along the Spanish peninsula and the Balearic Islands has also decreased (-23%). Frontex conducted a joint operation in 2008, Hera, in the Atlantic Ocean, near the West African coast. Minerva and EPN-Inaldo Joint Operations in 2008 and 2008 covered Western and Mediterranean Sea[20].

In 2009, the member states have issued a total of about 140,000 refusals of entry at the EU external borders. This represents a decrease of 11% compared to 2008. The analysis shows that the decrease is due to a smaller number of refusals of entry at land borders between Poland and Ukraine and between Poland and Belarus, after decreasing the regular traffic due to new visa requirements with the entry of Poland into the Schengen area in December 2007. In total, the refusals at the eastern land borders of the EU amounted to 30,000.

Refusals of entry were split about evenly between land (around 60,000) and air borders (about 65,000), while their number at the sea borders has been significantly lower (6,700). In addition, Spain has reported 400,000 refusals for permission to enter its land border with Morocco, Ceuta and Melilla.

4.3. Air borders and the contemporary threats

The air borders of the member states are the safest because it is very difficult for illegal immigrants to reach an international airport if their actions are inappropriate, and their status will always be checked.

The border sector that recorded the highest number of refusals of entry was the air border of the UK, with 17,600 or 13% of the total rejections. However, the UK figures include refusal of entry both in terms of flights from outside the European Union and within it. The Spanish air border reported the second-largest volume of refusals, 13,600 whereas at the top are located France (81,200) and Spain (77,000), representing 40% of the number of interceptions and the largest increase between 2008 and 2009. A second group of member states belonging to Italy and Greece reported fewer than 50,000 for each member state. A third group consists

[20] Frontex Report, 2009, http://www.fromtex.europa.eu/gfx/frontex/files/general_report/2009/general_report_2009_en_pdf, 24.08.2010.

of Portugal, the United Kingdom, Belgium and Sweden, which reported a number of interceptions of illegal stay between 20,000 and 30,000. Other member states have reported interceptions under 10,000[21].

This brief view on the current situation of the state borders of the EU confirmed the (still) fragmented aspect of the protection mechanisms: the national structures still dominate the landscape and are relatively few items bearing the European Union. Neither the clarification of state borders nor the establishment of the central authority have been made.

5. Comparative study between European and US borders

While the US, as a sovereign national state with defined and clear borders[22], was able to adapt their concepts in a short period of time to the rapidly changing global challenges including the post-9/11 period, the EU is still hampered by institutional inconsistencies when they have to react in crisis situations.

Unlike uniform concepts available in the US in the field of security, organization and equipment, Europe still looks like a patchwork of states and administrative traditions. The treaties do not provide the harmonization of public administration in member states nor does the European Commission have the means to impose its laws, with some exceptions in terms of fair economic competition laws.

Moreover, border security closely related to sovereignty and justice[23] remains a difficult field to implement supranational concepts[24]. Thus, despite the vast influence of the European Union upon governing rules of the internal space, without borders, and upon the crossing of external borders, border control remains the prerogative of the member states.

This has caused serious concern in the period which has elapsed after the 9/11 events, when Europe was addressing security

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[21] Frontex Report, 2009, http://www.fromtex.europa.eu/gfx/frontex/files/general_report/2009/general_report_2009_en_pdf, 24.08.2010.

[22] **Meyers D., R. Koslowski, Ginsburg, S.,** *Room for progress. Reinventing Euro-Atlantic borders for a new strategic environment,* MPI October 2007, p. 5.

[23] See **Sieber, U.,** Die Zukunft des Europaischen Strafrechts. Ein neuer Ansatz zu den Zielen und Modellen des europäischen Strafrechtssystems. To be published at ZStW 121 (2009), p. 1 - 63. English translation under title The Future of European Criminal Law. A New Approach to the Aims and Models of the European Criminal Law System planned in **Grasso, G**. and **R. Sicurella** (eds), Per un rilancia del progetto europeo: esigenze di tutela degle interessi comunitari e strategie di integrazione penale, Catania, 2009, p. 685-757.

[24] **Carrera, S.**, The EU Border Management Strategy. FRONTEX and the Challenges of Irregular Immigration in the Canary Islands. Working document No. 261. CEPS, Brussels, March 2009.

arrangements. At the Laeken summit in December 2001 it was criticized the increasing imbalance in the financial costs of the external border. By that time the costs were covered almost equally by all the member states and especially by Germany and France. The gradual development of the Schengen Zone has involved a change to the new partners, in particular the Baltic states, Poland, Slovakia, Hungary, and later Romania and Bulgaria[25].

Although at this stage the time had not yet come to consider radical solutions such as the European Corps of Border Police[26] to assume full responsibility of border control and taking a part of the national responsibility in the benefit of the Union, a process has been launched to explore options to pay some debts and at the same time to ensure increased EU influence.

While the principle that responsibility for control and surveillance of external borders lies with the member states[27] is formally reaffirmed, institutions develop a policy which is done in small steps of gradual involvement of the European Union in a manner acceptable to the leaders of the other nations.

In particular, the establishment of the Frontex agency in 2004 is an excellent example of such methods of operation: making use of encouragement, not coercion, the member states were encouraged to use the option made available, namely the use of Frontex services. Among the services offered, the technical ones prevailed while any involvement in operational activities was carefully camouflaged, especially on the request of the member states to avoid the impression that the EU would try to undermine national autonomy.

Also, in some regions, the European Union maintained its requirements, the selective nature and the strict observance of the subsidiarity principle, the major decisions that have shaped the reality of European borders directly establish the European concept of Integrated Border Management (EU-IBM), various IT systems at a large scale, such as the Schengen Information System (SIS II), the Visa Information System (VIS), Eurodac and Frontex.

Nevertheless, differences occur in the attempts to implement transatlantic policies into action. In contrast with the current powers of the

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[25] **Hobbing, P.**, Management of External EU Borders: Enlargement and the European Guard Issue, DCAF Conference on Managing International and Inter-Agency Cooperation at the Border, held in Geneva 13- 15 March 2003, p.6.

[26] As regarded by the Commission in May 2002 as a direct answer to the questions discussed at the Laeken Summit.

[27] Council Regulation (EC) No. 2007/2004 from 26 October 2004 for setting up the European Agency for the Management of External Borders operational Cooperation of the EU Member States publshed in the EU Journal L349, 25.11.2004, p. 5.

European Union, the US have launched new initiatives such as the Center for Security Initiatives (CSI) and Databases of Travelers (PNR). Seemingly pragmatic at first sight, the impasse during negotiations could be resolved only by implication and extension of the initiative to include the Union as such[28].

For example, the European Information System (SIS) was originally designed as a set of compensatory measures[29] in the Schengen Agreement in 1985 to allow the abolition of internal border controls, but as currently conceived it clearly does not contribute to correct the gaps in the European system of entry/exit.

Another example is the European Visa Information System which is often seen as a duplicate of the US-VISIT[30] representing the prototype of all entry/exit systems, whereas in reality things are different[31]. Just as SIS II, the European Visa Information System has its origins in the set of projects implemented to compensate any shortcomings in security that might arise from the abolition of internal border controls.

The main purpose is to support the common visa policy which is an important condition for the functioning of the Schengen area. Such a transformation into an entry-exit system was proposed in the context of discussions regarding the synergy and interoperability of EU databases, but had no complete safety and practicality reasons.

This shows how far the European Union has come, and especially how far it is from the US situation, characterized as an old state frontiers with structured borders and a federal administration for borders that understands its duty as a national law enforcement agency: from coast to coast, from border to border.

REFERENCES:

Carrera, S., The EU Border Management Strategy. FRONTEX and the Challenges of Irregular Immigration in the Canary

[28] Communication of the Commission to the European Parliament and the Council COM (2010) 385 final, *General presentation on the data management in the area of freedom, security and justice,* Bruxelles, 20.07.2010.

[29] Together with the other complementary measures according to the Schengen Convention from 1990: reintroducing the border checks at the external border according to the common standards (see 1.1.1 and 1.1.4), common visa policy (see 1.1.3) and police and judicial cooperation.

[30] **Jacksta, Robert**, *Smart Borders: The Implementation of US-VISIT* and other Biometric Control Systems, Alexandria, VA, October 26-27, 2004.

[31] **Hobbing, P.**, *A comparison of the now agreed VIS package and the US-VISIT system*, Briefing Paper for the European Parliament, 4 July 2007.

Islands. Working document No. 261. CEPS, Brussels, March 2009;

Communication COM (2002) 233 final of the Council and European Parliament on integrated management of external borders of member states of the European Union. European Concept on Border Control Management, Doc. 14570/01 FRONT 69 7 December 2001;

Communication of the Commission to the European Parliament and the Council COM (2010) 385 final, Overview on the management of information in the space of freedom, security and justice, Brussels, 20.7.2010;

Convention of 19 June 1990 implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at common borders, Schengen, 19 June 1990.

Council Decision COM (2007) 654 final of 11.27.2007 to use PNR for the correct enforcement of the law;

Ilka Laitinen, Frontex, Declaration made in Warsaw for Reuters, 12/18/2009;

Council Regulation (EC) Nr. 2007/2004 of 26 October 2004 establishing the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union published in the Official Journal of the European Union L 349, 11.25.2004;

Frontex General Report for 2009;

Geddes, Europe's Border Relationships and International Migration Relations, Journal of Common Market Studies 43 (4), 2005;

Georgi, F., Bordering on a Nightmare? A Commentary on the 2008 "Vision for an EU Border Management System, MCP Prague, 2008;

Guide for the border guards (Schengen Handbook), see European Commission, 2006;

Hobbing, P., A comparison of the now agreed VIS package and the US-VISIT system, Briefing Paper for the European Parliament, 4 July 2007;

Guidelines for Integrated Border Management in the Western Balkan countries, January 2007;

Hobbing, P., Integrated Border Management at the EU Level, CEPS, Brussels 2005;

Hobbing, P., Management of External EU Borders: Enlargement and the European Guard Issue, DCAF Conference on Managing International and Inter-Agency Cooperation at the Border, Geneva 15.03.2003;

Hobbing, P., Uniforms without Uniformity: A Critical Look at European Standards in Policing, in: E. Guild and F. Geyer, Security versus Justice. Police and Judicial Cooperation in the European Union, Ashgate, 2008, pp 243-263;

IOM 2008, About Migration: Facts and Figures, http://www.iom.int/jahia/Jahia/lang/en/pid, 25/06/2010;

Jacksta, Robert, Smart Borders: The Implementation of US-VISIT and other Biometric Control Systems, Alexandria, VA, October 26-27, 2004;

Manual for EU IBM concept implementation in Central Asia, December 2006;

D. Meyers, S. Ginsburg and R. Koslowski, Room for progress. Reinventing Euro-Atlantic Borders for a New Strategic Environment, MPI October 2007;

NATO and the OSCE Ministerial Conference, the concept of Border Management and Security, Ljubljana 2005;

Sieber, U., Die Zukunft des Europäischen Strafrechts. Ein Neuer ansatz Modellen und zu den Zielen des europäischen Strafrechtssystems. To be published at ZStW 121 (2009). English translation under the title The Future of European Criminal Law. A New Approach to the Aims and Models of the European Criminal Law System planned in Grasso, G. and R. Sicurella (eds), Per un rilancia del progetto europeo: esigenze di tutela degle interessi comunitari e strategie di integrazione penale, Catania, 2009;

UK Parliament, House of Lords, FRONTEX: the EU external borders agency European Union - Ninth Report, European Union Committee, London, 26 February 2008.

INTERMESTIC SECURITY AND THE DEVELOPMENT OF A NEW EU STRATEGY FOR INTERNAL SECURITY

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Abstract

The term intermestic is an portmanteau word standing for international and domestic and it is a strategic management approach in the field of foreign affairs and security that views the relatively equal important spheres of domestic and international affairs. Europe must consolidate a security model, based on the principles and values of the Union: respect for human rights and fundamental freedoms, the rule of law, democracy, dialogue, tolerance, transparency and solidarity. The Internal Security Strategy has been adopted in order to help drive Europe forward, bringing together existing activities and setting out the principles and guidelines for future action. Security has therefore become a key factor in ensuring a high quality of life in European society, and in protecting our critical infrastructures through preventing and tackling common threats.

Keywords: *intermestic security, strategy, Lisbon Treaty, Stockholm Programme, Schengen Space, security Europeanization.*

1. Between common foreign security and the internal security identity of the EU

Within the EU the relation between domestic and foreign security[1] is a concept often called *intermestic security*. The elements of foreign common elements (PESC and PESA) have correspondents in the domestic security, configured according to the Lisbon Treaty[2].

A contemporary concept of security, the so called general security, concentrates not only on the military elements but also on the non-military

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[1] **K. Derghoukassian**, *After Powell: Global Intermestic Security Doctrine*, p.5. Annual meeting of the International Studies Association, Honolulu, Haiti, 05.03.2005, http://www.allacademic.com/meta/p69935_ index.html, 19.04.2010.

[2] **Costică Voicu**, ***Strategia de Securitate Internă a Uniunii Europene, configurată de Tratatul de la Lisabona***, International Conference „*Internal Affairs and Justice in the Process of European Integration and Globalization*", Police Academy, May 2010, Bucharest, p. 254-263.

threats to security. On the other hand, for those in favor of the human security concept, the main objective is the individual and their security. The two approaches regarding security and the globalization process, which may be called inside the EU structures the Europeanization of security, have a significant impact on the concept of domestic security. However, Barry Buzan, who developed the theory of general security, emphasized that generalizing security does not mean the fall of the domestic security concept or the failure of the state-nation concept, understood as a main objective of security[3]. The concept of EU domestic security is said to be a highly complex concept, yet undefined, and in consequence hard to implement.

2. The development of the domestic security concept

First of all, it is necessary to revise the main concepts related to security, taking into consideration the fact that the development of this concept brought the development of the domestic security idea.

2.1. The approach of the Copenhagen School for Security Studies on domestic security

During the Cold War security was reduced mainly to military elements. For instance, Ole Waever, taking into consideration a few pacifist initiatives from the ex Soviet Union, noticed that the Eastern security concepts in the 80s have a broader meaning and are mainly based on military aspects. The Western concept concentrates on its military dimension[4]. Thus, an innovative approach of the security studies, which underlined the importance on non-military threats for the state security may become popular for the first time in the West at the end of a bipolar epoch[5]. In 1983 Richard H. Ullman criticized the domestic security as being excessively narrow and militarized. His definition shows a wrong image of the reality[6]. As a consequence, the Copenhagen School considers that the threats are both military and non-military (political, economic, social and environmental). On the other hand, it is possible to make a

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[3] **Barry Buzan,** Human Security in International Perspective, in Mely, A.,C.,, Hassan M.,J., The Asia-Pacific 14th Reunion, 3-7 June, 2000, Kuala Lumpur: ISIS Malaesia, 2001, p. 583-596.

[4] **Waever, O.** *Conflicts between visions: Visions of conflicts,* in Waever, O., Lemaitre, P., Tromer, E., *European Philosophy,* Basingstoke: Macmillan, 1989, p. 302-303.

[5] **Barry Buzan,** *Rethnking Security after the Cold War, Coopeartion and Conflict,* vol. 32, no. 1, 1983, p. 158.

[6] **Ullman, R., H.,** *Redefining Security, International Security,* vol. 8, no. 1, 1983, in Buzan, B., Hansen, L., vol. 1, London; Thousand Oaks: Sage Publications, 2007, p. 296.

distinction not only between military security, but also political, economic, social or environmental security.

Another problem is the nature of internal/external security threats as some of them fall within the scope of foreign affairs (military threats), while others fall within the competence of both (military and non-military). Redefining security threats illustrates a partial combination between internal and external security domains[7].

Steadily, the nation-state is perceived by the Copenhagen School as the principal element in all sizes and for all threats to security.

2.2. The influence of the concept of human security for internal security

A meaningful concept of security has been elaborated in recent years; in this way security focused on the individual.

The research on security in the '90s, realized by Buzon and his colleagues, was not the only idea of security that has become popular. The UN also developed the secondary concept of human security in its activity, in 1945.

The concept of human security was very popular in the '90s and remains popular in the western countries today. A large number of books, articles and papers on this subject have appeared; on the other hand, several countries were also very interested in the idea, Japan and Canada in particular. Following the establishment of the two approaches to human security, the Japanese approach focuses on the freedom to desire; the Canadian one, on the freedom to be afraid (the right to a safe life, democratic state) in foreign policy.

In 2004, the European Union has also greatly appreciated the idea of acceptance of a Doctrine for Europe on human security, known as the Barcelona Report[8]. More importantly, both dimensions of the human security situate the individual on the main objective position, while for the concept of security in the broadest sense, the main objective remains the nation-state.

The western-European integration process was the trigger for the Europeanization. O. Waever, a member of the Copenhagen Scholl, disagrees with this statement according to which internal and external security is interviewed. On the other hand, as risks increase in Europe that were previously held within the states, in recent years they have become external or intermestic.

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[7] **Anderson M., et al,** *Reasurring European Union,* New York, Oxford University Press, 1995, p. 158.

[8] Doctrine for Europe on Human Security, Barcelona Report, 2004.

The main reason, obviously, is the growing independence of the members of the European Union – this phenomenon has reached an unimaginable level here[9]. It determines the unique character of the Europeanization internal security within the European Union, being a reveler phenomenon reported and illustrated by Didier Bigo: "changing the significance of national borders in barriers and the creation of European level distinction between internal and external borders of the European Union."[10]

3. Intermestic security between internal and external security of the member states

Another issue that should be considered is the growing role of the domestic (internal) and foreign relations (external) in economy, politics etc. and consequently as the security features are observed today. What may be surprising today is that these connections are directly related to Lenin's old dictum: "there is no greater nonsense than separating the international from the internal policy"[11].

In fact, the meaning of the word 'intermestic' as a neologism was established by an American scientist, ex-president of the External Relations Council, professor Bayless Manning, who has argued that this new problem meant a growing interdependence between economy, politics, diplomacy and other, which simultaneously, profoundly and inseparably is internal and external: "If I am allowed to create a word – these issues are intermestic – a neologism formed by garaging the words 'international' and 'domestic'"[12].

Initially, as Manning pointed out, the term referred strictly to the economic and political aspects. Under the current work, however, are mentioned, briefly, the connection between domestic and foreign policies since they have a direct impact on relations between the internal and external security. Why does it so, obviously, the increasing of globalization and regionalization in all sectors of state – policy including security policy and its threats.

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[9] **Wagner, W.,** *The setting up of the Community Internal Security: Democratic Peace and extradition policies in Western Europe,* Peace Research Journal, vol. 40, 6 November, 2003, p. 699-700.

[10] **Bigo, D.,** *The Mobius Ribbon of Internal and External Security,* Mathias, A., Jacobson, D., Lapid, Y., *Identities, Borders, Orders: rethinking international relations theory,* Minneapolis, 2001, p. 112.

[11] **Sherr, J.,** *The Soviet Power: continuance of challenge,* Basingstoke, London, Macmillan, 1987, p. 12.

[12] **Manning, B.,** *Congress, executive and intermestic affairs: three proposals, Foreign Affairs,* no. 55, 1997, p. 309.

Finally, the idea has been analyzed by scientists and politicians over the past two decades. They have created terms such as: intermestic policy[13], intermestic problems[14] or intermestic area[15]. It is, thus, understandable that sooner or later the intermestic security term will become also popular. An example of intermestic policy definition states that it contains a set of government policies that show both internal and external policies, such as the trade policy and the immigration policy.

Christopher Hill states: "if someone may talk analytically about an interpretation between governmental domain and intergovernmental relations, in the middle of the area where grey is situated, intermestic area, this can be helpful to specify the various functions of governments and translational actors".

Intermestic security was introduced by Victor D. Cha in 2000 in his article named "Globalization and international Security studies". In particular, the author focused on the changing nature of threats that he associated to the phenomenon of globalization: "Globalization creates an overlap between domestic issues and the nature of external nature that national governments need to recognize in policy development. An example of this intermestic approach of security policy can be an acceptance that the threats of transnationalism removed traditional division between internal and external security[16]".

On the other hand, some opponents to the idea of intermestic still make a clear distinction between domestic and foreign policies by supporting their position with the following statement: "this division is one that commonly applied in rhetoric, but carefully treated, can be heuristic valuable"[17]. In particular, these adversities are often quoted by researchers of the Copenhagen Scholl requiring distinction between domestic and foreign affairs: trans-nationalism is another version of a liberal attempt to deny the specific of foreign affairs. Internal policies are different from foreign policies[18].

A problem that arises when the concept of intermestic is used (restricted to the European Union level) is the interference of internal security issues, regarded as are of the unique features of the European

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[13] **Barringtonet, L., et all,** *Comparative Policies: structure and choice,* Boston, Cengage Learning, 2009, p. 488.
[14] **Rose, R.,** *Learnings from the public comparative policy, A practical Guide,* New York, Routledge, p. 34.
[15] **Hill, Ch.,** *Changing the foreign policies,* Basingstroke, New York, Palgrave Macmillan, 2003, p. 214.
[16] **Cha, V., D.,** *Globalization and the International Security Study,* Peace Research Journal, vol. 37, no. 3, 2000, p. 397.
[17] **Anderson, M.,** *Protecting the European Union,* p. 158.
[18] **Weaver, O.,** *A Conflict of Visions,* p. 305.

Union. At the beginning, one of the researchers from the Copenhagen School, Ole Waever, in the late '80s, brought up a new term related to the political and security changes that were eventually produced in Europe as a consequence of the collapse of the USSR: Europeanization. What is it? What does it represent? Europeanization is a fact – if taken into account a Europe that is gradually defined more inside and less outside by the superpowers.

4. Premises of a strategy for internal European Union Security

4.1. Europeanization of internal security in the area of freedom, security and justice

For a long time the European Union wished to develop an effective cooperation and mutual relationships in creating internal security, for example Section of freedom, security and justice. Moreover, the European Union adapted a series of documents relating directly or indirectly to the internal security.

Key documents in this case are: The European Security Strategy, External Strategy of justice, freedom and security, Informational Management Strategy Programme, Stockholm Programme – a single Europe serving and protecting its citizens and ultimately, the security strategy of the European Union.

People must be protected from both, military and non-military threats. One question remains open, who can do it: the member-states or international organizations such as the European Union, or both? Or somebody else? The nation-state will be the main topic in terms of security, in a united Europe, while the Lisbon Treaty effectually enters into force the European integration process?

First of all, one of the most relevant documents of the European security in general, was the European Security Strategy – a secured Europe in a better world, adapted in 2003. An internal Security Strategy is formulated to complete this document. Some dispositions of these documents relate directly to the new approach of providing internal security to the European Union.

It has an important role, in particular, the merge of external and internal threats for the security member states. After the Cold War, the borders were left more and more open, and the internal and external security aspects are interconnected and large-scale aggressions on the current members are unlikely. Instead, Europe faces difficulties becoming

more diverse, less obvious and less predictable; moreover, the new threats are dynamic[19].

Regarding new dangers, phenomena such as terrorism, building weapons of mass destruction, regional conflicts, government failures and organized crime can be listed. On the other hand, the overlap of internal security issues with those of foreign security can be understood as a consequence of the gradual intensification of the cooperation process, in this case The Third Pillar, and, on the other hand, the profound globalization that forces member states to co-work intensely in the field of internal security (the Europeanization of the European Union's internal security)[20].

4.2. The Stockholm Programme and the foreshadowing of the strategy fields

The next document that contains instructions about a Strategy for the Internal Security of the European Union is *The Stockholm Programme, An open and safe Europe serving and protecting its citizens*, adopted by the European Council in the second half of 2009 and planned for the 2010-2014 period. Among other purposes, it has been highlighted that "internal and external security are inseparable. The elimination of the threats, even the ones that are remote to our continent, is essential for protecting Europe and its citizens"[21].

In conclusion, achieving the fusion of the internal security with the external one among the territories of the European Union states is the main objective nowadays. So, the nation-state as the main objective of security could be replaced with new objectives: the European Union citizens and its bodies.

According to the Stockholm Programme (2009), the Internal Security Strategy must be built around three complementary and inseparable fields of action: the consolidation of police cooperation, an adapted criminal justice system and a better management of access in territory. Based on the principle of availability, the program aims to discuss a large scale extension of the collecting and processing of the data regarding border crossing and putting it together at European level. Although it is accepted that it promotes opening and safety, the programme is assigned also the characterization of a step towards a

[19] Ibidem, p. 286.
[20] **European Strategy for Security**, Bruxelles, 12.12.2003, http://www.consilium.europa.eu/uedocs/cmsUpload/ 78367.pdf, 20.04.2010, p2.
[21] EU Council, **The Stockholm Programme**, 17024/09, Bruxelles, 02.12.2009.

European stronghold of advanced technologies[22]. It is expected to bring fighting against the immigration phenomenon, and also a tightening of the methods used by the European Union in order to make their borders more inaccessible.

The list of measures adopted by the European Union at the Conference on security in Stockholm (December 2009), represents an effort to establish a standard architecture for the European Union security and *an area of freedom, security and justice in the service of the citizens.*

An agenda was established regarding security and justice starting with 2010 until 2014, which should be translated into guidelines or legislative proposals, before coming into force. This way, the exchange of information between national security services would be eased significantly, based on the principle of availability, the databases would be centralized in the European Union and made accessible to the authorities of every single state.

The multi-annual programme establishes an agenda regarding the politicies about refugees in the European Union for the next 5 years. An extension is desired of the control system of the European borders, Eurosur, which is going to use satellites and cameras in drones (airplanes without pilots) and airplanes. Frontex, specialized in border control in the Mediterranean area, shall extend in order to detect illegal refugees in the territorial waters surveillance network.

The Stockholm Programme has as its main objective the finalization of the process of European integration: the freedom to travel for the European citizens. The Schengen agreements mean more liberty and at the same time *more security*[23]. This is because the Schengen agreement facilitated border crossing for the European Union citizens, but the Schengen Informational System (SIS) stopped being just a simple database, and now it focuses on preventing and identifying the threats to public order and security.

The Stockholm Programme, in internal security of the European Union, sets a series of measures meant to support achieving this goal. Among these measures there are: police staff training in European problems, including exchange of programmes (like Erasmus); the setting up of a European model of information and the improvement of collection and handling of operative information (including custom-house field); it is being aimed at overcoming obstacles against information exchange with third countries.

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[22] Wicht, Christine, *More Security at Any Price - The Stockholm Programme of the European Union*, www.eurozine.com, 02.08.2010.

[23] **Wolfgang Schäuble**, interview with the finnance minister, www.wordpress.com, March 2010.

Also, the integration of the Prum Treaty in the European Union law[24] insures indirect access to the databases of the member states that include information about digital finger-prints and DNA, and a direct access to the car registration files. And the technical measures have an important role. Therefore, it is made a special mention about the development of the informational system SIS II (Schengen Information System) and VIS (Visa Information System) and introducing an electronic recording system for entrances and exits of the member states territory, and also a programme with registered travelers. For this purpose, the Committee has in sight the setting up of a new agency that would start functioning in 2015.

Also it wishes to strengthen the policy on visas; the setting of common goals: the fight against international organized crime, represented by human trafficking, sexual exploitation of children and child pornography, cyber crime, economic crime, the continuation of the anti drug strategy (2005-2012); reducing the terrorist threat.

In the context, a very important element is control and surveillance of the borders in order to protect them. "The European Union finds itself in the situation of facing the challenge of insuring the exercise of freedom of free movement, insuring in the same time the security of the people within an integrated approach to control access to the territory[25]."

Control types (security, immigration, border) at the crossing points must be rationalized especially by separating the private traffic from the commercial one. In some particular cases, this type of rationalization will involve the improvements of the existing infrastructure and the increased appeal of new technologies. A closer cooperation between national authorities will allow a simplification of the procedures, making it easier to cross the border. Also there is a necessary attention that must be directed to vulnerable people or group of people. Priority will be given to needs of international protection, and receipt of unaccompanied minors. For that we have to ensure good coordination of Frontex activities with those of European Asylum Support Office for receiving persons intercepted at the crossing of external borders.

Of particular importance in this area is the visa policy. The Union must effectively implement the tools at its disposal. Entry into force of the new code of visas and the progressive pursuit of VIS will allow greater consistency and efficiency. The regional programmes for consular cooperation will accompany the implementation of VIS and will include:

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[24] Decision 2008/615/JAI from 23 June 2008, published in the EU Official Journal L210/1 from 06.08.2008.

[25] **Wolfgang Schäuble**, Interviu cu ministrul de finanțe al Germaniei, www.wordpress.com, martie 2010.

European training of consular staff of member states, systematic planning of common visa application centers or representation agreements between member states, information campaigns and awareness in the countries concerned , and establishing a regular dialogue with these countries[26].

The following aspects should also be taken into account: the legal institution of family reunification[27]; the improvement of control over illegal immigration, with the following aspects: combating illegal work, human trafficking , implementation of return[28], a directive that has to be transposed into national law by December 2010; adoption of common standards on the status of illegal immigrants who can not be removed inclusive.

4.3. Identification of the strategy functions of the EU internal security

At the current level, some established theories are accepted for the definition and implementation: the theory about the increasing role of the state in regulating the essential areas (economy, finances, justice, security and public order); the theory which promotes deregulation, reduction of the state intervention in society function theory or the current that encourages the growth of the decisional role of the European Union, that has to have two Security Strategies: ***a strategy for internal security and a strategy for external security.***

Anyway, in the structure of internal security the following components are identified: economic security, financial security, social security, military security, the security of the environment, judicial security.

In the same time, the European Union's Internal Security Strategy must be conceived according to the following principles: *the principle of respecting the rights and the fundamental liberties; the principle of real solidarity between the member states; the principle of preventing and controlling the main threats against persons and collectivities; the principle of complete approach and of a common culture regarding the internal security; the principle of mutual trust between the member states; the principle of joining the European Union's strategies of internal security and external security; the principle of harmonization between the internal security strategies of the member states and the European Union's security strategy.*

In February the European Union's ministers of Internal Affairs amended a Strategy for Internal Security for the European Union that is

[26] **C. Voicu**, op. cit., p. 254-263.
[27] **C. Voicu**, op. cit., p. 254-263.
[28] By revising the Directive 2003/86/CE from 22 September 2003, published in the EU Official Journal L 251, 3.10.2003, p. 12-18.

one of the priorities of the Spanish presidency. Additionally, a Committee on Operational Cooperation on Internal Security (**COSI**) was set up.

Other regulations of the strategy are also particularly relevant because of its connection with the changes in the perception of internal security and its current objectives. These problems are debated based on the documents published by European Union's agencies and branches. From here it results that the theory of extension in the matter of internal security is confirmed by the Union's documents regarding the external aspect of the internal affairs.

5. The impact of integrated management of the borders on the European Union's internal security

The notion of border is rapidly dissolving, representing the old notion of lines and fronts. Instead there are frontiers and regions and the concept of security must be adapted taking into consideration these changes. The trans-nationalisation of security opposes the national and the social security. It creates a situation in which we cannot make the difference between external and internal[29].

Still, the European Union admitted the process of globalization and its effect on security. Furthermore, only in the countries where democracy is very well founded, where the people's rights and laws are obeyed, that the efficient fight against trans-national dangers is possible. So, the European Union paraphrases the idea of human security (Kofi Annan's Millennium Development Purposes).

The most relevant aspect for the concept of evolution of the internal security concept is nevertheless the adoption of a Strategy for Internal Security by the European Union in February 2010; it was one of the priorities of the Spanish presidency. The strategy encompasses a broad spectrum of objectives for the European Union regarding the internal security matter. So, in terms of a theoretical approach of internal security there are provisions that are analyzed.

In the first instance, the Strategy formulates a definition of internal security this way: *the internal security concept must be understood as a broad and scope concept that supports a broad range of sectors to eliminate these major dangers and others that have major impact on the life, integrity and welfare of the citizens, including natural hazards and the ones made by man, earthquakes, forest fire, floods and storms*[30].

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[29] **Directive 2008/115/CE** from 16 December 2008 published in the EU Official Journal L 348/98, 24.12.2008.

[30] ***Bigo, D.,*** *When Two Become One**:** Internal and external securitisations in Europe*, Londra-New York: Routledge, 2000, p. 171.

So, these declarations refer to the Canadian approach to human security (the so called freedom to protect yourself) that focuses more on political freedom than on the other one. The strategy states a common policy of internal security in the European Union defining in the same dimension the European Model of Security, consisting of tools and joint efforts for: *mutual consolidation of the relationship between security, freedom and intimacy; cooperation and solidarity between member states; implication of all European Union structures; investigation of the causes of insecurity, not just the effects produced; stimulation of prevention and anticipation; implication in all the areas that play an important role in public-political, economical and social protection; and a larger independence between internal and external security*

The purpose of the common fight against modern threats such as terrorism, organized crime, cyber fraud, illegal border crossing, natural hazards or set by a human being. The main purpose of the strategy *is a more integrated approach to achieve the selected goal; we selected a security model that combines law enforcement with the legal work, border management and civil protection*[31].

Mostly, the globalization process is the one that has a major impact on changing the connotation of the internal security term in our era. So, terms like **intermestic** security have the role to highlight the interplay between external and internal areas nowadays.

Taking into consideration the conclusions mentioned above and the European Union's definition of internal security, we consider that a modern concept of national security should not only focus on securing nation-states and their authorities the way traditionalist connotation shows it, but especially on securing citizens and all the other fields (internal, external, non-military, military), a wide and embracing concept that complies multiple areas, being able to tackle these major challenges and others that impact the life, integrity and welfare of citizens in order to enforce law and order and public safety[32].

REFERENCES

Barry Buzan, Rethinking Security after the Cold War, Cooperation and Conflict, vol. 32, no. 1;

Barry Buzan, Security of persons from international perspective, quoted by **Mely, A. C., Hassan M. J.,** Asia of the Pacific Ocean in the new millennium: political and security challenges, the 14th Asia-Pacific Reunion, 3-7.06.2000, Kuala Lumpur: Malaysia, 2001;

[31] EU Council, *Draft for the EU internal security strategy,* 5842/10 Bruxelles, 23.02.2010.

[32] In 2008, due to regional and national efforts at EU level, 1009 persons were arrested on the terrotory of 13 countries charged with terrorism, Europol, TE-SAT Report, 2009, p. 6.

Bigo, D., When two become one: Internal and external securization in Europe, Kelstrup, M., Williams, M. C., The theory of international relations and European integration policies. Power, security and community, Londra-New York, Routlefge, 2000;

Decision 2008/615/JAI from 23 June 2008 on enhancing cross border cooperation mainly for combating terrorism and cross border crime, EU Official Journal L210.1 from 06.08.2008;

Derghoukassian, K., After the Powell Doctrine: The Global Intermestic Security, p. 5, annual meeting of the International studies Association, Honolulu, Haiti, 05.03.2005;

Directive 2003/86/CE from September 2003 on the right to family reunification, published in the EU Journal L251, 3.10.2003;

Directive 2008/115/CE from 16 December 2008 setting out common standards and procedures to be applied in Member States for returning illegal third- country nationals published in the EU Journal L348/98, 24.12.2008.

European strategy for security, Bruxelles, 12.12.2003;

European Union Council, Draft of the UE security strategy: towards a European security model, 5842/10, Bruxelles, 23.02.2010;

European Union Council, Stockholm Programme, A safe and open Europe protecting its citizens, 17024/09, Bruxelles, 02.12.2009;

Hill, Ch., Changing the foreign policies, Basingstroke, NY, Palgrave Macmillan, 2003;

Human Security Doctrine for Europe, The Barcelona Report of the Study Group on Europe's Security Capabilities, Barcelona 2004.

K.P.Marcyuk, Bezpieczeństwo wewnętrzne w poszerzonej agendzie studiów nad bezpieczeństwem (szkoła kopenhaska i human security), Warszawa: Elipsa, 2009;

L. Barringtonet al, Comparative policies, Boston, Cengage Learning, 2009;

Manning, B., Congress, executive and intermestic affairs: three proposals, Foreign affairs, no. 55, 1977;

R. Doty, Sovereignty and the nation: constructing the boundaries of national identity, in: The social construction of state sovereignty, **T.J. Biersteker** and **C. Weber** (eds.), Cambridge: Cambridge University Press; 1996;

R. Rose, Learning from comparative public policy, New York, Routledge;

R.H.Ullman, Redefining security, international security, vol. 8, no 1, 1983, in **B. Buzan, L. Hansen** (eds.), vol. I, London; Thousand Oaks: Sage Publications, 2007;

Sherr, J., Soviet Power: The continuing challenge, Basingstoke, Londra, Macmillan, 1987;

V.D.Cha, Globalization and the international security study in The Journal of Peace Research, vol.37, no. 3, 2000;

Voicu, C., EU internal security strategy according to the Lisbon Treaty, paper presented at the international conference Internal Affairs and justice in the process of globalization, Police Academy, May 2010;

W. Wagner , Community Internal Security: Democratic peace and Western Europe Extradition policies, The Journal of Peace Research, vol.40, no 6, November 2003;

Wicht, Christine, More Security at any Price – The Stockholm Programme of the European Union, www.eurozine.com, 02.08.2010;

Wolfgang Schäuble, interview with the Finance Minister from Germany, www.wordpress.com, March 2010.

THE ELECTRONIC CONTRACT UNDER THE ROMANIAN LAW

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Abstract

The paper analyzes certain aspects of the electronic contract (the contract concluded in electronic form) as regarded from the perspective of its dynamics, i.e. the sequence of its chronological stages (negotiation, conclusion, performance of obligations and dispute resolution). It starts from the premise that the use of electronic communication means which allow the contract to take the electronic form is the modern expression of collaboration between legal science and computer science.

The first topic regards the informational fundaments of the contract, which is the characteristic that allows a contract to accept an electronic form. Therefore, the definition of the electronic contract is centered on the special feature of the legally accepted evidence of such contract.

Specific rules for the conclusion and performance of electronic contracts are analyzed (contractual negotiation, offer and acceptance, moment of conclusion, obligation carrying a dematerialized object), as well as the special problems regarding consumer protection and personal data protection.

Last but not least, the paper includes two propositions for law modification (applicable not only in the Romanian law) aimed at enhancing the way electronic communication means are used in contractual relations.

Definition of the Electronic Contract

The contract is a fundamental institution of the private law, both in domestic and international relations. As the whole society evolves towards the virtual environment, the contract has to adapt to the new electronic technologies. But the legal system has a greater resistance to changes and adapts later to such structural changes.

In its attempt to adapt to the virtual environment, the contract took the shape of the contract concluded in electronic form, or, in short, the electronic contract. We shall make a short analysis of the electronic contract.

The *electronic contract* may be defined as an agreement between two or more parties, enforceable by law, agreement that is stated in electronic form[1].

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[1] It should be noted that there is no legal definition of the electronic contract under the Romanian law.

This definition that we suggest underlines the two structural elements of the electronic contract, respectively:

- the common category – the contract as a legal institution, and
- the specific difference – the electronic form.

The electronic contract is not a new species of contract, such as the civil contract, the commercial contract, the administrative contract, etc., but it can be any of the above mentioned, to which it offers a new shape. As a result, there can be a civil contract concluded in electronic form, or an electronic civil contract, a commercial contract concluded in electronic form, etc.

The electronic form results from the use of the electronic means of communication at distance. As this condition is lax, in this category any technical instrument can be included; however, it should be noted that not all of them can be used as a piece of evidence in court. And it would be a waste of the potential to conclude an agreement by use of electronic means but to prove it by classic means (such as witness testimony, paper-based writings, etc.). This is why we had to restrict the definition of electronic contract to the agreement concluded in electronic form by use of means that are accepted as court evidence.

Nowadays, under the Romanian law, the only electronic form accepted as piece of evidence is the one resulting from the use of electronic signature for electronic data (in Romanian is "*inscris electronic*" which can be approximately translated as "document in electronic form" or "electronic deed"; although the Romanian Law no. 455/2001 on the electronic signature is the implementation of the EU Directive no. 1999/93/EC, the "electronic deed/inscris electronic" is not to be found in the European act).

1. The Electronic Signature

In order to be accepted as piece of evidence in legal proceedings, a specific means has to be recognized as such by law. Only one electronic means may be used nowadays as court evidence under the Romanian law, and this is the electronic document (data that is electronically signed), regulated by Law no. 455/2001. Of course, this is a very low level use of the potential of the very numerous electronic communication means.

As already shown, the Romanian law (Law no. 455/2001) created an institution that is not to be found in the source-legislation (EU Directive no. 1999/93/EC) which it implements, and this is the "document in electronic form" or the "electronic deed". It is defined by law (article 4, para. 2) as "a collection of logically and operationally interrelated data in electronic form that reproduces letters, digits or any other meaningful

characters in order to be read through software or any other similar technique"[2].

The document in electronic form is an institution created for the purpose of assimilation, from a functional perspective, of the computer data with the paper-based data, the same way as the electronic signature should be similar to handwritten signature.

The legal definition underlines the fundamental difference between the written document and the electronic document: the last one lacks a substantial base. When written, a classic agreement is indissolubly related to its support (the paper); meanwhile, the electronic data does not need a special support, but can be copied and transferred to any support that is technically suitable to record it. For the handwritten document, the relation between the content and the support is fundamental; for the electronic document, only the content matters. Therefore, the concepts of original and copy become meaningless, and the copy, even the copy of a copy, is not only similar but even identical to the original.

The paper-based agreement proves the will of the parties by their handwritten signatures. Similarly, the electronic document has to bear the signature of its issuer(s); but, in this case, it is an electronic signature.

The electronic signature is defined by art. 4, para. 3 of Law no. 455/2001 as data in electronic form, which are included in, attached to or logically associated with a document in electronic form and serve as a method of identification.

The electronic data is widely open to copy and distribution, therefore the regulation is very strict on the conditions regarding the creation and use of electronic signatures. The public service of certifying the electronic signature is monitored and controlled by the supervisory authority (which currently is the Romanian Ministry of Communication and Information Society[3]).

2. The Dynamics of an Electronic Contract

From a static point of view, the contract as a legal institution is shaped by its definition, its classification and by the relation with other legal institutions.

In the same time, the contract is a very useful and, also, very used legal instrument; therefore, we should analyze it from a dynamic point of view, which is the sequence of its stages, from negotiation to fulfillment of obligation. This is the structure we shall observe in our coming analysis.

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[2] The translation was kindly provided by Dr. Bogdan Manolea and is to be found on his web-site at the following address: http://www.legi-internet.ro/en/e-sign.htm.

[3] For any other information, please visit the Ministry website at the following address: http://www.mcsi.ro/.

A. Negotiation

The negotiation is the pre-contractual phase in which the parties expressly state the elements of the future contract. The electronic means of communication are intensely used, even more intense than at the moment the contract was concluded, as there is no conditioning in doing so: the parties do not have to take legal proceedings in order to negotiate contracts.

Any person can be easily contacted and offered a contract by using electronic means of communication; therefore, the commercial market developed many on-line advertising techniques, some of them quite unfair. The most disturbing of them all proved to be the so-called "spam"[4], and it triggered anti-spam legislation.

Spam can be defined as the use of electronic messaging systems (including digital delivery systems) to send unsolicited bulk messages indiscriminately. While the most widely recognized form of spam is the e-mail spam, the term is applied to similar abuses in other media, such as instant messaging spam or mobile phone messaging spam[5].

The anti-spam regulation was gradually adopted and modified in the European Union, throughout the years, but it was implemented in Romania all of a sudden, from the "*acquis communautaire*", when Romania became a member state. As a result, the legislation missed the correlation between its components, and for a period of time Romania had antagonistic legal solutions for the same problems.

Such was the case of unsolicited commercial messages sent by electronic mail, as the Government Ordinance no. 130/2000 regarding distance contracts imposed the *opt-out system*[6] (art. 16, original form), while Law no. 365/2002 on electronic commerce imposed the *opt-in system*[7] (art. 6, para. 1). The problem was solved by the change of the

[4] The word is a commercial trade mark designating some canned pork meat; its computer-related use seems to originate in a scene from a popular British TV show, "Monty Pithon", in which some of the characters kept on repeating the word "spam" every two or three words, making the others characters furious.

[5] Spamming is economically viable because advertisers have no operating costs beyond the management of their mailing lists, and it is difficult to hold senders accountable for their mass mailings. Because the barrier to entry is so low, spammers are numerous, and the volume of unsolicited mail has become very high. In the year 2011, the estimated figure for spam messages is around seven trillion.

[6] The addressee keeps on receiving such messages, unless she/he solicited not to receive any more. The name originates from "option-out", as the addressee had the option to get out of the system.

[7] The sender was not allowed to send such unsolicited commercial messages to persons who have not expressly stated that they accept to receive them. The name comes from "option-in", as the addressee has the option to get into the system.

Ordinance, but it was not the only problem revealing imperfections in legislative technique.

B. Conclusion of the Electronic Contract

The electronic contract is concluded the same way as the paper-based one, the rules imposed by the Civil and Commercial Codes being applicable by the meeting of the offer and of the acceptance. The only change is that the offer and the acceptance should take the electronic form, as they are the two halves of the future electronic contract. For the special category of the distance contracts[8], the use of electronic means of communication at distance imposes certain rules in order to guarantee that every contracting party is fully aware of the facts that she/he will be subject of an obligation legally enforceable. Such a special rule governs the moment the contract is concluded between a merchant and a consumer: different from a classic contract, which is concluded in the moment the offeror receives the acceptance from the offeree, the respective contract is concluded only when the offeror (the merchant) informs the consumer that the acceptance was received. This a new way the consumer is informed that she/he became part of a compulsory contract and is a special means of consumer protection, such as the consumer's right to unilaterally withdrawal from a distance contract.

C. Fulfillment of the Obligation

The fulfillment of an obligation assumed by electronic means depends on the nature of goods and services to be provided. If it regards tangible goods, then the fulfillment involves material performance, and the electronic contract is no different from the paper-based contract. But if it regards non-tangible goods or services, the obligation may be fulfilled by the use of electronic means of communication. The most common examples are the delivery of information (electronic paper, news bulletins, etc.), of audio-books, music and films and of software.

The electronic contracts are usually distance contracts concluded between merchants and consumers. The lack of material contact – both with the other contracting party and the good/service to be purchased – creates certain distrust for the person that has to pay the price of the product (consumer), especially if the payment is to be made in advance.

[8] The *distance contract* is defined by the Government Ordinance no.130/2000 as the product or service provision contract concluded between a supplier and a consumer, within a selling system organised by the supplier, who uses exclusively, before and after concluding the respective contract, one or more means of distance communication (art.2, par.1, letter a).

The consumer fears not only that the product is not conforming to the promised standards, but also that the product will not be delivered or, worse, that the contracting party does not even exist (if it takes a fake identity). The lack of confidence is increased by the fact that the payer has to reveal certain personal data, such as identification data (name and address) and financial data (bank account) and she/he is not aware of the way this information will be used by the product supplier who receives it.

The law aimed to reduce this distrust, so that it strictly regulated the payment procedure. The rules rely on technical systems that guarantee, for example, that the provider does not charge the consumer bank account with more than the sum representing the price of the product

D. Litigation

The contract concluded by electronic means of communication is not denied legal effects if its existence is evidenced in a traditional way (written paper, witness testimony, etc.), but the use of the electronic documents is the method adapted to the new virtual environment. In the Romanian contemporary law, only the electronic document that bears the electronic signature of its issuer is accepted in legal proceedings; the audio or video recordings are not recognized legal effect in civil courts.

Law no. 455/2001 on electronic signature regulates two different situations in which the electronic document is accepted as court evidence:

- a document in electronic form that incorporates an electronic signature or has an electronic signature attached to or logically associated with it, based on a qualified certificate not suspended or not revoked at that time, and generated using a secure-signature-creation device is assimilated, in as much as its requirements and effects are concerned, to a document under private signature (article 5);
- a document in electronic form that includes an electronic signature or has an electronic signature attached to or logically associated with it, acknowledged by the party the respective document is opposed to, has the same effects as an authentic document, between those who signed it and between those who are representing their rights (article 6).

Further on, the law states that, should the written form be required as proof or validity condition of a legal document in such cases as the law may provide, a document in electronic form shall satisfy to this condition if an extended electronic signature, based on a qualified certificate and created using a secure-signature-creation device was incorporated to, attached to or logically associated with it (article 7).

This way, the electronic document, which is basically a collection of electronic data, is completely assimilated to the paper-based document. More than that, there exists the category of authentic documents issued by a public notary (regulated by Law nr. 589/2004 on the electronic notary).

The evidence is to be used in court, but the electronic contract has a small value, therefore is more likely that any litigation related to it is to be solved out of court. The court proceedings consume huge resources (both time and finances), so it does not worth to bring such litigation to a judge. Consequently, there was need for a category of alternative dispute resolution, adapted to the new environment, cheap and quick. The mediation and arbitration are also applicable, and increasingly used, as they are officially promoted.

3. Other Special Situations regarding the Electronic Contract

As already stated, the electronic contract does not represent a new category of contract, but it can be any of the civil, commercial, administrative, etc. contracts. But the new electronic form creates supplementary issues which have to be addressed. For example, the need to offer a certain protection to the consumer imposes new means of achieving this goal; in this category, we mention the consumer's right to unilateral withdrawal, which was created to outrun the distrust created by the lack of material contact between consumer, supplier and product (articles 7-10 of the Government Ordinance no. 130/2000).

In the end, we emphasize that the legislation on the electronic contract evolved from the incipient soft law (Resolution no. 40/71/1985 of the General Assembly of the United Nations, regarding the legal value of the computer records) to the intermediary UNCITRAL Model Laws on Electronic Commerce (1996) and Electronic Signature (2001) and to the internationally enforceable current legislation of the European Union. In the future, further steps have to be made, towards at least these goals:

- the acceptance of the multi-media means in legal proceedings; and
- the use of computer simulation as evidence in court.

Only when these goals are be achieved, the full potential of the electronic means of communication, and therefore of the electronic contract, will be reached.

CRIMINOLOGY ASPECTS OF COMPUTER CRIME SUBCULTURES

Adriana TUDORACHE*

Abstract

The sociological term "subculture" refers to groups that share several elements of mainstream culture, but maintain their own customs, values, norms and distinct styles of life.

Merton's theory according to which those with low formal education and limited economic resources are more likely to head to a life of crime, can not explain the appearance of hackers - who are the product anomiei of influence, and have ample means of U.S. aims to achieve success, but instead, may explain their involution.

Internet as the industrial revolution had transformed every aspect of our social life, including criminal subcultures.

Today, criminology, agree on the fact that hackers are subcultures with very different cultural values, norms and practices.

Din punct de vedere strict juridic infractorul este persoana care săvârşeşte cu vinovăție o faptă prevăzută de legea penală care prezintă pericol social. Din punct de vedere criminologic conceptul de infractor are o semnificație complexă datorită condiționărilor bio-psiho-sociale care îl determină pe individ să încalce legea.

Cauza criminalității a constituit şi constituie una din problemele esențiale ale criminologiei. Înțelegerea acestor cauze va permite o bună prevenire a comportamentului criminal, o prevenție mult mai necesară decât prevenția specială rezultată ca urmare a sancționării încălcării legii.

Teoria lui Merton constituie punctul optim de plecare în studiul criminologic al subculturilor criminalității informatice, deoarece, aplicând această teorie la subculturile criminalității informatice de astăzi, aceasta poate fi utilă în înțelegerea fenomenului.

Merton a actualizat Teoria lui Durkheim pentru a explica dezrădăcinările şi dislocarea socială cauzate de Marea Recesiune Economică, care i-a lăsăt pe mulți indivizi fără mijloacele de a îndeplini țelurile americane.

Durkheim a introdus versiunea sa conceptului de **anomie**, nefiind primul care a folosit acest termen: o stare obiectivă a mediului social caracterizată printr-o dereglare a normelor sociale datorită fie unor schimbări benefice, dar bruşte, dar mai ales dezastrelor (naturale,

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economice, războaie, etc.), societatea fiind incapabilă, momentan, să regleze, să modereze tendințele crescânde ale individului pentru satisfacerea unor idealuri de confort material şi prestigiu social.

Robert Merton dezvoltă, cu toate că preia conceptul de anomie de la Durkheim, o paradigmă, examinând mai concret consecințele negative ale anomiei. Merton pune următoarea întrebare: de ce frecvența comportamentelor deviante variază între diferitele structuri sociale şi cum se intamplă că devianțele au diferite forme şi tipare în structuri sociale diferite[1].

Merton **susține** -concepția sa diferind de a lui Durkheim- că adevărata problemă este creată, nu de schimbarea socială bruscă ci de o structură socială care oferă aceleaşi idealuri tuturor membrilor săi fără însă a le oferi şi mijloace egale pentru a le atinge: această lipsă de integrare între ceea ce cultura defineşte şi ceea ce structura permite (mai întai încurajând succesul, apoi prevenindu-l) poate provoca prăbuşirea normelor care nu mai sunt ghizi eficienți ai comportamentului.

Teoria sa accentueaza importanța, în orice societate, a două elemente:

- scopurile-aspirațiile culturale sau idealurile pentru care oamenii cred că merită să te lupți;
- mijloacele instituționalizate sau căile acceptate pentru atingerea respectivelor idealuri.

Într-o societate stabilă aceste elemente trebuie să fie bine integrate, cu alte cuvinte trebuie să existe la îndemâna indivizilor mijloace atât de importante pentru ei; discrepanța dintre idealuri şi mijloace determină frustrare, care duce la stres.

Merton a conturat 5 modalități în care oamenii se adaptează idealurilor societății şi mijloacelor de obținere. Răspunsurile indivizilor, modurile de adaptare, depind de atitudinea lor față de idealurile societății şi mijloacele instituționalizate de atingere a acestora.

Tipologia modurilor individuate de adaptare:

(1) *conformarea* -presupune acceptarea scopurilor şi de asemenea a mijloacelor societății- fiind cel mai obişnuit mod de adaptare; cei ce se adaptează prin conformare luptă pentru obținerea bunăstării prin metodele aprobate de către societate şi vor continua acest lucru indiferent dacă vor reuşi ori nu;

(2) *inovarea* -presupune acceptarea scopurilor dar respingerea mijloacelor necesare pentru atingerea acelor scopuri-; considerând că ei nu pot atinge bunăstarea prin mijloace legale scot la iveală noi metode pentru care pot atinge scopurile (metode nelegale); „în această situație o virtute

[1] Merton R. K., *Social Theory and Social Structure,* Free Press, New York 1968, p. 185.

americană de bază, ambiția, promovează un viciu american de baza - comportament deviant";

(3) *ritualismul* -presupune respingerea scopurilor dar acceptarea mijloacelor-; cei ce se adaptează prin ritualism abandonează idealurile despre care au crezut la un moment dat că sunt de neatins şi s-au resemnat modului lor de viață; este adaptarea celor care vor să „mearga la sigur" au obținut un nivel minim de succes prin mijloace legale, sunt blocați de teama de a nu pierde chiar şi acest nivel minimal: „nu ridica capul mai sus, nu ținti mai departe[2]" etc.;

(4) *retragerea* -presupune respingerea scopurilor cât şi a mijloacelor, cea mai puțin comună dintre cele 5 moduri de adaptare- aparține tipului de persoană care este cu adevărat străină de societate. Merton sugerează că „retragerea" apare după ce o persoană a acceptat atât scopurile cât şi mijloacele dar a eşuat în mod repetat să-şi atingă scopurile prin mijloace legitime; în acelaşi timp, din cauza socializării anterioare, individul nu este capabil să adopte mijloace legitime; „ieşirea este completă, conflictul este eliminat şi individul este total asocializat[3]";

(5) *rebeliunea* -care este caracterizată de respingerea scopurilor şi mijloacelor legale şi de încercarea de a stabili o nouă ordine. Merton sugerează că această adaptare este în mod clar diferită de celelalte şi reprezintă mai degrabă o încercare de a schimba structura socială, o încercare de a instituționaliza noi scopuri şi mijloace pentru restul societății.

Adaptările prezentate nu descriu tipuri de personalitate, ci o alegere individuală a comportamentelor ca răspuns la stresul anomiei; astfel, indivizii pot alege un anumit mod de adaptare sau pot folosi adaptări simultane.

Termenul sociologic „subculturi" se referă la „grupuri care împart mai multe elemente de cultură dominantă , dar care îşi mențin propriile obiceiuri, valori, norme şi stiluri distincte de viață".

Sociologii utilizează conceptul de subcultură pentru a se referi la grupuri religioase, de noi imigranți şi la grupuri bazate pe vârstă, avere, preferințe sexuale, educație şi ocupație.

Conformismul navigatorilor pe Internet

Conformitatea apare atunci când indivizii adoptă scopurile aprobate de societate, folosind mijloace aprobate de aceasta. Majoritatea utilizatorilor de Internet sunt conformişti, din punctul de vedere al lui

[2] Merton R. K., *Social Theory..., op. cit.,* p. 201.
[3] *ibidem,* p. 208.

Merton, pentru că aceştia folosesc Internetul în scopuri legitime. Conformitatea utilizării Internetului include folosirea acestuia pentru a comunica, a educa, a consulta profesionişti, a cumpăra cadouri şi pentru a comunica cu familia, prietenii, etc.

Primii hackeri au utilizat intruziunile într-o modalitate benefică din punct de vedere social -ca o practică prin care să înțeleagă cum funcționează sistemul-. La începutul anilor 1960 şi 1970 hackingul era pentru mulți studenți echivalentul funcțional al unui studiu avansat privind calculatorul.

Inovația: hackingul pentru profit

Unii utilizatori se folosesc de Internet ca de un instrument pentru a comite infracțiuni. „Inovația" este actul de introducere a unui nou dispozitiv sau proces creat prin studiu şi experimente. Merton definea inovația ca pe o acomodare socială a indivizilor care au asimilat accentele culturale de succes fără a-şi însuşi în acelaşi timp normele care guvernează înțelesurile acestui termen. Inovatorii săi ideali erau devianți sociali care foloseau mijloace ilicite pentru a obține succesul financiar. Acest tip de inovatori se aplică majorității infractorilor care utilizează Internetul ca pe un instrument de câştig ilegal. Deoarece găsesc calea convențională către succes închisă, inovatorii utilizează mijloace ilegale pentru a-şi realiza țelurile.

Inovatorii din umbră utilizează mijloace ilegale pentru a atinge îmbogățirea rapidă prin hacking. Inovatorii calculatoarelor se bucură atunci când instituțiile legale sunt incapabile să detecteze efectiv criminalitatea informatică. Multe infracțiuni informatice se concentrează pe utilizarea în alt scop a calculatoarelor, în vederea obținerii de câştiguri financiare ilegale.

Criminalitatea organizată privind Internetul din țările mai puțin dezvoltate poate constitui un sistem semnificativ al fraudelor on-line, al infracțiunilor privind calculatoarele şi al infracțiunilor cu tentă sexuală din spațiul informatic.

Ritualismul: hackingul ca obişnuință

A treia categorie de subcultură este reprezentată de ritualişti care au aşteptări scăzute, având o viață fără scopuri sau țeluri pe termen lung. Ritualiştii resping țelurile de succes, dar se conformează mijloacelor acceptate din punct de vedere social. Exemplul clasic al ritualistului este muncitorul cu un salariu minim pe economie care are aşteptări scăzute de succes pe termen lung. Un adult care lucrează la un restaurant fast-food sau la un serviciu de curățenie este un exemplu de adaptare ritualistică.

Industria calculatoarelor face multe meserii mai puțin solicitante, făcându-i pe cei care erau odată supracalificați să aibă acum o muncă de rutină.

Evazionismul: hackingul ca dependents

Merton susține că evazioniştii, cei care resping ţelurile şi mijloacele, sunt cea mai rară subcultură. În zilele lui Merton, evazioniştii erau nişte paria sociali, cum ar fi agresorii, dependenții de droguri, prostituatele şi alcoolicii. Pentru evazioniştii de astăzi, calculatoarele şi Internetul reprezintă o formă de dependență.

Evazioniştii care pătrund în sistemele informatice ale unor companii sunt, inițial, motivați de emoția căutării mai degrabă decât de câştigul economic. „Hackerii recreativi pătrund în rețelele informatice pentru emoția provocării sau pentru a obține drepturi în comunitatea hackerilor”[4]. Un infractor juvenil în vârstă de 15 ani din Connecticut a fost acuzat de pătrunderea în sistemul informatic al Forțelor Aeriene Americane, care detectează pozițiile avioanelor forțelor aeriene din întreaga lume. El a fost, de asemenea, acuzat de pătrunderea în calculatoarele Departamentului de Transport al SUA, în Centrul Volpe din Cambridge, Massachusetts, cauzând pierderi economice majore[5]. Un adolescent din Massachusetts a cauzat inchiderea unui aeroport regional prin intreruperea sistemului de telefonie dupa ce a patruns in sistemul informatic al acestuia.

Multi dintre infractorii informatici care lanseaza viruşi de calculator pot fi, de asemenea, clasificati ca fiind evazionisti electronici, deoarece autorii virusilor, ca şi alti agresori prin calculator, sunt motivati de emotia inselarii autoritatilor din intreaga lume.

Rebeliunea: hackingul ca nesupunere la regulile societății

Rebeliunea reprezintă al cincilea tip de subcultură propus de Merton în care scopurile şi mijloacele sociale sunt respinse în favoarea unor alternative. Hackerii calculatoarelor care au dezvoltat programul de calculator numit „DeCSS”, care înşeală sistemele de protecție pentru DVD-urile care conțin filme, se referă la ocupația lor ca fiind o formă de „nesupunere la electronica civilă”.

Extremiştii culturali de la sfârşitul anilor 1960, la fel ca şi cei electronici de astăzi au blamat cultura dominantă, arătând valori, norme şi instituții alternative. Extremiştii culturali au respins familiile tradiționale nucleare şi au experimentat grupuri familiale extinse având stiluri de viață

[4] Sinrod & Reilly, *Cyber-crimes: A Practical Approach to the Application of Federal Computer Crime Laws,* Santa Clara Computer & High Tech, p. 185
[5] Linda Rosencrance, *Teen Charged with Jacking into Air Force System,* www.infowar.com.

în comun. În mod similar, „hacktivism-ul" este o formă de activism politic împotriva globalizării şi a controlului unor companii de pe Internet[6]. Criminologul Paul Taylor observa că hacktiviştii îşi aleg ca țintă, de regulă, corporații puternice, postând mesaje politice pe site-urile acestora. Recent, hacktivism-ul a fost extins la viruşi motivați politic. De exemplu, un virus similar forței Kournikova a fost lansat împreună cu „un mesaj de atac asupra Forței de Securitate Israeliene şi de chemare la Încheierea violențelor în Orientul mijlociu"[7].

Teoria lui Merton, potrivit căreia cei cu o educație formală redusă şi cu resurse economice limitate au şanse mai mari să se îndrepte spre o viață plină de infracțiuni, nu poate explica apariția hackerilor -care sunt produsul anomiei de afluență, şi care au ample mijloace de a atinge țelurile succesului american- dar, în schimb, **poate explica involuția acestora.**

Internetul, ca şi revolutia industrială, a transformat fiecare aspect din viața noastră socială incluzând subculturile infracționale. Istoria hacker-ilor oferă o analiză a motivelor infracțiunilor informatice.

Prima generație de hacked a cuprins copii din cele mai influente şi educate segmente ale societății americane. Primii hackeri erau studenți extrem de curioşi cu privire la domeniul calculatoarelor, programatori de calculatoare foarte creativi care ulterior au devenit profesori de ştiințe informatice, creatori de programe, administratori de rețele şi antreprenori creativi cum ar fi Bill Gates care a lansat revoluția calculatoarelor personale.

Printre primii hackeri au fost şi studentii de la MIT care au accesat calculatoare fără a avea permisiune pentru a-şi satisface curiozitățile intelectuale.

Studiul experimental a lui Dorothy Denning asupra hacker-ilor a concluzionat că aceştia sunt un grup difuz cu valori complexe. Interviurile ei cu hackerii au confirmat spiritul etic al acestora, în sensul că aceştia aveau ca motivație primară dorința de a înțelege sistemele informatice, securitatea şi rețelele şi nu dorința de a comite infracțiuni informatice.

Cultura hackingului etic a involuat în hacking negativ, crimă organizată, dependență de calculatoare, pentru a numi cateva subculturi.

Hacker-ii din anii 1960 s-au transformat în subculturi cu o existență josnică cum ar fi cele care se ocupă de deparolări, de spargerea parolelor şi nu numai.

Literatura de specialitate privind hackerii confirmă existența unei diversități de subculturi, de la hackeri etici până la rețele de crimă organizată şi extremişti culturali.

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[6] Stuart Millar, *For Hackers, Read Political Heroes of Cyberspace,* Guardian, 8 martie 2001, p. 4
[7] Cyberdigest, *Jane's Intelligence Review,* 23 martie 2001, LEXIS, Market & Industry File

Astăzi, criminologii sunt de acord asupra faptului că hacker-ii constituie subculturi diverse cu vaste valori culturale, norme şi practici.

Se consideră că hacking-ul este un produs de conflict şi contestație între grupuri sociale diverse[8]. Se precizează că „cei care cunosc calculatorul se împart în două categorii: cei care sunt pregătiți să coopereze cu baza calculatoarelor şi cei pentru care baza calculatoarelor constituie o anatemă".

Bibliografie

Autori români:

Constantin A.: *Tehnici de investigare în criminalitatea informatică*, Lucrare de disertație susținută la Universitatea Română de Ştiințe şi Arte "Gheorghe Cristea", Bucureşti 2008 ;

Dobrinoiu M.:*Infracțiuni în domeniul informatic*, Ed. All Beck, Bucureşti 2006 ;

Alecu G., Barbaneagra A.: *Reglementarea penală şi investigarea criminalistică din domeniul informaticii*, Ed. Pinguin Book, Bucureşti 2006 ;

Maxim T., Chipăilă A., Gorunescu T.F., Ungureanu R.: *Informatica versus criminalitatea*, Ed. Pro Universalis, Bucureşti 2005 ;

Amza T., Amza C.P.: *Criminalitatea informatică*, Ed. Lumina Lex, Bucureşti 2003 ;

Giurea L., Blanda P.: *Proecția juridică a programelor pentru calculator*, Ed. Pidner & Pildner, Târgovişte 2003 ;

Cioclei V.: *Manual de criminologie*, Ed. All Beck, Bucureşti 1998 ;

Stănoiu R.M.:*Criminologie*, Ed. Oscar Print, Bucureşti 1998 ;

Nistoreanu G., Paun C.:*Criminologie*, Ed. Europa Nova, Bucureşti 1996.

Autori străini:

Adler F., Mueller G.O.W., Laufer W.S.: *Criminology, 2nd edt.*, McGraw-Hill, New York 1995

Internet:

Safe information security Services, http://www.7safe.com

American Society of Crime Laboratory Directors (ASCLD), http://www.ascld.org

[8] Paul A. Taylor, *Hackers: Crime in the Digital Sublime,* Routledge, New York, 1999, p. 15.

Electronic Crime Partnership Initiative (ECPI), *http://www.ecpi-us.org*
IBM T.J. Watson Research Center, *http://www.watson.ibm.com/index.shtml*

ATYPICAL LEGAL SYSTEMS

Getty Gabriela POPESCU*

Abstract

Juridical diversity, generally grouped in a coherent ensemble of great branches, such as the Romano-Germanic, Anglo-Saxon or Muslim branch, counts several legal systems which cannot be included in any of the classical branches, whose differences never cease to intrigue yet, however, must not be rejected or wrongfully attributed to one of the aforementioned branches, for they are atypical systems and knowing them becomes a necessity, as differences do not exclude the harmony existing in the juridical activity.

Among the atypical juridical systems, there are: (I) the Scandinavian legal system, (II) the Japanese legal system and (III) the Chinese legal system.

1. The Scandinavian legal system

Although it was initially considered to be part of the Romano-Germanic branch, due to its distinctive features, the doctrine currently acknowledges it as being an independent legal system.

The following states are part of the system: Finland, Denmark, Sweden and Norway. Some authors even include Iceland. The characteristic difference of the system is given by the history of these states, as well as by the way they were influenced by the Romano-Germanic system, especially by the German and the French civil codes. A strong historical influence is represented by the government form, the constitutional monarchy that is, that played an important part starting with the XVI century. Nowadays, of all the 4 Scandinavian states, only Finland is a republic, the 3 others being constitutional monarchies (Denmark, Norway and Sweden); therefore their juridical systems have been profoundly influenced by the characteristics of constitutional monarchies.

Therefore, Denmark has a parliamentary regime, the prime minister being granted an essential role in exerting the political power, while the monarch only plays a symbolical part. The parliament is elected by the people, for a period of 4 years. The only difference is given by the fact that Norway is a Lutheran state, just as Sweden, a country that elects part of its parliament members by scrutiny (310 member) and another part by the

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proportional system (39 members), for a period of 3 years. Finland has a presidential regime, the president being elected by the people for 6 years, yet there is also a prime-minister running the government. The parliament members are chosen for a period of 4 years, through the same manner.

The sources of the Scandinavian law are mainly formed of the German and French codes which have imposed codification in the Scandinavian states, while also taking the measure of unifying the regulations on commerce, patents, trade marks, the regime of matriculations, as well as the financial legislation.

With regard to the code of the family, it reflects the tradition of Nordic cultures, so that the rules regarding the divorce, marriage, adoption and child support obligations are deeply influenced by traditional beliefs.

Concerning the criminal law, its conception avoids long punishments and therefore the periods of imprisonment must be as short as possible, the longest of them only reaching 15 years.

However, the doctrine mentions the fact that the Scandinavian legal experts acted just as the Anglo-Saxons did and although innovative legal solutions were rapidly introduced, the newly-proposed rules were never conceptualized.

2. The Japanese legal system

This type of legal system was influenced both by the Chinese system (1) and the western one (2). The Chinese influence determined the introduction of Buddhist perceptions and the formation of juridical manuscripts. The western influence is both European and American, and led to a better development of the civil, constitutional, family law and also to a better juridical organization.

1. The Chinese influence began in the 5th century and lasted until 1986, during the reign of Emperor Meji, who embraced the western values.

Therefore, the Japanese legal system was built on the Chinese model, and in fact marked by Confucianism, adopting several codes containing repressive dispositions. In fact, the greatest development is known in the administrative and criminal law. The legal system was also formed by a Chinese customary part, yet the norms describing this part played a double role, both moral and legal, this leading to the conclusion that the science of law is still doubled by moral.

Slowly but surely, Confucianism lost its amplitude, being replaced by Buddhism, thus diminishing the role of the monarch, the latter being aided in dealing with the state affairs by a sort of councilor of the palace, named shogun, as well as by various noblemen. This determined the

construction of feudal castles, imposing the principle of superiority in the detriment of inferiority (those outside the castle), the inequity between citizens being considered rightful. As a matter of fact, the notion of subjective law cannot be found in the Japanese legal system of this era. The noblemen were given certain privileges, as prerogatives of their status.

2. The western influence expresses itself starting with 1868 and reaches two peaks – the European influence on the legal system and the American influence, especially with regard to juridical organization.

The European influence reached its most important period between1868 and 1945, and is characterized by the creation of civil law brought along by the adoption of the civil code, which contained both dispositions of the French civil code, and dispositions of the German civil code. Nevertheless, there are also dispositions materializing certain Japanese regulations, most notably with regard to the family, regulations that reflect the traditions of the Japanese culture. The civil code was followed by other similar events – the civil procedure code was adopted in 1890 and the criminal procedure one was adopted in 1922. They are still being used today (after having been amended and revised), except the criminal procedure code.

The 1898 Japanese constitution used the 1850 Prussian constitution as a model, being strongly influenced by a limited monarchy.

With regard to the law of contracts, it was of German influence, yet elements of the French law can also be encountered. Therefore, in case of failing to comply with the conditions agreed in the contract, the German theory is employed, with three consecrated cases: the non-execution for failing to meet the time limit, the impossibility of execution and the breach of contract.

Moreover, the contractual liability may be grouped with the criminal liability, in spite of the provisions of the French law. However, the situation of failing to comply with the provisions of the contract is approached as per the provisions of the French law (according to the civil code of the Napoleon era), meaning that, if the debtor fails to comply, the creditor may demand reparations of interest.

The civil liability has a mixed influence – both German and French. There are only two conditions: the existence of a premeditated or wrongful misdemeanor, following a breach of the duty of care, breach of a subjective right (mentioned by the German law), or of a norm mentioned in a law. The reparation of damages includes both material and moral prejudice, just as decided by the French law and further outlined by the German law.

The second important moment in the formation of the Japanese law system is represented by the introduction of the American law, after Japan's capitulation in 1945. The American presence in Japan after the war exerted a strong influence over the juridical system. Consequently, a new constitution was adopted in 1946, founded on innovative principles, such as: the people's suzerainty principle, the citizens' equality principle, the state secularity principle, granting the rights and fundamental liberties of the population. The oral regulations which have been transposed to the Civil code, especially with regard to the institution of the family, were left aside, marking an important modernization phase of the Japanese law (the traditional family law was changed). However, the decisive influence of the American law has radically changed the juridical organization manner and the control of the laws' constitutionality.

With regard to the juridical organization, there were the following court categories: the primary courts, the regional courts, the courts of appeal and the Supreme Court. Following the American model, all the courts have equal trial rights, therefore their competence is universal, no matter the cause brought to trial. Consequently, the minor issues were presented to the primary courts; the appeals were presented to the regional courts, the annulments to the courts of appeal; the Supreme Court annulled the decisions of the courts of appeal on matters related to cases of breaking the law or Constitution.

The Supreme Court of Justice was formed by a president and 15 judges appointed by the executive power, for a period of 10 years; yet, whenever legislative elections took place, the judges needed to be reconfirmed. In spite of the political influence, the Court is authorized to issue regulations for the interpretation of procedural norms. Moreover, the Court also sets up the budget plan for all the juridical bodies, the plan being further adopted by the Parliament.

The Supreme Court, as a higher body, is habilitated to assess:

- the conformity of the verdicts with the laws in force, being obliged to deliberate and decide on all the causes brought to its attention, this marking a difference from the Anglo-Saxon system;
- the conformity of the laws with the Constitution (similarly to the American system). By accident, this competence was jointly exerted with the inferior courts.

The doctrine mentions the fact that "the jurisprudence of the Supreme Court is marked by a strong conservatorship, which is given by the reduced number of non-constitutional declarations of laws, and also by the restrictive interpretation of the Constitution or examined law's innovative dispositions. This conservatorship is, however, much reduced now and is to be eliminated".

One can notice both a strong American influence and a European influence in the Japanese juridical system; however, according to traditional Japanese conceptions, every conflict is better resolved amicably, therefore trials are regarded as exceptional resorts.

The aforementioned type or bringing justice is determined by two phases: the compromise and the conciliation. The compromise is an amicable convention reached during litigations, eventually ending all the conflict-related actions. Every court has a conciliation committee, formed by a judge and two private persons. The judge doesn't play a decisive part in reaching the verdict, his rights being equal to the ones of the third parties.

3. The Chinese legal system

Until the 20th century, the Chinese law was based on Confucianism, which meant that the system was mainly formed by oral regulations. The written regulations were mostly found in criminal law related issues, under the form of dynastic codes.

The notion of subjective law is only introduced in the 20th century, being also a contribution of the European law. China's transition to communism and the creation of the People's Republic in 1949 marked the beginning of a new phase in the legal system, which was now aligned to the socialist ideology. As a consequence, the subjective law and state governed by the rule of law notions lost their significance.

The transition to communism resulted in the rethinking of the law sources' values, the written law gaining the status of main source. The other sources (civil and commercial oral regulations and the jurisprudence, pertaining exclusively to the Supreme Court) are secondary sources. Nevertheless, the jurisprudence of the Supreme Court tries to determine directly-applicable law principles.

The laws are adopted by the People's National Assembly, counting 2977 members, elected for a period of 5 years by the indirect vote of the people's assembly leaders in the province, self-governed regions, who also elect the 155 members of the permanent Committee, who served as a replacement of the National Assembly, once a year (between sessions).

The doctrine also mentions the fact that, if the Chinese system agrees to prioritize the international norms to internal ones, whenever there is a conflict between the two categories, the provided answer is not entirely positive. Therefore, no law foresees the superiority of an international text over an internal law: "The juridical context surrounding these pressing issues allows the Chinese political power to provide pragmatic answers, adapted to their own selfish interests".

Regarding the juridical organization, it is formed by two jurisdiction types. The first jurisdiction is comprised of the local people's tribunals and special tribunals, while the second one is represented by the Supreme People's Court.

The local people's tribunals can be further divided into 3 types of courts: the basic people's tribunals (existing in communes and small towns); the superior people's tribunals (existing in provinces and self governed regions). It is to be noted that these tribunals are assisted by a Committee of judges, only getting involved in the difficult cases.

The special people's tribunals are, in fact, the specialized courts, either military or maritime ones.

With regard to the Supreme Court, it is structured in several sections (civil, penal, economic, administrative, appeal, communications and transportation), the judges are appointed on political reasons by the Permanent Committee of the People's National Assembly. The Court may be the first, but also the last to judge misdemeanors. Its verdicts and decisions are mandatory for any other inferior court.

Regarding the criminal code, it mostly follows the features of the soviet (communist) legislation, as it only focuses on the worst of misdemeanors. The "smaller misdemeanors" or contraventions are attributed to the administrative law. In fact, according to the Chinese criminal code, a misdemeanor can be sanctioned if it contravenes to the public order, meaning that any deed aimed to hurt private or collective property in any way, or the suzerainty and territorial integrity, is punishable.

However, among all the conviction, the conviction to death is still mentioned. According to the official reports of Amnesty International, there are around 2000 people sentenced to death, leading to several recommendations and protests from the part of several international documents.

If in the criminal law-related issues, the influence of the soviet law over the Chinese law increases, in the private-law issues there are influences of the Romano-Germanic law, as well as the reminiscence of the Japanese culture. The private law was subject to an important reform in 1987, when several laws were adopted and grouped into a single codex, then further named "General Civil Law principles". These laws were intended to modify, which brought along further modification in the importance of law sources, the most important one becoming the written law, in detriment of the orally passed regulations.

It is to be mentioned that, apart from the socialist legal system implemented by the European countries until 1989, the Chinese system encouraged the development of private property and the existence of commercial law. Therefore, unlike other ex-socialist states, through the

1988 reform, 4 new types of companies were created: the equity joint venture, the cooperative joint venture, the limited liability companies and the joint-stock companies, considered to be far more flexible for foreign investors. The only thing that needs to be added is that the legislative requests that the owners of such companies should meet several requirements, stipulate the number of years the company is believed to carry out its activity and also obtain the approval of the Chinese government (which brings about a serious afflux of bureaucracy).

Conclusions

Although in their content elements are borrowed either from the Romano-Germanic system, or from the Anglo-Saxon one, the atypical law systems are mixed judicial regimes; that is why they do not belong to any of the big law families. On the other hand, the fact that they do not belong to any of the classical families does not mean that they lack importance or that they can be ignored by the scientific research; every legal system or branch represents an element of diversity of the judicial macro-system.

Additionally, there is no pure judicial system: we borrow and adapt each other's realities and this creative exchange proves the harmonization and unity of judicial diversity.

But harmonization does not necessarily mean a unification or assimilation of the national systems, because the juridical world cannot be reduced to only 3-4 legal systems. Diversity is normal and necessary, even for the juridical branches, as it represents an element of national identity.

COORDINATES OF THE FAMILY LIFE ACCORDING TO ARTICLE 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ARTICLE 3 OF THE HAGUE CONVENTION

Gina IGNAT*

Abstract

A vector of the protection ascertained by the European legislator in article 8 paragraph 1 of the European Convention on Human Rights, regarding family life (not explained in the content of the Convention), is subject to – like many other cardinal institutions targeted by the conventional text – the dynamic and progressive interpretation of the human rights claim court. This court has explained its content, establishing multiple valences in agreement with the internal law of the national states, and with the relevant stipulations of the international law.

The parent's and child's possibility of enjoying each other's company represents a primary element of the family life that claims urgent and efficient interventions by state authorities for the exact implementation of both positive obligations arising from the Convention and those stated in the Hague Convention in 1980 regarding the civil aspects of international child abduction.

Thus, the European Court of Human Rights has emphasized continuously each contracting state's duty to provide itself with an appropriate and sufficient legal arsenal to ensure that positive obligations are abided on grounds of article 8 of the Convention and to other international law instruments which it has ratified.

In this paper we intend to focus on the essential coordinates of family life as they are presented both in the Convention text written down by the European Court of Human Rights and the Hague Convention in 1980.

Keywords: *family life, Convention, positive obligations, international law.*

1. Limitation of the state sovereignty by acknowledging and internationally guaranteeing human rights

The appearance and the development of the international protection of human rights, therefore the international cooperation of states in this regard, makes the problem of human rights no longer represent an area of exclusive national competence, reserved only to national sovereignty understood absolutely and discretionarily (Popescu, 2000).

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Thus, the state has no longer absolute power over the individuals in its jurisdiction. On the contrary, it is obliged to respect their rights that were acknowledged by international law/norms.

Given the fundamental distinction between the international and the internal law, the international regulations of human rights have a special regime. The internal law is a subordination that gives rise to only one judicial order within which the subjects are subordinated to the state power, in its triple function: legislative, executive and judicial. The international public law represents a law of coordination among sovereign states and it does not accept any legislator, judge or mandatory sanction, except the consent of the states in question (Sudre, 2006).

One of the principles governing the relationship between the international law of human rights and the internal law is the principle of subsidiarity. This principle may be enforced substantially and through procedures.

In addition, the principle of subsidiarity also functions in the international judicial norms in force regarding human rights. In case of a conflict between two international norms that both tend to be enforced although they have contrary provisions, the solution will be given neither by the principle of judicial hierarchy nor by the principle of succession in time, but by the principle of subsidiarity which enforces the most favourable norm for human rights (Popescu, 2007).

We consider that the applicability of international norms concerning human rights must also be guided by another rule known to the internal law, namely the prelevance of special norms in relation to the general one. Therefore, if more international regulations are involved, the priority will be for that regulation which regulates in detail the relations concerning a right or a category of individuals.

For the present approach we intend to analyze mainly the relation between two such international regulations – the European Convention on Human Rights and the Hague Convention on the civil aspects of international child abduction – the convergence of which concerns the regulation of the relationships between parents and children, but also the distinctions demanding the applicability of the text with special norm value by virtue of the settlement in detail of the key aspects that must be taken into account when defending family relationships.

2. Relevance of international law in terms of jurisprudence of the European Court of Human Rights

The jurisprudence of Strasbourg Court of Law, an authority which has the monopoly over the interpretation of the European Convention on

Human Rights (ECHR), may impose obligations to states that go beyond what the text of the treaty seems to pretend.

According to article 60 of the Convention, no disposition can be interpreted as limiting or affecting human rights and fundamental freedoms which may be recognized according to the law of each contracting party.

One must also consider the prevalence of the authority of the European mechanism of human rights protection, an idea enhanced by the provisions of article 62 stating that "The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention." (Puşcă, 2002).

The European Court of Human Rights emphasized in the first decision taken in an interesting dispute (Ireland against Great Britain, January 18, 1978) the fact that "compared to the classical international treaties, the Convention exceeds the common reciprocity between the contracting states". Besides a series of bilateral synallagmatic commitments, it creates objective obligations that, in terms of its Preamble, benefit from a "collective guarantee". The European judge emphasizes the specificity of the Convention, linking the objective feature of the conventional norm to the "collective guarantee" which represents its institutional expression (Sudre, 2006).

The recognition of human rights acquires a global and universal character that shows a visible concord of the international society, a good collective consciousness: human rights *urbi et orbi*. Though this globalization of the proclamation discourse cannot erase the differences between the proclamation instruments (Sudre, 2006).

Thus has the Court decreed in the sense of necessity and requirement of enforcing the European Convention of human rights according to the principles of international law, especially those referring to the international protection of human rights" (ECHR, the case Pini, Bertani, Manera and Atripaldi vs. Romania, the ruling in June 22, 2004).

It is worth mentioning in this context that, at an international level, there are treaties with general vocation and treaties with limited applicability linked to an analytical approach which translates a "division" tendency of a person; thus, particular/private rights or special categories of individuals are protected. The following titles can be quoted as an example: the declarations of the United Nations General Assembly regarding children's rights (November 20, 1959), the conventions referring to children's rights (November 20, 1989), etc. (Sudre, 2005).

3. The right to respect for one's private and family life

If it is true that all the rights guaranteed by the Convention must respond to a preoccupation regarding effectiveness, this statement is even more true when talking about the right to respect for one's private and family life. This is the reason why the European judges have progressively devoted an evolution of the concepts of private and family life; these concepts are rather vague since the notion of private and family life can be understood in a wider or narrower sense (Renucci, 2009).

The protection of private and family life makes many international texts overlap. Thus, the right to respect for private and family life is protected against arbitrary or illegal interferences by the public authority and family, "a natural and fundamental element of the society", sees its right to protection acknowledged by the state and society.

As for the protection ensured by the European Convention of Human Rights in this domain, one can notice the preoccupation of the Convention authorities to interpret dynamically the Convention in order to protect it against any anachronism and to take into account the evolution of its customs and social needs.

According to article 8 of the Convention, "each person has the right to respect for his private and family life, his home and correspondence" (1).

"There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others" (2).

The first paragraph of article 8 is drawn upon the Universal Declaration of Human Rights adopted few years before the Convention.

The incidence field of this text is practically unlimited. In general, it guarantees the right to privacy, the notion used in the American doctrine, or the right to be left alone, using a less judicial term. Article 8 is the first of a series of four texts that protects rights representing the social respect for the individual, the protection system of human individuality being completed by the provisions of articles 9, 10 and 11 (Bîrsan, 2010).

As shown by the text of article 8, this covers many situations, four notions being referred to – private life, family life, residence and correspondence. These notions join other terms of the Convention, the Court giving them an autonomous definition, different from the qualification present in the internal law of the respective state.

4. Relationships between parents and children

Characterized by the exigency of effectiveness, the dynamic interpretation of the right to respect for private and family life takes place first on the land of conceptual definition. Thus, keeping the generous acceptation of the concepts governing the applicability of the right guaranteed by article 8 ("private life", "family life"), the European judge enhances the applicability of the conventional norm and consequently of the sphere of applicability of the right in question.

The protection of family life is organized around two axes: the right to marriage and the right to respect for family life. As the right to marriage is mainly treated in article 12 of the Convention, we will refer to the connotations of article 8 devoted to the protection of family life.

Through a constructive interpretation of the right to respect for family life, the European judge has enhanced the sphere of applicability of this right, giving a meaning to the notion of "family life", and proceeded to the extension of the content of the guaranteed right.

As the European Court declares in the stipulation Marckx against Belgium on June 13, 1979, "by guaranteeing the right to respect for family life, article 8 presupposes the existence of a family."

The notion "family life" is meant as a family relationship to which an effective relationship is added. "Family", as presented by article 8 of the European Convention on Human Rights, is not limited only to relationships based on marriage and the right to respect for family life is valid both in case of a "natural family" and a "legitimate" one, from the moment we can speak of an effective family life (Sudre, 2005).

The effectiveness of interpersonal relationship represents the main criterion of "family life". Living together is generally a decisive condition of the effectiveness of a family relationship. However family life can exist even when there is no living together. A divorce or the ending of a life together do not end the family relationship between a parent and his child, and neither does the absence of parents living together at the moment of birth since they had a "family life" at a certain moment. Formulating the principle according to which "from the moment of birth and simply through birth" a "family life" connection is established between parents and child, the Court shows flexibility in its appreciation of the effectiveness of family life (Sudre, 2006).

The citizen's right to respect for their family life must have as a premise the insurance of the possibility of taking all the legal measures to keep the family together (Bozeşan, 2007).

Thus, the Court has always stated that article 8 implies the parent's right to benefit from the state adequate measures regarding their being

with their child, and at the same time compels the national authorities to dispose of these measures.

5. Establishing of family relationships and necessity of their preservation in case of parents separation

The importance given to family life justifies the preoccupation of the international society to avoid situations of separation between parents and children and to decrease the effects of such a separation when this cannot be avoided.

The main principles concerning child protection have been stipulated in 1959 in the Declaration of the Rights of the Child: "The child, for the full and harmonious development of his personality, needs love and understanding. He shall, wherever possible, grow up in the care and under the responsibility of his parents…." (article 6).

The International Pact on Civil and Political Rights shows that "The family is the natural and fundamental group unit of society and is entitled to protection by society and the State" (article 23 (1) supported by article 10 of the International Pact on Economic, Social and Political Rights) and that "no person can be subject to arbitrary or illegal interference on his private life, family, home or correspondence, or to any illegal attack on his honour and reputation" (article 16 (1) and (2)) (Hodgkin, 2004).

The same important ideas are underlined in article 9 of the Convention on the Rights of the Child adopted by the United Nations General Assembly on November 20, 1989[1], according to which:

(1) States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

(3) States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

Article 9 of the Convention on the Rights of the Child emphasizes two essential principles for the rights of the child: first, children should not be separated from their parents unless it is in their best interests, and second, all the procedures leading to this separation must be correct. It

[1] Retified by Romania in the regulation no. 18/ 1990, republished in M.Of. no. 314/13 06. 2001.

also states the right of the child to maintain relationship with his or her parents and establishes, at the same time, the obligation of the state to inform the parent or the child where the other one is and if the separation was required by the state (for example, by deportation or prison) (Hodgkin, 2004).

In the spirit of the Convention on the Rights of the Child, in case of parents separation, the authorities of the European Convention on Human Rights clearly state the principle of maintaining personal relationships of the child with each parent.

In other words, although life together is generally an essential condition of family life, it is not a *sine qua non* condition; the absence of a life together does not prevent family life. In fact, family life exists before a life together, starting with the birth of the child. Parents living or not together at that moment does not matter as the connection with their child implies *per se* the family life (Renucci, 2009). The effective character of a relationship has been taken into account but always in connection with the family.

The right to respect for family life determines the establishing of an obligation of means by the state. The state must "take action so that it could allow individuals in question to lead a normal family life" (Marckx vs Belgium, June 13, 1979).

The protection of family life presupposes the establishing of family relationships by judicially recognizing them.

The effectiveness of family life presupposes that the relationship between parents and children, the basis of family life, should be protected; as the Court states "for a parent and his child, the fact that they are together represents a fundamental element of family life" (Olsson vs. Sweden, March 24, 1988).

The right of a parent and of a child to respect for family life, guaranteed by article 8, as stipulated by the European Court of Human Rights (Olsson vs. Sweden, Eriksson vs. Sweden, Andersson vs. Sweden), is a right to measures meant to reunite them (Debet, 2002).

The nontitular father of the parental authority has such a visit and hosting right that he cannot be deprived of, only if there are serious reasons. It remains to be determined if the court decisions are well carried out, a good execution being demanded in Hokkanen vs. Finland (Debet, 2002).

The European Judge also imposes on judicial authorities some positive obligations of educational assistance, systematized in the decision Scozzari and Giunta vs. Italy, July 13, 2000: the obligation to ensure that decisions are effectively and coherently put into practice, tending to foster the meetings between parents and children, and the obligation of social services that must not prevent the respective decisions from being

enforced; the obligation of giving parents "pertinent and complete information" regarding the placement measures taken; the obligation of supervising the persons or the institutions the children were entrusted to.

The parent to whom the child was not entrusted has the right to visit and to have a relationship with him unless the child protection opposes (Hendriks vs. Holland, Hokannen vs. Finland, September 23, 1994). In more general terms, any parent who does not live with his child has the right to have a relationship with him, and the European judge condemns any difference in treatment concerning the right to visit between divorced fathers and those who have children that were not born inside a marriage (Sahin vs. Germany, July 8, 2003).

On the execution of court decisions of entrusting children after a divorce, the Court has decided that the national authorities' obligation of taking measures for the reunion with the parent to whom the child was entrusted is not absolute, on the assumption that he is with the other parent, as it is possible that such a reunion presupposes its careful preparation.

However, the state is not obliged to reestablish the conditions of a degraded life through the deeds of those interested (Debet, 2002).

The nature and the extension of the highlighted obligation depend on the circumstances of each case, but the understanding and cooperation of all people and institutions involved in its carrying out represent a very important element that must be taken into account in such situations.

The national authorities must make efforts to achieve the necessary cooperation, taking into consideration the rights and interests of all people involved, especially the interests of the child protected by article 8. Where the contacts with the parents might threaten these interests or violate his rights, national authorities are compelled to ensure a "just balance" for all the interests.

In the case Maire vs. Portugal (Decision of June 26, 2003), where the plaintiff invoked that the Portuguese authorities did not facilitate the execution of a court decision, pronounced by the court of another state (France), the European court showed that, in such cases, whether the measure is appropriate or not, this will be appreciated taking into account how fast it was decided. It is true that the procedures regarding the allocation of parental authority, including the execution of the decisions that have established it, demand an "urgent treatment" because time can have irremediable consequences concerning the relationship between the child and the parent who does not live with him any more.

In the case Monory vs. Romania and Hungary (Decision of April 5, 2005), the same Court stated that since in all these cases the interests of the child have a primordial importance, it is possible to justify the fact that, after 8 months since the plaintiff's daughter had left Hungary, the

Romanian Court appreciated that she had got used to her new place and that the main interest was to let her stay with her mother in Romania even if no legal decision had been made regarding her new residence (Bîrsan, 2010).

6. Exigencies of the conventional law on child abduction

The states that have ratified the Convention on the Protection of the Right of the Child have the responsibility, according to article 11, of preventing the children from being taken out or retained without justification outside their jurisdiction, of ensuring the retrieval of these children, and of taking all the necessary measures so that the kidnapped children in their jurisdiction should be returned.

The respective article aims especially at the cases of kidnapping or restraint by parents.

As it is stipulated in article 11, the most effective way of implementing its provisions is the signing and implementation of relevant international instruments, such as the Hague Convention, regarding the civil aspects of children kidnapping at an international level (1980)[2].

The Hague Convention represents a global instrument proposing to protect children under 16 who (by violating the custody rights of certain individuals) have been illegally transferred or retained abroad, provided the Hague Convention is in force between the two involved states. Normally, under these circumstances, the Court decides that these children should be returned immediately to their residence where a final decision will be made concerning their future. The Court may refuse to give such an order if the child protests or if he is subjected to the serious risk of being harmed or if the child has lived in the new place for more than a year.

What is more, besides the Hague Convention, there are other regional treaties, such as the Inter-American Convention on returning children and the European Convention on Recognition and Enforcement of decisions concerning Custody of Children. These treaties may be useful to extend the principles of the Hague Convention, for example by emphasizing the details of the decisions that already exist (Hodgkin, 2004).

As it was natural, enforcing the European Convention on Human Rights cannot be achieved without ensuring the effectiveness of the transposition of international law principles, especially those connected to the international protection of human rights. Thus, the rights enunciated

[2] Retified by Romania in the regulation no. 100/1992 published in M.Of. no. 243/30.09.1992.

in this convention, stipulating positive obligations for the contracting states, such as the problem of the reunion of children to their parent, must be interpreted taking into account the Hague Convention regarding the international aspects of children kidnapping.

Certainly, the interference of the state is urgently requested when it has been established that removing or returning a child has become illicit, that is there is one of the hypotheses considered by article 3 of the Hague Convention, namely:

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention;

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

In what concerns the international "kidnapping" of a child by one of the parents or the refusal to allow the child to return to the parent he was entrusted to in other country, the Court underlined that, in the preamble of the Hague Convention, the contracting parties express their conviction that "the interest of the child" is vital for any problem regarding his custody and state their will of internationally ensuring the protection of the child against the damaging effects of his removal or illicit return and of establishing the necessary procedures that guarantee the return of the child in the state where he has his usual residence and effectively achieve the right to visit of the other parent (Bîrsan, 2010).

Therefore, the European judge does not hesitate to interpret the positive obligation previously mentioned in article 7 of the Hague Convention of 25 October 1980, which presents a list of measures that must be adopted by the states ensuring the immediate return of the children. On condition that the "kidnapping" is illicit (Guichard vs. France, decision of 2 September 2003), national authorities must "make adequate and sufficient efforts" to enforce a court order requesting the return of the child to his mother (Ignaccolo-Zenide vs. Romania, decision of 25 January 2000, Sylvester vs. Austria, decision of 24 April 2003).

The Hague Convention establishes measures meant to ensure the immediate return of children illegally retained in a contracting state. According to article 11 of the Convention, the judicial and administrative authorities already informed have the obligation to take immediate action for the return of the child, any action later than 6 weeks having a serious reason.

7. Interference of international norms on the protection of family life. Realities and perspectives

The principle of the minimum level of the international protection is a principle of the international law on human rights, stated as a clause in all the international treaties on this subject, from which, by means of internal norms, one cannot derogate "down" but "up", a greater national protection being added (Popescu, 2003).

The almost universal ratification of the Convention on the Rights of the Child is a remarkable achievement. The fact that every state has practically assumed the responsibility for an obligations code in favour of its children, places the rights of the children right on top of the objectives of the fight for human rights. It also places a huge responsibility on the shoulders of governments and the civil society, namely that of living up to the assumed commitments (Bellamy, 2004).

A core principle in all the international treaties on child protection, the best interest of the child gets a special significance when the child is separated from his parent or both parents. In such a situation, governments and public and private bodies must evaluate the impact of their action on children, ensuring that the child's interest has priority, that he is given the adequate importance and that a "child-friendly society" is being built.

First of all this concept implies the obligation of taking into consideration the best interest of the child individually, especially in the situations regarding the separation of children and parents, parental responsibilities and the absence of a family environment, etc.

Internationally, it has been repeatedly underlined the idea that childhood is not "the antechamber of life", but "life itself".

Given the importance of preserving the best environment for the harmonious development of each child, society is forced to take care of the necessary measures.

Knowing the jurisprudence of the European Court of Human Rights, with reference to the way in which the Hague Convention is applied, is a necessity.

Therefore each state receives the task of making immediate and effective efforts to apply the right of the applicant at his minor's return, aiming to satisfy the right to respect for private and family life guaranteed by article 8 of the European Convention on Human Rights.

In this respect, the court of law must promptly adopt the implementation of the corresponding disposals of the Hague Convention, as the celerity of the way in which trials of custody are solved may have irremediable consequences on the relationships between the minor and the parent that does not live with him.

The Hague Convention offers a series of measures to mediate the immediate return of minors removed or retained illegally in any contracting state and stipulates the obligation of judicial and

administrative authorities of taking immediate action in the trials of returning minors, any inaction longer than 6 weeks leading to the demand of an explanation for delay.

As the essential aim of article 8 of the European Convention on Human Rights is that of protecting the individual against arbitrary action by public authorities, domestic courts must interpret the guarantees offered by the Hague Convention in this respect. Consequently, the state is forced to take positive measures in order to achieve the right of a parent to be with his child but also positive obligations which are inherent to the effective "respect to family life". In both situations one must take into consideration the proportionality ratio that must exist between the interest of the person and that of society, hypothesis in which the state benefits from a certain margin of appreciation. However, attention, promptness and adequate and sufficient efforts are important to require respect for family life.

While analyzing the objectives of the Hague Convention and the positive obligations of a contracting state, according to article 9 of the European Convention on Human Rights, although it is possible that the modification of relevant situations might justify why a definitive legal disposal has not been applied or a violated right has not been achieved, it is essential to establish the fact that the state bodies involved have taken all the measure of execution and the changes that appeared in this situation are not due to their lack of action.

Bibliography

Bellamy, C., Preface for the Manual of implementation of the Convention on the Rights of the Child, revised edition, Bucharest, 2004; p XI;

Bîrsan, C., The European Convention of Human Rights, Article Comments, Second edition, C.H. Beck Publishing House, Bucharest, 2010;

Bozeşan, I., Some Considerations on the ensurance of respect for private life and the right to a fair trial in the development of civil trials, The Judicial Courier no. 1/2007, p. 5;

Brița, D., On the Hague Convention on the international children kidnapping and the CEDO jurisprudence, http://www.mpublic.ro/minori_2008/minori_4_3.pdf.;

Chiriță, R., The European Convention of Human Rights, Comments and explanations, Second edition, C.H. Beck Publishing House, Bucharest, 2008;

Debet, A., L'influence de la Convention européenne des droits de l' homme sur le droit civil, Dalloz, Paris, 2002 ;

Hodgkin, R., Newell, P., Manual of implementation of the Convention on the Rights of the Child, revised edition, Bucharest, 2004;

Lefterache, L., The Limitation of the exercise of some rights as accessory punishment, the Judicial Courier no. 9/2006, p. 137;

Popescu, C.-L., The international protection of human rights – sources, institutions, procedures, All Beck Publishing house, Bucharest, 2000;

Popescu, C.-L., The relationships between the international norms regarding human rights and the judicial internal norms. The subsidiarity principle, The Judicial Courier no. 5/2007, p.22-23;

Puşcă, B., Puşcă, A., The Judicial Protection of human rights, The Danubius Academical Foundation Publishing house, Galați, 2002.

Renucci, J.-F., A Handbook on the European Law of human rights, Hamangiu Publishing house, Bucharest, 2009;

Sudre, Fr., European and international law on human rights, Polirom Publishing house, Iaşi, 2006.

THE CONCEPT OF LAW AND RULE OF LAW

Beatrice-Daiana DASCĂLU *

Abstract

The notion of law can be explained taking into account its material content or nature of public authority vested with the right to adopt rules of conduct generally binding and impersonal and the procedure used for this purpose.

The "supremacy of the Constitution" is a phrase usually used in specialized Romanian literature, but also in other literature, along with other expressions, such as: supreme legal value, super legality, the supreme law, the law of laws, etc.

The supremacy of the Constitution is the fact that the Constitution is the basis of state organization, the legal basis of all legislation. Leadership is a trait that stands on top of political and legal institutions in a society organized in states, the source of all regulations, directions of economic development, political, social and legal.

The concept of law is defined in terms of minor nuances of the various branches of the law system.

In a broad sense, the concept of law is extended to any rule of law having general - required In literature, the law is defined as a legal act of Parliament, established under the Constitution, according to predetermined procedures and governing social relations, most general and most important, or a normative legal act adopted by the legislature after the procedure established for that purpose, which, in its legislative powers, lays down general rules for application and repeated application of which is assured by state coerciţiunii virtuality.

The concept of law can be explained taking into account its substance or the nature of public authority vested with the right to adopt rules of conduct in general - mandatory and impersonal - and the procedure used for this purpose.

Affirming the principle Generalitat law leads to the consequence that the ideas guiding spirit of the rule of law, no laws can be considered truly so-called "personal law", is acts of Parliament (or the executive power) to create rights or obligations to one or more individuals predetermined. So, the extent that such a law aimed at individual circumstances established, governed by a law of general earlier, it can be removed for failing its rules.

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Generality of law is absolute and nothing prevents a law regulating the narrow fields of social life and also to address some subjects to be determined, but all the generic features.

Other laws may be adopted and authorities of executive power, including the bodies of central and local government. Between all these law occupies a central place, it being within the top hierarchy of legal documents. That is also the rule of law, conferred in the first place that is adopted by representatives of the nation and express its sovereign will. All other legal acts must conform with the law.

Legal force of law is superior legal force subordinates, issued by the executive.

Rule of law is ensured primarily by establishing in the constitution or by customary law of the field, the regulatory sphere reserved to social relations law. In principle, Parliament can legislate in any area of social life, as it is the sole legislative authority and supreme representative forum of the people. However, the political regimes in which the constitutional level is not set aside a certain regulatory domain of the Legislature, as for example if the U.S. Congress and the French Parliament, parliamentary practice outlined a balance between the legislative powers of Parliament and government regulatory power.

It would be absurd to claim that Parliament could regulate all spheres of social life in the smallest details and would virtually lock the Legislature. Therefore it is recognized in general executive power to issue rules of conduct primary fields of social life, but to empower the legislative power.

Another way to ensure the rule of law of reserving the right to amend a law, that body adopted is using the same procedure in Parliament and legislative approval of the recourse to such law. A law may be amended only by a rule with the same legal force.

In the constitutional systems of law are distinct categories, such as constitutional laws, organic and ordinary laws can be changed by the same character.

A law having an upper legally may amend the provisions of a law with a legally inferior.

By its essence and its social function the Constitution is legally superior to any other rule of law. Therefore all normative acts adopted by Parliament and government and acts of other public authorities must comply with constitutional rules and principles. If a piece of legislation, including a law passed by Parliament or regulation of organization and operation there of, contrary to the Constitution, can not take effect. The justification lies in the very supremacy of the constitution and its legal political character. Thus the Constitution finds its supreme expression of

the people in terms of objectives and instruments for the exercise of political power.

The Constitution is established rights and liberties and structural factors of the legal system to which they provide guiding principles: equality of all citizens, legality, laws, etc.

Modern constitutional systems provide penalties for violation of constitutional provisions or state authorities engaged in political activity itself as such, the Head of State or by political parties. Thus, the Constitutional Court of Romania, the Federal Constitutional Court of Germany, the Constitutional Court of Moldova, are competent to rule on the constitutionality of political parties.

It is also the head of state a general duty to ensure compliance by all other authors these activities public, nongovernmental organizations, citizens, political parties, etc., of the Constitution (e.g. article 2, para. 3 of the Constitution of Romania, article 5 of the Constitution of France). In Portugal the guarantor of the constitution is Revolutionary Council under 142 and 146 of the Constitution and the Republic of Moldova under the provisions of 134, paragraph 3 Constitutional Court guarantees the supremacy of the Constitution. Ensuring constitutional rule means thus ensure social stability and legal order in state. Due to the supremacy of Constitution, the legislature has established a specific constituent hierarchy of normative acts, the head of which are located the Basic Law. Undertaking shall follow constitutional laws, organic laws, ordinary laws, ordinances, judgments, etc. government.

The Romanian constitutional system, like in the constitutional system of the Republic of Moldova, constitutional law is an exception to the rule of the Constitution, because it will change. Of course this does not mean that constitutional law can be contrary, even implicitly, constitutional provisions unchanged. We specify the law by changing the Constitution should be within the existing constitutional order. We should make an observation regarding the Constitution based on custom. By definition, the problem of such kind of rule of fundamental law is put in terms other than the supremacy of the constitution written.

New custom content or a new constitutional law will be easily custom obsolete or that, the law which required amendment or repeal.

Supremacy of the Constitution is only one principle and should be accompanied by a mechanism to give texture, to defend it. Professor George Alexianu wrote that this view was to show a special mechanism to ensure superior standards established by the constituent power to ordinary laws, meaning that they may be amended only by the power that it has established, with respect to forms and special safeguards different from ordinary laws.

To ensure the primacy of constitutional doctrine and constitutional practice created two legal institutions: the control of constitutionality of laws and administrative court. The new Constitution of Romania took over the practice of modern constitutional political-judicial system of compliance control laws with the Basic Law. Between the constitutional jurisdiction of the Romanian legal system and of Western are both similarities and differences. Thus, the main difference between Romanian and French contentious procedure is that in our constitutional system of checking the constitutionality of organic laws and regulations of both legislative chambers before being promulgated and that, to be implemented, not mandatory, but is triggered following a complaint from the President of the Republic, the Presidents of Chambers, Government, Supreme Court of Justice or from a number of at least 50 deputies or at least 25 senators, while in France, organic laws are subject mandatory control exercised by the Constitutional Council.

Also, Romania's Constitutional Court ruling on the objection of unconstitutionality raised before the courts. Another difference lies in the scope of bodies empowered to seize the Constitutional Court about the constitutionality of ordinary laws. As in Romania and Moldova, under the new Basic Law, High Court of Cassation and Justice may refer the Constitutional Court on the constitutionality of a law before its promulgation. The French legal system, the high court of the judicial hierarchy is not involved in the referral to the Constitutional Council.

Between the two institutions to verify the constitutionality of normative acts of Parliament there are a number of differences such as the training module of the Constitutional Court. As in Romania and Moldova Constitutional Court is composed exclusively of judges appointed, and not as members of law consists of the Constitutional Council of France.

Regarding the opinions issued by the Constitutional Court of Moldova rally our opinion Professor Victor Popa, who observed that the legislature has committed a serious error, since the strength of juridical opinion Constitutional Court makes a supranational body that basically can assume powers Parliament to suspend from office the President of the Republic or to dissolve Parliament since the opinions of the Constitutional Court are final and can not be appealed, they go beyond the situation to be intended to see or justify the actions of Parliament and President of the Republic.

LE CONCEPT DE FAIT ILLICITE – CONDITION POUR LA RESPONSABILITE CIVILE CONTRACTUELLE

Nora Andreea DAGHIE*

Resume

Le conseil de surveillance de la société commerciale par actions est compose d'un nombre d'au moins 3 membres et au plus de 11 membres. Ce nombre de membre situé entre 3 et 11 est laissé à la latitude des commanditaires pour l'établir par l'acte constitutif en conformité avec art. 153⁶ de la Loi numéro 31/1990.

La nature juridique des rapports entre membres du conseil de surveillance et société est établie par les dispositions concernant le mandat et celles spéciales inclues à la loi des sociétés commerciales, comme il résulte de l'interprétation de l'art. 72 et 153⁸ alinéa (3) de la Loi numéro 31/1990. Conformément à ceux-ci, l'art. 144² alinéa (1) s'applique par conséquent aussi aux membres du directorat, pendant que art.144² alinéa (1) fait envoi à l'art.72 de la Loi 31/1990 qui règlemente les rapports entre administrateur et société[1].

Mots cles: *conseil de surveillance, société commerciale par actions.*

JEL Classification: K2, K22

1. Quality of Supervisory Board Member

Law no. 31/1990 requires the fulfillment of certain conditions for the membership in a supervisory board.

Therefore, according to art. 153[13] of the Law of Commercial Societies „The directors of joint stock companies in the unitary system, respectively members of the management in the dual system, are natural persons. A legal person may also be appointed administrator or member of the supervisory board of a joint-stock company, but they are compelled to assign a natural person as a permanent representative. The latter is subject to the same conditions and obligations and has got the same civil and criminal liability as an administrator or member in the supervisory board, natural person, acting on his own behalf without exonerating by that the legal person they represent from liability or diminishing the joint liability of the latter. Whenever the legal person revokes their

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[1] St.D. Cărpenaru, *Treaty of commercial law*, Ed. Universul Juridic, Bucureşti, 2009, pag. 385. By modification of Law no 31/1990 by O.U.G. nr. 82/2007, the solution was adopted in art. 152 alin. (2) and (3).

representative, they have the obligation to assign a replacer at the same time".

Given that art. 153^{13} is included within the III-rd section of Law no. 31/1990 under the heading „Joint Dispositions for the unitary and the dual systems", in case of both systems of administering commercial companies, a natural person may be appointed member. The law becomes even more specific in the case of supervisory boards and gives possibility for assignment of a legal person too in the position of a member, which is not applicable in the case of managers or management.

Referring to dispositions under art 73^1 of Law no. 31/1990[2], the following are applicable: „People who, according to art. 6 para. (2), cannot be founders can neither be managers, members in supervisory boards and of management, censors or financial auditors and if elected they will be revoked from these rights"[3].

Art. 153^8 of the law provides: „Members of supervisory boards cannot be concomitantly members of management. Also, they cannot cumulate the capacity of a member in a supervisory board with the one of employee with the company".

Based on the same article of the Law of commercial societies, it is set forth that, by the deed of partnership or by a decision taken in the shareholders' general assembly, shareholders have the possibility to set out specific conditions of professionalism and independence for the members of the supervisory board[4].

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[2] Art. 73^1 has been altered by item 6 of art. I of O.U.G. no. 82 dated 28 June 2007, published in Official Gazette no. 446 dated 29 June 2007.

[3] Art. 6 para. (2) of Law no. 31/1990: „People cannot be founder who *according to law have been condemned for fraudulent administration, use of false, forgery, misappropriation, bribery given or taken, for crimes provided in Law no. 656/2002 for prevention and sanctioning for money laundry, as well as for establishment of steps for prevention and fighting financing of terrorism deeds, along with alterations and further supplementing, for crimes provided for under art. 143 - 145 of Law no. 85/2006 on the procedure of insolvency or for the ones provided under the present law along with alterations and further supplementing*".

[4] In assessing the independence of a member in supervision board criteria shall be considered as provided under art. 138^2 para. (2): *„In appointing the independent administrator the Shareholders' general assembly will consider the following criteria: he shall not be manager with the company or of a company controlled by the former and not have fulfilled such a position for the last 5 years; he shall not have been employee of the company or of a company controlled by the former or have had such labour relation in the last 5 years; he shall not receive or have received from the company or from a company controlled by the former any supplementary remuneration or other advantages other than the ones corresponding to his capacity of a non-executive administrator; he shall; not be significant shareholder in the company; he shall not have or have had in the last while business relationship with the company or with a company controlled by such in his position of either shareholder, administrator, manager or employee of a company having such relationship with the concerned company if by their substantiate feature they are of a kind to bias on his objectivity; he shall not be or have been in the last 3 years financial auditor or associate employee of the current financial auditor of the company or of a company controlled by*

Under art. 153[16] of Law no 31/1990 there are restrictions provided as concerning the plurality of the supervisory board members' mandates: „A natural person may exert concomitantly at most 5 administrator mandates and/or supervisory board member mandates in joint-stock companies whose registered office lies throughout Romania's territory. This provision applies to equal extent to that natural person who is administrator or member of the supervisory board and to the natural person who is permanent representative of a legal person being administrator or member in supervisory board. The interdiction provided under para. (1) does not refer to cases when the person elected in the board of directors or in the supervisory board is owner of at least one quarter of the total of the company's shares or is member in the board of directors or supervisory board of a joint-stock company holding the concerned quarter. The person who breaches the provisions of the present article is compelled to resign from positions of member of the board of directors or the supervisory board who exceed the maximum number of mandates provided under para. (1) within one month after the occurrence of a case of inconsistency. On expiry of this period, s/he will lose the mandate for exceeding the legal number of mandates in chronologic order of appointments and shall be compelled to restitution of remuneration and other benefits received towards the company in which he exerted such a mandate. The deliberations and decisions he took part in while exerting his mandate will remain valid."

2. Assignment of Supervisory Board Members

According to art. 153[6] of Law no 31/1990, „Members of the supervisory board are assigned by the Shareholders' General Assembly except for the first members who are assigned by the deed of partnership. Candidates for positions of a member in a supervisory board are nominated by existing members of the board or by shareholders".

Before appointment in the position of a member in the supervisory board, the nominee shall notify the company's body in charge with his/her nomination regarding any relevant aspects from the perspective of provisions in art. 153[15] and 153[16].

In case that, after the nomination in the position of a supervisory board member, one position gets freed, the dispositions of art. 153[7] of Law no 31/1990 are applicable: „In case of vacancy of a position of member in the supervisory board, the board may proceed to assigning a provisional

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such; he shall not be manager in another company in which a manager of the company is non-executive administrator; he shall not have been non-executive administrator of the company for over 3 mandates; he shall not have family relationship with a person in one of the cases provided for under letter s a) and d)".

member until the meeting of the general assembly takes place. Should the mentioned vacancy (para. (1)) determine a decrease in the number of supervisory board members below the minimum legal number, then the management shall summon without delay the general assembly for completion of vacant places. In case that the management fails to fulfill the obligation to summon the general assembly (para. (2)), any concerned party may address the legal court to appoint the person in charge with the summoning of the general assembly of shareholders that shall make the necessary".

In a similar manner with the assignment of the administrator and the members of management, the person assigned in the member's position in a supervisory board shall accept explicitly the position according to dispositions under art. 153^{12} para. (3) of Law no 31/1990.

In order to fulfill the position of a supervisory board member, the person assigned shall be insured for professional liability.

3. Mandate Duration of Supervisory Board Members

According to art. 153^{12} para. (1) and (2) of Law no. 31/1990: „The duration of administrators' mandate, respectively mandate of management's and supervisory board's members is established by deed of partnership and cannot exceed 4 year time. They are re-eligible unless otherwise disposed by the deed of partnership. The duration of the mandate for the first members of the board of directors, respectively of the first members of the supervisory board, cannot exceed 2 year time".

4. Remuneration of Supervisory Board Members

Members of the supervisory board are paid according to art. 153^{18} para. (2), (3) and (4) of Law no. 31/1990: „Supplementary remuneration of members in the board of directors or supervisory board in charge with specific positions within the concerned body as well as remuneration of managers in a unitary system or of members of management in a dual system are established by the board of directors, respectively the supervisory board. The company's articles (deed of partnership) of the shareholders general assembly will set up the general limits for every remuneration granted this way. Any other advantages may be granted only according to para. (1) and (2). The general assembly or the board of directors or supervisory board, respectively, and, if applicable, the committee of remuneration shall make sure in establishing remunerations and other advantages that theseare justified based on the specific duties of the concerned persons and on the economic statement of the company".

According to art. 144[4] of the law, crediting is forbidden to members of management by the company.

5. Attributions of the Supervisory Board

The main attributions of the supervisory board are regulated by art. 153[9] of Law no. 31/1990: „The Supervisory Board has got the following main attributions:

a. exerts permanent control on the company's management by the directorate;

b. appoints and revokes the members of the directorate;

c. checks compliance with the law, with the deed of partnership and with the decisions of the shareholders' general assembly for management operations of the company;

d. at least once a year, draws reports to the shareholders' general assembly concerning the activity of the supervisory deployed.

In exceptional cases, when the interest of the company demands it, the supervisory board may summon the shareholders' general assembly.

No attributions of company management can be assigned to the supervisory board. However, there may be provided in the deed of partnership that certain types of operations cannot be carried out without agreement of the board. In case the board gives their consent for such operation, the directorate may demand agreement by the ordinary general assembly. The decision of the general assembly regarding such agreement is given with a majority of 3 quarters of the number of votes pertaining to the present shareholders. The deed of partnership cannot set out another majority and neither can set forth other conditions."

6. Obligations of Supervisory Board Members

The law of commercial companies requires that the members of the supervisory board fulfill their obligations concerning the participation in the life of the joint-stock commercial company.

Based on art. 144[1], referred to by art 153[8] of Law no. 31/1990 as being applicable also in the case of supervisory boards, „Members of the board of directors will exert their mandate with caution and diligence of a good administrator. The administrator shall not breach obligation provided under para. (1), if at the moment of making a business decision s/he is reasonably entitled to deem s/he acts in the company's interest and based on adequate information. In respect of the present law, a business decision is any decision to take or not to take any steps concerning the company's administration. The members of the board of directors will exert their mandate with loyalty and in the company's

interest. They shall not divulgate confidential information and commercial secrets of the company to which they have access in their capacity of administrators. This obligation is in their charge also after the cease of the administrator's mandate. The content and the duration of the obligations provided for under para. (5) are set forth in the administration contract"[5].

According to art. 153^{23} of Law no. 31/1990, the members of the supervisory board are liable to take part in the shareholders' general assemblies.

Also, in the case of members of the supervisory board, art. 144^{3} of the law is applicable: if, in a certain operation, they have direct or indirect interests contrary to the company's interests, they shall notify on that the other members and the censors or domestic auditors and shall not take part in any deliberation on this operation.

7. Operation of the Supervisory Board

The supervisory board shall meet at least every 3 months, as provided under art. 153^{11} para. (1) of Law no. 31/1990.

The summoning is achieved under conditions of art. 153^{11} para. (1), (2), (3) and (4) of the law: „(…) The chairperson summons the supervisory board and presides the meeting. The supervisory board may be summoned at any moment on demand by at least 2 of the board members or the directorate. The board shall meet in at most 15 days after summoning. Should the chairperson not consider the demand of summoning by the board according to dispositions under para (2), then the authors of the demand may summon themselves the board by establishing the daily agenda for the meeting. The members of the directorate may be summoned for meetings of the supervisory board. They have no right to vote in the board."

The making of decisions in the meetings of the supervisory board is achieved with due observance of art. 153^{20} of Law no. 31/1990. For their validity, at least half of the members in each of these bodies shall be present, unless a larger number is stated by the deed of partnership. Decisions in the supervisory board are made with the majority vote of the members present. Decisions on appointment or revoking of the chairperson are made with the majority vote of the board members. Members of the supervisory board may be represented in meetings of the concerned body by only other members of such. One member present may represent a single member absent. The deed of partnership may dispose that participation in meetings of the supervisory board should also take

[5] See also R. Catană, *The duty of care and prudence of managers in the reform of company law*, in Pandectele Române no. 3/2006, page 188 and further on.

place by means of distance means of communication with their duly specification. At the same time, the deed of partnership may limit the kind of decisions that may be made under such conditions and may provide for a title to oppose such procedure in favour of a determined number of members of the concerned body. The distance means of communication provided for under para.(4) shall meet the technical conditions required for identification of participants, actual participation of such in the meeting of the board and re-transmittal of deliberations continuously. Unless otherwise disposed by the deed of partnership, the chairperson of the supervisory board will have the prevailing vote in case of parity of votes. If the depending chairperson (in position) of the supervisory board cannot or is forbidden to participate in the voting within the concerned body, the other members will be entitled to elect a meeting president with the same rights as the depending chairperson. In case of parity of votes and if the president does not benefit from the prevailing vote, the proposition subject to vote is deemed rejected.

Based on art. 153^{11} para. (5) of Law no. 31/1990, a Minutes of each meeting will be drawn-up that shall include name of participants, agenda, order of deliberations, decisions made, number of votes met and separate opinions. The Minutes will be signed by the president of the meeting and by at least another member of the board present in the meeting.

8. Revoking of Supervisory Board Members

According to art. 153^{6} para. (4) of Law no. 31/1990, „Members in supervisory boards may be revoked at any time by the shareholders' general assembly with a majority of at least two thirds of the number of votes by the shareholders present".

9. Consulting Committees

According to art. 153^{10} of Law no. 31/1990, „The supervisory board may create consulting committees composed of at least 2 members of the board and in charge with investigations and preparation of recommendations for the board within fields like audit, remuneration of the members of directorate and of supervisory board and of personnel, or nomination of candidates for different positions in the management. On a regular basis, committees will submit reports on their activity to the board regular. The president of the directorate may be appointed member in the supervisory board without acquiring thus the capacity of a member in the board. At least one member of each committee created based on para. (1) shall be an independent member of the supervisory board. At least one

member of the audit committee shall hold relevant experience in applying accounting principles or in financial audit".

Bibliography

M. Bratiş, Constituirea societății comerciale pe acțiuni, Ed. Hamangiu, Bucureşti, 2008 ;
St. D. Cărpenaru, Drept comercial român, ed. a VIII-a, Ed. Universul Juridic, Bucureşti, 2008 ;
St. D. Cărpenaru, Tratat de drept comercial român, Ed. Universul Juridic, Bucureşti, 2009 ;
N. Dominte, Organizarea şi funcționarea societăților comerciale, Ed. C.H. Beck, Bucureşti, 2008 ;
F. Gârbaci, Societăți comerciale deținute public. Instrumente juridice de protecție a investitorilor, Ed. Rosetti, Bucureşti, 2003 ;
Gh. Piperea, Drept comercial, vol. I, Ed. C.H. Beck, Bucureşti, 2008 ;
D. Sitaru, Dreptul comerțului internațional. Partea generală, Ed. Lumina Lex, Bucureşti ;
R. Catană, Obligația de diligență şi prudență a administratorilor în contextul reformei dreptului societăților comerciale ;

ABSOLUTE AND RELATIVE JURISDICTION. OBJECTION ON LACK OF JURISDICTION. CHANGES BROUGHT BY THE "LITTLE JUSTICE REFORM" ON THE CIVIL CODE. REFERENCES TO THE NEW CIVIL CODE

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Abstract

The legal provisions on the subject of regulation of the legal jurisdiction may have either a binding character thus determining the exclusive capacity of certain courts to settle the claims and trials assigned to them, or a provisional character based on rules that do not prescribe binding provisions for the parties or for the court.

The legal system applicable in case of disregard of the jurisdiction provisions is determined precisely by the delimitation of the absolute provisions from the relative ones thus resulting the fact that the concept of lack of jurisdiction is indissoluble related to the one of the existence of jurisdiction this being exactly its opposite.

The lack of jurisdiction is an abnormal situation which may appear in the course of the legal procedure and the clearance of this situation may be realized only by legal means provided by the law to this end, one of these being precisely the objection on lack of jurisdiction.

The changes brought by the "little justice reform" on the Civil Code create however a system of exceptions from the Common Law for the binding provisions which regulate issues regarding jurisdiction or lack of jurisdiction; these changes seem to be maintained mainly by the new Civil Code (Law 134/1 July, 2010, published in the Official Journal 485/15 July, 2010, still unenforced).

Keywords: *absolute legal provisions, relative legal provisions, legal system, resolution, ruling, refusal of jurisdiction.*

The legal provisions having as subject the regulation of the legal jurisdiction may have either a binding character or a provisional character. The provisions having a binding character determine the exclusive capacity of certain courts to settle the claims or trials legally assigned to them.

The absolute jurisdiction is created through binding legal provisions that the parties cannot depart from; the relative jurisdiction is set up on rules that do not prescribe the compulsory provisions for the parties or for the court. Non-compliance with the legal provisions regarding the jurisdiction of the courts imposes their lack of jurisdiction;

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disregarding the provisions with binding character regarding the jurisdiction brings up the absolute lack of jurisdiction, whereas disregarding the provisional dispositions determines the relative lack of jurisdiction of the substantive courts[11].

The cases of absolute and relative lack of jurisdiction arise from the corroboration of article 159 of the Civil Code with the provisions of article 19 of the Civil Code.

According to article 159 of the Civil Code, the lack of jurisdiction is absolute when the provisions regarding the general jurisdiction, material jurisdiction and territorial jurisdiction are violated. According to paragraph 2 of the same article, the lack of jurisdiction is of private nature in any other situation.

Article 19 of the Civil Code provides that the parties may agree in writing or by verbal statement in the court of law that the lawsuits on assets shall be trialed by other courts than those which, according to the law, have territorial jurisdiction except for the cases when the territorial jurisdiction is exclusive.

From the corroboration of the two texts the following can be concluded: the jurisdiction of the courts of law is always absolute against other state institutions; the material jurisdiction is absolute, a superior court of law having no possibility to solve a certain cause assigned to the jurisdiction of an inferior court of law or the other way around; the territorial jurisdiction of the courts of law is mainly relative, although the exceptional territorial jurisdiction has an absolute character[2].

In case of violation of one of the binding jurisdiction provisions the parties cannot ignore the act of violation of the jurisdiction provision and the right to claim the absolute lack of jurisdiction devolves to all the parties involved in the trial even to the one responsible for violation of the provision[3].

According to article 159[1] paragraph 1 and 2 of the Civil Code[4], the absolute lack of jurisdiction may be claimed by either the parties or the judge. Before the "little reform", the absolute lack of jurisdiction could be claimed at any stage of the case however, at present only the lack of general jurisdiction of the courts of law may be claimed either by the parties or the judge at any stage of the claim according to paragraph 1 of the above-mentioned article. According to paragraph 2 the lack of material

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[1] I. Les, "Tratat de drept procesual civil. Editia a III-a" [Treaty of process civil law. Third edition], Editura All Beck, Bucuresti, 2008, p.256.

[2] I. Les, "Sanctiuni procedurale in materie civila. Editia a III-a revizuita" [Procedural sanctions in civil matter. Third edition revised], Editura Hamangiu, Bucuresti, 2008, p.105

[3] I. Deleanu, "Tratat de procedura civila. Volumul I" [Treaty of civil procedure. Volume I], Editura All Beck, Bucuresti, 2005, p.339.

[4] Art 159[1] was introduced by art.I para 23 of the no Law 202/2010.

and territorial jurisdiction of public nature may be claimed either by the parties or the judge on the first day of appearance in the first court but no later than the beginning of the debates on the cause.

If the parties do not claim the absolute lack of jurisdiction, the court has the responsibility *ex officio* to bring into debate this issue and therefore to settle upon it. If the interest to discuss the jurisdiction of public nature occurs during a trial in which a representative of the Public Ministry participates, s/he also has the right to bring to the court's attention the issue of lack of jurisdiction[5].

According to article 159[1] paragraph 4, the judge is *ex officio* bound to ascertain and to establish if the court referred to has general, material and territorial jurisdiction to decide on the claim, taking down in the transcript of the proceedings of the hearing the legal basis for ascertaining the jurisdiction of the referred court. Paragraph 5 stipulates that ascertaining the jurisdiction according to paragraph 4 does not impede on formulating the objections on the lack of jurisdiction in the cases and the conditions provided for in paragraphs 1 and 3, on which the judge shall decide in accordance with the law.

As regards the claim on the lack of jurisdiction of a private nature, the regulations remained the same, namely it can be claimed by the defendant through submission of defense or whenever the submission of defense is not mandatory it can be claimed on the first day of the hearing at the latest (article 159[1] paragraph 3).

The new Civil Code preserves almost entirely the regulations regarding the absolute and the relative jurisdiction (Chapter IV – Procedural incidents regarding the court's jurisdiction, Section I – Lack of jurisdiction and conflicts of jurisdiction, articles 125, 126).

The objection on lack of jurisdiction represents together with the jurisdiction regulator the procedural means established by the Civil Code for avoiding the cases of lack of jurisdiction in which the party called before a court with lack of jurisdiction may request the dismissal of the case and the sending of the cause for settlement to the court of law or to the legal organization with jurisdiction according to the law[6].

The legal system of the objection on lack of jurisdiction is determined by the nature of the violated jurisdiction provisions, meaning that non-compliance with the absolute jurisdiction provisions determines the absolute lack of competence and disregarding the provisional dispositions on jurisdiction determines a relative lack of jurisdiction.

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[5] I. Deleanu, op.cit., p.339.

[6] I. Les, "Tratat de drept procesual civil. Editia a III-a" [Treaty of process civil law. Third edition], op.cit., p.267.

The objection on lack of jurisdiction is settled by the court referred to with the main case, according to the rule "the judge of the case is also the judge of the objection" with priority in front of other objections of procedure.

In order to protect and guarantee the violated procedural rights and in order to prevent the decision pronounced from being censored by other means of appeal, the court is compelled to bring into the preliminary debate of the parties the objection on the lack of jurisdiction[7].

The court shall pronounce on the objection on lack of jurisdiction through a ruling in case of rejection of the objection and through a decision in case of admission.

In case the court finds the objection unfounded it shall pronounce the solution of rejection and continue to resolve the case. According to article 158 paragraph 2, the discontented may lodge an appeal or recourse after the ruling on the case.

Admission of the objection on the lack of competence produces the effect of sending the case for settlement to the court or the organization with legal jurisdiction according to the law and the decision of refusal of the jurisdiction has a double effect: dissoluteness of the court referred to with the main case and investiture of another court or organization with legal jurisdiction.

According to article 158 paragraph 3, if the court declares its lack of jurisdiction, the decision is not subject to any means of appeal, the case being sent immediately to the court with jurisdiction or, as the case may be, to another organization with jurisdiction for legal activities[8].

Admission of the lack of jurisdiction has consequences with regard to the actions of procedure performed until the moment of refusal of jurisdiction without being necessary to formulate an objection on nullity[9]. The effect of invalidation of the actions of procedure is now produced from the moment of pronouncing the decision, this being peremptory even from this moment. In order to emphasize the idea of nullity of the actions of procedure, article 105 paragraph 1^1 of the Civil Code[10]

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[7] *Idem*, p.267.

[8] Para 3 of article 158 was modified by art 1 para 20 of the Law no 202/2010. Previous to this modification, the text had the following content: "if the court declares its lack of jurisdiction, an appeal may be filed against the decision within 5 days from the ruling. The file shall be sent to the court with jurisdiction or, as the case may be, to another organization with jurisdiction for legal activities, as soon as the decision for declination of jurisdiction becomes peremptory".

[9] I. Les, "Sanctiuni procedurale in materie civila. Editia a III-a revizuita" [Procedural sanctions in civil matter. Third edition revised], op.cit, p.106.

[10] Para 1 of article 105 was modified by art. I para 8 of the Law 202/2010. Previous to this modification, the text had the following content: „The procedural actions taken by a judge with no jurisdiction are null".

stipulates: "The actions of procedure performed by a judge with violation of the jurisdiction provisions of public or private nature shall be declared null under the conditions provided for by the law".

In order to operate the nullity regulated by article 1, it is therefore necessary to statute a court on its lack of jurisdiction, in other words the lack of jurisdiction represents the cause of nullity of the procedural actions. For this situation the law does not condition the nullity with the existence of injury, the legislator most likely presumed the existence of injury since the judgment cannot be conceived without it being statuted by the judges appointed by law. Violation of the provisions on the jurisdiction of the courts of law brings prejudice to the normal process of the activities of the legal bodies and it also brings prejudice to the interests of the litigant parties faced with the situation of not being trialed by their regular judges[11].

The nullity regulated by article 105 paragraph 1 is not only an unconditional nullity but also a derivative nullity comprising mainly all the acts drawn up in the court without jurisdiction. The situation is different in case of an act of intimation of the court. Some of the effects of the request for prosecution are naturally produced in the court of committal for trial. According to article 1870 of the Civil Code, the request for prosecution suspends the prescription event when it is addressed to a court without jurisdiction even if it is null for lack of forms of actions. At the same time, the effect of delaying the debtor shall be admitted in case of the request for prosecution presented to a court without jurisdiction. These solutions are justified by the fact that what is essential in recognizing the above-mentioned effects is the unequivocal will of the plaintiff to leave the inactivity state and to go to law for defending the subjective rights[12].

As regards the evidence presented to a court without jurisdiction, the principle of preservation and usage of the evidence already presented to this court applies and article 160 of the Civil Code stipulates that the evidence presented in the court with jurisdiction shall remain in favor of the trial. The principle applies as a consequence to the fact that the evidence belongs to the case and its usage in the circumstances it was presented to a court which later declined its jurisdiction may achieve a better administration of justice by saving the time and the money necessary for repeating all the evidence[13].

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[11] O. Ungureanu, "Actele de procedura civila in procesul civil (la instanta de fond)" [Actions of civil procedure in the civil lawsuit (in the substantive court)], Casa de Editura si Presa "Sansa" – S.R.L., Bucuresti, 1994, p. 270.
[12] I. Les, "Tratat de drept procesual civil. Editia a III-a" [Treaty of process civil law. Third edition], op.cit., p.270.
[13] *Idem*, p.270.

The final part of article 160 of the Civil Code stipulates that the court with jurisdiction has the possibility to order the restoration of the evidence previously presented only for well justified reasons. *Per a contrario*, with regard to the procedural actions, there is no question of a right of appraisal of the competent courts as concerns their efficiency, since the declination of its jurisdiction was ordered [14].

The nullity of the procedural actions taken by a court without jurisdiction operates in case the request is to be settled by an organization without legal competence. However in these cases the court cannot decline its jurisdiction and the solution that imposes is the rejection of the action as inadmissible.

The solution of declination of jurisdiction cannot be ordered even in case it is ascertained that the lawsuit belongs to the jurisdiction of a foreign court since a foreign court cannot order the committal for trial to a court that does not belong to its legal system as the principle of the states' sovereignty imposes the refrain from any interference as regards the prerogatives of the public authorities of another state[15].

The decision of declination of jurisdiction causes different effects as regards the dissoluteness of the court referred to and the investiture of another court or body with legal prerogatives. Thus, in case of dissoluteness of a court, the effects of the trialed cause shall be produced, whereas in case of investiture of another court these effects shall not be produced.

According to the modifications of the Civil Code, the lack of competence as well as the nullity of the procedure actions regulated by provisions of a public nature may be claimed even by means of appeal[16]. According to article 317 paragraph 2 of the Civil Code, it is possible to file the appeal for annulment "when the ruling is made by judges in violation of provisions of a public nature with regard to jurisdiction". However, the claim for lack of jurisdiction by means of appeal for annulment represents a particular situation since article 317 paragraph 1 stipulates that "the peremptory rulings may be contested by appeal for annulment for reasons expressly provided for in this article only if these reasons could not be claimed by means of appeal or recourse". Nevertheless, the appeal for annulment may be received if the absolute lack of jurisdiction was claimed

[14] I. Les, "Sanctiuni procedurale in materie civila. Editia a III-a revizuita" [Procedural sanctions in civil matter. Third edition revised], op.cit, p.107.
[15] I. Les, "Tratat de drept procesual civil. Editia a III-a" [Treaty of process civil law. Third edition], op.cit., p.169.
[16] Art 304 para 3 when the ruling was made in violation of jurisdiction of public nature of another court claimed in accordance with the law – presented as modified by art I para 29 of the Law no 202/2010. Previous to the modification the article had the following content: "when the ruling was made in violation of the jurisdiction of another court".

by ways of recourse but the court rejected it for further verifications or if the recourse was rejected without being trialed substantively. This type of cases occur in practice especially as a result of the annulment of a recourse as being unstamped or irregularly introduced[17].

Bibliography

I. Les, "Tratat de drept procesual civil. Editia a III-a" [Treaty of process civil law. Third edition], Editura All Beck, Bucuresti, 2008;

I. Les, "Sanctiuni procedurale in materie civila. Editia a III-a revizuita" [Procedural sanctions in civil matter. Third edition revised], Editura Hamangiu, Bucuresti, 2008;

I. Deleanu, "Tratat de procedura civila. Volumul I" [Treaty of civil procedure. Volume I], Editura All Beck, Bucuresti, 2005;

O. Ungureanu, "Actele de procedura civila in procesul civil (la instanta de fond)" [Actions of civil procedure in the civil lawsuit (in the substantive court)], Casa de Editura si Presa "Sansa" – S.R.L., Bucuresti, 1994.

[17] I. Les, "Sanctiuni procedurale in materie civila. Editia a III-a revizuita" [Procedural sanctions in civil matter. Third edition revised], op.cit, p.111;

THEORETICAL CONSIDERATIONS ON THE SUPERVISORY BOARD OF JOINT STOCK COMPANIES

Dragoş-Mihail DAGHIE*

Resume

Le conseil de surveillance de la société commerciale par actions est compose d'un nombre d'au moins 3 membres et au plus de 11 membres. Ce nombre de membre situé entre 3 et 11 est laissé à la latitude des commanditaires pour l'établir par l'acte constitutif en conformité avec art. 153[6] de la Loi numéro 31/1990.

La nature juridique des rapports entre membres du conseil de surveillance et société est établie par les dispositions concernant le mandat et celles spéciales inclues à la loi des sociétés commerciales, comme il résulte de l'interprétation de l'art. 72 et 153[8] alinéa (3) de la Loi numéro 31/1990. Conformément à ceux-ci, l'art. 144[2] alinéa (1) s'applique par conséquent aussi aux membres du directorat, pendant que art.144[2] alinéa (1) fait envoi à l'art.72 de la Loi 31/1990 qui règlemente les rapports entre administrateur et société[1].

Mots cles: *conseil de surveillance, société commerciale par actions.*

JEL Classification: *K2, K22.*

1. Quality of Supervisory Board Member

Law no. 31/1990 requires the fulfillment of certain conditions for the membership in a supervisory board.

Therefore, according to art. 153[13] of the Law of Commercial Societies „The directors of joint stock companies in the unitary system, respectively members of the management in the dual system, are natural persons. A legal person may also be appointed administrator or member of the supervisory board of a joint-stock company, but they are compelled to assign a natural person as a permanent representative. The latter is subject to the same conditions and obligations and has got the same civil and criminal liability as an administrator or member in the supervisory board, natural person, acting on his own behalf without exonerating by that the legal person they represent from liability or diminishing the joint liability of the latter. Whenever the legal person revokes their

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[1] St. D. Cărpenaru, *Treaty of commercial law*, Ed. Universul Juridic, Bucureşti, 2009, pag. 385. By modification of Law no 31/1990 by O.U.G. nr. 82/2007, the solution was adopted in art. 152 alin. (2) and (3).

representative, they have the obligation to assign a replacer at the same time".

Given that art. 153^{13} is included within the III-rd section of Law no. 31/1990 under the heading "Joint Dispositions for the unitary and the dual systems", in case of both systems of administering commercial companies, a natural person may be appointed member. The law becomes even more specific in the case of supervisory boards and gives possibility for assignment of a legal person too in the position of a member, which is not applicable in the case of managers or management.

Referring to dispositions under art 73^1 of Law no. $31/1990^2$, the following are applicable: „People who, according to art. 6 para. (2), cannot be founders can neither be managers, members in supervisory boards and of management, censors or financial auditors and if elected they will be revoked from these rights"[3].

Art. 153^8 of the law provides: "Members of supervisory boards cannot be concomitantly members of management. Also, they cannot cumulate the capacity of a member in a supervisory board with the one of employee with the company".

Based on the same article of the Law of commercial societies, it is set forth that, by the deed of partnership or by a decision taken in the shareholders' general assembly, shareholders have the possibility to set out specific conditions of professionalism and independence for the members of the supervisory board[4].

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[2] Art. 73^1 has been altered by item 6 of art. I of O.U.G. no. 82 dated 28 June 2007, published in Official Gazette no. 446 dated 29 June 2007.

[3] Art. 6 para. (2) of Law no. 31/1990: „People cannot be founder who *according to law have been condemned for fraudulent administration, use of false, forgery, misappropriation, bribery given or taken, for crimes provided in Law no. 656/2002 for prevention and sanctioning for money laundry, as well as for establishment of steps for prevention and fighting financing of terrorism deeds, along with alterations and further supplementing, for crimes provided for under art. 143 - 145 of Law no. 85/2006 on the procedure of insolvency or for the ones provided under the present law along with alterations and further supplementing*".

[4] In assessing the independence of a member in supervision board criteria shall be considered as provided under art. 138^2 para. (2): *„In appointing the independent administrator the Shareholders' general assembly will consider the following criteria: he shall not be manager with the company or of a company controlled by the former and not have fulfilled such a position for the last 5 years; he shall not have been employee of the company or of a company controlled by the former or have had such labour relation in the last 5 years; he shall not receive or have received from the company or from a company controlled by the former any supplementary remuneration or other advantages other than the ones corresponding to his capacity of a non-executive administrator; he shall; not be significant shareholder in the company; he shall not have or have had in the last while business relationship with the company or with a company controlled by such in his position of either shareholder, administrator, manager or employee of a company having such relationship with the concerned company if by their substantiate feature they are of a kind to bias on his objectivity; he shall not be or have been in the last 3 years financial auditor or associate employee of the current financial auditor of the company or of a company controlled by*

Under art. 153[16] of Law no 31/1990 there are restrictions provided as concerning the plurality of the supervisory board members' mandates: „A natural person may exert concomitantly at most 5 administrator mandates and/or supervisory board member mandates in joint-stock companies whose registered office lies throughout Romania's territory. This provision applies to equal extent to that natural person who is administrator or member of the supervisory board and to the natural person who is permanent representative of a legal person being administrator or member in supervisory board. The interdiction provided under para. (1) does not refer to cases when the person elected in the board of directors or in the supervisory board is owner of at least one quarter of the total of the company's shares or is member in the board of directors or supervisory board of a joint-stock company holding the concerned quarter. The person who breaches the provisions of the present article is compelled to resign from positions of member of the board of directors or the supervisory board who exceed the maximum number of mandates provided under para. (1) within one month after the occurrence of a case of inconsistency. On expiry of this period, s/he will lose the mandate for exceeding the legal number of mandates in chronologic order of appointments and shall be compelled to restitution of remuneration and other benefits received towards the company in which he exerted such a mandate. The deliberations and decisions he took part in while exerting his mandate will remain valid."

2. Assignment of Supervisory Board Members

According to art. 153[6] of Law no 31/1990, „Members of the supervisory board are assigned by the Shareholders' General Assembly except for the first members who are assigned by the deed of partnership. Candidates for positions of a member in a supervisory board are nominated by existing members of the board or by shareholders".

Before appointment in the position of a member in the supervisory board, the nominee shall notify the company's body in charge with his/her nomination regarding any relevant aspects from the perspective of provisions in art. 153[15] and 153[16].

In case that, after the nomination in the position of a supervisory board member, one position gets freed, the dispositions of art. 153[7] of Law no 31/1990 are applicable: „In case of vacancy of a position of member in the supervisory board, the board may proceed to assigning a provisional

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such; he shall not be manager in another company in which a manager of the company is non-executive administrator; he shall not have been non-executive administrator of the company for over 3 mandates; he shall not have family relationship with a person in one of the cases provided for under letter s a) and d)".

member until the meeting of the general assembly takes place. Should the mentioned vacancy (para. (1)) determine a decrease in the number of supervisory board members below the minimum legal number, then the management shall summon without delay the general assembly for completion of vacant places. In case that the management fails to fulfill the obligation to summon the general assembly (para. (2)), any concerned party may address the legal court to appoint the person in charge with the summoning of the general assembly of shareholders that shall make the necessary".

In a similar manner with the assignment of the administrator and the members of management, the person assigned in the member's position in a supervisory board shall accept explicitly the position according to dispositions under art. 153^{12} para. (3) of Law no 31/1990.

In order to fulfill the position of a supervisory board member, the person assigned shall be insured for professional liability.

3. Mandate Duration of Supervisory Board Members

According to art. 153^{12} para. (1) and (2) of Law no. 31/1990: "The duration of administrators' mandate, respectively mandate of management's and supervisory board's members is established by deed of partnership and cannot exceed 4 year time. They are re-eligible unless otherwise disposed by the deed of partnership. The duration of the mandate for the first members of the board of directors, respectively of the first members of the supervisory board, cannot exceed 2 year time".

4. Remuneration of Supervisory Board Members

Members of the supervisory board are paid according to art. 153^{18} para. (2), (3) and (4) of Law no. 31/1990: „Supplementary remuneration of members in the board of directors or supervisory board in charge with specific positions within the concerned body as well as remuneration of managers in a unitary system or of members of management in a dual system are established by the board of directors, respectively the supervisory board. The company's articles (deed of partnership) of the shareholders general assembly will set up the general limits for every remuneration granted this way. Any other advantages may be granted only according to para. (1) and (2). The general assembly or the board of directors or supervisory board, respectively, and, if applicable, the committee of remuneration shall make sure in establishing remunerations and other advantages that theseare justified based on the specific duties of the concerned persons and on the economic statement of the company".

According to art. 144[4] of the law, crediting is forbidden to members of management by the company.

5. Attributions of the Supervisory Board

The main attributions of the supervisory board are regulated by art. 153[9] of Law no. 31/1990: "The Supervisory Board has got the following main attributions:

e. exerts permanent control on the company's management by the directorate;

f. appoints and revokes the members of the directorate;

g. checks compliance with the law, with the deed of partnership and with the decisions of the shareholders' general assembly for management operations of the company;

h. at least once a year, draws reports to the shareholders' general assembly concerning the activity of the supervisory deployed.

In exceptional cases, when the interest of the company demands it, the supervisory board may summon the shareholders' general assembly.

No attributions of company management can be assigned to the supervisory board. However, there may be provided in the deed of partnership that certain types of operations cannot be carried out without agreement of the board. In case the board gives their consent for such operation, the directorate may demand agreement by the ordinary general assembly. The decision of the general assembly regarding such agreement is given with a majority of 3 quarters of the number of votes pertaining to the present shareholders. The deed of partnership cannot set out another majority and neither can set forth other conditions."

6. Obligations of Supervisory Board Members

The law of commercial companies requires that the members of the supervisory board fulfill their obligations concerning the participation in the life of the joint-stock commercial company.

Based on art. 144[1], referred to by art 153[8] of Law no. 31/1990 as being applicable also in the case of supervisory boards, "Members of the board of directors will exert their mandate with caution and diligence of a good administrator. The administrator shall not breach obligation provided under para. (1), if at the moment of making a business decision s/he is reasonably entitled to deem s/he acts in the company's interest and based on adequate information. In respect of the present law, a business decision is any decision to take or not to take any steps concerning the company's administration. The members of the board of directors will exert their mandate with loyalty and in the company's

interest. They shall not divulgate confidential information and commercial secrets of the company to which they have access in their capacity of administrators. This obligation is in their charge also after the cease of the administrator's mandate. The content and the duration of the obligations provided for under para. (5) are set forth in the administration contract"[5].

According to art. 153^{23} of Law no. 31/1990, the members of the supervisory board are liable to take part in the shareholders' general assemblies.

Also, in the case of members of the supervisory board, art. 144^{3} of the law is applicable: if, in a certain operation, they have direct or indirect interests contrary to the company's interests, they shall notify on that the other members and the censors or domestic auditors and shall not take part in any deliberation on this operation.

7. Operation of the Supervisory Board

The supervisory board shall meet at least every 3 months, as provided under art. 153^{11} para. (1) of Law no. 31/1990.

The summoning is achieved under conditions of art. 153^{11} para. (1), (2), (3) and (4) of the law: "(…) The chairperson summons the supervisory board and presides the meeting. The supervisory board may be summoned at any moment on demand by at least 2 of the board members or the directorate. The board shall meet in at most 15 days after summoning. Should the chairperson not consider the demand of summoning by the board according to dispositions under para (2), then the authors of the demand may summon themselves the board by establishing the daily agenda for the meeting. The members of the directorate may be summoned for meetings of the supervisory board. They have no right to vote in the board."

The making of decisions in the meetings of the supervisory board is achieved with due observance of art. 153^{20} of Law no. 31/1990. For their validity, at least half of the members in each of these bodies shall be present, unless a larger number is stated by the deed of partnership. Decisions in the supervisory board are made with the majority vote of the members present. Decisions on appointment or revoking of the chairperson are made with the majority vote of the board members. Members of the supervisory board may be represented in meetings of the concerned body by only other members of such. One member present may represent a single member absent. The deed of partnership may dispose that participation in meetings of the supervisory board should also take

[5] See also R. Catană, *The duty of care and prudence of managers in the reform of company law*, in Pandectele Române no. 3/2006, page 188 and further on.

place by means of distance means of communication with their duly specification. At the same time, the deed of partnership may limit the kind of decisions that may be made under such conditions and may provide for a title to oppose such procedure in favour of a determined number of members of the concerned body. The distance means of communication provided for under para.(4) shall meet the technical conditions required for identification of participants, actual participation of such in the meeting of the board and re-transmittal of deliberations continuously. Unless otherwise disposed by the deed of partnership, the chairperson of the supervisory board will have the prevailing vote in case of parity of votes. If the depending chairperson (in position) of the supervisory board cannot or is forbidden to participate in the voting within the concerned body, the other members will be entitled to elect a meeting president with the same rights as the depending chairperson. In case of parity of votes and if the president does not benefit from the prevailing vote, the proposition subject to vote is deemed rejected.

Based on art. 153^{11} para. (5) of Law no. 31/1990, a Minutes of each meeting will be drawn-up that shall include name of participants, agenda, order of deliberations, decisions made, number of votes met and separate opinions. The Minutes will be signed by the president of the meeting and by at least another member of the board present in the meeting.

8. Revoking of Supervisory Board Members

According to art. 153^{6} para. (4) of Law no. 31/1990, „Members in supervisory boards may be revoked at any time by the shareholders' general assembly with a majority of at least two thirds of the number of votes by the shareholders present".

9. Consulting Committees

According to art. 153^{10} of Law no. 31/1990, "The supervisory board may create consulting committees composed of at least 2 members of the board and in charge with investigations and preparation of recommendations for the board within fields like audit, remuneration of the members of directorate and of supervisory board and of personnel, or nomination of candidates for different positions in the management. On a regular basis, committees will submit reports on their activity to the board regular. The president of the directorate may be appointed member in the supervisory board without acquiring thus the capacity of a member in the board. At least one member of each committee created based on para. (1) shall be an independent member of the supervisory board. At least one

member of the audit committee shall hold relevant experience in applying accounting principles or in financial audit".

Bibliography

M. Bratiş, Constituirea societății comerciale pe acțiuni, Ed. Hamangiu, Bucureşti, 2008;
St. D. Cărpenaru, Drept comercial român, ed. a VIII-a, Ed. Universul Juridic, Bucureşti, 2008;
St. D. Cărpenaru, Tratat de drept comercial român, Ed. Universul Juridic, Bucureşti, 2009;
N. Dominte, Organizarea şi funcționarea societăților comerciale, Ed. C.H. Beck, Bucureşti, 2008;
F. Gârbaci, Societăți comerciale deținute public. Instrumente juridice de protecție a investitorilor, Ed. Rosetti, Bucureşti, 2003;
Gh. Piperea, Drept comercial, vol. I, Ed. C.H. Beck, Bucureşti, 2008
D. Sitaru, Dreptul comerțului internațional. Partea generală, Ed. Lumina Lex, Bucureşti;
R. Catană, Obligația de diligență şi prudență a administratorilor în contextul reformei dreptului societăților comerciale, in Pandectele Române no. 3/2006.

EVOLUTION DE LA CRIMINALITE CONCERNANT LES INFRACTIONS CONTRE LE PATRIMOINE

Monica BUZEA*

Resume

En Roumanie, comme dans tous les autres états européens, les infractions contre le patrimoine constituent une grande partie du phénomène infractionnel et se situent sur les premières places par rapport au nombre total des infractions commises.

L'évolution statistique des infractions par lesquelles on porte atteinte au patrimoine démontre que malgré le progrès des conditions moyennes de vie, elles ont des motivations complexes du point de vue criminologique, à partir des conditions économiques et jusqu'aux modifications culturelles et idéologiques, spécifiques aux périodes de crise, qui font que le patrimoine devient prioritaire, même comparé aux droits fondamentaux de la personne.

En Roumanie, comme dans tous les autres états européens, les infractions contre le patrimoine constituent une partie importante du phénomène infractionnel et se situent sur les premières places par rapport au nombre total des infractions commises. D'ailleurs, l'argument criminologique de leur prépondérance a justifié l'attention accordée le long du temps à l'étude de leur évolution et causalité.

De cette perspective, une étude statistique[1], effectuée en Roumanie, pour la période 1989-2009, atteste le fait que le nombre des inculpés pour les infractions de vol a diminué de 50,4%, la même diminution étant enregistrée pour les infractions de dilapidation de 84,3%, pour les infractions de gestion frauduleuse de 91,3% et pour l'infraction de destruction de 63,2%. On a enregistré une augmentation de l'infraction de brigandage, cas où le nombre des inculpés a augmenté de 120%.

De manière justifiée, on se demande s'il s'agit d'une diminution réelle de la criminalité ou seulement d'une apparence, dans les conditions où le nombre des cas solutionnés a augmenté de 386,9% malgré la diminution générale des infractions contre le patrimoine de 40,6%; ou, par exemple, la diminution pour l'infraction de vol de 50,4% correspond à une augmentation des cas solutionnés de 295,5%[2].

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[1] C. Sima, *Directions de l'évolution de la criminalité entre 1989-2009*, Revue de criminalistique, criminologie et pénologie no. 1/2010, p. 38-46;

[2] Idem;

Ainsi, la baisse du nombre d'inculpés mis en jugement pour des infractions contre le patrimoine ne reflète en fait pas une baisse de l'infraction dans ce domaine, car le nombre de tels cas progresse évidemment. En plus des faits pour lesquels on a donné une solution, il y a des infractions apparentes, dont les organes de justice sont informés mais dont on n'a pas réussi à identifier l'auteur; de plus, pour établir la criminalité réelle, donc des faits consommés effectivement, connus ou non par les autorités judiciaires, on devrait aussi avoir en vue les situations de passivité des victimes, quand par exemple, le préjudice enregistré est réduit ou récupéré.

Un des arguments pour diminuer le nombre des inculpés dans le domaine des infractions contre le patrimoine trouve sa justification dans les solutions adoptées dans de telles causes : on connaît bien l'augmentation progressive des justifications basées sur l'art. 18 indice 1 du Code pénal, par l'appréciation du manque de degré de péril social, enregistrée après 1989

D'ailleurs, les modifications apportées par la Loi 202/2010, concernant certaines mesures pour accélérer la solution des procès, ont permis, vu l'art. 230 du Code de procédure pénale et l'art. 18 indice 1 du Code pénal, la solution des causes qui ne présentent pas le degré de péril social d'une infraction, avant de commencer la poursuite pénale, même par la non-application d'une sanction.

Bien que la définition de l'infraction soit reconsidérée, en renonçant au péril social comme trait général de l'infraction, le nouveau Code pénal permet que les situations qui sont à présent solutionnées cf. à l'art.18[1] C.pen, trouvent la solution conformément au principe de l'opportunité de la poursuite pénale.

Concernant la causalité de ces infractions, dans les travaux rédigés avant 1989, on soulignait que dans la conscience et le comportement de ceux qui apportent des préjudices à la propriété collective il y avait des manifestations d'avidité, d'enrichissement exagéré, d'égoïsme exacerbé, tout cela sur le fond d'un manque évident d'éducation civique, d'ignorance ou d'inculture[3].

De nos jours, on remarque[4] l'évolution de la thèse consacrée à l'existence dans ce secteur d'une criminalité d'enrichissement, originaire dans les classes sociales inferieures, le phénomène devenant beaucoup plus complexe. Ainsi, dans la société contemporaine se manifeste « la dépersonnalisation du patrimoine », ce qui fait que l'infracteur agit sur

[3] Aurel Dincu, *Criminologie*, Université de Bucarest, Faculté dr droit, 1984, p. 284 en Stancu

[4] G. Fiandaca, E. Musco, *I delitti contro il patrimonio*, Volume II, Zanchelli Editore, Bologhia, 2008, p. 1-2;

une valeur abstraite, sans venir en contact direct avec la victime ; différents facteurs inhibiteurs disparaissent et aussi un « hédonisme de consommation » qui privilégie la possession des biens matériels.

Donc, l'évolution statistique des infractions contre le patrimoine démontre leur multiplication, malgré le progrès des conditions moyennes de vie, car leur apparition, parfois par de nouvelles modalités, est basée sur des motivations complexes du point de vue criminologique, à partir des conditions économiques et jusqu'aux modifications culturelles et idéologiques spécifiques aux périodes de crise, qui font que le patrimoine devienne prioritaire, même avant les droits fondamentaux de la personne.

QUELQUES CONSIDERATIONS SUR L'IRRESPONSABILITE ET L'IVRESSE INVOLONTAIRE, CAUSES QUI ENLEVENT LE CARACTERE DE CONTRAVENTION DE L'ACTE

Madalina-Elena MIHAILESCU*

Resume

Notre brève étude se propose d'approcher deux de ces causes ayant posé des questions et mis les bases de quelques discussions intéressantes autant dans le plan de la doctrine roumaine que dans le plan de la doctrine européenne ou américaine et c'est justement la raisons dont nous avons compris nous pencher sur elles avec une attention plus grande – irresponsabilité et l'ivresse involontaire.

L'irresponsabilité est une cause qui écarte la culpabilité grâce au manque de discernement de la personne qui, au moment de l'acte, ne pouvait avoir le contrôle de ses faits ou ne pouvait se représenter les conséquences de ses actes d'une manière correcte. L'ivresse involontaire est la cause qui exclut la culpabilité dû à la circonstance où l'auteur se trouvait au moment de l'acte prévu par la loi contraventionnelle en état d'ivresse involontaire totale produite par l'alcool ou d'autres substances

Comme premier élément de la culpabilité, la responsabilité – parfois nommée aussi capacité de culpabilité[1] suppose l'attitude du sujet d'adopter une conduite conforme aux exigences de l'ordre juridique, en d'autres termes la capacité de comprendre la signification anti-juridique de son acte et de se diriger sa conduite par conséquent. Aussi, l'existence de la responsabilité suppose-t-elle un certain degré de maturation de l'être humain, mais aussi un état biopsychique de nature à permettre au sujet de connaître la signification de son acte et de diriger sa conduite par rapport à cette connaissance.[2]

Le constat de la responsabilité comme prémisse générale de la culpabilité ne peut se faire de manière directe que par un examen négatif, en d'autres termes en constatant l'inexistence de quelque cause qui enlèverait cette prémisse [3]

Le caractère conventionnel de l'acte conformément à l'article 11 alinéa 1 de l'Ordonnance du Gouvernement no. 2/2001 relative au régime

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[1] Dans la doctrine plus ancienne de droit pénal on parlait d'*imputabilité*.

[2] *Fl. Streteanu*, Tratat de drept penal. Partea generala, vol. I, maison d'édition C. H. Beck, Bucarest, 2008, page 550.

[3] Ibidem, page 551.

juridique des contraventions est enlevé au cas de la légitime défense, de l'état de nécessite, de la contrainte physique ou morale, du cas fortuit, de l'irresponsabilité, de l'ivresse involontaire complète, de l'erreur de fait, ainsi que de l'infirmité s'il est relié à l'acte commis.

Notre brève étude se propose d'approcher deux de ces causes ayant posé des questions et mis les bases de quelques discussions intéressantes autant dans le plan de la doctrine roumaine que dans le plan de la doctrine européenne ou américaine et c'est justement la raisons dont nous avons compris nous pencher sur elles avec une attention plus grande – irresponsabilité et l'ivresse involontaire.

Irresponsabilité

L'irresponsabilité est une cause qui écarte la culpabilité grâce au manque de discernement de la personne qui, au moment de l'acte, ne pouvait avoir le contrôle de ses faits ou ne pouvait se représenter les conséquences de ses actes d'une manière correcte. Les causes susceptibles de générer irresponsabilité sont, d'habitude, les maladies de nature psychique, telle la débilite mentale ou la psychopathie paranoïde, mais le manque de discernement peut aussi avoir d'autres causes, tel l'exemple le plus facile, le sommeil.

Les conditions de irresponsabilité sont les suivantes : l'actant doit manquer du facteur intellectif ou volitif ; le manque des deux facteurs doit exister pendant l'exécution de la contravention[4] ; état irresponsabilité ne doit pas être dû à l'ivresse, à la minorité ou à l'erreur de fait ; l'acte commis en état irresponsabilité doit être prévu par la loi contraventionnelle.

N'étant pas consciente des conséquences de son acte, une telle personne ne sera « réceptive » ni aux sanctions contraventionnelles applicables, et ces sanctions n'auront pas d'influence sur sa conduite à l'avenir. irresponsabilité, comme nous en avons déjà fait précision, peut avoir pour causes la folie, l'idiotie, le crétinisme, les psychoses ou l'évanouissement et peut se présenter comme un état psychique permanent (incurable) ou temporaire (intermittent). [5] Par la suite, il ne s'agit pas par exemple de contravention l'acte de la personne ayant refusé de présenter les pièces d'identité à la demande des organes de police, refus dû en fait à un malentendu de la part de la personne respective, malentendu motivé par le handicape physique, oligophrénie, maladie

[4] L'irresponsabilité doit exister pendant l'entière période d'exécution de l'élément matériel de l'aspect objectif du contenu constitutif.
[5] *M. Preda*, Drept administrative. Partea generala, 4e édition, maison d'édition Lumina Lex, Bucarest, 2006, page 298-299.

dont elle souffrait.[6] Ainsi a-t-il été annulé le procès-verbal de contravention par laquelle on avait donné une amende à une personne qui, en motivant sa plainte, a déclaré que le jour où le procès-verbal avait été dressé, elle avait été mise dans l'Hôpital Gheorghe Marinescu par un agent de police. En analysant les pièces au dossier, l'instance a constaté que le plaignant souffrait d'une maladie psychique, il n'avait donc pas la représentation objective des faits pour lesquels l'amende contraventionnelle lui avait été appliquée. [7]

irresponsabilité est reconnue aussi par les législations d'autres états comme l'une des causes de non responsabilité, un exemple étant *la législation française* [8], où l'on fait mention du fait que la personne qui a été diagnostiquée à temps comme ayant un trouble psychique ou neuropsychique qui a « aboli » sa capacité d'appréciation ou le contrôle de ses actions n'est pas responsable du point de vue pénal (implicitement du point de vue contraventionnel non plus, les contraventions étant ici prévues par le texte du même code).

La personne qui, le jour des faits, a eu un trouble psychique ou neuropsychique ayant déprécié son discernement ou empêché le contrôle de ses actions, répondra pénalement – contraventionnellement, mais l'instance tiendra compte de cette circonstance lors de l'établissement des peines et des régimes d'exécution.

Dans le droit espagnol, de l'autre part, on considère comme irresponsable celui qui lors de l'acte illicite, à cause de la dépréciation mentale ou grâce à toute maladie mentale ne peut comprendre les effets négatifs de ses actes. Conformément à la même législation, la folie temporaire ne constitue pas une cause qui exonère l'actant de sa punition, si elle a été produite pour le but de commettre l'acte illicite. [9]

L'irresponsabilité est reconnue comme une cause d'enlèvement du caractère illicite d'un acte – implicitement celui du caractère contraventionnel – aussi par la législation britannique, tant celle-ci que les instances judiciaire tenant compte des maladies mentales « reconnues »[10]. C'est d'ailleurs le cas *R vs Chanfook*, 1994 dans le contexte du jugement d'une cause qui avait à la base des coups simples, de nature à ne pas produire des lésions, appliqués à une personne. Le cas en soi et du point de vue conceptuel aussi de maladie mentale reconnue a été commenté plus tard par *Alec Buchannan* et *Graham Virgo* dans leur article nommé

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[6] Idem.
[7] La sentence civile no. 9896/1994, Le tribunal civil du Secteur 1 de Bucarest.
[8] Article 122-1 du Code penal français.
[9] Article 20 alinéa 1 de la loi no. 10/1995, le Code penal espagnol, modifié par la loi no. 5/2010.
[10] *Catherine Elliot, Frances Quinn*, Criminal Law, 8th edition, Longman, England, 2010, pages 366-367.

Duress and mental abnormality[11], publié dans Criminal Law Review[12], 1999.

La folie est aussi invoquée par ***Le code contraventionnel de la Fédération Russe*** comme une cause dont devrait souffrir une personne physique au moment de l'acte contraventionnel pour ne pas être tenue responsable. Conformément à ce texte de loi, la personne répondra de manière contraventionnel seulement si elle était malade mentalement et ne pouvait comprendre la signification erronée de ses actions ou inactions, suite à une maladie mentale chronique, temporaire ou non, ou à l'imbécillité ou toute autre maladie mentale au moment de l'acte illicite.

L'ivresse involontaire complète (accidentelle)

L'ivresse involontaire est la cause qui exclut la culpabilité dû à la circonstance où l'auteur se trouvait au moment de l'acte prévu par la loi contraventionnelle en état d'ivresse involontaire totale produite par l'alcool ou d'autres substances. C'est la seule cause exonératoire de responsabilité qui se trouvait dans le code pénal mais qui manquait parmi les causes mentionnées par la Loi no. 32/1968, l'ancien acte normatif relatif au régime juridique des contraventions, en appréciant qu'il s'agissait évidemment d'une omission du législateur contraventionnel[13], se retrouvant à présent dans le texte de l'acte normatif.

L'ivresse accidentelle est état où une personne est arrivée de manière indépendante de sa personne. Par exemple, une personne travaille dans un milieu de vapeurs d'alcool et sans s'en rendre compte elle inhale de tels vapeurs et arrive à état d'ivresse, ou la personne respective est contrainte physiquement ou psychiquement à consommer des boissons alcooliques, ou elle consomme des substances apparemment inoffensives sans se rendre compte de leur effet et arrive à cet état L'ivresse complète est caractérisée par la paralysie presque complète de l'énergie physique et l'obscurcissement des facultés psychiques. Dans cet état, la personne est incapable de comprendre le caractère de son action ou inaction et de se maîtriser[14]. Pour être une cause d'enlèvement du caractère contraventionnel de l'acte, elle doit être accidentelle, c'est-à-dire que l'énergie psychique de la personne doit être paralysée totalement, c'est-à-dire qu'elle existe au moment de la contravention. [15]

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[11] En traduction "La privation de liberté et l'anomalie mentale"
[12] La revue de droit penal.
[13] *A. Iorgovan, Tratat de drept administrative, 4e édition, maison d'édition C. H. Beck, Bucarest, 2005*, page 399.
[14] *C. Draghici, C. V. Draghici, A. Iacob, R. Corches, Drept contraventional.,Edit Tritonic, Bucarest, 2008, page 59*
[15] *M. A. Hotca*, Regimul juridic al contraventiilor. Comentarii si explicatii. 4e édition, maison d'édition C. H. Beck, Bucarest, 2009, page 219 et suivantes.

Selon le degré d'intoxication, l'ivresse peut être *totale* ou *partielle*, l'ivresse *totale* pouvant être à son tour de trois façons : psychopathique – delirium tremens, épileptiforme, intoxication alcoolique latente mais persistante et complète, respectivement la paralysie de énergie musculaire accompagnée par l'éteinte totale des facultés psychiques. L'ivresse complète nommée aussi *magna ebrietatis* est la seule, d'ailleurs, qui enlève le caractère contraventionnel de l'acte commis.[16]

Selon la manière dont le sujet est arrivé à cet état, on peur distinguer *l'ivresse volontaire* qui existe quand la consommation des substances l'ayant déterminé a été volontaire, même si le sujet n'a pas désiré d'arriver à état d'ivresse et *l'ivresse involontaire* – accidentelle – au cas de laquelle le sujet est arrivé à consommer les substances respectives de manière involontaire (par exemple, il a été contraint de les consommer, ou en travaillant dans un milieu où il y avait une forte concentration de vapeurs d'alcool, il est arrivé à état d'ivresse en les inhalant).

Il y aura aussi une ivresse involontaire au cas où le sujet a consomme volontairement les substances respectives, mais il a été en erreur en ce qui concerne leur nature ou leurs effets, quand par exemple il prend des médicaments sans savoir qu'ils sont susceptibles de produire un tel état [17]

Dans la doctrine étrangère on soutient parfois que irresponsabilité due à l'ivresse existe là où l'alcoolémie dépasse 3/000, pendant qu'une alcoolémie entre 2/000 et 3/000 est seulement en mesure d'atténuer la responsabilité Conformément à l'une des opinions, on considère que dans ce cas impose aussi un examen in concreto de l'état où la personne en cause se trouvait, étant donné que les effets de l'alcool sur la capacité de compréhension et volonté d'une personne sont déterminés aussi par d'autres facteurs que la simple concentration d'alcool dans le sang. Le niveau de l'alcoolémie peut être qu'un indice relatif au caractère complet ou incomplet de l'ivresse, qui doit être corrélé avec d'autres éléments. [18]

Dans *le droit espagnol* aussi, il résulte du texte du Code pénal[19] que

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[16] *M. A. Hotca*, Regimul juridic al contraventiilor, maison d'édition C. H. Beck, Bucarest, 2007, page 204.

[17] *Fl. Streteanu*, op. cit., 2008, page 555.

[18] Dans une solution de la jurisprudence allemande, on n'a pas constaté une ivresse complète pour une alcoolémie de 3,94/000, apud. *Fl. Streteanu*, op. cit., page 556

[19] Article 20 alinéa 2 du Code penal espagnol fait mention du fait que la personne qui, au moment de l'acte, se trouve en état de pleine ivresse, sous l'influence de la drogue toxique, des stupéfiants ou des substances psychotropes ou sous l'influence d'autres effets similaires, si celles-ci n'ont pas été consommées pour le but de commettre l'acte illicite, n'est pas responsable de façon pénale – contraventionnelle. Ainsi, la personne ayant commis l'acte à cause de sa dépendance de telles substances qui l'empêche de comprendre les effets négatifs de ses actes, en alternant son discernement, ne pourra pas être responsable de façon pénale ou contraventionnelle.

pour être cause d'enlèvement du caractère illicite d'un acte, l'intoxication doit être « complète et non provoquée ». Cet état doit être présent au moment de l'acte et perturber totalement la personne respective, en lui produisant « un état de totale anesthésie physique et morale » qui mette en péril sa capacité de compréhension et son discernement. Dans la législation et dans la littérature de spécialité espagnole[20] on parle d'une parallèle entre état d'intoxication et *le syndrome d'abstinence* produit par le renoncement à une drogue, celui-ci pouvant aussi produire des symptômes similaires à l'intoxication volontaire, ce qui peut conduire aussi à commettre une contravention dans de telles conditions. Ce syndrome peut causer de graves déséquilibres physiques et psychiques et peut se manifeste en l'absence d'un traitement antidrogue adéquat au cas de personnes dépendantes de certaines drogues /toxicomanes. [21]

De lege ferenda nous pouvons suggérer nous aussi l'introduction dans le texte de l'acte normatif, à cote des autres cause qui enlèvent le caractère contraventionnel (article 11 de l'Ordonnance du Gouvernement no. 2/2001) celle-ci aussi, respectivement *le déséquilibre psychique produit par la dépendance aux drogues ou l'absence du traitement adéquat au cas de toxicomanes*. Il va de soi que dans de telles circonstances, de telles personnes sont évidemment dépourvues de discernement ou ont un discernement troublé et par la suite elles ne se rendent pas compte des implications de leurs actes et de leurs implications sociales. De plus, dans de telles conditions les actes sont clairement commis sans aucune forme d'intention, la consommation de drogues n'étant pas réalisée en vue de commettre une infraction ou une contravention, mais dans tout autre but qui nuise à la santé physique et surtout au discernement et au psychique du contrevenant.

Bibligraphie:

C. Draghici, C. V. Draghici, A. Iacob, R. Corches, Drept contraventional, Edit Tritonic, Bucarest, 2008 ;

C. Elliot, F.Quinn, Criminal Law, 8th edition, Longman, England, 2010 ;

M. A. Hotca, Regimul juridic al contraventiilor, maison d'édition C. H. Beck, Bucarest, 200 ;

M. A. Hotca, Regimul juridic al contraventiilor. Comentarii si explicatii. 4e édition, maison d'édition C. H. Beck, Bucarest, 2009 ;

[20] *Jose Nauel Maza Martin*, Circunstancias que excluyen o modifican la responsabilidad criminal, Wolters Kluwer Madrid, Espagne, 2007, page 33.
[21] Ibidem, page 34.

A. Iorgovan, Tratat de drept administrative, 4e édition, maison d'édition C. H. Beck, Bucarest, 2005 ;
J N. Maza Martin, Circunstancias que excluyen o modifican la responsabilidad criminal, Wolters Kluwer Madrid, Espagne, 2007 ;
M. Preda, Drept administrative. Partea generala, 4e édition, maison d'édition Lumina Lex, Bucarest, 2006 ;
Fl. Streteanu, Tratat de drept penal. Partea generala, vol. I, maison d'édition C. H. Beck, Bucarest, 2008 ;
Code penal français ;
Loi no. 10/1995, le Code penal espagnol, modifié par la loi no. 5/2010.

CONSIDERATIONS SUR L'APPLICATION DE L'ART. 320 INDICE 1 DU CODE DE PROCEDURE PENALE DANS LE JUGEMENT PENAL EN CAS DE RECONNAISSANCE DE LA FAUTE

Monica BUZEA*

Resume

La Loi 202/2010, concernant plusieurs mesures pour accélérer la solution des procès, publiée dans le Moniteur Officiel no. 714 du 26.10.2010, apporte un élément nouveau par l'article 320 indice 1 du Code de procédure pénale, concernant le jugement en cas de reconnaissance de la faute.

La procédure prévue par cet article est conditionnée par la déclaration de l'inculpé qui reconnaît avoir commis les faits retenus par l'acte de saisissement et de sollicitation de son jugement basés sur les preuves administrées pendant l'étape de poursuite pénale, déroulée avant le début de la recherche judiciaire. Les effets principaux consistent dans la célérité de la solution de la cause et le bénéfice accordé à l'inculpé, la réduction d'un tiers des limites de punition en cas d'emprisonnement et la réduction d'un quart des limites de punition en cas d'amende.

Comme toute autre disposition législative nouvellement introduite, l'institution analysée a déterminé dans la pratique judiciaire des discutions liées au moment où elle devient incidente et la modalité d'application.

Parmi les problèmes liés à l'application pratique de l'art. 320 indice 1 du Code de procédure pénale - introduit par la Loi 202/2010, concernant certaines mesures pour accélérer la solution des processus, publié dans le Moniteur Officiel no. 714 du 26.10.2010 – il est aussi difficile d'établir jusqu'où cette procédure peut devenir incidente.

Conformément à l'art. 320 indice 1 du Code de procédure pénale, l'inculpé doit déclarer sur l'honneur ou par inscrit authentique, jusqu'au début de la recherche judiciaire, qu'il reconnait avoir commis les faits retenus par le réquisitoire et demande que le jugement soit fait conformément aux preuves administrées pendant la poursuite pénale, bénéficiant ainsi de la réduction des limites de punition.

Dans la situation où l'instance de jugement est saisie par réquisitoire, les mesures antérieures à la séance de jugement, complétées par celles du début, visant des aspects organisateurs et des questions

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incidentes, sont suivies par la vérification de la régularité de l'acte de saisie, conformément à l'art. 300 du Code de procédure pénale.

En tant qu'étape ultérieure, la recherche judiciaire se définit comme partie du jugement où on administre et on vérifie toutes les preuves de la cause pénale[1].

Cette étape du processus pénal commence par la lecture de l'acte de saisie, activité qui consiste par sa lecture par le greffier ou une présentation succincte de son contenu, conformément à l'art. 322 du Code de procédure pénale

Dans la procédure habituelle, après la lecture de l'acte de saisie, on explique à l'inculpé l'accusation, on lui fait connaitre qu'il a le droit de ne rien déclarer mais qu'il peut poser des questions et offrir des explications.

Si on interprète les prévoyances de l'art. 300 indice 1 du Code de procédure pénale, en procédure simplifiée, après la vérification de la régularité de l'acte de saisie, mais avant sa lecture, on prend une déclaration à l'inculpé sur sa reconnaissance complète des faits retenus dans l'acte de saisie, mais on insiste sur le fait qu'il ne peut pas solliciter l'administration de nouvelles preuves, excepté les inscrits en circonstance qu'il peut administrer à ce terme-là.

Il y a eu des difficultés en ce qui concerne la situation transitoire, où la recherche judiciaire, par la lecture de l'acte de saisie et éventuellement l'administration de preuves, a été commencée avant l'entrée en vigueur de la Loi 202/2010 et la sollicitation de l'application de la procédure simplifiée a été faite ultérieurement.

En général, dans la pratique judiciaire, on a rejeté ces sollicitations, les causes étant solutionnées conformément à la procédure habituelle; mais il y a eu aussi des instances judiciaires qui ont interrogé de nouveau les inculpés après l'entrée en vigueur de la Loi 202/2010, bien que la recherche judiciaire soit déjà commencée, et, suite à leur sollicitation, on a appliqué la procédure simplifiée, tenant compte aussi de l'art. 13 du Code pénal[2].

Dans ce sens, on peut constater que le texte de l'article analysé a une nature mixte, car il contient des dispositions de procédure pénale, liées aux conditions d'application de la procédure spéciale et aussi des dispositions de nature pénale, avec référence aux possibles conséquences sur la nature de la punition.

Tenant compte du fait que ces conditions de droit processuel sont celles qu'on doit examiner au préalable, car elles sont essentielles pour

[1] N. Volonciu, *Traité de procedure penale*, vol. II, Ed. Paideia, Bucarest, 1996, p. 191;
[2] Département de Focşani, Sentence pénale 1850/2010, def. par D. pen. 276/2011 de la Cour d'Appel de Galați; Dép. de Tecuci, S. pen. 675/2010, def. par D. pen. 350/2011 de la Cour d'Appel de Galați;

l'admission de la demande, la réduction de la punition n'étant que la conséquence de leur ensemble et de leur validité, on constate qu'il a un caractère processuel pénal déterminant.

Le principe de l'activité qui gouverne l'application de la loi processuelle pénale établit qu'elle produit ses effets à l'avenir, à partir du moment où elle entre en vigueur. Dans ces conditions, le principe de l'application de la loi plus favorable n'est pas incident, contrairement à celui de la non-rétroactivité, spécifique seulement à la loi pénale.

Ainsi, les normes de procédure pénale s'appliquent dès leur entrée en vigueur et jusqu'au moment où elles s'arrêtent, conformément au dicton tempus regit actum[3].

La Loi 202/2010 ne contient aucune mention sur l'application d'une autre règle pour cette situation transitoire. D'ailleurs, comme on l'a montré dans la doctrine, la nouvelle réglementation peut consacrer l'ultra-activité de l'ancienne loi car la rétroactivité de la nouvelle loi de procédure pénale n'est pas permise par l'art. 15, alinéa 2 de la Constitution[4].

[3] G. Theodoru, *Traité de droit processuel pénal*, Editions Hamangiu, Bucureşti, 2007, p. 54;
[4] Idem, p. 57;

PRINCIPLES OF NOTARY ACTIVITY

George SCHIN*
Angelica CHIRILĂ**

Abstract

Generally, the notion of principle designates a basic element, an idea, a basic law on which a scientific theory, a political, legal system, a conduct norm, etc. are established. Correlatively, we appreciate that the principle of notary activity represents the basic ideas and value judgments that are checked in the entire legislative frame regulating this activity, as a whole or in some constituent parts.

The basic principles of the notary activity can be detached from the provisions of the first chapter of Law no. 36/1995. Some of these principles derive from constitutional norms, representing a particular application of them. Other principles are, of course, specific to the notary activity.

Keywords: *notary activity, principles, legality.*

Generally, the notion of principle designates a basic element, an idea, a basic law on which a scientific theory, a political, legal system, a conduct norm, etc. are established (Language, 1996).

Correlatively, we appreciate that the principle of notary activity represents the basic ideas and value judgments that are checked in the entire legislative frame regulating this activity, as a whole or in some constituent parts.

The basic principles of the notary activity can be detached from the provisions of the first chapter of Law no. 36/1995. Some of these principles derive even from constitutional norms, representing a particular application of them. Other principles are, of course, specific to the notary activity (Leş, 2003).

Making an analysis of these principles, we will retain the most relevant aspects:

1. The principle of the legality of the notary activity

It is a principle that derives from the basic principle of the Romanian Law System and, as a matter of fact, from any other legal system of a state of law. The principle was formulated for the first time in

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the French Declaration of the Rights of Man and of the Citizen in 1789 and reiterated in the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on. December 10, 1948, and, later on, in the International Covenant on Civil and Political Rights, adopted on December 16, 1966, but also in the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1953.

The principle of legality was written also in the Constitution of Romania, in art. 72, letter h) and i) and is displayed in the entire Romanian system of law.

In the domain of notary activity, the principle has more aspects: the settlement of notary offices is performed according to the law; complying with the competence rules is of high importance; the activity is performed in compliance with the legal dispositions regarding the procedure of issuing some documents, because only this way the documents can have public authority.

Also, the entire notary activity is governed by the compulsoriness of complying with the legality principle, circumstance that results from some texts included in Law no. 36/1995, the frame law within the domain.

Accordingly, article 6 of this normative act provides that notaries public and other institutions that develop notary activity have the obligation to check that the documents they issue do not comprise clauses opposed to the law and to good morals, to ask and give clarification to the parties on the content of these documents in order to be convinced that they understand their meaning and accept their effects, in order to prevent litigations.

In case the document required is contrary to the law and to good morals, the notary public is obliged to refuse to issue it.

In case the document presented has an ambiguous content and the notary public cannot refuse issuing the document, s/he will draw attention of the parties on the legal consequences to which they are exposed and will make a specific mention within the document.

If a party opposes to inserting the mention, the notary public will refuse to issue the document.

Complying with the legality and the active role of the notary public, this one has the role to fulfill the preventive function of the notary activity (Leş, 2003).

2. The principle of equality of treatment before the notary public

Generally, the principle of equality before the law is a basic principle of the Romanian law system, being recorded in article 16 of the Constitution of Romania: "Citizens are equal before the law and public

authorities, without any privilege and discrimination. No one is above the law".

In the domain of notary activity, the principle is specially indicated through article 7 of Law no. 36/1995 which stipulates: "the notary activity is equally performed for all persons, without distinction of race, nationality, ethnic origin, language, religion, sex, opinion, political affiliation, fortune or social origin".

According to this principle, unless the legality principle analyzed before is breached, the notary public cannot refuse to issue a document in connection to which s/he was solicited, due to the reasons shown in article 7 of Law no. 36/1995.

3. Notary activity as monopole of notaries public

The principle is expressly stated in article 2 of Law no. 36/1995 which stipulates: "The notary activity is performed by notaries public through notary documents and notary juridical consultations, under the present law".

In most western countries, the notary activity is performed by the notaries public offices, and the notaries execute the wide majority of documents with notary character. The situation is similar in the system of our legislation.

The principle according to which the notary activity constitutes notaries public monopole deals with some important exceptions. Accordingly, in article 5 it is stipulated that: "Notary documents can be performed also by diplomatic missions and consular offices of Romania, as well as by other institutions under conditions and limits provided by the law". Article 12 acknowledges also the exception according to which: "The secretaries of parishes and towns' local councils where no notaries public offices operate will execute, on parties' request, the following notary documents: a) legalization of the signatures on the documents presented by the parties; b) legalization of copies of documents, except for documents with private signature."

With all these exceptions, the principle of notaries' monopole on the notary activity is reinforced by article 10 of Law no. 36/1995, which establishes the general competence regarding their notary activity.

4. The principle of keeping the professional secret

Through the particularity of the profession which s/he carries out, the notary public may know about certain facts or circumstances which the parties do not want to make public. Due to this reason, article 36 of Law no. 36/1995 stipulates that: "Notaries public… have the obligation

to keep the professional secret regarding the documents and deeds which they have acknowledged during their activity, even after ceasing their activity under the respective position...".

Also, the notary public is bound to comply with the confidentiality of the papers issued and to not disclose the data or information entrusted to her/him.

Given the importance granted to protecting the particular interest of the parties, as it can be observed, the obligation persists even after ceasing the activity by the notary and it is extended also on the auxiliary personnel from notary public offices. The regulation of putting to practice the Law of notaries public and notary activity establishes this obligation in article 29. According to this text, the obligation to keep the professional secret imposes to the notaries public "the restraint to give information, as well as to allow the access to the notary public documents, aside from the parties, heirs and their representatives, as well as the persons who justify a right or legitimate interest".

The legal dispositions comprised in article 29 paragraph (1) of the Regulation have an extremely restrictive character, but are totally justified. A third party cannot justify, in principle, a right or legitimate interest to know the content of the documents issued by the parties.

The archive of notary public can be inspected only by a magistrate and based on the delegation issued to this purpose by the competent legal authority. If the notary documents are inspected for forgery, they can be taken and remain in the file of the case if they are declared false, with the obligation to communicate the prosecutor's decision or ordinance; on contrary, the documents must be returned (article 29 paragraph (4) of the Regulation) (Leş, 2008).

Also, exceptions to this principle are accepted in cases when the law or the parties concerned free the notaries from this obligation. Not complying with this principle can lead to criminal responsibility, even of the notary public for committing the crime of disclosing the professional secret, provided by article 196 Penal Code.

5. The principle of performing a public interest service

The principle is acknowledged by article 3 of Law no. 36/1995 which establishes that "the notary public is invested to fulfill a service of public interest and s/he has the statute of an autonomous function." Through notaries public, the persons concerned (physical or juridical) can satisfy some necessities determined by the inevitability to participate in the legal life. Therefore, the notary public activity is organized in order to satisfy some private interests.

The order of law cannot be indifferent against the way to perform the notary public legal operations. The law confers to the notary document probative force and the character of a "public authority" document. The establishment of this principle is justified by the importance of the activity developed by the notary public, activity which has as purpose the ascertainment of civil legal or commercial undisputable reports of physical or juridical persons.

6. The principle of developing the notary activities only on request of persons concerned

This principle is also expressly acknowledged by Law no. 36/1995. Through dispositions of article 43, paragraph (1), this normative document provides that: "All notary documents are issued on request". It was considered that this principle has incidence on the entire notary activity, the claim representing a premise of any operation, even in the case of performing other operations than notary documents, including on the occasion of giving juridical consultations (Leş, 2008).

Bibliography

Language, E. D. (1996). Bucharest: Univers Enciclopedic Press;
Leş, I. (2003). Special civil procedures. Bucharest: All Beck Press;
Leş, I. (2008). Notary law Workbook. Bucharest: C.H. Beck Press.

NATIONAL MARGIN OF APPRECIATION OR MULTIPLE STANDARDS IN THE ECHR CASE-LAW CONCERNING THE FREEDOM OF EXPRESSION

Carmen MOLDOVAN*

Abstract

The concept of national margin of appreciation varies from case to case and from a moment to another, as a result of the living instrument" quality of the European Convention on Human Rights which is subject of an autonomous interpretation from the Strasbourg Court. The national restrictions applied to the freedom of expression (art. 10 of the ECHR) are subject of a restrictive interpretation. The extent of the discretion for the state authorities is determined by the character of the measure adopted, the nature of the activities, the legitimate objective pursued. By application of these elements there are cases of inexistence of a margin of appreciation and cases of an extensive national discretion. Participation in politics or in general interest debates, press activity have an indispensable role for the democratic society and are the beneficiaries of a special status which determines a limited maneuver space for states.

This paper will emphasize the variable character of the national margin of appreciation and interpretations of the Court that contradict the general principles established previously.

Keywords: *fundamental rights, restraints, diversity, proportionality, interpretation.*

1. The Concept of margin of appreciation

The national margin of appreciation doctrine is known in the European system of protection of human rights jurisprudence due to its construction by the European Court of Human Rights which has implemented a thorough analysis methodology of decisions done at the national level (by governments, courts or other national actors).

The name of the doctrine comes from the French term *marge d'appreciation* used in the jurisprudence of the Council of State (*Conseil d'Etat)* not only on the administrative law but also on the influence of administrative law in the civil jurisdictions, and it designates the extent of discretion that could be recognized to the administrative authorities.[1] The

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[1] Herbert Rubasha, *Accommodating diversity: Is the doctrine of margin of appreciation as applied in the European Court of Human Rights relevant in the African human rights system*?, LLM Thesis, 2010, pp. 7-8.

most complex development of the administrative discretion doctrine was developed in Germany (*Ermessensspielraum*)[2] but it is more restrictive than the theory used by the Strasbourg Court and the Communitarian law.

Due to the diversity of cultural and legal traditions embraced by each State, identifying and imposing uniform standards of European human rights was a difficult process in which the European Convention on Human Rights[3] was considered a common denominator. The aim of using the national margin of appreciation doctrine is to determine whether a state interference in the exercise of a fundamental right guaranteed by the European Convention has a necessary character to achieve a particular legitimate interest or purpose. Such justification is possible in connection with several guaranteed rights: the right to privacy, family, home, and correspondence (art. 8 para. 2), the right to freedom of religion (art. 9 para. 2), the right to freedom of association (art. 9 para. 2), the right to freedom of expression (art. 10 para. 2), the right to life under the conditions prescribed by art. 2 para. 3.

The International Court of Justice of the UN has an uneven interpretation of the concept of national discretion. The prestigious international court adopted contradictory positions: in some cases it has been recognized the existence and extent of a national margin of discretion, while others do not accept this notion.[4]

The controversy is developed around two possibilities: the application of a non-intrusive standard analysis, in close relationship with the principle of subsidiarity of international law or whether to adopt a centralized analysis method of the rules adopted in an international organization.[5]

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[2] George Nolte, *General Principles of German and European Administrative Law – A Comparison in Historical Perspective,* Modern Law Review Limited, Blackwell Publishing, Oxford, 1994, p. 67.

[3]The Convention for the protection of rights and fundamental freedoms was adopted by the Council of Europe at Rome on 4 November 1950 and entered into force on 3 September1953. Romania ratified the Convention on 20 June 1994 by Law no. 30/1994, published in the "Monitorul Oficial", Part I, no. 135 of 31 May 1994.

[4]ICJ, *Oil Platforms* (Iran c. U.S) [2003] ICJ Reports 90 - the International Court of Justice repelled the doctrine of margin of appreciation; ICJ, *Avena* (Mexico c. U. S.) [2004] ICJ Reports-International Court of Justice took a more permissive attitude on the margin of appreciation doctrine; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* Opinion of 9 July 2004 [2004] ICJ Reports, 43 LM - the International Court of Justice rejected again the national margin of appreciation doctrine.

[5] Frédéric Sudre, Jean-Pierre Marguénaud, Joël Andriantsimbazovina, Adeline Gouttenoire, Michel Levinet, *Les grands arrêts de la Cour européenne des Droits de l`Homme*, 3e édition, Presses Universitaires de France, Paris, 2005, p. 79; Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, inThe European Journal of International Law, Vol. 16/5, 2005, p. 908.

2. Definition and characteristics of the doctrine of margin of appreciation

The concept of national discretion of states is very difficult to define, because it exists only through jurisprudence and it has variable features. However, despite the criticisms made about the application of the doctrine of national margin of discretion, there is consensus in the specialized literature that it is a means of ensuring the protection of fundamental rights, while preserving the autonomy of national authorities that have sovereign powers to regulate the conduct prohibited and content of rights, respecting the minimum requirements imposed by international agreements.

The doctrine that has seen significant development in the jurisprudence of the European Court can be defined as: "The degree of deference or error allowed to national executive, legislative, administrative or judicial bodies before declaring a national derogation or restriction of a right guaranteed by the Convention to constitute a material breach of the Convention guarantees. It can be considered as a limit which should allow international supervision of a Member State's power to adopt and enforce its laws."[6]

As a consequence of this regulatory model, we can be in a situation in which, in the process of implementation of an international rule, national authorities from different countries may use different measures, but all compatible with the conventional safeguards assumed.[7]

The European Court of Human Rights case law highlights the absence of a uniform European conception of various concepts, as well as the diversity national legislation in space and time of e.g., in its ruling in the *Handyside* Case, the Court stressed that it cannot be identified a uniform concept of *moral*[8] in the national law.

The national margin of discretion is not unlimited, but it is subject of review by the European Court of Human Rights by examining the principles and criteria established in its judgments. The discretionary power of the state has not the same amplitude for all limitations to the rights guaranteed, but it is governed by the principle of proportionality of the interference with the legitimate aim pursued and the observance of a *fair balance* between public interest and individual interests[9].

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[6] Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of Europe on Human Rights Jurisprudence,* Kluwer Academic Publishers, 1996, p. 13.

[7] Frédéric Sudre, Jean-Pierre Marguénaud, Joël Andriantsimbazovina, Adeline Gouttenoire, Michel Levinet, *op. cit.,* p. 75.

[8] ECHR, *Handyside v. United Kingdom*, § 48.

9 The principle of proportionality, similar to the concept of national margin of appreciation, is not expressly regulated by the Convention and it began to be used and developed by the Court in its case law of the 90s. Jean-François Renucci, *Traité de droit*

One way to understand the general steps for developing a doctrine of national discretion may be the fact that courts must interpret international standards as involving a minimum of constraints on the conduct of states.[10] Such construction of the legal rule to be applied allows to member states parties a considerable "zone of legality"[11]. Reducing the legality limits of the measures taken by national authorities as a result of restrictive interpretation of the rules that guarantee fundamental rights could produce the effect of interference from the international community in the conduct of states and promoting the idea of subsidiarity in international relations[12].

Despite generally positive assessments on the development of margin of appreciation doctrine, there was criticism mainly focused on the implications of the erosion occurred on the level of prescribing the conduct to be adopted by states. As an example, it was stated that this doctrine encourages relative or subjective application of the international law norms, producing attenuation on its quality to regulate the conduct of the recipients (the States) and a subversion of their authority and perception of fairness of the adopted conduct (expectation of similar treatment of cases with similar objects)[13].

It was stated that the use of this doctrine contributes to the abolition of the legality limits and that it can strengthen the perception of international law as an inefficient system of legal rules, a weak system of unenforceable ineffective principles, which contains very few real constraints over state powers to regulate restraints on rights. In few words, the concept was presented as a subtle method which allows to powerful states to circumvent the objective rules of international law[14] and as a sophisticated method to reintroduce the term *State* in the international context[15].

On the other hand, the arguments in favor of the national margin of appreciation doctrine went forward to support the existence of an

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européen des droits de l`homme, Librairie Générale de Droit et de Jurisprudence, Paris, 2007, p. 802; ECHR, *Branningan and Mc Bride v. United Kingdom,* § 32.

[10] Yuval Shany, *op, cit*., p. 912.

[11]The idea is well illustrated in the *Lotus* case decided by the International Permanent Court of Justice, in the sense that whatever is not prohibited by legal rules, is allowed, PCJI *, Lotus (France c.Turkey)* [1927].

[12] Yuval Shany, *op. cit.,* p. 912; ECHR, *Use of Languages in Belgium (the Belgian Linguistics Case),* 1968, § 281-282.

[13] ECHR, *Certian Aspects of the Laws on the Use of Languages in Belgium (No.2) (Merits)*, 1967, § 353; Partially dissenting Opinion of Judge Wold.

[14] Cora S. Feingold, *The Doctrine of Margin of Appreciation and the European Convention on Human Rights*, in Notre Dame Law Review, 53, 1977, p. 95.

[15] Paolo C. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, in The American Journal of International Law, Vol. 97/ 38, 2003, p. 72.

independent energy in the legal pluralism of the international law (particularly human rights rules)[16].

3. Variation of elements defining the national margin of appreciation

A comprehensive development, in the field of free speech protection was made by the Court in *Handyside* Case[17], where it analyzed the legality of the ban of British officials to the distribution of a book to teenagers on claims that it affected public morality. The Court upheld the government's argument on the legitimacy of measures taken to restrict free speech and established the major coordinates of the national margin of appreciation doctrine:

"Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force (...) Nevertheless, Article 10 para. 2 does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States' engagements (...), is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10."[18]

The subsequent jurisprudence of the Court indicates that the manner of application of the national margin of discretion doctrine depends on a variety of factors that determine the scope of power granted to national authorities. From the whole set of factors, three have a particular importance: 1) *the comparative advantages of local authorities* - the analysis of the basic rules is better assessed by national authorities and allow a wider margin compared with the objective rules which the Court may independently evaluate,[19] 2) the existence of an *applicable standard* - the greater the consensus on the existence of a European standard, the narrower the margin of appreciation for the Member State,[20] 3) *the nature of interests involved* - the importance of national interests concerned should be brought into balance with the nature of the individual right compromised by the analyzed restriction. The extent of national margin of appreciation

[16] Michael J. Perry, *Are Human Rights Universal? The Relativist Challenge and Related Matters,* in Human Rights Quarterly, 1997, pp. 498-509.
[17] ECHR, *Handyside v. United Kingdom.*
[18] ECHR, *Handyside v.United Kingdom*, §§ 48-49.
[19] ECHR, *Sunday Times v. United Kingdom*, 1980, § 59.
[20] ECHR *Rees v. United Kingdom*, 1987, § 67.

enjoyed by states must reflect this balance formula[21] by proportionality principle requirements.

The Court examines the circumstances of the case and a number of factors[22]: the specific quality that the author has (politician, journalist, lawyer, military, civil servant, judge, member of a banned organization), the type of speech (artistic, religious, political, commercial), the possibility for the author to use other forms of expression,[23] where the speech took place, the target audience of the expressed message, the means by which the message was broadcasted (television, newspapers, public exhibitions).

As a general rule, the Court appears to recognize for some domains a more extensive power of discretion to national authorities to assess on the necessity for measures to achieve an objective. This is the case, for example, where the Court identifies a similar practice in member states, a situation known as the common denominator or common standard applicable law.

Thus in the *Sunday Times* case, the Court treated the antithesis between the exception of *protection of morals* and the more objective notion of *judicial authority*:

"The view taken by the Contracting States of the "requirements of morals", observed the Court, "varies from time to time and from place to place, especially in our era", and "State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements". Precisely the same cannot be said of the far more objective notion of the "authority" of the judiciary. The domestic law and practice of the Contracting States reveal a fairly substantial measure of common ground in this area. This is reflected in a number of provisions of the Convention, including Article 6, which have no equivalent as far as "morals" are concerned. Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation.[24]

The consequence arising from the *Sunday Times* case is that the national margin of appreciation has not the same amount for each of the goals listed by the state through the adoption of measures constituting an interference with the normal exercise of freedom of expression, being

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[21] ECHR, *Leander v. Sweden*, 1987, § 59; ECHR *Çakici v. Turquie,* 2001, § 191-192; ECHR, *The Observer v. United Kingdom,* 1992, § 218 (Partially dissenting Opinion of Judge Morneilla); Yuval Shany, *op. cit.,* p. 927.

[22] Adrian Tudorică, Dragoş Bogdan, *Articolul 10. Dreptul la libertatea de exprimare,* în coord. Dragoş Bogdan, Mihai Selegean, *Drepturi şi libertăți fundamentale în jurisprudența Curții Europene a Drepturilor Omului,* Editura All Beck, Bucureşti, 2005, pp. 495-496.

[23]The question of the applicant's contribution to public debate on the union problem by expressing criticism regarding the independence of trade-unions and the functioning of the judicial system could have been performed outside the terms of use -"embezzlers" ("delapidatori"), ECHR, *Constantinescu v. Romania,* 2000.

[24] ECHR, *Sunday Times v. United Kingdom*, § 59.

extended when it concerns the protection of public morals (a concept that has no objective definition) while it is more difficult to prove the legitimacy of an the interference in the respect of private.[25]

In some of its rulings, the Court emphasized that a democratic society is characterized by "tolerance and respect for the dignity of persons" so, in some instances it may be considered necessary to punish or prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance, including religious intolerance. From this statement it results that states have on this aspect a great discretion, but from the entire case law clearly emerges the idea that the European Court in such matters exercises a very strict control of national interference and in the case that the speech in question is described as one that promotes hate (*hate speech*), the national margin of appreciation is restricted. However, the identification of firm elements, which serve to establish limits for the national margin of discretion, is a very difficult operation.[26]

Due to the considerable number of member states to the European Convention on Human Rights, it is very possible to find a variety of interpretations and permissive appreciations in the national legal systems on specific issues. This fact is not likely to draw a rigid framework in assessing the margin of appreciation, but it is only the raw material in its delineation.[27] The European Court may not give great importance to the fact that in other states there is a greater tolerance of certain publications, as it corresponds to the need of moral attitude variations in different societies.[28]

Generally, the existence of a constant attitude in regulation or lack of regulation of a particular domain in other member states may affect the extent of the national discretion by the European Court.[29] Such a comparison is reasonable when the main question is to determine whether certain restrictions on the exercise of guaranteed rights are necessary or not in a democratic society. The general use by the members of the Council of Europe of such restrictions may constitute an indication of the

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[25] Gérard Cohen-Jonathan, *La Convention européenne des droits de l`homme*, Edition Economica, Paris, Presses Universitaires D` Aix -Marseille, Aix-en-Provence, 1989, p. 472.
[26] Anne Weber, *The Case-Law of the European Court of Human Rights on Article 10 ECHR Relevant for Combating Racism and Intolerance,* in Council of Europe, *Expert Seminar: Combating Racism*, 2007, p. 100; Mark W. Janis, Richard S. Kay, Anthony W. Bradley, *European Human Rights Law. Text and materials*, Third Edition, Oxford University Press, Oxford/New York, 2008, p. 243.
[27] Mark W. Janis, Richard S. Kay, Anthony W. Bradley, *op. cit.,* p. 243.
[28] ECHR, *Handyside v. United Kingdom.*
[29] ECHR, *Dudgeon v. United Kingdom;* Mark W. Janis, Richard S. Kay, Anthony W. Bradley, *op. cit.*, p. 243.

necessary character of the measure, while its absence may be an indication of failure to fulfill the requirement of necessity.[30]

The analysis of the European Court over the justification of the interferences in the exercise of rights guaranteed by the conventional provisions depends on the relative effectiveness of measures adopted by national authorities and is one with a strong practical character.

The variation of the content of national margin of discretion doctrine is fully illustrated in the *Guardian vs. United Kingdom* case.[31] The object of the Court's analysis consisted in evaluating the conformity with the European Convention guarantees of the prohibition for the applicant to publish newspaper excerpts from *Spycatcher*, a memoir of a former officer of the British Secret Service (MI-5) in which were recounted numerous illegal actions undertaken by the Service. This restriction was upheld by the *House of Lords* until October 1988. Until the onset of internal procedures, some of the information had already been published in other books or broadcasted on TV. During the course of proceedings, information has appeared in many articles published in the UK, USA and Australia, and the book was published in full in the United States of America and many copies were brought to UK.

The European Court of Human Rights found that in this case, the restriction was justified until 30 July 1987, but it lost this status after that date. At this time much of the information contained in the book was already public and in these circumstances the Court considered that any attempt to maintain their confidentiality was an approach more or less vain.[32]

Some of the separate opinions to the decision expressed the doubt that there was a difference between the two periods considered by most judges. In part, the decision was based on an estimate of the information that was already known when issuing the prohibition orders and on the possibility that the plaintiffs had access to new and different information.[33]

Moreover, other opinion supported the inevitability of spreading materials that the government wanted to keep secret, even from the beginning. Judge Pettitti stressed that taking into account modern technology, the territorial division of thoughts and expression is impossible.[34]

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[30] ECHR, *Fretté v. France*, Mark W. Janis, Richard S. Kay, Anthony W. Bradley, *op. cit.*, p. 243.
[31] ECHR, *Guardian v. United Kingdom,* 1991.
[32] ECHR, *Guardian v. United Kingdom,* 1991.
[33] Dissenting Opinion of Judge Walsh; Mark W. Janis, Richard S. Kay, Anthony W. Bradley, *op. cit.,* p. 244.
[34] Partially dissenting Opinion of Judge Pettitti.

It follows that the essential element is the effectiveness of the attempt to suppress information. In this case, the publication ban was not necessary to prevent damage to national security because the information would become public and almost certainly damage would have occurred regardless of interference and a futile measure should not be considered necessary.[35]

4. The distinction between value judgments and statements of fact

Another criticism that can be made on the interpretation of the European Court in the recognition of national discretion is that it makes no clear distinction between the statements of fact and value judgments on the basis of objective elements. The distinction is relevant because, as shown in its case-law, for a statement of fact to be regarded as affecting a person's reputation, it involves a demonstration of its veracity, while the value judgments must have a factual basis that can vary depending on its nature and severity.[36]

Although from the analysis of the entire case-law of the European Court of Human Rights it appears the preference for freedom of expression when it conflicts with other fundamental rights, by the ruling in 2007 in the *Lindon and Otchakovsky July-Laurens v. France*[37] case this relationship been called into question.[38]

The facts of the case are relevant to highlight the deviations from the usual interpretation of the European Court. The applicant had published a novel, entitled *The Trial of Jean-Marie Le Pen* (*Le process de Jean-Marie Le Pen*) in which the author has imagined a National Front militant accused of killing a young Maghreb claiming racist nature of the act. The main character of the novel, the attorney of the accused raises the question of responsibility of Jean-Marie Le Pen for this act. The author and the publisher of the novel have been charged with defamation by the National Front and Jean-Marie Le Pen, on the basis of six passages in the novel and sentenced by the national courts.

One of the issues raised by this case refers to the existence of freedom of speech in the case of a novel. It is emphasized that most of the European Court case law on the freedom of press has covered articles

[35] Mark W. Janis, Richard S. Kay, Anthony W. Bradley, *op. cit.*, p. 244.
[36] Patrick Wachsmann, *Vers un affaiblissement de la protection de la liberté d`expression par la Cour Européenne des Droits de l`Homme* ?, in Revue trimestrielle des droits de l`homme, No. 78, 2009, pp. 500-501.
[37] ECHR, *Lindon, Otchakovsky-Laurens and July v. France*, 2007.
[38] Patrick Wachsmann, *op. cit.*, pp. 491-511.

published in journals, periodicals, and only in rare cases it have been brought into question books or radio broadcasts.[39]

The first question is whether the works of fiction may be subject to similar requirements imposed by rules governing freedom of expression, bearing in mind the Court's view, expressed in the *Müller* case on pictorial art that *those who create, interpret, disseminate or exhibit a work of art contribute to exchange ideas and opinions essential to a democratic society*.[40]

Clearly, there is a discrepancy between this vision of the European Court and the new interpretation, particularly because of the lack of landmarks to place works of art in relation to the rules that apply to freedom of expression. Such a process is difficult, due to art features, for which there cannot be conceived a clear and precise definition, the author having a great freedom to create in many cases based on facts or real people, and this aspect cannot be subject to any form of an outside control.

In contrast, the effect it produces over the people who determined the creation of the characters can be analyzed. The French courts' reasoning consisted in removing the fiction and asking from the author a minimum prior verification on certain aspects contained in the novel, which contradicts the author's creative freedom.

Although the Court observes that the novel in question is a part of a debate of general interest and is a form of the political and militant expression, an element for which Article 10 of the Convention provides a high degree of protection and the national margin of the authority to decide on the need for sanction applied to applicants is limited, surprisingly the final conclusion was the absence of a breach of Article 10. The contradiction between the general terms of the Court's jurisprudence regarding freedom of expression and this conclusion is obvious.

The complaint against the interpretation of the domestic courts does not refer to independence issues or more stringent treatment for the applicants, but the fact that they did not take into consideration the particular features of the work concerned, that distinguish this case from the ones that the Court usually settled. In this case, the object of analysis is a novel, a work of creative fiction, sufficient element to remove the issue of veracity of the facts alleged from the legal debate. Instead, it supports rather the possibility of analysis of good faith of the applicants; for the reader there is no need to proof the accuracy of the facts alleged in a novel even though they relate to real people, because reading a novel is not aimed at finding accurate information.[41]

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[39] Patrick Wachsmann, *op. cit.,* p. 492.
[40] ECHR, *Müller v. Switzerland,* 1988; Patrick Wachsmann, *op. cit.,* pp. 493-494.
[41] Patrick Wachsmann, *op. cit.*, p. 501.

Although it is not excluded that the content of a novel through its content, to damage the reputation of individuals, however, the damage does not occur as in the case of a report publication and the novels are not in any case cited to attest a certain reality, being a creation that combines realistic elements with elements of fiction so it may not be subject to the burden of proof.[42]

Regarding the Court's attention to the context of the case, there is another contradiction in its reasoning. Thus, the Court found no violation of Article 10 of the Convention, although the situation concerning Jean-Marie Le Pen was exposed in a way that would logically lead to the opposite conclusion. The Court notes that he is a politician known for the virulence of his speeches and for taking extreme positions that resulted in criminal convictions for incitement to racial hatred, apology for war crimes, slander and defamatory statements to public persons.[43]

In general, in the case of incitement to violence against an individual, a public person or a group of persons, the European Court has recognized to member states a very broad discretion in assessing the need for interference from the national authorities in the freedom of expression. They have powers to determine the cases that undermine the public order and to regulate the repressive measures, including penal sanctions.[44]

In this case, the perspective of the European Court, attached to the idea of protection of the freedom of expression, contradicts the principles well established in its case-law for decades and is situated in a diametrically opposite position from the interpretation of the United States Supreme Court on the *First Amendment,* characterized by absolutism to the scope of protection of freedom of speech to such an extent that it is estimated that the American society should tolerate offensive speech to grant the development of rights set in the *First Amendment*.[45]

Another criticism is that the Court defeated its own principles stated in previous cases regarding the protection of different ways of expression, having recognized for the author the free choice of how to express ideas and opinions without influence from national or European authorities.[46]

The hope is that the restrictive interpretation of this judgment will not have continuity and the Court will return to the principles set out previously.

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[42] *Idem,* p. 502.
[43] ECHR, *Lindon, Otchakovsky-Laurens and July v. France,* § 56.
[44] Luzius Wildhaber, *The European Court of Human Rights - 1998-2006. History, Achievements, Reform*, N.P. Engel Publisher, 2006, p. 223.
[45] *Terminiello c. Chicago,* 337 U.S. 1 (1949), *Cohen c. California,* 403 U. S. 15 (1971), *Hustler Magazine c. Falwell,* 485 U.S. 46 (1988).
[46] Patrick Wachsmann, *op. cit.,* p. 505.

Conclusions

The concept of national margin of appreciation places on opposite positions the member states (committed by their free consent to carry out certain international obligations) and the international courts (with powers to examine the compatibility of acts or omissions of the member states and the international treaties).

An in-depth study of this concept reveals both gaps or shortcomings and disadvantages represented by the following aspects: the excessive flexibility of the legal concepts may lead to unstable content and limits, an unpredictable evolution and exaggerated powers recognized to international bodies that do not set clear and predictable landmarks in showing clearly the distinction between permissible and impermissible actions of states.

REFERENCES

Austin, A., Lester, M., Fisher, *T., Article 10: Freedom of Expression*, in (gen. ed.) Jessica Simor, *Human Rights Practice*, Thomson, Sweet & Maxwell, London, 2008;

Carozza, P. C., *Subsidiarity as a Structural Principle of International Human Rights Law,* in the American Journal of International Law, Vol. 97/38, 2003;

Cohen-Jonathan, G., *La Convention européenne des droits de l`homme*, Edition Economica, Paris, Presses Universitaires D` Aix - Marseille, Aix-en-Provence, 1989;

Feingold, C. S., *The Doctrine of Margin of Appreciation and the European Convention on Human Rights*, in Notre Dame Law Review, Vol. 53, 1977;

Janis, M. W., S. Kay, R. S., Bradley, A. W., *European Human Rights Law. Text and materials*. Third Edition, Oxford University Press, Oxford/New York, 2008;

Nolte, G., *General Principles of German and European Administrative Law – A Comparison in Historical Perspective,* Modern Law Review Limited, Blackwell Publishing, Oxford, 1994;

Perry, M. J., *Are Human Rights Universal? The Relativist Challenge and Related Matters,* in Human Rights Quarterly, 1997;

Renucci, J.-F., *Traité de droit européen des droits de l`homme*, Librairie Générale de Droit et de Jurisprudence, Paris, 2007;

Rubasha, H., *Accommodating diversity: Is the doctrine of margin of appreciation as applied in the European Court of Human Rights relevant in the African human rights system*?, LLM Thesis, 2006;

Shany, Y., *Toward a General Margin of Appreciation Doctrine in International Law?*, in The European Journal of International Law, Vol. 16/5, 2005;

Sudre, F., Marguénaud, J.-P., Andriantsimbazovina, J., Gouttenoire, A., Levinet, M., *Les grands arrêts de la Cour européenne des Droits de l`Homme*, 3e édition, Presses Universitaires de France, Paris, 2005;

Tudorică, A., Bogdan, D.,, *Articolul 10. Dreptul la libertatea de exprimare,* in coord. Dragoş Bogdan, Mihai Selegean, *Drepturi şi libertăți fundamentale în jurisprudența Curții Europene a Drepturilor Omulu*i, Editura All Beck, Bucureşti, 2005;

Wachsmann, P., *Vers un affaiblissement de la protection de la liberté d`expression par la Cour Européenne des Droits de l`Homme* ?, in Revue trimestrielle des droits de l`homme, No. 78, 2009;

Weber, A., *The Case-Law of the European Court of Human Rights on Article 10 ECHR Relevant for Combating Racism and Intolerance,* în Council of Europe, *Expert Seminar: Combating Racism*, 2007;

Wildhaber, *L., The European Court of Human Rights - 1998-2006. History, Achievements, Reform*, N.P. Engel Publisher, 2006;

Yourow, H. C., *The Margin of Appreciation Doctrine in the Dynamics of Europe on Human Rights Jurisprudence,* Kluwer Academic Publishers, 1996.

THE OFFENCE OF DECEIT IN CONVENTIONS AND THE SALE OF GOODS OWNED BY OTHER PERSONS WITHOUT THE ABILITY TO PASS TITLE

Mirela Carmen DOBRILĂ*

Abstract

In the sales contract, the seller must be the owner of the right which is alienated, because the property is conveyed to the buyer only if the seller is the true owner of the property sold. Due to the lack of regulation in this field in the Romanian civil law, the sale of goods owned by other people remains a controversial issue; taking into consideration other legal systems where the sale without the ability to pass the title is regulated, the New Romanian Civil Code includes provisions concerning this problem.

In the matter of sales contract, when the seller does not have the title, it is sometimes difficult to separate penal responsibility from civil liability as the sale of ascertained goods owned by other people can match the offence of deceit in conventions, regulated by article 215 of the Romanian Criminal Code, because the seller can deceive or maintain the deceit of the buyer by presenting him, in a misleading way, as the true owner of the sold goods, in order to obtain unjust material benefits, causing damage to the buyer; the legal framing of the sale by a non-owner as deceit should be solved on a case-by-case basis.

Keywords: *the offence of deceit, sales contract, transfer of ownership, sale by a non-owner, lack of title.*

JEL Classification: *K11, K12, K14.*

The issue of *selling goods owned by another person* is raised when individual goods owned by someone are alienated by someone else who is not their owner, and solutions given in literature and judicial practice differ when the situation is not regulated by the legislator. As the sales contract is a contract whereby the seller transfers the property in goods to the buyer for a money consideration called price, the seller must be the owner of the right which is alienated, because he or she cannot otherwise transfer the right constituting the object of the agreement.

Beyond a civil law-based analysis of the situation occurring when ascertained goods are alienated by a person who is not the owner, an analysis of the context in which *selling goods owned by other people* is circumscribed to the text incriminating deceit in conventions (article 215 para. 3 of the Criminal Code) appears as necessary.

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According to article 215, para. 1 of the Romanian Criminal Code, the offence of *deceit* is defined as the act of deceiving a person, by presenting a false fact as being true or a true fact as being false, in order to obtain unjust material benefit for oneself or for another and if damage was caused. The Romanian Criminal Code defines deceit in convention in article 215, para. 3 as the act of deceiving or maintaining the deceit of a person, when concluding or executing a contract, if without this deceit the person would not have concluded or executed the contract in the conditions stipulated.

Sometimes analysed in Romanian legal writings under the name of *fraudulent sale* (Urs, 2006: 45), the sale of goods owned by other persons may be encountered in legal practice either when both contracting parties concerned are informed about the lack of ownership of the seller, or when both sides or only one of them knows that the property sold belongs to someone else. From a criminal law perspective, the action of selling goods owned by other people is made relevant by the offence of deceit in conventions when the seller, without the ability to pass title, is deceiving the buyer in order to conclude a contract, by presenting himsef as being the true owner of the sold good in order to obtain unjust material benefit for himself or for another, with the immediate consequence of causing prejudice for the buyer, and if without this deceit the buyer would not have concluded or executed the contract in the conditions stipulated.

Within the Romanian legal system, the sales contract has a translative character of rights, because it involves the transfer of ownership from the seller to the buyer[1]. The conveyancing effect of the sales contract involves, as a prerequisite, that the property belongs to the seller (Sanilevici and Macovei, 1975: 33).

The problem of potential consequences of selling goods by a non-owner, as person who does not have ownership over them, i.e. selling goods owned by another person, has only been formulated in modern law, in the system within which the sale implicitly transfers the ownership (unlike the situation in the Roman law, where the sale did not have translative character of property, and it was possible to sell goods that were not owned by the seller) (Sanilevici and Macovei, 1975: 34). The French Civil Code specifically establishes the nullity of selling goods owned by other people (article 1599), but the Romanian Civil Code of 1864 did not import this solution, even though the sales contract has translative

[1] According to article 1295 of the Civil Code, the sales contract is legally concluded and the ownership of property is transferred to the buyer, once the contractual parties have agreed on the goods and the price. According to article 971 of the Civil Code, in the case of contracts related to the conveyance of property or other real rights, the property or the right is transmitted through the consent of the parties.

character of property both in our legal system, and in the French Civil Code.

Article 1599 of the French Civil Code clearly stipulates that selling goods owned by other people is considered void or null, as no person can sell goods that do not belong to him or her, since this could result in prejudice being caused when the buyer was not aware that the property sold actually belonged to someone else than the person selling it; thus, liability for damages may be established if the buyer did not know that the property belonged to the true owner. Despite the fact that in the Roman law selling goods owned by other people was possible, in the sense that the seller promised to transfer the *vacua possesio* (undisturbed possession) to the buyer, and if the former did not ensure this transfer, they were forced to provide reparations to the latter, the editors of the French Civil Code considered that selling goods owned by other people could not coexist with the new principle of instantaneous transfer of ownership, even though there are cases in which the act of selling does not allow for it; thus, the interdiction is now considered rather cumbersome than useful and in legal practice efforts are made to limit it (Malaurie et al, 2009: 24). For instance, when the sale has as object future goods, as in goods that are to be manufactured, or goods unascertained at the time of the contract, the ownership is not transfered at the moment the contract is concluded, but at a subsequent moment, in which case the requirement of title is no longer justified.

After the Romanian Civil Code was adopted, influenced by the Roman law and the provisions of article 1599 of the French Civil Code, the Romanian doctrine, in its majority, leaned towards sanctioning such a transaction with absolute nullity, the acknowledged differences of opinion only referring to the grounds for finding nullity (Codrea, 1998: 28).

In order to ensure the validity of the sales contract, the ascertained goods at the time of the contract must be under the ownership of the seller, a condition which is derivative from the translative character of property of the sale-purchase contract, being an application of the rule according to which no one can transfer to another person more than he or she owns (*nemo plus iuris ad alium transferre potest quam ipse habet*) (Macovei, 2006: 40).

The solutions adopted in legal doctrine for the controversial problem of selling property owned by a third party differ according to the extent to which both of the contracting parties, or at least one of them, were afflicted by error, or, on the contrary, to whether the contract was concluded in full knowledge (Deak, 2001: 56). Thus, if the buyer was afflicted by error and misled into believing that the seller is the true owner of the property sold, the sales contract is sanctioned with relative nullity, due to the vitiation of consent by error relating to the esential quality of

the seller (*error in personam*), considered by the buyer to be the owner of the property. If both parties have concluded the sales contract with full knowledge that the property belongs to the true owner, the contract is rendered absolutely null for illicit cause (*fraus omnia corrumpit*).

In a different opinion, it is emphasized that, in this specific case, the grounds for the annulment of the sales contract must be initially provided by deception, because the buyer, acting in good faith, was misled by the seller, acting in bad faith, about the quality of owner possessed by the latter; another opinion expressed was that this is the case of deception by reticence, the fault in this case consisting in the infringement of the obligation of mutual information (Stănciulescu, 2008: 37).

In Decision no 5801 of October 21, 2004, the High Court of Cassation and Justice ruled that selling goods owned by other people does not justify the request to establish absolute nullity for illicit cause, since civil laws neither prohibits it, nor considers it in contravention with law and order: „This does not mean that the true owner is at the mercy of people who want to acquire his or her property. Having his own goods sold by a non-owner in a fraudulent way, the true owner does not lose his title, but in case the property is in the possession of some other party, the true owner may claim it before usucapion intervenes. If he or she has the full possesion over the property, they may oppose the title against the buyer who is claiming title under the contract concluded with a person who is not the owner".

It has been considered that the illicit cause could be retained as a fundament for nullity only in the cases where the sold goods were acquired by the seller by committing a criminal offence, such as fraud or theft (Sanilevici and Macovei, 1975: 37).

Based on the fact that the current Romanian Civil Code does not regulate selling goods owned by other people, and due to the absence of a solution provided by the legislator both in judicial doctrine as well as in legal practice, several opinions and controversies have emerged about its validity, the New Civil Code sought to correct these faults, ensuring, based on the model of the Italian Civil Code (articles 1478-1480)[2], a specific regulation of the issue of selling goods owned by other people.

Thus, with regard to this regulation of the institution of selling goods owned by other people in the New Civil Code[3], it must be noted that article 1683 removed the controversies in the matter by introducing the seller's obligation to convey the property: according to para. 1, if, on

[2] Article 1478 of the Italian Civil Code: *Se al momento del contratto la cosa venduta non era di proprietà del venditore, questi è obbligato a procurarne l'acquisto al compratore. Il compratore diventa proprietario nel momento in cui il venditore acquista la proprietà dal titolare di essa.*
[3] Law no. 287/2009, Official Gazette No. 511/24 July 2009.

the date the contract was concluded on ascertained goods, these goods are under the ownership of a third party, the contract is legally valid and the seller is required to ensure the transfer of ownership from the rightful owner to the purchaser. Thus, in a sales agreement, the seller must have the right to sell at the time the property is to shift.

As for the dispositions in the New Civil Code regarding selling goods owned by other people, it is generally agreed that article 1683 marks the end of an era, one during which the matter of selling goods owned by other people constituted fertile ground for doctrine discussions, as well as various and innovative legal practice solutions (Moțiu, 2010: 113).

The obligation of the seller is considered as executed either by the acquiring by him or her of the goods in question, or by the ratification of the sale by the owner, or by any other means, direct or indirect, which confer the buyer ownership over the goods; these dispositions have the role of listing, without limiting, the ways in which the seller can ensure the passing of ownership. If the law does not state otherwise, or the intentions of the parties are not contrary, the property is rightfully conveyed to the seller from the moment of his or her acquiring the goods, or of the ratification of the contract by the owner.

The boundary between penal and civil responsibility is not yet perfectly delineated, and it is difficult to separate penal responsibility from civil liability when, obviously, the situation implies a tort liability, and this is reflected in legal practice, where a convincing and well-argued solution has not always been found (Pătulea, 2003: 119).

It has been argued that the phrase *goods owned by other people* requires some clarifications, as, for instance, as the Italian Criminal Code envisions it, this phrase is used to refer to goods *under the ownership of other people*; unlike the Italian Criminal Code, the current Romanian Criminal Code allows for a much broader meaning of the phrase *goods owned by other people*, in the sense that the goods are considered to belong to someone else every time the victim has a right of any kind over the goods (Guiu, 2004: 186).

In Romanian legal writings, it is shown that when the purchaser pays the price of the goods and is not granted ownership, because the object of the sales contract did not belong to the seller, he or she is materially prejudiced, and the misleading action of the seller can be charged as a completed offence of deceit, regulated by article 215 para. 3 of the Criminal Code (Bogdan, 1999: 115; Ciucă, 1990: 29).

It is considered that, alongside other ways of taking action, the *bona fide* purchaser, who has been determined through fraud or deceptive influence to acquire goods from a non-owner may also claim for receiving reparations (Codrea, 1998: 35), under the conditions of tort liability when,

after the annulment of the document, the victim is still suffering prejudice of any sort. Deceiving the buyer by the seller who is not the true owner can acquire a criminal nature by making the latter account in terms of criminal liability under the offence of deceit in convention.

The person who purchases goods from people who have no title over it, not even apparent ones, will be able to claim, to his defence, the principle of good-faith, which contradicts other Civil law principles: *nemodat quod non habet*, or *nemo plus juris ad alium transfere potest quam ipse habet* (Codrea, 1998: 28).

In the attempt to see whether selling goods owned by other people is circumscribed to the legal text incriminating deceit in conventions, legal scholarship (Bocşan and Bogdan, 1999: 50) has noted that, should the seller subversively state that he or she is the rightful owner of the goods to be alienated, we will be in the situation of misleading action, even if the seller only used a simple lie, as Criminal law does not condition the offence of deceit in conventions to any additional material activity, and it suffices for the victim of the deceit – the purchaser – to have been misled about the circumstances of the sale at the moment the contract was concluded.

As to the criminal law significance of lying to the offence of deceit in conventions, it is held that a lie, even a poorly told lie, can be a means to commit the offence of deceit, as the law only requires the presence of a delusion (Bogdan, 1999: 113), irrespective of any means through which it would occur.

With regard to incriminating legal text, the simple fact of presenting a false act as being true or a true fact as being false does not represent the action of misleading, in the sense written in the law, if it is not accompanied by external facts which reveal with great certainty the intention to deceive and give this statement the semblance of truth (Mateuț, 1999: 361), which is why we can only consider that there is an error when the altered representation of reality in the mind of the afflicted party is correlated with external elements.

The simple act of lying, as well as simple reticence or ommission may be means of deluding, when they occur in correlation with circumstances or actions which give them the semblance of plausibility (Dongoroz et al., 2003: 497), so that they are meant to make the victim believe them to be in agreement with reality. The dishonest action of the seller to introduce himself or herself as the true owner is an instance of deceptive activity, being however insufficient for the seller to make the dishonest statement in order for deceit to occur, which implies using external means, capable of giving this statement the semblance of truth.

Thus, in legal practice, it has been noted that the conditions imposed by the incriminating text of deceit in conventions have been met in the eventuality that the accused alienated stacks of hay belonging to

some agricultural co-operatives to a *bona fide* purchaser who, after paying the price of the hay, went and picked up the respective stacks from the field on which they had been raised (Diaconescu, 1990: 28). The purchasers having been misled on an essential element of the sale-purchase contract, the objective side of the offence of deceit in conventions is realised, and the completion of the deceit takes place when the damage occurred, which is to say when the seller took the money from the buyers (Ciucă, 1990: 29).

According to article 953 of the Civil Code, consent is invalid when it is granted by mistake, obtained through violence and fraud. An error refers to a situation when a person has an erroneous representation of reality, considering that what is false is true, or that what is true is false (Stănciulescu, 2008: 37).

Deceptive manoeuvres, specific to the vitiation of the consent of the purchaser through fraud (due to the fraudulent and subversive behaviour of the seller), are conferred criminal law dimensions, as the criminal norm protects not only the strict interests of people and legal persons, but also the general interest of society. By consequence, selling goods owned by other people, done by people who act in bad faith, also implies damaging the patrimony of the purchaser, the deed meeting the criteria for constituting the offence under article 215, para. 3 of the Criminal Code (Herlea, 1990: 35). As for the completion of the offence of deceit, it is held that the prejudice consists of the commonly agreed upon price, regardless of whether it has or has not been paid, the payment being relevant only in terms of the participation of the purchaser in the criminal trial.

We cannot agree to this opinion as far as the last aspect is concerned, as the existence of the prejudice is an essential element for the completion of the objective side of the offence of deceit in conventions, so that when the price was paid by the *bona fide* purchaser for the goods which did not belong to the seller, this will constitute completed deceit in conventions. When the purchaser, although he or she has been misled or has been maintained in error by the seller, will not pay the price because, for instance, he or she has discovered the deceptive manoeuvres used by the seller, this will constitute the offence under article 215 para. 3 of the Criminal Code, as punishable attempt.

Deceptive manoeuvres, as objective elements of the fraud, as vice of consent, may occur in various forms: actions performed to create a false representation of reality, simple lies or reticence (Codrea, 1998: 31).

In the event that the seller does not inform the purchaser on his or her not being the owner of the alienated goods, he or she will be committing the offence under article 215 para. 3 of the Criminal Code, by maintaining the deceit of the buyer, as the *bona fide* purchaser is in error about the seller having the quality of owner, an error which is not superposable to the similar notion in Civil law; the error, in criminal legal

terms, refers to the altered representation of reality in the mind of the deceived, and must refer to the representation of a false fact as true, or of a true fact as false (Bocşan and Bogdan, 1999: 51).

The fact that, in legal practice, there are difficulties in separating criminal from civil responsibility is illustrated by ruling no. 3399 of June 27, 2001, given by the High Court of Cassation and Justice, concerning the matter of selling goods owned by other people (Pătulea, 2003: 119). In fact, after, as the administrator of a company, the defendant sold to the victim a certain quantity of sunflower seeds, with an invoice for the entire quantity of seeds that were being sold, and a reception report that acknowledged that the goods would remain under the custody of the seller, available to the purchaser, who was going to collect them in several shippings, the defendant resold most of the seeds in his custody to another purchaser, who offered a greater price. Although the seller was charged for committing the offence of deceit in conventions, article 215 para. 3 of the Criminal Code, committed upon the conclusion of the sale-purchase contract, the High Court of Cassation and Justice ruled his acquittal on the basis that the deed committed by the defendant did not meet all the constitutive elements of the offence of deceit, the subjective side being absent, i.e. the intention to deceive, so that this was not a case of criminal liability for an offence, but of a non-fulfillment of a contractual obligation (Pătulea, 2003: 120).

It must be emphasized that it cannot be a situation of selling goods owned by other people except in the case of specific goods, ascertained at the time of the contract, as, if the sale has as object future goods, in goods that are to be manufactured, or unascertained goods, the conveyance of property occurs at an ulterior date, at the moment of the production of the goods or at the moment of individualization (Macovei, 2006: 41). Where there is a contract for the sale of unascertained goods, no property of the goods is transferred to the buyer unless and until the goods are ascertained.

In the case of selling goods owned by other people, the good faith of parties or of the purchaser only cannot, in itself, produce legal effects translative of property, and therefore it cannot alone constitute a condition that can lead to the acquisition of the title of property, but only together with other legal principles. The purchaser and the seller (the apparent or self-declared owner) are of good faith, in the situation in which the former signs the contract believing he or she has purchased from a person owning the goods which are sold to him or her, so that he or she has made a legal purchase. As for the latter, the position of good faith is between erroneous belief (ignorance) in a certain state of things, a belief which is strong enough to be convincing for both parties or at least for one of them, and the deceitful appearance, which also sincerely persuades everyone or

almost everyone, but the foundation of good faith cannot be indifference, indolence or lack of action to check whether what is said and what is are one and the same (Cotea, 2007: 425-426).

The intention to mislead is appreciated with regard to the moment of the transaction, as no relevance is given to the circumstances which may have subsequently intervened or the facts depending on suspensive conditions (Medeanu, 2006: 191). A notable example is the offence of deceit in conventions in the deed committed by a tenant who sold the apartment he had rented, stating in the sale-purchase contract that he was the owner of that dwelling (Hotca, 2007: 1163; S.C.J., Decision no. 3485/2001). Unlike the possible consequences under the civil law, there can be no relevance, nor can it constitute an impediment for the retaining of the offence of deceit in conventions, the existence of the possibility of the defendant to subsequently purchase the property over the goods on account of the legal dispositions giving tenants priority in purchasing the goods.

As for the situation of the purchaser who pays the price for goods and does not receive ownership, as the object of the sale contract did not belong to the seller, it has been argued that no prejudice had been caused to the purchaser, in case that the owner had not claimed the goods that had been alienated by the seller acting in bad faith, and thus the material prejudice, as essential element for the offence of deceit in conventions, was missing (Pătulea, 1989: 61). Thus, it is held that there is only a possibility to prejudice the purchaser, by dispossessing him or her after the owner claims the respective goods, and for the existence of deceit in conventions, the legal text of article 215 para. 3 of the Criminal Code requires a certain, and not virtual prejudice (Paicu, 1989: 60), considering that because the owner did not claim his or her goods, and the legal court did not rule for the goods to be restored, the purchaser was not prejudiced in any way.

This opinion cannot be shared, as whether the true owner does or does not claim his or her goods has no_significance in the context of retaining the offence of deceit by the seller, and the solving of the civil cause in the criminal trial is a moment ulterior to when the deed was committed, so that the condition of prejudice is met. And the fact that the prejudice caused in this way can be repaired by returning the price or by any other means has no bearing on the existence of the offence of deceit in conventions (Bogdan, 1999: 115).

It may be said (Bocşan and Bogdan, 1999: 56) that selling goods owned by other people, in the event that the purchaser has been misled or has been maintained in error on the existence of the property within the patrimony of the seller, meets the conditions required by the incriminating legal text of deceit in conventions, the alienating party being guilty of fraud, by acting in bad faith and using deceptive means, when he or she

hides (either by action, or omission) to his or her contractual partner the real situation of the goods, which falls upon article 215, para. 3 of the Criminal Code.

Further, according to article 215, para. 2 of the Criminal Code, deceit committed by using untruthful names or capacities or other fraudulent means constitutes an aggravated form both for deceit regulated by article 215 para 1 and for deceit in conventions regulated by article 215 para. 3. A means is considered fraudulent when it has the appearance of a truthful way that inspires confidence, but in reality is dishonest (Dongoroz et al., 2003: 500). The difference between the means of deceit of article 215 para. 1 and the fraudulent means of para. 2 is rather quantitative and mostly about intensity, and a means should be considered fraudulent when it is likely to ensure the success of the action of the offender (Toader, 2008: 201). Thus, when a misleading of the purchaser by the seller declaring himself or herself to be the owner of the goods occurs, a quality he or she does not actually have, it becomes a question of whether selling goods owned by other people, realised by the seller subversively and dishonestly claiming to be owner of the goods, can be considered deceit in conventions in the aggravated form of article 215, para. 2 of the Criminal Code, when all the requirements of the incriminating legal text are met.

In all cases when qualified legal bodies are faced with legal situations comparable to the above-mentioned ones, they will be forced to proceed to a rigorous analysis of the facts and of the qualification of the deed committed by the defendant according to the legal texts, in order to exactly clarify whether the deed is a criminal offence and whether the constitutive elements are or are not met for any offence; in order to do this, however, a survey of the provisions of civil law will also be necessary, in order to establish whether they are dealing with contract liability or with criminal liability and if, in this latter case, it is or not a criminal offence (Pătulea, 2003: 126).

The Constitutional Court rejected the plea of unconstitutionality on article 215 para. 3 of the Criminal Code, through decision no. 58 of March 23, 2000, published in the Official Gazette no. 228 of May 23, 2000, considering that, through this regulation, the expression of valid consent of the contractual party is defended with criminal legal means (T. Toader et al., 2007: 358-359). In decision no. 58 of February 6, 2003 of the Constitutional Court, published in the Official Gazette no. 194 of 26 March 2003, that rejected the plea for unconstitutionality on art. 215 para. 3 of the Criminal Code, it is shown that this legal text sanctions the fraud practiced when concluding or executing a contract, as an attempt against the person's assets by delusion, an offence regulated in all criminal laws.

The offence of deceit consists in the act of willfuly making false statements with the intent that the contractual party shall act relying on

them, and with the result that he or she does so and suffers harm in consequence (Garner, 2004: 435), just as the fraud or deceit of the seller, as a non-owner, consists in misrepresentation of the truth or a concealment of the lack of title in order to obtain benefits by inducing the buyer to act in his detriment. Thus, article 215 of the Criminal Code gives an expression to the principle of good faith in contractual relations, by criminally sanctioning precisely those acts by a non-owner who is selling goods owned by other people, by deceitful manoeuvres, in a way that violates the principle mentioned above.

Suitable as it might be through the logical sequencing of arguments presented, in the legal practice there might be encountered real difficulties in qualifying the sale of another persons goods as deceit in convention.

When the buyer, considered a *bona fide* purchaser, is fraudulently told that the property of the sold good belongs to the seller, the qualification of selling of a third party's property as deceit is based on the false representation induced by the seller with knowledge of its falsity and with intent to induce reliance on it, and if the buyer justifiably relies on the deception, to his injury. The sale of goods owned by other people, without the ability to pass title, may be qualified as the offence of deceit in convention when the seller presents a false fact as being true, by fraudulently representing to the buyer that he has good title of the goods he or she sold, pretending to be the rightful owner, and in this way he or she is deceiving or maintaining the deceit of the buyer, when concluding or executing the sales contract, and if without this deceit the purchaser would not have concluded or executed the contract in the conditions stipulated; as a consequence, the buyer is a victim of fraudulent misrepresentation due to the seller's actions and he or she is cheated by the buyer, as the non-owner does not have the ability to pass title.

REFERENCES

Bogdan, S., 1999, *Înşelăciune în convenții. Latura Obiectivă*, Revista de Drept Penal (Romanian Penal Law Review) no. 3, p. 110-116;

Bocşan, M. D., Bogdan, S., 1999, *Considerații civile şi penale aupra vânzării lucrului altuia*, Revista Dreptul (Law Journal) no. 6, p. 46-56;

Ciucă, V., 1990 *Implicații de natură penală în cazul vânzării lucrului altuia*, Revista Dreptul (Law Journal) no. 5, p. 28-31;

Codrea, Ruxandra, 1998, *Consecințele vânzării lucrului altuia în situația în care cel puțin cumpărătorul ignoră că vânzătorul nu este proprietarul lucrului vândut,* Revista Dreptul (Law Journal), no. 9, p. 28-37;

Cotea, F. S., 2007, *Buna-credință. Implicații privind dreptul de proprietate,* Hamangiu Publishing House, Bucharest;

C.S.J., decizia penală nr. 3845 din 18 septembrie 2001, în Revista de drept penal nr. 1/2003, p. 173 (The Supreme Court of Justice, Decision No 3485 of 18 September 2001, in Romanian Penal Law Review no. 1/2003, p. 173);

Deak, F., 2001, *Tratat de drept civil. Contracte speciale (Civil Law Treaty. Special contracts)*, Universul Juridic Publishing House, Bucharest;

Diaconescu, H., 1990, *Implicații de natură penală în cazul vânzării lucrului altuia*, Revista Dreptul (Law Journal) no. 5, p. 25-28;

Dongoroz, V., Kahane, S., Oancea, I., Stănoiu, Rodica, Fodor,I., Iliescu, Nicoleta, Bulai, C., Roşca, V., 2003, *Explicații teoretice ale codului penal român. Partea specială*, ediția a II-a, vol. III, , Academiei Române Publishing House, All Beck Publishing House, Bucharest;

Garner, B. A., 2004, *Black's Law Dictionary*, Eight Edition, West Publishing House;

Guiu, Ketty, 2004, *Infracțiunile contra patrimoniului. Considerații generale*, Revista Dreptul (Law Journal), no. 3, p. 172-205;

Herlea, C., 1990 *Implicații de natură penală în cazul vânzării lucrului altuia*, Revista Dreptul (Law Journal), no. 5, p. 31-35;

Hotca, M. A., 2007, *Codul penal. Comentarii şi explicații*, C.H. Beck Publishing House, Bucharest;

I.C.C.J., secția civilă şi de proprietate intelectuală, decizia nr. 5801 din 21 octombrie 2004, Revista Dreptul nr . 10/2005, p. 224-225, disponibilă și la www.scj.ro; (The High Court of Cassation and Justice, Civil and Intellectual Property Department, Decision No 5801 of 21 October 2004, published in Law Journal, no. 10/2005), p. 224-225, available also at www.scj.ro;

Macovei, C., 2006, *Contracte civile (Civil contracts)*, Hamangiu Publishing House, Bucharest;

Malaurie, P., Aynès, L., Yves-Gautier, P., trad. de Diana Dănișor, 2009, *Drept civil. Contractele speciale (Civil Law. Special Contracts)*, Traducere a ediției a 3-a din limba franceză (Translation of 3rd edition in French), Wolters Kluwer Publishing House, Bucharest;

Mateuț, Gh., 1999, *Unele aspecte teoretice şi practice prvind infracțiunea de înşelăciune*, Revista Studii de drept românesc (Romanian Law Studies Review) no. 3-4, p. 355-392;

Medeanu, T., 2006, *Dreptul penal al afacerilor,* Lumina Lex Publishing House, Bucharest;

Moțiu, F., 2010, *Contractele speciale în noul Cod civil (Special Contracts in the New Civil Code)*, Wolters Kluwer Publishing House, Bucharest;

Paicu, A., 1989, Notă la sentința penală nr. 1645/1986 a Judecătoriei Baia Mare (Opinion on penal sentence no 1645/1986, The Law Court Baia Mare), Revista Română de Drept (Romanian Journal of Law). no. 6, p. 60;

Pătulea, V., 1989, Notă la sentința penală nr. 1645/1986 a Judecătoriei Baia Mare (Opinion on penal sentence no 1645/1986, The Law Court Baia Mare), Revista Română de Drept (Romanian Journal of Law), no. 6 , p. 61;

Pătulea, V., 2003, *Vânzarea lucrului altuia. Criterii de determinare a naturii răspunderii juridice în astfel de cazuri,* Revista Dreptul (Law Journal), no. 10, p. 119-126;

Sanilevici, R., Macovei, I., 1975, *Consecințele vânzării lucrului altuia în lumina soluțiilor practicii juridicare*, Revista Română de Drept (Romanian Journal of Law), no. 2, p. 33-40;

Stănciulescu, Camelia, 2008, *Theoretical and practical aspects regarding consent, as validity condition on the civil act*, Lex ET Scientia International Journal - Juridical Series Nr. XV Vol. 1/2008, "Student's Book" Publishing House, available at http://lexetscientia.univnt.ro/archive/, p. 37-43;

Toader, T., 2008, *Drept penal român. Partea specială,* 3-rd edition Revised and amended, Hamangiu Publishing House, Bucharest;

Toader, T., Stoica, Andreea, Cristuş, Nicoleta, 2007 *Codul penal şi legile speciale: doctrină, jurisprudență, decizii ale Curții Constituționale, hotărâri CEDO*, Hamangiu Publishing House, Bucharest;

Urs, I., 2006 *Remarks concerning the „fraudulent" sale in the Romanian Law*, Revista de Derecho de la Pontificia Universidad Catolica de Valparaiso XXVII, Semestre I, p. 45-50, available at http://www.rderecho.equipu.cl/index.php/rderecho/article/view/612/577.

COMPUTER SEARCH IN THE NEW CODE OF CRIMINAL PROCEDURE

Bogdan BUNECI*

Abstract

The evidence and the means of evidence are fundamental institutions that ensure finding the truth in criminal trials, and they are separate legal categories which can be theoretically explained in a conjugate way because the evidence is factual (realities, events or circumstances) and serves finding the truth, while the means that help observing these facts that can serve as evidence in criminal proceedings, are named means of evidence.

The pieces of evidence are extra procedural fact entities that concern the subject of the trial and by the administration of which they gain procedural character; the means of evidence are also extra procedural realities that gain legal procedure character by being used in criminal proceedings.

In this context, the computer search and the access to informatic systems, regulated by the new Code of Criminal Procedure, gain a special valence alongside other means of evidence inserted in the law, because they contribute to the understanding of the research process and to discovering and identifying those pieces of evidence stored in a computer system or a computer data storage.

Keywords: *evidence, means of evidence, computer system, computer search, storage media, informatics data.*

The Criminal Procedure Code adopted in 1968 defined the scientific meaning of the concepts of evidence and means of evidence, stating in art. 63 para. 1 that the notion of evidence means those facts that serve to declare the existence or nonexistence of an offense under criminal law, to identify the person or persons who committed it and know the circumstances necessary for a just settlement of the case. These fact elements are facts and circumstances meant to determine whether or not the facts and circumstances exist, and are obtained by determining the activity of probation[1].

The means of evidence are those means provided by law that note the factual account that is evidence; in art. 64 of the Criminal Procedure Code they are listed as follows: the statements of the accused or defendant, the civil party and civilly responsible party, witness statements, documents, audio or video recordings, technical, scientific, forensic and expert findings.

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[1] Grigore Theodoru, *Criminal Procedure Law Treaty*, Hamangiu Publishing, 2007.

The means containing samples can be obtained by judicial authorities through various processes of probation, for example, taking a personal written statement by the accused, a victim or witness, their hearing by a criminal prosecution body or by judges, their confrontation, etc.

Between the evidence and the means of evidence there is an intrinsic connection because the evidence can be used only if it is obtained by means of evidence provided by law; sometimes there may be cause for confusion between the two.

The judicial activity that uses the evidentiary procedures in order to obtain means of evidence, which then shows the samples to ascertain the facts and circumstances leading to the case, is called probation. This is all trial and procedural provisions of law by judicial authorities needed to establish the factual knowledge of facts making up the case.

Referring to the work of probation, as defined above, we mention that it is primarily in the facts and circumstances whose existence must be found, and we think the subject of probation, the second refers to of evidence to prove the existing facts and circumstances, and finally refers to the assessment of evidence which should lead to the belief that the act was committed by the person prosecuted. In this respect, art. 62 of the Criminal Procedure Code is relevant in the sense that "in order to find the truth, the prosecution and the court is obliged to settle the case in all respects, based on evidence".

Knowing that in the Criminal Procedure Code the principle of the presumption of innocence is working, both the prosecution and the court have an obligation to conduct an intense evidentiary activity, because the prosecutor cannot prosecute the defendant until samples were collected to establish guilt, nor the court can convict the defendant if there is no certainty that the act exists and that it was committed.

In turn, the appellate court has an obligation to check if the issue was given all the evidence necessary to ascertain the truth, if it has been properly appreciated, and because of the devolutive effect of the call it has the ability to manage any other evidence deemed necessary (art. 378 of the Criminal Procedure Code).

Also, the court of appeal is required to determine whether there has been any failure on the essential evidence in solving the case or if a serious error of fact has not been committed, within the meaning of art. 385^9, section 18 of the Criminal Procedure Code.

As noted above, art. 64 of the Criminal Procedure Code lists the means of evidence that may lead to proof of facts or circumstances, except that our system is based on free samples probation, meaning that the prosecution or the court are not obliged to use some evidence for proof of

actually having a choice of all the evidence, the one that it deems most appropriate[2].

Chapter II of Title III of the Criminal Procedure Code lists absolutely all the evidence, statements from the accused or the defendant to conduct surveys.

Noticing that the time elapsed since the adoption of the Code of Criminal Procedure in 1968 to the present offenses occurred in November, the field, diversifying the activities in which criminals attempt to damage public property or private, the new Criminal Procedure Code, adopted by Law no. 135/2010, introduced in Chapter evidence, making the search more precise, a new evidence called "search and access to a computer system" (art. 168 of the Criminal Procedure Code).

Thus, the search of a computer system or computer data storage means the process of research, discovery, identification and gathering of evidence stored in a computer system or computer data storage, achieved through technical means and procedures, such as to ensure the integrity of the information contained therein.

The judge of rights and freedoms may order, on the prosecutor's request, the performance of a computer search, when the discovery and collection of evidence is necessary to investigate a computer system or computer data storage.

The prosecutor submits the application requesting approval of the search case file information to the judge of rights and freedoms, and this is dealt with in closed session, without summoning the parties, with obligatory participation of the prosecutor.

If the request is based, the judge orders by conclusion his admission, accepts the information searches and issues the search mandate, on condition that the conclusion should include the following: name of the court, date, time and place of issue, name and status of the person who issued the mandate, the period for which the warrant is issued and the work to be performed is ordered, the purpose for which it was issued, name of the suspect or accused, if known, the judge's signature and the seal of the court.

The final conclusion of the rights and freedoms which the judge decides on the application for declaration of the search for information is not subject to appeal.

If, during the search of a computer system or computer data storage, it appears that the computer data sought are contained in another computer system or computer data storage and are accessible from system or media initially, the prosecutor has immediately preservation, copying

[2] Petre Buneci, Criminal Procedure Law – *General Part*, Universitary Publishing, 2008, p. 250.

computer data identified and will require urgent completion of the initial authorization.

In the execution of the ordered search, in order to ensure the integrity of computer data stored on high objects, the prosecutor orders making copies.

If lifting objects containing computer data would seriously affect the activity of persons holding these objects, the prosecutor may order copies that serve as evidence. Copies are made by technical means and appropriate procedures, such as to ensure the integrity of the information contained therein.

Necessarily, the search in a computer system or computer data storage is performed in the presence of the suspect or the accused, if possible, a representative thereof or a witness.

The suspect or defendant may request that the search in a computer system or computer data storage to also be performed in their absence; the presence of a witness in this case is mandatory.

Searching in a computer system or computer data storage is carried out by the prosecution, as showed by the court prosecutor in the application submitted.

After the search in a computer system or computer data storage, a minutes of the computer search is drawn, including: name of the computer system which was built or data storage or the name of the person whose system was accessed, the name of the person who conducted the search, the names of the persons present during the search, the description of the information systems or computer data storage for which the search was ordered, the description and listing of activities, the description and data information discovered during the search, the signature or stamp of the person who carried out searches, the signature of those present during the search. A very important thing is that the prosecution has an obligation to take measures so that the computer search will not affect the personal lives of the person where the search is performed, and the recorded data will not become unduly public. If, within the informatics search, secret data are found, they shall be kept secret under the law.

Clearly this new evidence makes a significant contribution to the work of gathering the necessary evidence for the discovery of serious facts and persons involved in criminal activity causing significant material damage to public property or private expense.

REFERENCES

Romanian Constitution, published in Official Gazette, Part I, no 767 from 31.10.2003;

Romanian Code of Criminal Procedure, published in Official Gazette, Part I, no 79 from 30.04.1997, modified version through Law 202/2010, regarding some accelerating measures of case solving;

Romanian New Code of Criminal Procedure, adopted by Law no 135/2010, published in Official Gazette, no 486 from 15.07.2010;

Grigore Theodoru, *Criminal Procedure Law Treaty*, Hamangiu Publishing, 2007;

Petre Buneci, *Criminal Procedure Law – General Part*, Universitary Publishing, 2008.

COMPANY MANAGEMENT BY THE DIRECTORS

Ramona Mihaela OPREA*

Abstract

The company may be administered by one or more administrators who may be associates or not and who are appointed by the memorandum of associates or by the General Meeting of Associates. The company's administrators may depute the management of the company to one or more managers one of which will be „the general manager".

The managers may be executive administrators of the company (in which case they are not part of the Board of Associates); in this particular case, they can be appointed as „Delegate Administrators".

Regarding the object of the delegation as the commercial mandate, the judicial form of the delegation is included in the category of a third person's substitution.

The managers will conclude a contract mandate with the company, stipulating that the managers are the company's mandataries and they act in the name of and for the Board of Associates.

Keywords: *administrator, director, Board, mandate contract, juridical report.*

The social will of any company is accomplished by the executing acts of the persons who administer the companies.[1]

In a narrow sense (only regarding joint-stock companies), Law no. 31/1990 regulates the administration of the companies by the directors.

According to art. 137, para.1 of the Law, once the associates choose the unitary system, the company is managed by one or more administrators, the number of which is always odd. In the first case, he is „single manager" and in the latter case, the plurality is established by the law and it is organized as a collegial body called the „board"[2]. According to article 143[1] of the Law, the board may delegate the management of the company to one or more directors by appointing one „general manager".

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[1] St. D. Cărpenaru, Comentariu - the art. 70. - , in *„The Company Law – Comments on articles"*, Ediția 4, de St. D. Cărpenaru, S. David, C. Predoiu, Gh. Piperea, Publishing House Beck, Bucureşti, 2009, p. 274.

[2] St. D. Cărpenaru, *Romanian CommercialLaw Treaty*, Juridical Universe Publishing House, Bucharest, 2009, p. 253.

According to the article 137, para. 3, Law no.31/1990.The provisions of the Law regarding the Board and it did not regard the plurality of the administrators.

„Directors may be appointed from the directors of the company, and in this case they are executive directors, or from outside the board and in this case they may be reffered to as the delegated administrators. Consequently, a person may be at the same time, shareholder, administrator and director of a company. However, unlike the administrator, the directors must necessarily be natural persons" (art.153[13] para.1).[3] "In order to have an efficient control of the directors – executive administrators – the majority of the members of the collegial body must be formed by non-executive administrators" (art. 138[1]).

The term "director"[4], synonymous with the term "manager", includes both the directors and the members of the directorate. Indeed, regarding the administration of the joint-stock companies of the dual system[5], Law no. 31/1990 also refers to the members of the board[6], the unique general managers (the only members of such a body).

Regarding these persons, it is stipulated that they are not directors[7] in the narrow sense according to the provisions of article 143[1] of the Law. Moreover, besides the solution in para. 5 of the same article, the law makes this distinction and lists in several provisions the directors and the members of the board, simultaneously.

Also, the functions of the directorate are not issued by the contractual mechanism of the delegation, like in the case of the directors of the unitary system, but they have their source in the Law, the separation of powers between the Supervisory Board and the directorate resulting from the law and it can be rectified only by the dual system, with changes in the memorandum of associates.

On the other hand, it points out that the directors of the companies organized on the model of the unitary system cannot be confused with their directors-employees, referred to in art. 294 of the Labour Code: "To the purpose of this code, employees with management attributes means

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[3] Alexandru Țiclea, Tiberiu Țiclea, The peculiarities of the mandate commercial contract of the joint-stock companies'directors, „Law" Review, no.8/2010, page 144.

[4] Gh. Piperea, *Commercial Law*, vol. I, C.H. Beck Publishing House, Bucharest, 2008, p. 200, p. 20.

[5] In the dual system, according to the article 153 alin.1 of the Law, the company is administered by a directorate and a Supervisory Board.

[6] The directorate has exclusivelly the management and the legal representation of the join-stock company, in the dual system (The company is represented by the Supervisory Council in the relationship with the Directorate.For further details the articles 153-158 of the Law 31/1990.

[7] Alexandru Țiclea, Tiberiu Țiclea, The Peculiarities of the Mandate Commercial Contract of the Joint-Stock Companies'Directors , *cit. supra*, p. 142.
For the same opinion, Ion Traian Ştefănescu, Şerban Beligrădeanu, *The Legal Relationship between the companies and its administrators or directors*, in „Law" no. 8/2008, the note 17, p. 52.

managers-employees, including the chairperson of the Board if s/he is an employee, the general directors and the directors, deputy directors and general deputy directors, the heads of labor-divisions, departments, divisions, workshops, offices – and the other similar categories established by the law or by the collective agreements or, where appropriate, by the rules and regulations".

Nothing prevents the fact that the departments may be led by the senior officials of the company.

These persons, practically the heads of those departments are, in fact, those who we identify as "professional managers" for example: the head of legal, chief financial officer, IT director.

The distinction[8] between the first mentioned, called "social directors-mandataries" and "proffesional managers" (employees) must start from the provisions of article 143[5] of Law 31/1990, which states: "To the purpose of this law, the head of the joint-stock company is only the person to whom the powers of the management of the company have been delegated, in accordance with para. 1. Any other person, regardless of the technical name of the function occupied in the company, is excluded from the rules of this law regarding the directors of the joint-stock company".

The Director is a manager who has the management of the entire company, enterprise or department, thereof. In this sense he has the freedom of iniative, which entails a certain combination of risk, so that the interests of the compay/shareholders are the same with the director's.

In the case of professional directors, there are no management tasks and the freedom of initiative is no longer necessary. „Also, there is no association with risk, as shown in the case of the social directors-mandataries."

"The essential criterion must necesarily relate to the above criteria and it identifies the primacy of the social will. In other words, the actual accomplishment of the distinction between social directors-mandataries and the professional directors of a company. The social will has a decisive importance whose content will be investigated with priority to check if the details regarding the delegation of the management of the company from the Board to the directors are stipulated.

As such, the decision of the Board, who determines, for example, that „the management of the company will be delegated to the following: the general, economic, trade, human resources, technical directors" etc., will be the essential action in mentioning that these directors are social mandataries. Any other function whose name contains the term „director"

[8] For both provisions regarding this distinction, Alexandru Țiclea, Tiberiu Țiclea, The peculiarities of the commercial mandate contract of the joint-stock companies'directors, *cit. supra*, p. 151-159.

could be considered in the purpose of article 143[1] only if the job description should include the management responsabilities for the company, which would undoubtedly involve the delegation mechanism provided by the text of the law. Otherwise, we are in the presence of a professional manager".[9]

Legal Relationship between the Directors and the Board

This report, according to the majority opinion, is a commercial mandate[10], regardless of the name used by the parties in the contract document.

"However, this legal relationship is not a common commercial mandate. Its content is not only contractually determined by the parties, but a legal one, including the necessary rights and obligations set by the provisions of the company law. On the one hand, to emphasize the dual nature (contractual and legal) of the relationship between the directors and the Board of directors, and to distinguish the mandate of the commercial director, on the other hand, it is appropriate to consider that we are in the presence of a legal relationship of a social mandate."[11]

This category, with a similar meaning but with the difference that it necessarily includes representation is a usual one in the French Law.

„The name is not coincidental. The qualifier 'social' highlights that the mandate regards the accomplishment of the social will of the company, which, in the case of directors, is made by the mechanism of the power delegation. It should be noted however that the idea of the social mandate sends narrowly only to the mandate relations having as subjects, on the one hand, the company itself, as mandatory, and on the other hand, the natural and legal person (for administrators)."[12]

By analogy, the directors are the social mandataries in the broadest sense. This conclusion is based on two arguments[13]:

1. all relationships mentioned above have a similar physionomy, governed by the provisions relating the mandate and the company law.
2. the relationship between directors and the company is a social sub-mandate report, containing the appropriate qualifications. So,

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[9] *Ibidem*, p. 156.
[10] St. D. Cărpenaru, *Romanian Commercial Law*, cit. supra., p. 261; Magda Volonciu, *The Companies' Functioning*, în "Commercial Law", de S. Angheni, Magda Volonciu, C. Stoica, Ediția 4, C.H. Beck Publishing House, Bucharest, 2008, p. 161.
[11] Alexandru Țiclea, Tiberiu Țiclea, The peculiarities of the commercial mandate contract of the joint-stock companies' directors , *cit. supra*, p. 145-146.
[12] Alexandru Țiclea, Tiberiu Țiclea, The peculiarities of the commercial mandate contract of the joint-stock companies' directors , *cit. supra*, p. 146.
[13] *Ibidem*.

strictly speaking, the Law regards the directors as social sub-mandataries.

The concept of „social mandate" has utility in our law in two respects: it has the role to simplify (as terminology) and the role of clarification (in theory) so we identify a social mandate as a type of commercial mandate.

Delegation of attributes of the management of the company to its directors

The legal relationship between the company directors and the joint-stock company presents controversial issues, especially with regard to its nature. Accordind to an opinion, this report is one of commercial sub-mandate, the Board delegating the management tasks of the company to the director. Since the delegated object is the commercial mandate, the legal operation of delegation is part of the category of a third party's substitution.

Likewise, it further recognizes that „the legal nature of the delegated management of the company finds a basis in the substitution of a legal right *sui generis* with specific effects, which are grafted on the legal mandate between the company and the Board of directors.

According to another opinion „the leadership transmision powers of the General Meeting of the shareholders to the Board of directors and from the Board of directors to the directors (...) cannot be described as mandate and submandate because the Board of directors may send to the executives only part of their prerogatives and not the prerogatives submitted by the General Meeting of shareholders".

It is also considered that „in addition to the delegation, the directors concluded with the company a mandate contract where it is described that the directors are mandataries of the company acting in the name and for the company".

We concur with the first opinion[14] with the mention of „the social nature" of the submandate because of the legal relationship between the company and its directors. The company presents most of the features of a submandate, while the important features of a real mandate are not found. Thus:

a) It is the essence of the unitary system that the joint-stock company is managed by a single administrator or by a Board with the responsibility for performance of all the acts necessary and appropriate to achieve the objetcs of the company. In this respect, the managers, appointed at the authorization of the company, by the memorandum of associates (if

[14] Alexandru Țiclea, Tiberiu Țiclea, The peculiarities of the commercial mandate contract of the joint-stock companies' directors, *cit. supra*, p. 149 -151.

applicable, by the Constituent Meeting) or subsequently by the General Meeting, concluded with the company a social contract, receiving these powers.

According to the common law, the mandate contract may provide the right to a mandatary to substitute a third person, transferring all the rights or part of them. The power of delegation is precisely the operation by which the administrators pass some of the rights to the directors.

But the right of substitution of the administrator has the source in the law and it is not necessarily stipulated in the memorandum of associates[15]. Its exercise is performed by a decision adopted by the Board and it is both the instrument of appointing the director and the instrument of delegation.

b) The power to revoke the company's directors belogs exclusively to the Board. The General Meeting of shareholders, the supreme body of the Company cannot dismiss them directly, it can constrain the managers to do so.

If the administrator is at the same time director, the General meeting decides to dismiss him. Altghough the loss of confidence in that person as an administrator would lead to the conclusion that the company has lost confidence in his capacirty as director and paradoxically, the law does not allow the direct revocation of that person from the office of director. The conclusion that the General meeting has a relative weakness in this regard is justified.

However, there is another course of action available to the General Meeting and other action to the shareholders, we will further analyse.

c) The law gives the company a direct action for damages against the directors (art.155) which presents some peculiarities, which moderates the lack of power of the General Meeting of shareholders. If the latter decides by majority required for adoption by the General Meeting to take action for damages against the directors as they are suspended from office until the decision remains irrevocable.

In the absence of introducing this measure and when the General Meeting proposal does not comply with one or more shareholders' proposal to initiate it, the shareholders representing, individually or jointly, at least 5% of the share capital are intitled to introduce an action

[15] The article 153[12] alin. 3 excepts the directors from the express and written appointment, unlike the case of the social manadataries, because the latter 9 the administrators, the members of the directorate, the members of the Supervisory Board) are in a direct relation with the company, an implied accept could not be allowed because of the social interest protection. A special situation is found when a director receives the legal representation, this act must be mentioned at the Trade Register by a pecimen signature.

for damages against the directors in their own name but on behalf of the company (art.155^1 para1).

For the identity reason, using the argument *a fortiori*, art. 155^1 par. 4 applied in both cases, the General Meeting has the right to revoke a certain director. Thus after a final court decision on the admission of any of those two actions, the General meeting of shareholders may decide the end of a director's term of office.

The doctrine states that an action for directors' liability would refer only to the directors who are not part of the Board, and who, in the unitary system, are delegated the powers according to art. 143. Therefore, the directors – executive administrators would have the same legal regime applicable to the action for damages as well as the other administrators. But the statement is not strictly correct since if the General Meeting decides to act, it will only cease their mandate as administrator not the director mandate. In addition, no irrevocable court decision will cease the director mandate, the General Meeting has the right to decide in this situation.

Of course, in terms of article $73^{1,}$ the natural person has not the right to be part of a company if he was included in some acts that determine the prohibition of founding a company, the natural consequence being the cesation of the mandate, considering that „he was deprived of rights".

d) The administrators are responsible to the company for the damage caused by the acts of the directors, since the damage would not have occured if they had exercised their duties imposed by their office (article 144^2 para. 2).

In theory it is considered that this is a guarantee of the administration's responsibility to the company, like the general liability for the other's action.

e) we have to emphasize the distinction regarding the directors whose appointment was established by the memorandum of associates.

Also, unlike the case of the directors appointed by the Board, the directors appointed by the General Meeting are directly responsible to it.

Bibliography:

Gh. Piperea, *Commercial Law*, vol. I, C.H. Beck Publishing House, Bucharest, 2008;

Alexandru Țiclea, Tiberiu Țiclea, *The Peculiarities of the Commercial Mandate Contract of the Joint-Stock Companies'Directors*, „Law" Review, no. 8/2010;

St. D. Cărpenaru, *Romanian Commercial Law*, Juridical Universe Publishing House, Bucharest, 2009;

The Law 31/1990 republished, regarding companies.

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THE PROTECTION OF HUMAN DIGNITY IN ALBANIA AND ROMANIA

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Abstract

The article presents an analysis of the crime againts dignity in the Albanian criminal law: insult and defamation. We examined certain judgments of courts in Albania and the solutions given by those courts that violate the right to freedom of expression protecting the dignity of misuse and abuse protection. With all the pressure of the Albanian civil society and of the world on the decriminalization of insult and libel, the study tries to argue that there is compatibility between the existence of such offense and the European Convention on Human Rights. The solution is not decriminalization of those and unlimited freedom of speech, but protection of both principles, dignity and freedom of expression, because they are equally protected by the European Convention on Human Rights.

Actually, the protection of human dignity in Romania is analyzed in terms of Constitutional Court Decision and the Decision of the High Court of Cassation and Justice. We shall present an analysis of the decision of the Constitutional Court of Romania nr. 62/2007 and of the effects it produced. We shall examine the appeal in the interest of law made by the General Prosecutor of Romania, although I prefer to analyze Decision nr. 8/2010 (yet unpublished in the Official Gazette of Romania) of the High Court of Cassation and Justice that upheld the interest of law. We shall also present the arguments that allowed this appeal and the implications of the decision to produse will be asked wether the Constitutional Court under article 146 letter is due to the legal conflict between the legislative authority of Parliament and High court of Cassation and justice as judicial authority.

Keywords: *insult, defamation, human dignity, freedom of expression.*

1. The principle of protection of dignity in Albania

The importance of the price to be paid for the protection of dignity has been acknowledged since the time in which modern states are laying the ground work. Since the Code of Leke Dukagjini, dignity is given special protection. The first Albanian Penal Code in 1928 paid special attention to the protection of honor, given that the Code was practically an innovation at that time, and was drafted largely on the Italian Criminal Code, but borrowing standards from the French Code.

Human dignity is protected by law. In different places and different times, the rules vary dignity. Where the population is heterogeneous the

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concept of "dignity" has several variations. Dignity is something abstract, but decisions are taken in the name of concrete. In antiquity, Aristotel conceived the idea of "universality of human nature". Pope John Paul II, a great personality who has fought for human rights, considered awareness a feature that determines human dignity". When using the fair grounds, the man expresses his intellectual capacity and therefore creates the moral law, logic (Gjoka and Gjoka, 2007, 7-8).

In Albania's constitutional history, the current Constitution adopted in 1998 is the first that explicitly sanctioned human dignity as a fundamental constitutional principle. According to art. 3 of the Constitution, "human dignity, fundamental rights and freedoms of the State is bound to respect and protect them". In the preamble to the Constitution, the protection of human dignity and personality is formulated as an obligation of the people. We conclude that this principle is linked through the Constitution and the rights and fundamental freedoms. Observing the dignity serves as a basic interpretation, without which the other principles may apply. To protect human dignity, is provided in the Constitution required for the functions of state bodies, respect for human rights and fundamental freedoms. Parliament can not enact laws to contain interference to conflict with human dignity. Constitutional did not give a clear definition of the principle of dignity.

In Albania we have not to date a definition given by the Constitutional Court. The Constitution of Albania, unlike other constitutions, is an important principle of dignity between constitutional principles. He serves as a basic principle for interpreting all the articles of the Constitution and the respect are the foundation of the legal system (Anastasi, Omari, 2008, pp.68-69).

Moral values are protected in a comprehensive way in a democratic county ehere individual role is in the foreground (Elezi, 1998, p.25).

In art.1b Penal Code stipulates that criminal legislation of the Republic of Albania is required to protect the territorial independence of the state, human dignity, rights and freedoms, constitutional, property, environment, coexistence and understanding of national minorities and Albanians living together religious norms through criminal and crime prevention (Alusala, 2008, p.5). Given the importance and value of the principle of protecting the dignity, the previous article (art.1b Criminal Code) governs the protection of dignity immediately after independence teritoriality.

Safeguard the dignity of the Albanian Penal Code regulating crimes which affect the principle, provided that such crimes: insult (art.119 Criminal Code), racist or xenophobicreasons insult via computer (art.119b Penal Code), defamation (art.120 Criminal Code), insult against a foreign state representative (art. 227 Criminal Code), insult to the civil service (art.

239 Criminal Code), defamation (art. 240 Criminal Code), defamation of the President of the Republic (art.241 Criminal Code), the humiliation of the Republic and its symbols (art.268 Criminal Code). Insult of the judge (art.318 Criminal Code).

The Albanian Penal Code divides offense in crimes and delicts. Art. 1 of Criminal Code divides offense in crimes and delicts. The difference between them is determined for each case in the special provisions of this Code. Although not expressly provided for in the Code, the basic criterion of this division is the material criterion, the seriousness of the offence. Acts with a higher degree of hazard is included in the category of crimes, the facts instead of a lower degree of danger in the delict category (Muci, 2007, p.101).

According to article 32 of Criminal Code, Punishment for crimes is set for 5 days to 25 years. Punishment for delicts is punishable by 5 days to 2 years. Among the offenses of libel and slander are only two crimes: insult against a foreign state representative (art.227 Criminal Code), which is punishable by fine or imprisonment up to 3 years; defamation of the President of the President of the Republic (art.241 Criminal Code), which is punishable by fine or prison sentence up to 3 years.

1.1 Insult

Insulting a person's purpose is crime and punishable by fine or imprisonment up to six months (art. 119 Criminal Code). Paragraph 2 provides that the act committed in public, against several persons, more than once, is punishable by fine or imprisonment up to one year.

Criminal Code does not define the offense of insult, the same situation is found in art. 185 German Criminal Code (Bohlander, 2008, p.139), but this one is criminal doctrine.

By means harm to insult the honor of the person using offensive language or gestures. By insulting prejudice self-esteem (Elezi, 1982, p.1982). Of particular importance is the expression of words. If the terms are contrary to human behavior, social rules of living together and affect the person's sense of honor, will be in the presence of the offence to insult. If expressions or gestures are offensive or not, this is a case to be analyzed effectively, as appropriate. The terms ”crazy”, ”bastard”, etc for a certain person may be considered as an insult when they affect fis honor and another person are not considered an insult.

The legal object of the offence is the social relations that relate to honor the person.

In theory there is legal doctrine protecting old sense of honor of the person aware of this value, insulting and denigrating to understand the character of the expressions addressed. Based on this theory could not

accept the insult to the dignity of people who do not realize this value, insulting words addressed not perceive their ex. mentally ill persons, dead, people who sleep, etc (Elezi, 1974, p.301).

It protects the dignity of the person whether it is perceived as moral or not, because there are no people without dignity, it can be found in very man merely to exist as a human being.

Material object. Offences against the dignity no material object.

The offender need not meet any special quality, we infer that the active subject can be any person. In accordance with article 12 of the Criminal Code the person committing an offense of criminal responsibility for his action when he reached the age of sixteen.

The crime of insult can be committed by one person, the author, which is only active subject directly or more persons which intentionally co-authors that contribute to the activity that constitutes the material element of the crime of insult.

In the event that multiple perpetrators with offensive words addressed to the same person, each of them directly commits the crime, they commit separate acts of insult, in this case there will be no participation, but many independent offenses of insult and an equal number of subjects the immediate active (authors).

A victim can be any person or entity. In some cases passive subject has some special quality. As in the case of insult against a foreign state representative (art.227 of Criminal Code) to be in the presence of this offense, the person insulted should be representative of a foreign state, in terms of insult because of the civil service (Art. 239 C. pen), passive subject must be official;

It can also be accomplished through writing, physical gestures, offensive gestures, spitting or other gestures by bringing dignity. People's Court of Tirana, Case no. 683 dt.03.06.1965, condemn H.B. for libel committed by gestures, because shaved wife to insult. Insult physical gesture is distinguished from other crimes such as injury to the subject actively seeks not causing physical suffering but harm to honor victims (Elezi, 1972, p.303).

Paragraph 1 of art. 119 does not specify the ways they can commit crime. The crime can be committed by offensive expressions attributing the oral, written, drawings, etc. Insult, generally requires the presence of the person insulted, this person whom it is addressed words offensive, but is likely to commit crime in the absence of the person, the author believes that the facts will become known to the person. If the words are offensive or not, whether or not the honor and dignity, it is an issue that is resolved by the court, the only legal authority in a position to decide for them.

Aggravating circumstances are provided in paragraph 2 and achieved by committing the act in public, against more people and more than once.

The Albanian Criminal Code does not explain the concept of "*public*". This legal vacuum is settled case-law. Determining criterion to clarify this concept is not the place to consume the act but the presence of several persons.

Decision no.2 dt. 01.06.1957 of the High Court accepted the consideration that the notion of public is, when it was committed in the presence of an assembly consisting of more than 8-10 people (Elezi, 1974, pp.303-304).

This delict is committed in public through publications that are accessible by many people. Publications may include caricature drawing, painting, etc. Also, it can be committed in various works of art exhibited in public.

By art.32 of Law no.8733, dt. 24.01.2001, were introduced two aggravating circumstance"*against several persons*" and "*more than once*", these variants aggravating offence were provided from in the Criminal Code of 1977.

The alternative aggravating "*against several persons*", while we understand the offense committed against several persons. When the act was committed by example against three persons and only one person makes a complaint or all three makes complaints, two people withdraw their complaints, the offense will be considered in its simplest version, not according to that aggravating forms.

By circumstance "*several times*" we mean the act repeated several times, but not at short intervals and not in the same criminal intention. If a person assigned to offensive language at short intervals of time, the legal classification of the offense will be under paragraph. 1 simple form and must not be used variant aggravating.

Offensive action must relate to a person, indifferent of its morality. Being an inherent attribute, one can not be considered wholly lacking in dignity. Moreover, the Criminal Code considered as offence against claims that violate the dignity of this value. The crime exists even when the person against whom the action had place has no discernment necessary to tell him that the offensive

Immediate consequence is a violation of the honor and dignity. This result occurs even when committing the offending action and it is presumed in that case, so there needs not to be proved by the offended person.

Causal link between the offender and follow the action must be socially dangerous, resulting from committing crime. Penal Code

considers crimes against the dignity and offensive statements or allegations concerning factual or true.

It's not important if the person against whom the offender is moving has or not has the necessary discernment to realize that offend him. A crime can be committed against the dignity of a minor irresponsible or against a person suffering from mental alienation. The existence of an offense against the dignity, however, is excluded if it is directed offensive action against anyone who commits even as human dignity is protected by criminal law as a social value and not in relation to the importance attached to it by single individual.

Guilt. In the Special Part of the Criminal Code are not covered offenses committed with intent to direct and indirect intention or both. This formulation is solved taking into account the reasons and purpose, it is understood that the offense is committed with direct intention (Kacupi, Haxhia, Elezi, 2009, p.114). The end goal is understood by the defendant had in mind by committing the criminal act. According to the Criminal Code purpose is part of the material element of the crime of insult art. 119 Criminal Code, even in the offenses are provided "insulting the person with the purpose", according to legal classification made by the legislature, it is understood that persons committing the act intended to harm the person's honor. In the current wording of the provision, the offense is committed only by direct intention.

The doctrine was expressed that, if you can not prove they are true or not insulting expressions, we have competition between the "in dubio pro reo" principle and the protection of dignity (Stojani,2007, p.56). European Court of Human Rights has called repeatedly not face criminal charge to the journalists if they do not know the exact veracity, in this case journalists ECHR accepted that the presumption of good faith.

1.2 Calumny

According to art. 120 Criminal Code with the purpose of assignment expressions and any other information that is known to be false and affect honor and dignity, is crime and punishable by fine or imprisonment up to one year. Paragraph. 2 provides that the commission act in public, against several persons and more than once and punishable by fine or imprisonment up to two years (Kaftili, Pernoca, 2009, p.78).

Criminal Code gives the definition of calumny as an expression or assignment information that is known not to be true and affecting dignity.

Albanian criminal law knows no concept of defamation when it awarded expressions are true information, as provided in other legislation ex. French, Romanian, etc. Expressions of calumny award events that have happened in the past or present. If expression refers to actions that will

occur in the future, the act will not be considered calumny, but in specific circumstances can consitui crime of insult.

Under the doctrine, in connection with the insult and calumny is protected person honor the living and dead person does not have honor because personal honor can not continue after the moment of death, but there's that social aspect of honor relatives and people who knew him (Elezi, 2002, p.131), solutions opposite are provided in other legislation ex. the German Penal Code Article 188 which criminalized defamation of the memory is deceased, 175 Swiss Penal Code provides for defaming the memory of the deceased and missing persons.

Material object. As the offence of insult, calomny has no material object.

Perpetrator of the offense may be any person. In accordance with article 12 of the Criminal Code the person committing an offense is criminal responsibility for his action when he reached the age of sixteen, against persons responsible for crimes which starts at fourteen years. The legislator increased age of criminal responsibility to persons who commit crimes because they have a certain psychological development of the people to know the criminal nature of the facts and legislator held that intellectual development begins by the age of sixteen in people who commit crimes.

The crime of calumny may be committed by one person, the perpetrator, who is the only active subject directly or more persons which intentionally co-perpetrators that contribute to the activity that constitutes the material element of the crime of calumny.

In the event that multiple perpetrators addressed defamatory words to the same person, each of them commits the crime directly, but participate in the development of separate acts of calumny, in this case there will be no complicity, but many crimes of calumny.

An eloquent example is the Decision nr. 221, dt.21.06.1999 High Court left unchanged decisions of Tirana First Instance Court Decision no.679, dt. 16/07/1998 and the Tirana Court of Appeals Decision no. 111, dt. 04/14/1999, which is condemned for libel and slander F.B to pay the fine of 100,000 (one hundred thousand) leke. The offense has been committed by him in writing in public. The convict has shown in his defense that he is the director of the newspaper were published written against the victim, but he is not the author of these writings. The information came by fax, individual criminal responsibility in these circumstances can not be held criminally liable for acts that are not committed by him. These arguments were not taken into account by the court (High Court Decision no. 221 dt.21.06.1999).

The way in which the delict of calumny is regulated in the Albanian Criminal Code violates the freedom of expression, because it excludes good faith.

De lege ferenda we propose the inclusion of bad faith in offense of calumny (thought it was real and made reasonable checks, even if it turns out that the information is not true), Criminal Code article 120, paragraph 1 should have the legal meaning: allocating with purpose and in bad faith expressions and any other information that is known to be false and affect honor and dignity, is delict and punishable by fine or imprisonment up to one year. This formulation is compatible with the ECHR, in this case the person's good faith is presumed.

In Albania there is no press law nor a law providing for the obligations of the editor- in- chief, editor and president of newspaper, however, some courts have sentenced the editor and president of the newspaper with the author of writings. *De lege ferenda* util the adopt of press law propose to introduce a general article in the Criminal Code reads as follows: "Where a delict is committed through publication in a social communication and is consumed as a result of publication. Only the author will be punished outside the following exceptions:

1. If the author can not be identified, it is criminal liability in the absence of the editor and the person responsible for publication.

2. If the publication took place without the knowledge or against the author will be punished as a crime author and the editor in his absence the person responsible for publication.

3. Any person responsible under the preceding paragraph's meaning not prevented the crime is punishable with a sentence of up to two years or a fine. If the person responsible has committed negligence the penalty is a fine offense. A somewhat similar provision is provided by article 28 of Swiss Penal Code.

A victim can be any person. In some cases it may be classified as having a particular official. If the crime of libel because of the civil service servant's (art.240 of Criminal Code) passive subject must be a public official. The tort of defamation of the President of the Republic (art.241 of Criminal Code) must be of the passive subject of the President of the Republic of Albania.

According to article 120 of Criminal Code that the tort of defamation should have met these conditions:

1) assignment expressions or information
2) expressions or information to be false
3) be concrete expressions or be concrete information
4) concrete expressions or concrete information to be derogatory to the dignity

5) attributed concrete expressions or concrete information, which are false and derogatory to the dignity are known by the author of crime that affect the dignity of the individual.

1) assignment expressions means to communicate, display support, to describe an act to tell others about someone else.

They can be committed through various means and ways as follows: in words - oral (lectures, speeches, shouting, threats, songs, spoken directly or indirectly, by means of audio recordings, video, television broadcast) writing (letters, posters, documents Books, articles) or graphics (drawings, cartoons). These means can be employed singly or combined, associated.

Gestures can be a means to achieve the objective side of the material element of the crime of libel only if they like a pantomime, it can reproduce a work attributed to a person.

2) By assigning expressions or information are false those expressions or information that is not true. True information or expressions must be made in accordance with the rules of social life. If the award of this information is not needed and then we will bring something on dignity and will be insult offence.

3) Another condition to be met for there to be libel award of expression or information is specific and not general. College of High Court, in Decision no. 654 dt. 10/06/1985 pronounced in relation to Sh.B defendant "expressed doubts that L.B have found some documents". This expression does not meet the elements of defamation, Art. 186 Criminal Code means assigning concrete expressions that are false and are known to affect someone else's honor. In the particular case to express doubt that the injured party would be lost documents isn't a specific information. Libel differs from critics addressed to a person, the determining criterion is the purpose of the author. If the author by critics attribute information that is known to be false and affect honor to will have a delict of libel (Zenko, Elezi, 1989, pp.458-459). Tirana Court with the decision no.467 dt.29.06.1978 among others focused on attributing negative qualities in the form of criticism in a meeting of professional organization, this does not meet the material element of the delict of libel.

4) Albanian criminal law knows no concept of defamation, in Romanian and French criminal law is punishable assigning expressions that bring true dignity, the Albanian criminal law is punishable false attribution expressions affecting dignity. Expressions of libel refers to events that occurred in the past or present. If the expressions refer to events that will occur in the future, the act may qualify insult. The expressions used are not only false but also defamatory to the person. Derogatory expressions are those of the person who assigns grades, which in accordance with the rules of social life not worthy of the man. If you are

denigrating expressions that are matters to be considered by the court for each case.

5) The last condition refers to the subjective side of committing the crime of libel, assigned expressions that are false and derogatory to the dignity of the concrete are known author of crime that affect the dignity of persons.

The author aims to insult offensive language award affecting dignity and thus discretiteze him, humiliate him. The libel award means of expression that are known to be false and are done with the view of infringement dignity. By assigning false expressions means making people aware of their contents. To distinguish the crime of libel at the insult, we must consider the following features:

a) the crime of defamatory libel we have concrete facts instead to insult the facts may be general or specific, but the author does not know that they are false, he is convinced that the facts are real;

b) Slander is consumed as a crime by assigning expressions, false information without having anything to do with taking or not aware of these facts to the person injured. To insult, the deed is consumed when the injured party learns of offensive expressions or gestures (Elezi, 1982, p.91).

In paragraph. 2 are under aggravating circumstances: the crime committed in public, against several persons and more than once. The aggravating circumstances are similar to the offence of insult.

Attempted crime is not possible for verbal offenses, it will exist when the offender chooses to commit one way possible action with ongoing time. The attempt is punished. The attempt is punished to the most serious offenses (Cerkini, 2009, p.43). Legal effects of the attempt are provided by art. 23 paragraph. 1 Penal Code, which penalizes only responsible for the crime. The court, depending on the proximity of the consequences and effects, to produce the result and the cause for which no crime was committed, reduce the penalty, and the penalty can be reduced to the minimum required by law or may provide another easy penalty (Kacupi, Haxhia, Elezi, 2009, p.168). Legiutorul exclude criminal liability for attempted crimes, because art. 23 Criminal Code predeve attempting to murder. Criminal liability is not punishable if the crime because of low social threat

To speak of the existence of the crime of libel, the activity that forms the material element of the crime must be committed with guilt. The perpetrator commits the crime of direct intent form is provided for a particular purpose assignment expressions or information. For the existence of libel is necessary to meet the intentional element among others, meaning that the author was aware that the fact stated is not true.

The offender is aware of the untruth of the statement he acts with the intent of compromising the offended

2. Offences against the digity and the compatibility with the ECHR

Neither the European Court of Human Rights does not stipulate that the offenses that protect the dignity (libel and slander) without prejudice to freedom of expression. The Court will analyze each case to determine whether a violation of Article. 10 of the ECHR, but so far no decision has ruled that the rules expressly provide for criminal defamation and insult affecting freedom of expression should be repealed.

The right to freedom of expression is not an absolute right, he knows that some interference is necessary in a democratic society, one of which is protection of individual reputation by criminalizing the offense of insult and libel. Article 10. 1 C.E.D.O. provides that any person has the right to freedom of expression. This right includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring broadcasters, film and television licensing regime, and paragraph. 2 states that freedom may be subject to such formalities, conditions, restrictions or penalties with the following conditions:

1) to be prescribed by law;

2) constitute a necessary for a democratic society;

3) interference relate to national security, territorial integrity or public safety, prevention of disorder or crime, health, morals, reputation or rights of others, for preventing the disclosure of confidential information or for maintaining the authority and impartiality of the judiciary ;

On the first requirement, provided that insult and defamation are crimes which affect freedom of expression, are also different crimes range from those crimes. These crimes vary depending on the active subject and passive subject.

The second condition is the need to measure in a democratic society (proportionality), this means that none of the following rights, no right to protect the dignity and the right to freedom of expression should not be prioritized against each other for that are protected as the European Convention on Human Rights, but each case must be examined to see which of these values (human dignity or freedom of expression) is more important in practical situation, if it is abuse of freedom of expression, preference is given to protection of dignity, for the abuses and sanctions are set out in the Criminal Code. With freedom of expression may be injured dignity, if damage is done to protect the human dignity of a legitimate interest provided for in Article 10, paragraph 2, of the

Convention, the author will be exempted from criminal liability for libel and slander (Stojani, 2009, p.9).

Currently there is no press law in Albania and Romania, but for better conduct of the business press is appropriate to adopt a law. By adopting the law does not create an interference in the work of the press, but are better identified rights and obligations of the press and other categories of persons who have contact with the media.

The last condition requires that the interference must relate to the protection of reputation. Protection of reputation is protected by civil and criminal means. Insult, libel is interference which defend the reputation of the person.

It is the obligation of judges to examine each case and to interpret if the laws that restrict freedom of expression are included in the scope of interference under article 10 paragraph 2 of the ECHR, or exceed the scope of such interference. Also, it's all a matter for the judge to consider whether a publication or film exceeds or not limitations to the scope of freedom of expression (Loloci, Traja, 1995, p.10) .

There should be a balance between protecting the dignity of the insult, libel and freedom of expression. This balance can not exist by the repeal of insult and slander at the expense of freedom of expression, meaning that the dignity and reputation of other people who have been insulted would remain without any legal proceedings.

As is admitted in a legal-philosophical concepts of democratic states, "freedom of individual ends where the other person begins". Making a parallel with the famous maximum, freedom of expression should be restricted when harm the dignity of the person or, in other words, there must be a balance established by protecting both rights. This balance can not exist by decriminalization of insult and calumny, but only by applying the civil law for breach of dignity.

3. Dignity in Romania

The abrogation of the dispositions of Articles 205, 206, 207 by law 278/2006 regarding the change of Criminal Code was well received by the press and even some lawyers, but criticized by others, on the grounds that it abandons the defence, by means of criminal law, of one of the most fundamental values related to human personality (Basarab, Paşca, Mateut, Medeanu, Butiuc, Badila, Bodea, Dungan, Mirisan, Mancas, Mihes, 2008, p.328).

Consistently, the Constitutional Court rejected as unfounded the exceptions of unconstitutionality of dispositions of Articles 205, 206, 207 of Criminal Code, ruling that the legislature incriminates and punishes acts of insult and calumny as infringements of the law against the dignity of

the person, an essential value stipulated in Article 1, paragraph (3) of the Constitution, acts which demonstrate lack of respect for the human dignity (Toader, 2009, p.144).

Constitutional Court by Decision no. 62/2007, declared unconstitutional Article 1 pt. 57 from Law no. 278/2006 for the change and completion of the Criminal Code, which abrogated Articles no. 205, 206, 207 Criminal Code, considering that, by declaring unconstitutional the law of abrogation, the dispositions of articles no. 205, 206, 207 come back into effect. If finding unconstitutional some legal dispositions of abrogation, they shall cease their legal effects under the conditions of Article no. 147, al. (1) from the Constitution (the provisions of laws and ordinances in force, and also those of regulations, declared unconstitutional, cease their legal effects 45 days after publication of the Constitutional Court's decision, if in the meantime, the Parliament or the Govern, as appropriate, don't agree the unconstitutional provisions with the disposions of the Constitution). During this period, the dispositions found to be unconstitutional, are suspended, and the legal provisions that formed the subject of the abrogation remain in effect (Toader, 2009,p.144). Regardin the Constitutional Court Decision, two views have emerged in legal literature.

A first opinion expressed in the media was that the repealed provisions can not be brought into force by declaring unconstitutional a rule repealing these provisions, without the Parliament or the Government, as appropriate, to adopt a new regulation aimed at the field. This solution is based on art. 62 para. 3 of Law No. 24/2000 on the rules for the legal drafting, republished, "the repeal of a provision or normative act is final. Repealing the abrogation is not put into force of the initial". The only exception allowed by law refers to the Orders of the Government providing for repealing rules that are rejected by Parliament by law. It is thus considered to repeal can not return either directly or indirectly, via a decision of unconstitutionality (Popescu, Cioară, 2007, p.52).

The revised Constitution has provided that all decisions of the Court given in the resolution of any objections and exceptions of unconstitutionality, which found unconstitutional a law or ordinance, determines that the parliament or government to agree to the unconstitutional provisions of the Constitution. By carrying out this obligation, the law found unconstitutional shall remain in force, but suspended. After 45 days of its publication in the Official Gazette of the decision of unconstitutionality by the Constitutional Court if the obligation was not performed, those laws and ordinances shall lapse (Moraru, Tănăsescu, 2009, p.274).

A second opinion said that the publication of the decision establishing the unconstitutionality of provisions abrogatoare, the

provisions of the Criminal Code relating to insult, slander and burden of proof is in force, causing her full legal effect (Bulai, Filipaş, Mitrache, Bulai, Mitrache, 2008, p.395). We join the second opinion that the provisions of article 62 paragraph 3 of Law 24/2000 on the rules for the legal drafting, which is not allowed according to the repeal of a repealing act put in force prior to the enactment initial refers to activity regulation. Freedom of expression is inviolable, but exercise can not be prejudicial to the dignity, honor, privacy of the person and the right to own image. Establishing limits to the exercise of any right or freedom may be made by the legislature in compliance with Article. 53 paragraph.1 of the Constitution in order to protect the rights and freedoms of citizens, without being considered a means of censorship (Basarab, Paşca, Mateut, Medeanu, Butiuc, Badila, Bodea, Dungan, Mirisan, Mancas, Mihes, 2008, p.328).

Allowing the plea of unconstitutionality, the Constitutional Court did not exercise the powers of a positive legislator either directly or indirectly, because the provisions of articles 205, 206, 207 of the Criminal Code in force in its original form without any change during exercise control of constitutionality by the Constitutional Court.

Shown in different ways and purposes, the possibility of limiting freedom of expression is enshrined in art. 10 para. 2 of the European Convention on Human Rights. provisions under which "the exercise of these freedoms since it carries with it duties and responsibilities may be subject to such formalities, conditions, restrictions or penalties as are prescribed, they are necessary in a democratic society for the protection of the reputation or rights of others" (Toader,2009, 145.)

High Court of Cassation and Justice Decision No. 8 of 18 October 2010 upheld the prosecutor general's office decided that the crime of insult, slander and burden of proof is not in force.

Decision of the High Court of Cassation and Justice is controversial, dividing it into two categories legal world. The first category includes those who agree with this solution are granted by the High Court of Cassation and Justice, and those who have some objections to that decision. We join the second category for the following reasons:

Attorney General's argument that Article 62 paragraph 3 of Law no. 24/2000 on the legislative technique, provides that the repeal of a provision or a final bill is always and is not admitted by the repeal of a repealing act in force prior to the enactment initial call.

We believe that this statutory provision relates to the business of regulation and does not apply to the Constitutional Court decision that the Constitutional Court does not exercise the legislative powers.

The Constitutional Court has not amended or supplemented the provisions of art. 205, 206, 207 Criminal Code. It is the first time the

constitutional court ruled on disputes relating to provisions repealing ex. Decision nr.20/2000[1]. Contentious constitutional court consisted of several decisions that the provisions of art. 205, 206, 207 of the Penal Code are in accordance with the Basic Law as an example we mention a No Decision. 51/1999, Decision nr.134/2000 Decision nr.308/2001.

Another argument of the general prosecutor of the High Court of Cassation and Justice was that "since the provisions of art. I section 56 of Law no. 278/2006 have been found to be contrary to the Constitution, had to make their repeal, as provided under Art. 62 para. 1 of Law no. 24/2000, the repeal was followed by reincrimination facts provided by art. 205 and art. 206 of the Criminal Code ".The Constitutional Court has the authority to repeal acts and regulations, so that its decisions can also have this effect.

The Constitutional Court has outlined the way forward following the occurrence of a constitutional legal conflict between Parliament and the High Court of Cassation and Justice, holding that in exercising the functions set out in art. 126 par. 3 of the Constitution, Supreme Court of Cassation and Justice is obliged to ensure uniform interpretation and application of the law by all courts, with the underlying principle of separation of powers provided for in art. 1 paragraph. 4 of the Constitution. High Court of Cassation and Justice has no constitutional power to establish, amend or repeal the legal rules laid down by law or to perform their constitutionality[2].

We assume that the rules of legislative technique is applicable to decisions of the Constitutional Court. Article 62 pargraph. 1 of Law no. 24/2000 sanctioned that the provisions contained in a legislative act contrary to a new regulation on the same level or higher, should be repealed. May be total or partial repeal. Upon a finding by the Constitutional Court so far has not found the repeal (Repeal would have come from the legislature), nor reincrimination. Is the decision by the High Court of Cassation and Justice found that the offenses mentioned in art. 205. 206, 207 of the Penal Code is not equal to a repeal of Article 62 under par. 1 nr.24/2000 law? Does the supreme court did not exceed the constitutional jurisdiction, creating a constitutional legal conflict between Parliament and the High Court of Cassation and Justice?

These questions will be answered if the Constitutional Court shall be notified according to art. Lett.e 146 of the Constitution by the President of Romania, and if one of the presidents of both houses of Parliament, the Prime Minister or President of the Superior Council of Magistrates will

[1] http://www.ccr.ro/decisions/pdf/ro/2000/D020_00.pdf last accessed in 23.03.2011.
[2] Decizia Curții Constituționale nr. 838/2009, http://www.ccr.ro/decisions/pdf/ro/2009/D0838_09.pdf last accessed in 26.03.2011.

consider that it is a legal conflict between public authority [although in this case we are in the presence of a legal conflict between the parliament (legislative authority) and the High Court of Cassation and Justice (legal authority), because under Article 73, paragraph 1 of the Constitution, Parliament passes constitutional organic laws and ordinary laws, and according to art. 73 para. 3 letter. h) the organic law governing the crime, punishment and the execution of the sentence, and according to art. 126 paragraph three High Court of Cassation and Justice shall ensure uniform interpretation and application of the law by other courts under its jurisdiction.]

Court may resolve any constitutional legal conflict arising between public authorities and any conflicting legal situations whose birth lies directly in the text of the Constitution, and not only conflicts of jurisdiction (whether positive or negative) born between[3]

The delivery of this Decision, the High Court of Cassation and Justice has acted as a legislative authority, being affected the fundamental principle of rule of law, namely the principle of separation of legislative, executive and judiciary, governed by art. 1 paragraph 4 of the Basic Law.

References

Aurela Anastasi, Luan Omari, E drejta kushtetuese, Shtepia Botuese ABC, Tirane, 2008;

Ardita Alsula, Kodi Penal i Republikes se Shqiperise, i perditesuar dhe me praktike gjyqesore. Shtepia Botuese Alb Juris, Tirane, 2008;

Ali Zenko, Ismet Elezi, E drejta penale e Republikes Popullore Socialiste te Shqiperise, Pjesa e Posacme, Shtepia Botuese e Librit Universitar, Tirane, 1989;

Burim Cerkini, Tentativa si faze e kryerjes se vepres penale, Justicia nr.1/2009;

Costică Bulai, Avram Filipaş, Constantin Mitrache, Bogdan Nicolae Bulai, Cristian Mitrache, Instituții de drept penal. *Curs selectiv pentru examenul de licență 2008-2009, cu ultimele modificări ale Codului penal*, Editura Trei, Bucureşti, 2008.,*Instituții de drept penal. Curs selectiv pentru examenul de licență 2008-2009*, Editura Trei, Bucureşti, 2008;

Eleonora Gjoka, Kosta Gjoka, *Dinjiteti human*, Shtepia Botuese Elko, New York, 2007;

Ismet Elezi, *Mbrojtja juridike-penale e moralit dhe e dinjitetit te njeriut*, Te drejtat e njeriut, nr.2/1998;

[3]Official Gazette of Romania, Part I, No.317, 12 may 2003, http://www.ccr.ro/decisions/pdf/en/2003/D148_03.pdf last accessed in 26.03.2011.

Ioan Moraru, Elena Simina Tănăsescu, *Drept constituțional şi instituții politice, vol II*, Editura C.H.Beck, Bucureşti, 2009;

Ismet Elezi, *E drejta penale e RPSH*, Shtypshkronja Revista-Dispenca, Tirane, 1974;

Ismet Elezi, Hotărârea Plenului Înaltei Curți nr.1 dt.19.01.1982, Drejtesia Popullore nr.3/1982;

Ismet Elezi, *E drejta penale e Republikes se Shqiperise*, Shtepia Botuese Albin, Tirane 1999;

Ismet Elezi, *E drejta penale, Pjesa e Posacme*, Shtepia Botuese Shblu, Tirane, 2002;

Krenar Loloci, Kristaq Traja, E drejta Kushtetuese, Shtepia Botuese "At Gjergj Fishta" Tirane, 1995;

Lorenc Stojani, *Liria e shprehjes apo dinjiteti i njeriut? Reflektime mbi nismen legjislative per depenalizimin e fyerjes per gazetaret,* Revista shqiptare per studime ligjore, nr.1/2008;

Lorenc Stojani, *Argumentime qe i kundervihen depenalizimit te vepres se fyerjes*, Jeta Juridike nr.2/2007;

Matei Basarab, Viorel Paşco, Gheorghiță Mateuț, Tiberiu Medeanu, Constantin Butiuc, Mircea Badilă, Radu Bodea, Petre Dungan, Valentin Mirisan, Ramiro Mancas, Cristian Mihes, *Codul penal comentat vol.II.Partea specială*. Editura Hamangiu, Bucureşti, 2008;

Michael Bohlander, *The German Criminal Code*, Hart Publishing, Oxford, 2008;

Shefqet Muci, *E drejta penale, Pjesa e pergjithshme,* Shtepia Botuese Dudaj, Tirane, 2007;

Skender Kacupi, Maksim Haxhia, Ismet Elezi,*Komentar i Kodit Penal te Republikes se Shqiperise*, Shtepia Botuese West Print, Tirane, 2009;

Sorin Popescu, Cătălin Cioară, *Implicații care rezultă ca urmare a declarării neconstituționalității unei dispoziții având caracter abrogator,în lumina Deciziei nr. 62/2007 a Curții Constituționale*, în revista Dreptul nr.4/2007;

Tudorel Toader, *Drept penal român.Partea specială*.Editura Hamangiu, Bucureşti,2009;

Valjeta Kaftili, Aferdita Pernoca, *Kodi penal i Republikes se shqiperise,* Qendra e publikimeve zyrtare, Tirane, 2009;

http://www.ccr.ro/decisions/pdf/ro/2000/D020_00.pdf last accessed in 23.03.2011;

http://www.ccr.ro/decisions/pdf/ro/2009/D0838_09.pdf last accessed in 26.03.2011;

http://www.ccr.ro/decisions/pdf/en/2003/D148_03.pdf last accessed in 26.03.2011.

CONSTITUTIONAL FUNCTIONS OF THE JURIDICAL AUTHORITY

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Abstract

The coherent construction of the juridical system and an effective justice act are the main factors contributing to the formation of a state based on the rule of law. Nevertheless, history proves that the reconstruction of the juridical system is slowed down when faced with continuous political confrontations and unfavorable social-economic environment. In order for reforms to be successfully carried out in any domain, a favorable context leading to the implementation of the reforms is required, together with scientifically-based strategies. The process of getting over any critical situation requires both the citizens' consent and the reformation will expressed by the politicians of the transitioning countries.

The juridical system of the Republic of Moldova, considered from both the legal support and the manner in which laws are applied, is threatened by several negative factors, signaled by both concerned organizations and the population of the country. One of the main factors preventing an actual reformation of Moldova's juridical system is corruption. Many sociologic polls point to the fact that the population's trust in the bodies responsible for carrying out the justice act is extremely low. The same situation, yet at a smaller scale, can be observed in Romania too.

For the aforementioned reasons, the specialists are worried about the situation that currently describes the justice act. More and more studies are aimed at problems referring to justice and the justice act and the protection of human rights.

The worst part is that, after so many years, the issue regarding the judicial power's independence has not been solved yet and people are beginning to wonder why the judicial power is so dependant on the executive power. The severity of the situation has evolved to such an extent that even the viability of the separation of powers principle has started to be questioned.

In this context, a more and more fervent question arises – what was the true purpose of the juridical system's reformation? From a theoretical point of view, the answers may be several, yet reality shows that in order

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to reach the goals of certain political or legal documents, favorable conditions for the justice act must be created. Such conditions are: ensuring the financial independence of the juridical system, increasing the number of judges, creating an effective mechanism of selecting magistrates, solving the problem brought by the lack of court spaces etc. Moreover, creating effective instruments for trials becomes an essential condition if justice is to become truly effective and independent.

The favorable conditions for an independent justice act refer first and foremost to the persons carrying out the justice act and justice instruments must be aimed at increasing the population's trust in the juridical system.

Of all the powers in a state, the judicial power can be considered to be the weakest, as it is not supported by the population and their votes and it also lacks the coercive system the executive power has. However, in profoundly democratic states, the power of the juridical authorities is not based on the extent to which the citizens obey the law and its institutions. It represents an authority and authority can only be obtained by rightfully enforcing the law and by the equity of the decisions issued by the juridical authorities, doubled by a strong decision enforcing system. Therefore, enforcing the verdicts and court decisions is one of the main problems Romania and the Republic of Moldova are confronted with.

All aforementioned facts have been included in the paper as to remind people that a weak act of justice is an act of justice not successfully carried out.

Reality shows that justice is only served when all its functions are carried out. Therefore, the affirmation[1] stating that the juridical power is the instrument by which law influences social relations has not been made without a purpose. Consequently, whenever the juridical power fails to carry out its functions, it endangers the very existence of law.

In general, the functions of the juridical authority refer to the activities through which the bodies forming the juridical authority carry out their duties[2].

Ever since the beginnings of human civilization, serving justice was considered to be one of the main attributions of a state, as the verdicts were always reached and announced in the name of the state power bearer.

In modern times, only the law holds the monopole over the juridical system. This means that no institution, except the juridical bodies, has the right to reach verdicts or sentences which are to be executed.

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[1] Конституционное право зарубежных стран, în red. Б. Страшуна, Moscova, 1997, pag. 229.
[2] M. Ciaroev. Functions of the Judicial Authority//Rossiysky Sudya 3/7, 2002.

The most important achievements of the juridical system take place in democracies. In the centrally planned economies, this function is taken by the executive power, while the juridical power is hollowed. This reality is even more accurate if one takes into account the fact that the most important juridical reforms have been carried out at times when the dictatorships were harshly criticized.

In democracies, the juridical power is independent from the influence exerted by the legislative and executive powers and is also granted a well-defined constitutional frame. From a general point of view, the act of law, as one of the state's functions, is considered to be the enforcement of the law aimed at regaining the equity of juridical reports.

The main purpose of the aforementioned actions is the substitution of the concept of violence with the concept of law as to establish a juridical wall between the executive and its power[3]. By carrying out the act of law, the juridical power borders state power as per the limits determined by the science of law. A state governed by the rule of law is a place where no one can judge his or her own cause, as the personal interests might influence the final decision and will eventually lead to compromising the result. From the very same reason, not even groups of people can have the same function – judge and plaintiff in a trial.

Justice will never be able to serve its purpose rightfully when it identifies with one of the two powers, not knowing what are the purposes that must be served at first. From this very reason, judges must not be influenced under any circumstances by the other powers. Therefore, the juridical power will aim at serving either the executive power or the legislative power, against the best interests of justice, in order to gain certain advantages. For this reason, the legislative and executive powers must not be limited when deciding issues able to influence the decisions of the juridical bodies. Consequently, the power to decide on the amount of money the judges are paid represents a disturbing factor which induces a state of dependence and therefore poses a threat to the separation of powers. In the same way, the power of deciding on several favors for magistrates can influence court rulings, especially when conflicts involve the state.

The legislative and executive powers are the base of the juridical power, yet after it is formed, the juridical power detaches itself and becomes self-sufficient. However, one must understand the fact that the juridical power does not take any of the state's powers, as this would damage the essential element of the justice act – contributing to the solving conflicts, even those caused by the executive and legislative power.

[3] A. Tocvil, Democracy in America America, Moscova, 1992, pag. 120.

Unlike the activity carried out by the legislative and executive powers, whose purpose orbits around the planning of the state's political process, the purpose of the juridical activities is a precise one, that is identifying misdemeanors and sanctioning them.

In the present context, the role of the juridical system has expanded considerably. It therefore represents the last hope for every institution or person that was not able to solve a conflict in any other way. In any democracy, justice acts as a protector for the juridical order and for the state's fundamental rights and liberties. To this regard, the courts, no matter the level, meet two general functions: protecting human rights and ensuring public order. These two functions cannot be ensured by any other organ of the state, because the verdicts of the judges are to be respected by everybody and, whenever needed, their execution is ensured by the coercive power of the state.

The juridical solving of conflicts stands as one of the eldest functions of the state. The need to defend oneself and one's property arose long before the norms that later became customs and eventually rules and laws.

Ancient history proves that justice was made either by magical forms or in an arbitrary way. Once states were created, justice became an essential prerogative of suzerainty. For example, in ancient Egypt, the holder of suzerainty was the Farrow and justice was made in his name.

An essential role in the development of the concept of justice was played by the ancient Greek civilization. Historical documents prove the fact that justice was an issue of great concern of the ancient world. According to the ancient Romans, justice strengthens the suzerain power of the state and therefore it must be entirely free, as there is nothing more frightful than a corrupted justice act; justice must be complete, as it can never stop halfway to pursuing its goal; justice must be fast, because slowing it down can be considered to be a form of refusal.

In ancient Greece and ancient Rome, justice was both public and private. Public justice served as a defender of the collectivities, while private justice defended the interests of private entities. Until the creation of the first republics, the juridical power lay in the hands of the king, then it was transferred to ambassadors, and it eventually became the prerogative of praetors. The magistracy began to evolve with the creation of written law.

During the period states were organized in republics, the juridical power was divided between magistrates and people councils. This way, the Romans and the Greeks were invested with the power to determine the circumstances of the events brought to trial, as well as to prosecute the felons.

The medieval times outline a juridical system dominated by the rules of the inquisition. The inquisition demanded the trials to be kept secret, and formal evidence to be used during trials, as well as evidence obtained through torture. The deeds were interpreted according to the canonical law. The judges obtained the confession of the felon by every possible means, as a confession was believed to be the most important type of evidence.

In the despotic states, void of any laws, the judge is both the creator and interpreter of laws and equity.

Montesquieu was one of the French Renaissance exponents who stood against the juridical methods of the inquisition. According to him, the justice of the inquisition contradicts the juridical order, as in a monarchy, it only creates traitors, in a republic it only erases the honesty of people and in a despotic state it is just as destructive as the state itself.

Regarding the evolution of justice as one of the functions of the state, Montesquieu stated that in a despotic state, the king is able to trial misdemeanors on his own, yet he cannot act as a judge in a monarchy. In a true monarchy, the king is on the side of the prosecutors. Were he to act alone, he would be both a judge and a part of the trial.

The concept regarding the independence of the juridical power became viable after the French revolution in 1789. The documents issued after the revolution mentioned the prerogatives of the juridical power, prerogatives that were later included in most of the democratic states' constitutions.

According to Montesquieu, justice must be able to dispose of three inseparable elements: being granted power from the state, being independent from political views and being professional. At the same time, Montesquieu also states that judges must be vested with the same amount of power as the parties of the trial, so that the parties might not feel dominated.

Although Montesquieu's theory on the separation of the juridical power from the other powers of the state meets several practical obstacles, so far there have not been found any better alternatives. This would be the reason why all the constitutions follow the idea of this theory and any contradiction of Montesquieu's theory does nothing else than confirm it.

While acting in the population's best interest, the state must ensure the fact that same activities are carried out effectively and repeatedly by specialized bodies, respecting strict well-established norms and methods. These activities are grouped by several functions of the state, whose analysis can only be made through two specific criteria: the formal and the material ones.

The material criterion concerns the contents and nature of the activity regarded as the substance of the state's function. Although highly

criticized, it is a criterion of great interest. In order to meet the general needs, certain goals are established, as well as the necessary means of reaching them. The effectiveness criteria require the grouping of several activities in certain functions. These activities consist of juridical rights and obligations, present a certain degree of specificity and regard certain characteristics, require a certain organization, degree of effectiveness, special procedure, special enforcement organs etc.

Therefore, the legislative activity requires a specific content and nature, the activity of elaborating laws having to follow certain rules and regulations.

Another content and another nature is given by the organizing activity of enforcing the provisions of the law by the bodies of the public administration. The very same thing can be mentioned by the juridical activity, whose specificity lies in the principles of civil, commercial, administrative, fiscal and labor disputes, as well as in the application of the criminal dispositions. From the very same point of view, the external, economic and other activities of the state can be distinguished.

According to some authors, the state is supposed to have three functions: a) the legislative function, b) the executive or administrative function and c) the jurisdictional function. According to others, the state has four functions: legislative; executive or governmental; administrative and juridical. No matter which of the two hypotheses may be correct, the only function of concern in this matter is the jurisdictional or juridical one.

A state governed by the rule of law cannot exist without the jurisdictional function, as the lack of true justice only leads to injustice[4]. If a normal social life must take place as per the provisions of the Constitution and enforceable laws, there must also be a function and enforcement bodies meant to apply the necessary corrections and restore the true nature of law and order.

This jurisdictional function of the state is entrusted to several impartial and independent authorities, such as the Constitutional Courts and regular courts. The act of justice can only be carried out by a neutral third party, as nobody should seek his or her justice, because in such case, only the strongest people would be right in the causes they fight for. This is the reason why justice must be made by neutral bodies and be granted to the same extent to both the weak and the strong.

Conceived as a function which is to be carried out impartially and independently, justice managed to impose itself as a reality people have faith in and trust it will protect them wherever their rights and legitimate

[4] I. Muraru, Constitutional Right and Political Institutions, Actami Publishing House, Bucharest, 1997 p. 459.

interests are[5]. *Fiat justitia pereat mundus* (justice is to follow its course, even if not everybody benefits from it) is the favorite motto of the juridical field. Its significance resembles, to a certain extent, the divine and absolute power of God, revealing itself in any conditions, even in the eventuality of material loss, and in the same way, the judge assigned to solve a certain dispute or case must carry out his duties in the best possible way, in spite of every obstacle[6].

The jurisdictions generally regard the conflicts between moral entities, between moral entities and civil legal entities, or between moral entities and public authorities. The disputes are solved during trials, following certain rules and laws. The judge seeking to find the truth must fight for the right cause, in order to identify the situation where the law was broken, the victims, the causality, the responsibility and the persons responsible. In order for justice to be able to carry out its mission, it must follow a certain organization and certain principles. The organization of justice is made on jurisdiction degrees, allowing for a better error control. These jurisdiction degrees allow ensure the frame for trials and appeals, as a possibility of righting the wrong, re-assessing verdicts and re-examining the evidence.

All in all, the necessity of an independent juridical power is crucial for every state, and this is the result of many past confrontations. The state's function through which justice is exerted can be considered to be the result of a long-lasting battle, and abandoning it would also mean abandoning a fight where victory has paid a far greater price than it probably should have.

[5] I. Muraru, op. cit. p. 458.
[6] Ioan Muraru, Simina Tănăsescu, op.cit., pag. 586.