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THE 11TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

Legal Sciences in the New Millennium

The Aggression of Elective Autocracy Over Parliamentary Democracy

Ioan Alexandru[1]

Abstract: We must admit that Democracy is one of the words that started to lose their initial meaning due to the over-use within the political language and not only there, and thus we might say that many times has it become an empty word, almost meaningless. It is enough to follow, within mass-media, one the one hand, the manner of parliamentary activities and, on the other hand, to notice the important and frequent protests all around the world, but more often in Europe and Latin America, by means of which one questions their activity and that of the governments and where one can see special police forces, Molotov cocktails, tear gas and all other repressive materials. To easily understand what is going on, I have analyzed the concept of democracy by opposition to other three concepts of dichotomic political regimes: autocracy, dictatorship, communism and fundamentalism

Keywords: Democracy; autocracy; dictatorship; communism and fundamentalism

Not too long ago, to be more precise, on the 4th of February 2016, at the Romanian Academy, in the library amphitheater, there was a scientific debate occasioned by the issuing of my book, *Elective Autocracy vs. Parliamentary Democracy*. The speakers were Alexandru Surdu, member and Vice-president of the Romanian Academy, professor of political science Adrian Miroiu, PhD, who wrote the foreword of my book, Dan-Claudiu Dănișor, at that time rector of the Craiova University, Mircea Duțu, director of the Romanian Academy Institute of Juridical Sciences, the host of the debate, Dana Tofan from the University of Bucharest, and senior lecturer of political sciences Diana-Camelia Iancu, PhD, dean of the Faculty of Public Administration with NSPAS.

They all spoke about the chances of parliamentary democracy faced with the almost aggressive attempts of elective autocracy to gain complete control over the organization of nowadays society. I have tried, during my speech as in my book, to raise the alarm, and I will briefly analyze the actual state or, to be more precise, the conditions under which the political power is exerted in the states whose constitutions sustain the principles of parliamentary democracy.

The first thing that is worth mentioning is that, to tell the truth, we must admit that Democracy is one of the words that started to lose their initial meaning due to the over-use within the political language and not only there, and thus we might say that many times has it become an empty word, almost meaningless. It is enough to follow, within mass-media, one the one hand, the manner of parliamentary activities and, on the other hand, to notice the important and frequent protests all around the world, but more often in Europe and Latin America, by means of which one questions their activity and that of the governments and where one can see special police forces, Molotov cocktails, tear gas and all other repressive materials. To easily understand what is going on, I have analyzed the concept of democracy by opposition to other three concepts of dichotomic political regimes:

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autocracy, dictatorship, communism and fundamentalism[1]. What do we notice? We notice that in almost all nowadays democracies there is a preeminence of a sub-category of democracy, which professor Michelangelo Bovero (probably the most important and credible expert when it comes to actual democratic systems) calls "degenerate democracy", which, as far as I am concerned, is also found within our country, on the one hand, within a vertical distortion of institutional system, meaning the excessive growth of executive power and the accompanying outdating of the role of legislative power, and, on the other hand, by means of personalizing power and the tendency to restrain the friendly decision in order to reach, for too many times, the exertion of mono-cratic power, and thus influencing the citizen control mechanisms over power. The consequence: one gradually diminishes the conceptual border between democracy and autocracy, at first, and then between democracy and dictatorship.

We said it before and we have to clearly restate it that we can call democracy only that system in which collective decisions, the compelling norms for all come neither from above, meaning from a single subject, be it monarch or president of the republic, and nor from a few subjects, either aristocrats or oligarchs which take themselves as being above the collectivity, and that these rules, the juridical conduct rules, represent a product of a decision-making process that starts from underneath, from the basis, a process within which all, or more, have the right to freely and equally participate. We must understand that true democracy implies a form of governance, of a political regime that, in order to come into being and in order to keep on existing, without becoming only an appearance and in order not to disappear, is related to accomplishing some specified substantial conditions, and I analyzed these conditions. The conclusion is, with no exaggeration, that the situation is so sad as we should wonder whether these so-called democratic regimes of too many countries, including ours (following the proportions) are not dangerously getting closer to a critical line an whether, in certain cases, the line between democracy and non-democracy was not stepped over; and whether, by any chance, we are experiencing an elective autocracy. In other words, the fact that one crossed the line between a regime that still ensures a significant degree of liberty and political equality and thus ensures the favorable environment for making some collective decisions and a regime where decisions generally spring from the higher level, but are not the expression of a collective will.

In the present paper, we have showed and proved that some democratic political regimes, like the presidential and semi-presidential ones (as we have it) are more exposed to this danger of "degeneration of democracy", but I have and will further maintain that, finally, quoting Norberto Bobbio: "The worst form of democracy is, at any rate, better than the best dictatorship".

Ladies and gentlemen,

On the occasion of a conference at the Faculty of Law and the Institute for Public Policies, with the Diego Portales University (Chile), from the 8th November 2011[2], the Italian professor Michelangelo Bovero said that the first true turn, from which started the change in orientation and one proposed the change of rules for the political game in a undemocratic or less democratic ways, incorrectly applying the conditions of democracy or changing some of its rules and attacking or eroding the presuppositions or preliminary conditions of democracy took place in 1975, the year of the famous Michael Crozier, Samuel Huntington, and Y. Joji Watanuki report[3], entitled *The Crisis of Democracy*, regarding the democratic manner of governance. (Professor Dan-Claudiu Dănișor draws the attention on the fact that democracy is not a value in itself and that, in fact, it represents a procedure or a set of procedures whose obeying could ensure a democratic governance). According to this opinion, the diagnosis was, in fact, a simple one: democracy is ill- functioning or not at all, meaning that the essential public function is not enough, i. e. that of decision making and it is ill-functioning because it is a very

[1] Michelangelo Bovero, the Conference *Democracy and Fundamental Rights*, http://www.cervantesvirtual.com/servlet/SirveObrasf

[2] https://www.google.ro/ #q=Michelangelo+Bovero+opera.

[3] Huntington, Samuel, Michel Crozier, Joji Watanuki, *The crisis of Democracy, NYPU* (1975) https://hal.archives-ouvertes.fr/halshs-00525735/document.

difficult and too exigent regime. As it follows, the recommended remedy was: to make it better and more efficient, one must reduce the demands. For example:

In case of necessity, democracy must turn into a less comprising regime (as to fundamental rights and liberties or universal vote), meaning that some rights are limited or some categories are excluded, like migrants, thus large groups of people who are not excluded only from the right to obtain citizenship, but are even reduced to semi-servile conditions (see the case of the Romanians from UK).

Then, an extremely dangerous fact, i.e. breaking the rule regarding informative pluralism that should be an indispensible obstacle against the manipulation of public opinion and which the report (that bears the interests of the tycoons of communications) takes as impossible to realize because of the fact that the "objective" logics of global market, facing which, according to my opinion, we must knee as if they were divine laws, lead straight to large concentrations or even monopolization of mass media.

This motives of efficiency would seem to impose a serious simplification of political pluralism, reducing them, in fact, to a dualism and, even more severe, the questioning of the principle of majority, thus transforming the so-called "majority democracy" into a sub-species of democratic regime by inventing and practicing the political game as if this would be a zero sum game in which all the power is given to the winner. Even if this one, for example, gains only 15%, 20%, or 30% of the votes (see the modification of our electing law with just one voting session).

We could add to all these another degenerative aspect of parliamentary democracy, which refers, on the one hand, to the concentrations and confusions among political, economic, ideological or media power, this obscene cohabitation, as professor Bovero puts it, between money and politics and, on the other hand, to the unquestionable capacity of mass media, especially television, to darken more and more the capacity of political judgment of those considered "uneducated" or "ill-educated" citizens and which are the most of the voters, in almost all real democracies, and who can generate a phenomenon called inverted selection: the election of the worst ("good guy" was the appreciation of a voter about the former president).

I have to confess that I was seriously interested in the issue of constitutional democracy, an issue that was and still is debated upon throughout thousands of pages and tens of thousands of hours of conferences, debates, discussions, polemics, etc. for years I have read and studied tens of papers in order to write the book about constitutional democracy and the one about elective autocracy and I am still not sure whether it is a myth or could it become, sometimes, reality. (Alexandru, 2012) I wanted to try to find out if there is a chance to organize a state, a political model that ensures the hope of realizing the ideal of democracy: justice, liberty, and equality. Unfortunately, J. J. Rousseau seems to have been right when, in his famous paper *The Social Contract*, he said that "*If there were a nation of gods, it would for sure be a democracy. Such a perfect form of governance is not allowed for the mortals to have*". These words I have chosen as a motto for my book on constitutional democracy, issued in 2012.

Eduard Balladur is also right when he admits that those who conquer power, ignoring the minimal rules of democracy and behaving like real autocrats, are not willing to share it with no one. *Le pouvoir ne se partage pas* is the title of his book, issued by Fayard Publishing House in 2009, and I have mentioned this title in the motto of this paper.

Finally, one can easily see that the exertion of society leadership through a representative political regime seems not to accomplish the adaptation of governance methods to the dynamic of the economic and social changes, which deepens the fracture between state and society. Esteemed colleagues, dear students, it is high time we understood that *Democracy represents the governance of changes or it does not exist*. Or, since the state is unable to administer the changes by democratic means, it gradually gives up democracy.

Thus, the overpraised society in which the liberal liberty is triumphant turns its back to democracy in fact, since it avoids the lucid control of its members. One needs new models of power and new social policies that are adjacent to social dialogue, by means of which the voting people can express

themselves and actively take part into decision making. They should be able to sanction the public power during the electoral cycle as well.

My opinion is that the failures of Romanian democracy are also due to the style of governance of public administration institutions, to the quality of political acts and to social organization that did not adapt to evolution changes, to new economic demands, to social algorithms, to the requests of life level related ad least to the limit of decency. Thus, they are not the result of the process of transformation of the Romanian society (changes occurred in some other countries, too), but the dimensions and duration depended and still depend on the quality of management, on the value of political and administrative elite. In other words, to keep it simple: so political and administrative elite, so management!

As long as a former president declared that he wants to by a player-president (and, as we have noticed, he was the unique player) and another one publicly declares that he wants "a cabinet of his own", although by Constitution he should be neutral, there can be no consensus and such a person is no longer "the president of all Romanians", as he used to say during the campaign, but the representative of a group having obvious authoritarian tendencies[1].

As far as I am concerned, we are living in a world that is based on *ill and harmful* principles, on the exaggeration of the importance of the *ego*, if we are to mention the religious and ideological fanaticism, both being totally opposed to human nature, with the normality of human life as *a part of a whole*, who was created following the idea of universal harmony, tolerance, and solidarity. Our actions and activities are not in harmony with the intention of the creator of this world and to the physiological structure that was given to us. This is why we should understand that hostile and fanatic attitudes that are manifested within the confrontations with political "opponents" are harmful both for themselves, and for their followers, as the evolution of nowadays knowledge proves it. This disagreement between our authentic *Self* and material and social reality that we have created produced the present day deadlock. This is why we can say, without fear of mistake, that this deadlock, the crisis we are experiencing is, at first, of a moral and spiritual nature. We should think about this and try to find the right ways.

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[1] The authoritarian syndrome and the temptation to personalize power and even the slipping of parliamentary democracy towards dictatorship, excellently analyzed in the paper The State Is Me – an analytical history of the political crisis during July and August 2012 – written by Alexandru Radu and Daniel Barbu, issued in Official Monitor, in 2013, in which the harmful role of the former player-president for our parliamentary democracy.

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Special Administrative Jurisdictions

Vasilica Negruț[1]

Abstract: The Constitution of Romania revised in 2003 establishes the free and voluntary nature of the special administrative jurisdictions, a fact which allows the party concerned to address either the administrative-judicial body or directly the court. If they opted for the administrative-judicial way, it must be followed to the end, then, under the terms established by the law, the party may address the court, under the right of access to justice provided by article 21 of the constitution. The administrative jurisdiction is an activity of solving an administrative litigation by specific procedural rules of judicial procedure, based on the principle of the independence, of insuring the right to defense and the administrative-jurisdictional independence activity, which results in a jurisdictional administrative act. In order to achieve the objectives of the paper, namely to highlight the essential elements of the resolution of litigation according to special administrative jurisdictions, we have achieved an analysis of the legislative acts referring to this activity, of the doctrine and jurisprudence. After examination and empirical research, the paper summarizes and specifies the general conclusions on the role and importance of special administrative courts.

Keywords: special administrative jurisdictions; jurisdictional administrative act; competence; public authority

1. Introduction

The 1991 Constitution, in its original form did not contain special provisions on special administrative jurisdictions. In this context, the question was of whether we may speak of administrative jurisdictions in the specialized literature, being formulated different opinions on the matter (Iorgovan, 2005, pp. 500-501).

Thus, some authors have considered that the Fundamental Law of Romania no longer recognizes the administrative jurisdictions, the only jurisdiction activity recognized by the Constitution being carried out by High Court of Cassation and Justice and by other courts, according to art. 125 (Popescu, 2004, pp. 77-98)[2]. On the contrary, other authors have argued the opposite, exemplifying with typical example of the Court of Auditors mentioned in the 1991 Constitution (art. 139, par. 1) and Title V dedicating a special and specialized constitutional jurisdiction or constitutional contentious – an activity achieved by the Constitutional Court (Iorgovan, 2005, p. 501; Rîciu, 2009, p. 194).

Therefore, in interpreting all the provisions of the Romanian Constitution of 1991 it results that it establishes: *a constitutional jurisdiction*, achieved by the Constitutional Court according to article 144; a *judicial jurisdiction* exercised by the High Court of Cassation and Justice and by other courts

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[2] Art. 125 of the unrevised Constitution established: *"(1) Justice shall be achieved by the Supreme Court of Justice and other courts established by law. (2) It is forbidden to establish extraordinary courts. (3) The competence and procedure of courts shall be regulated by the law".*

provided by law, according to article 125; *an administrative jurisdiction* accomplished by certain jurisdictional organs, such as the Court of Auditors, according to article 139 of the Constitution, or the Superior Council of Magistracy, which had the role of disciplinary council of judges (art. 133, par. (2) of the unrevised Constitution) (Rîciu, 2009, p. 194). Complementing this view, which we share, we also mention the Plenum Decision no. 1 of 8 February 1994 the Constitutional Court on the free access to justice for persons to defend their rights, freedoms and interests[1]. Under this decision, the Constitutional Court recognizes that "*The establishment of a judicial administrative proceeding is not contrary to the principle laid down in art. 21 of the Constitution on the freedom of access to justice, while the decision of the administrative jurisdiction body may be challenged / in front of a court.*" Therefore, the Constitutional Court acknowledged the existence of administrative jurisdictions, even if they were not expressly provided by the Constitution of 1991. Also, by Decision No. 35/1993, the Constitutional Court stated that the existence of jurisdiction proceedings, besides the justice itself, it is not contrary to constitutional provisions, but rather by instituting such proceedings by organic law it is permitted the settlement of litigations within the structures of activity of those involved or interested.[2]

Through the revision of the Constitution, the term "administrative jurisdictions" acquires an express recognition by art. 21, par. (4) which states that the *special administrative jurisdictions are optional and free.*

2. Special Administrative Jurisdictions

The Law amending the Constitution represents a milestone in terms of administrative contentious, achieving a true "revolution" of the regulation, a change of philosophy regarding the role and place of administrative courts, as noted the reputed professor Antonie Iorgovan in its last great reference work (Iorgovan, 2005, pp. 502-503).

Following the introduction of art. 21, par. (4) of the Law for amending the Constitution there were set changes in other texts. We note in this respect the provisions established by the Court of Auditors, whose judicial attributions have been eliminated, art. 140, par. (1) IInd thesis stating that "*under the organic law, the litigations resulting from the activity of the Court of Auditors shall be settled by the specialized courts*" and according to art. 155, par. (6) "*until the establishment of specialized courts, the litigations resulted from the Court of Audit's activity shall be solved by the ordinary courts*".

By this text (art. 21, par. (4) of the Constitution), it is noted in the specialized literature, it was aimed at removing the anachronisms of institutionalization of preliminary and mandatory procedures of administrative jurisdiction, whereas in most such jurisdictions it can be achieved the "confusion of the judge with the party" (Deleanu, 2003, p. 13).

Since the optional and free nature of *special administrative courts* established by art. 21, par. (4) of the revised Constitution and the text of art. 6, par. (1) of the Law of administrative contentious no. 554/2004, in its editorial form the *special administrative jurisdictions* have generated controversy in doctrine, imposing the clarification of the notion of *prior administrative proceedings* and *judicial administrative procedure* (Puie, 2009, p. 318). According to art. 2, par. (1), letter j) of Law no. 554 *prior procedure (complaint)* represents the "application requesting to the issuing public authority or to

[1] Published in the Official Monitor no. 69 of 16 March 1994.
[2] Published in Official Monitor No. 218 of 6 September 1993. According to the Decision no. 35/1993, "*The fact that there is a jurisdictional-administrative way is not similar to free access to justice. In this respect, art. 21 should be in conjunction with article 123 of the Constitution which defines the meaning of "justice" stating that it is administered by a distinct category of public authorities, namely the courts".*

the superior authority, as applicable, the reexamination of an administrative act with individual or normative feature, in the meaning of its revocation or amendment." The role of the preliminary procedure is to provide the issuing public authority or superior authority the ability to verify the legality and appropriateness of the administrative act, which will, as a result of the control to decide whether to revoke, amend or maintain the administrative act.

According to art. 2, par. (1), letter e) *the special administrative jurisdiction* constitutes "the activity achieved by an administrative authority which has, according to the special organic law in the matter, the jurisdiction for solving a conflict on an administrative act, following a procedure based on the adversarial principals, of ensuring the right to defense and independence administrative-jurisdictional activity".

As it can be seen from the text of the mentioned article, the administrative authorities which exercise the special administrative jurisdiction are established only by organic law.

According to the current doctrine, the administrative jurisdiction represents "a special type of jurisdiction", which represents the settlement activity of an administrative litigation, according to legal procedural rules specific to judicial proceedings, which results in an administrative act with judicial feature (Vedinaş, 2015, p. 154).

By modifying the Administrative Litigation Law by Law no. 262/2007, it has been reformed the control institution of jurisdictional administrative acts (Rîciu, 2009, p. 200), ending in this way the confusion of administrative jurisdiction, the parallel appeal and the prior procedure.

By art. 6 of Law no. 554/2004, as amended, it regulates the procedural aspects related to exercising appeals against the judicial administrative acts, either before the special administrative jurisdiction, if they chose to do so, either before the courts of administrative contentious.

To qualify a procedure as being administrative-jurisdictional, it was highlighted in the specialized literature, there should be a document issued by an administrative authority, that is an organ of the central government or local administration invested with attributions of adjudication of conflict on a typical administrative act, with individual character, born between two or more physical or legal entities or between private persons and public authorities (Rîciu, 2009, p. 200). These issues are deducted according to the definitions given by Law no. 554/2004 of the administrative jurisdictional act[1] and the special administrative jurisdiction.

Also, conflict resolution is achieved by summoning the parties respecting the adversarial principle, being recognized to the parties the right of defense, being able to be represented or assisted by a lawyer.

It does not fall under the term "special administrative jurisdictions" the prior or hierarchical appeals set by some legislative acts as conditions for the introduction of some actions in justice (The Law of Administrative Contentious, for example), remedies that do not involve the contradictory, as they are settled based on rules of non-adversarial administrative proceedings (Apostol Tofan, 2015, p. 116).

However, the administrative-judicial procedure requires a body independent of the parties in the litigations, set up in this regard, which are not in the hierarchical relationships compared to the issuing authority of the act.

[1] According to art. 2, par. (1), letter d) of Law no. 554/2004, the administrative-judicial act is *the act issued by an administrative authority vested, by organic law, with special responsibilities for administrative jurisdiction.*

As shown in art. 6, par. (1) of Law no. 554/2004, the *special administrative jurisdictions* are optional and free. Therefore, if by the law it is regulated a certain legal administrative procedure to challenge an administrative act, it may be followed by the petitioner for free or it can refer the matter directly to the administrative court, the latter procedure is not compulsory.

By art. 6, par. (2) of the Law of Administrative Contentious also states that the "susceptible administrative acts, according to the organic law, subject to special administrative jurisdictions it may be appealed to the administrative contentious court, in compliance with art. 7, par. (1) if the procedure does not intend to exercise the administrative jurisdiction procedure".

So, under this provision, the injured party through a typical administrative act of an administrative authority, deemed illegal, has the following options: a) to carry out the preliminary procedure provided for by art. 7, par. (1) of the Act and then to address the administrative contentious court in accordance with art. 11, par. (1) and (2)[1] if the party does not intend to exercise judicial administrative proceedings; b) follow the administrative jurisdictional procedure established by the special law, in which case the administrative review will settle the dispute by issuing an administrative review, thus becoming applicable the provisions of art. 6, par. (3) and (4) of Law no. 554/2004.

According to par. (3) the "*administrative-jurisdictional act for which, according to the special organic law, it is expected to appeal before a different special administrative jurisdiction it may be appealed directly to the administrative contentious court, within 15 days from notification, if the means to depart from the administrative and judicial remedies*", which means that the administrative jurisdictional act may be appealed directly to the administrative court from the date of notification on the document, even if there are special administrative jurisdictions that contain one or more routes appeal.

Article 6, par. (4) of Law no. 554/2004 governs two situations of the victim: a) opting for the special administrative jurisdiction, but it does not want its continuation; b) exercising the appeal to an administrative jurisdictional body, but it wants to renounce at it during its settlement. In both cases, the renunciation decision must be notified to the administrative judicial body in question and thereafter, within 15 days from notification, the party may notify the administrative contentious court without further going through the prior procedure established by art. 7, par. (1).

The Legislation in Romania establishes a series of jurisdictional bodies in various fields: the committees for settling the issues provided by Law no. 33/1994 on expropriation for cause of public use (art. 15); disciplinary committees within public authorities and institutions established by Law no. 188/1999 (art. 79)[2]; Government Emergency Ordinance no. 34/2006 on the granting public procurement contracts, public works and services lease contracts. By this legislative act it was established the National Council for Solving Complaints which, according to art. 257, par. (1) is an independent body with administrative-jurisdictional activity, and according to paragraph (4), regarding its decisions, the Board is independent and it is not subject to any authority or public institution. The Council has jurisdiction to hear appeals concerning the granting procedure, through specialized completes, constituted according to the Rule of organization and functioning of the Council, approved

[1] Regarding art. 6, par. (2) of Law no. 554/2004, the Constitutional Court Decision no. 475/2008 states that "the establishment of an administrative procedure for handling requests, prior referral to court is not liable to restrict the access to justice and that no constitutional provision does prohibit by law to establish a prior administrative procedure, without its jurisdictional feature. This is because the text of art. 21, par. (4) of the Constitution confers an optional feature of the administrative judicial procedures, leaving open the possibility that, by law, to impose the conducting of a procedure without jurisdictional feature".

[2] Given that these committees are made up of civil servants of the issuing authority of the contested measure, it is questionable the independence of the disciplinary commissions as administrative disciplinary jurisdictions for civil servants.

according to art. 291 of Government Emergency Ordinance no. 34/2006; County committees for the implementation of the Land Law no. 18/1991 (art. 52) etc.

3. Conclusion

Establish the voluntary and free feature of the special administrative courts is one of the guarantees of free access to justice. The current understanding of the administrative jurisdictions highlights, as the well-known professor Antonie Iorgovan noticed in its latest reference work since 2005, that it is not just a simple evolution of a regulation, but a true "revolution" to regulation, a change in philosophy regarding the role and place of the administrative jurisdiction and implicitly of the administrative acts by which it is achieved, i.e. the administrative jurisdictional acts.

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The Work Performed within Special Legal Labour Relations

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

Keywords: public servant; magistrates; cooperative members; profession

Introduction

Hereinafter we shall analyze a series of labour relations specific to certain professional categories in Romania, with their similarities and, especially, their differences with respect to the legal labour relation regulated by the Labour Code.

Concept and Terms. Solution Approach

Labour (service) relations of public servants

According to the dispositions of Law no. 188/1999 regarding the Statute of public servants[2], they are in service relations with the institutions and authorities they belong to, relations which are exercised on the grounds of the appointment administrative act [art. 4, para. (1)].

According to the legal provisions mentioned, the *public service* can be defined as the *ensemble of duties and responsibilities established on the grounds of the law, for the purpose of achieving the public power prerogatives by the central public administration, the local public administration and the autonomous administrative authorities* [art. 2, para. (1)].

Public services can be divided into three classes, different with respect to the level of education required for their fulfillment, respectively, long-term higher education, short-term higher education and high school education.

Under the aspect of salary, Framework-Law no. 284/2010 is applied, regarding the unitary salary payment of the staff paid from public funds.

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[2] Republished in the Official Gazette no. 365 of 29 May 2007, subsequently modified through Law no. 294/2010, published in the Official Gazette no. 877 of 28 December 2010.

Law no. 188/1999 constitutes *common law* for all categories of public servants.

Even though in the specialty literature there were disputes regarding the integration of public servants either in labour law or in administrative law, these discussions present preponderantly theoretical interest (Țiclea, 2014).

It is obvious that the public servants perform the activity on the grounds of the service relationship and not on the basis of the individual labour contract, but it is equally evident that the common law regime applicable to public servants is greatly similar to that of employees. In addition, the last regulations in the field (see: Law of social dialogue no. 62/2011; Framework-Law no. 284/2010 regarding the unitary salary policy of the staff employed in the budgetary sector; Law no. 329/2009 regarding the reorganizing of public authorities and institutions, the rationalizing of public expenditure, the support of the business environment and the observance of the framework-agreements with the European Commission and the International Monetary Fund), regulate identically in very many aspects the problematic of employees and that of public servants (see the institution of the collective labour contract and of the collective agreements which overlap in many aspects; labour conflicts, the strike, which is equally applied for employees and public servants).

Also, what brings them closer to the statute of employees is the fact that[1]: they are allowed to associate in trade unions, allowed to resign, are disciplinary investigated and sanctioned, perform their activity within a work schedule of 8 hours a day and 40 hours a week, can perform extra work, have a rest leave, have a salary, can be delegated, relocated and transferred etc.

Still, what obviously separates them from employees is the fact that public servants are *bearers of public power*, which they exercise within the limits of their positions (Ticlea, 2014).

Still, within a public institution or authority, certain persons have the position of employee and others of public servant, but their duties are similar or identical (Ștefănescu, 2014).

Therefore, given the specific of the activity and the powers conferred, public servants are subjected to distinct regulations, but according to art. 117 of Law no. 188/1999, the statute of the public servants is completed with the provisions of the labour legislation, to the extent to which it does not contradict the legislation specific to the public service.

Both the public servant and the employee are in a *typical labour legal relation*: as the employee, the public servant is subordinated, from the legal (and economic) point of view to his employer, which pays him a salary; as an equivalent compensation of his work. It must be noted that the High Court of Cassation and Justice also qualified the relations in which a public servant is with the authorities and public institutions as labour relations[2].

Not last, the Court of Justice of the European Union, in the current context, considered that public servants must be assimilated to workers in what concerns the application of the rules of the free travel of persons (Decision of 24 March 1994 in Case 71/1993 *Van Poucke*).

All these legal regulations in effect in the matter of the public service emphasize the fact that there is no basic impediment in the path of Romania's ratification of Convention no. 151 (1978) regarding the protection of the organization right and the procedures for the establishing of the working conditions within the public service.

[1] Through Decision no. 1221/2009 of the Constitutional Court, published in the Official Gazette no. 759 of 6 November 2009, it was held that "public servants represent a separate category of employees, which is different through the specific legal status".
[2] Decision no. 77 of 5 November 2007, published in Official Gazette no. 553 of 22 July 2008.

Labour Relations of Soldiers and Professional Officers

The profession of military personnel presupposes an activity meant to ensure the functioning, improvement and management of the military body, during peace and war times. The military personnel is subjected to a special legislation, respectively Law no. 80/1995 regarding the Statute of the military staff[1].

According to this law, by *military personnel* are understood the Romanian citizens to whom the rank of officer, military master or petty officer has been granted, in connection to their military and specialty training (art. 1).

Given art. 16 para. (3) of the Constitution, which states that public service may be civil or military, it means that professional military staff are not employees, in the meaning of the Labour Code.

With the elimination of the mandatory military service, through Law no. 446/2006 regarding the population's training for defense[2] and through Law no. 384/2006 regarding the Statute of soldiers and professional officers, the legal framework for this distinct body of military staff was regulated.

According to art. 1 para. (2) of Law no. 384/2006, soldiers and professional officers are employed on the basis of an *employment contract* which is, in reality, an *individual labour contract of a particular type* (Beligrădeanu, 2003), concluded for a determined period of 4 years, with the possibility to extend upon expiry; for a period of 2 or 3 years.

From the corroboration of the legal provisions, it is derived the fact that, in order to gain the capacity of professional soldier, the following requirements must be met:

- the person in question, woman or man, to be Romanian citizen with his/her domicile in Romania;
- to be maximum 45 years old;
- to have been selected on the basis of his/her application;
- to have followed a training program;
- if the person is reservist, to have given up, in writing, the ranks gained before;
- to have taken the military oath (it is taken before appointment).

The parties to the contract are the professional soldier and the employing military unit.

This particular type of individual labour contract presents the following characteristic traits:

- the enlisted person is subordinated to the employing military unit; with the observation that this type of subordination that follows military discipline is much more severe than the subordination of a regular employee;
- the contract is named, it is on determined time, *intuitu personae*, is concluded in writing and it is commutative;
- the labour relations are executed through successive actions;
- the enlisted men receive a salary for the activity performed, called pay (T.N. In original, soldă);
- the enlisted men may be delegated, relocated or transferred, they have specific rights and obligations, they answer disciplinary or materially, and the labour relation may end through

[1] Published in Official Gazette no. 155 of 20 July 1995, as subsequently modified and completed.
[2] Published in Official Gazette no. 990 of 12 December 2006, as subsequently modified and completed.

resignation (Țiclea, 2014).

Labour relations of magistrates

The magistrates' labour relations caused numerous controversies in the specialty doctrine, where several opinions were formulated, as follows:

- the magistrates would be part of the category of dignitaries because they benefit of a gross monthly employment indemnity and are appointed by the President of Romania, at the proposal of the Superior Council of Magistrates;
- the magistrates would have a position involving public power, being subjected to statutory regulations;
- the magistrates would constitute a special category of personnel which is part of the judicial authority and which has the mission to exercise judicial power, being in a labour legal relation with the authority they are part of;
- the magistrates can be considered as occupying a public office because the public service is not only that exercised by public servants; the interpretation of the concept of public service is not limited to that indicated in art. 2 of Law no. 188/1999, but also comprises the authority public offices, among which, that of the magistrates[1].

The relevant provision are found in Law no. 303/2004 regarding the statute of judges and prosecutors[2] which omits, however, to state the nature of the magistrates' labour legal relation.

Certainly, magistrates are part of those exercising public power, but also certain is the fact that they are in a labour relation, their appointment to office being impossible to conceive except with the consent of those in question. The High Court of Cassation and Justice itself stated[3]: "the magistrates constitute a special category of staff which perform their activity on the basis of a *sui generis* labour relation".

The statute of magistrates presupposes certain particularities:

- any collective and/or individual negotiation with respect to the indemnities and labour conditions is out of the question;
- they do not subordinate to any hierarchical body;
- they enjoy immovability – judges and special stability– prosecutors;
- they are incompatible with any other public or private office, except in higher education;
- cannot strike;
- even though reference is made, with respect to magistrates, top the "performance of their activity on the basis of a labour legal relation", in which one party to the labour relation is the magistrate (having the capacity of servant/clerk, *lato sensu*), it cannot be accurately established which is the other party to the labour relation, which would have the capacity of

[1] Dec. CC no. 235/2011 regarding the unconstitutionality exception of art. 69 para. (1) letter e) of Law no. 360/2002 regarding the Statute of the policeman, published in Official Gazette no. 278 of 20 April 2011.
[2] Republished in Official Gazette no. 826 of 13 September 2005, as subsequently modified and completed.
[3] Decision no. 46/2008, published in Official Gazette no. 853 of 18 December 2008.

employer. In this sense, we agree with the opinion formulated in the doctrine (Ștefănescu, 2014), that, in reality, in this particular case, the employer's duties would be shared between several legal entities, respectively, on the one hand, the High Court of Cassation and Justice or the Prosecutors' Office attached to the High Court of Cassation and Justice; the Appeal Courts or the Prosecutors' Offices attached to the Appeal Courts; the Tribunals or Prosecutors' Offices attached to the Tribunals, and, on the other hand, the Superior Council of Magistrates and the President of Romania.

In conclusion, the labour legal relation of the magistrates is a legal relation which has as basis the expression of the agreement of will, it is a *contract – not named*, of public law, concluded with the Romanian state, represented by the Superior Council of Magistrates and the President of Romania.

Labour relations of cooperative members

The labour relations of the cooperative members are regulated according to the dispositions of Law no. 1/2005 regarding the organization and functioning of the cooperative enterprises[1].

Within the cooperative enterprise, the activity is performed by persons who:

- have exclusively the capacity of cooperative members;
- have a double capacity of cooperative members and employees;
- are exclusively employees.

According to art. 33 para. (1) of Law no. 1/2005, between the cooperative company and the cooperative member, the following categories of relations may exist:

- *patrimonial*, materialized in the obligation of the cooperative member to submit the shares;
- *labour*, in case of cooperative members associated for labour and capital, on the grounds of the individual labour contracts or of the individual labour agreement, as the case may be, concluded with the cooperative enterprise whose member he is;
- *commercial-cooperative* for the product deliveries and service provisions made by the cooperative member for the cooperative enterprise; as independent economic agent.

The essential difference between the cooperative labour relation and the legal relation based on the individual labour contract is the fact that the first has as basis an association agreement which generates a complex legal relation.

In the specialty literature was also formulated the opinion according to which a distinct branch of law should be considered – cooperative law (Athanasiu, 2005).

At present, the labour relations within the cooperative environment do not make the object of analysis in any branch of law. We agree with the opinion formulated in the doctrine according to which it is possible and, at the same time, justified, at present; to analyze the labour relations of cooperative members within labour law, due to the similarities existing with the labour relation of employees – art. 33 of Law no.1/2005 expressly refers to the individual labour contract, falling under the requirement of art. 2 of the Labour Code (in order for this Code to be applicable, a labour contract must exist) (Naubauer, 2012).

[1] Published in Official Gazette no. 172 of 28 February 2005.

Labour relations of priests

To the legal relations of this professional category are applied the specific regulations of each religious faith and, as addition, the regulations of the Labour Code; as common law.

The regulations in the Statute for the organizing and functioning of the Romanian Orthodox Church, recognized through Government Decision no. 53/2008[1], define a special regime of the clerical staff, respectively:

- conditions of appointment;
- incompatibilities;
- appointment;
- financial resources for salaries;
- granting of the rest leave;
- disciplinary jurisdiction;
- transfer;
- revocation from office.

Labour relations of the members of the diplomatic and consular core

The situation of the members of the Diplomatic and Consular Core is regulated through Law no. 269/2003 regarding the Statute of the Diplomatic and Consular Core of Romania[2]; the members of this Core are, usually, career diplomates and have a specific statute conferred by the duties and responsibility due to them.

According to art. 2 of Law no. 269/2003, the following persons have the capacity of members of the Diplomatic and Consular Core:

- the minister of foreign affairs;
- the secretaries of state and under-secretaries within the Ministry of Foreign Affairs;
- the general secretary and the deputy general secretary within the Ministry of Foreign Affairs;
- the diplomatic and consular staff performing their activity in the central administration of the Ministry of Foreign Affairs, within embassies and permanent missions attached to the international organizations, as well as within the consular offices of Romania, including the persons coming from the Foreign Trade Department and from other ministries and institutions, throughout the period of being sent on mission abroad with diplomatic or consular rank.

According to art. 3 para. (1), "the statute of the diplomatic and consular core of Romania is completed with the provisions written in the labour legislation and in the statute of public servants, unless this statute establishes differently".

Still, the provisions of Law no. 269/2003 are contradictory, in the sense that diplomats are treated as both employees and public servants. Thus, according to art. 51 para. (1) letter f), the end of the capacity of

[1] Published in Official Gazette no. 50 of 22 January 2008.
[2] Published in Official Gazette no. 441 of 23 June 2003, as subsequently modified and completed.

member of the Diplomatic and Consular Core is also regulated "through the disciplinary termination of the individual labour contract with the Ministry of Foreign Affairs" and through art. 67 is established the possibility to suspend such contracts, from here being derived the fact that the diplomats have the capacity of employees; on the other hand; according to art. 5 of Law no. 188/1999, it is established that the public servants *performing their activity within the diplomatic and consular services* may benefit of special statutes.

In conclusion, except for the members of the Diplomatic and Consular Core of Romania, indicated in art. 2 para. (1) letters a)-c) of Law no. 269/2003, the nature of the labour legal relation for the other diplomats should be clarified.

In any case, diplomats are in a labour employment relation with the Ministry of Foreign Affairs, regardless of its legal nature; if it is based on the individual labour contract or the administrative act of appointment to office (Athanasiu and others, 2007).

The legal relations of legal counselors

The organization and exercise of the profession of legal counselor is regulated through Law no. 514/2003 regarding the organization and exercise of the profession of legal counselor[1].

According to art. 1 of the law, the role of the legal counselor is to *protect the legitimate rights and interests of the state, of the central and local public authorities, of the public and public interest institutions, of the other public law legal entities, as well as of the private law persons, in the service of which he is, according to the Constitution and the laws of the country.*

The legal counselor may have the capacity of employee of that of public servant (art. 2 and 3 of Law no. 514/2003). Thus, the profession of legal counselor cannot be a liberal profession. As such, the exercise of the profession of legal counselor is excluded outside the labour (service) relations established by law. Thus, the exercise of the profession of legal counselor is incompatible with the capacity of lawyer, as well as with any other profession authorized or with paid salaries in the country or abroad [art. 10 letter a) and c)].

As a consequence, the applications for the authorization to establish and register consultancy, assistance and legal representation companies were and are inadmissible.

According to art. 2 of Law no. 514/2003, the *profession of legal counselor is exercised either on the basis of a service relation, in the conditions established by Law no. 188/1999 regarding the statute of public servants, or on the basis of a labour legal relation, following the conclusion of an individual labour contract according to the dispositions of the Labour Code.*

At the same time, through art. 11 of Law no. 514/2003 it is indicated that the exercise of the profession of legal counselor is compatible with the university and legal research didactic activity, with the literary, cultural and *publishing, not paid,* activity. This provision is totally illogical and inequitable, given the fact that any other public servants or employees may exercise their function/profession in parallel with the employee publishing activity[2].

[1] Published in Official Gazette no. 867 of 5 December 2003, subsequently modified and completed.
[2] Still, the Constitutional Court, through Decision no. 300/2004, published in Official Gazette no. 734 of 13 August 2004, established the fact that art. 11 of Law no. 514/2003 is constitutional.

The Situation of Attorneys Receiving a Salary within the Profession

The organization and exercise of the profession of attorney is regulated through Law no. 51/1995 for the organization and exercise of the profession of attorney, republished[1].

In the specialty doctrine (Baias, 1995), the practice of law as an attorney is defined as being that *liberal profession whose members, attorneys registered in Bars, give consultations with legal character, draft legal documents, assist and represent individuals and legal entities before the courts of law, the public authorities or institutions, as well as before any other subject of law, for the purpose of defending and capitalizing, within the limits of the law, on the rights, liberties and interests of their clients.*

Law no. 51/1995 establishes the fact that the profession of attorney is *free and independent.* As a consequence, the lawyers cannot have the capacity of employees, hence, they cannot be part of a labour legal relation.

According to art. 5 of the law, attorneys can exercise their profession in individual offices, associated offices, civil professional societies and limited liability civil professional societies.

In the associated offices, the civil professional societies and the limited liability ones, the tenured or associated attorneys can exercise their profession together with the established or the trainee lawyers, who have the capacity of collaborators. Hence, the civil professional society may also have *employed attorneys* [art. 5 para. (5) of Law no. 51/1995].

Thus, the collaborator attorneys performs his activity on the basis of a collaboration contract, of civil nature, and the attorneys employed within the profession conclude an employment contract.

The employment contract is not an individual labour contract and is not subjected to the labour legislation; it is concluded in written form between the tenured attorney of the office and each separate attorney.

According to art. 207 of the Statute of the profession, the employed attorney is not entitled to his own clients and in his professional activities must mention the office he works for. Moreover, it is specified that the employed attorney "undertakes to dedicate the entire agreed working time to the fulfillment of the duties entrusted by the society, with his full professional capacity". Considering that the employed attorney receives an amount of money from his employer, the civil professional society, it can be deemed, as a rule; that there is a form of economic subordination between the two parties (however, no legal subordination).

In conclusion, the situation of attorneys employed within the profession is unclear from the viewpoint of the applicable legal regime, because:

on the one hand, the profession of attorney presupposes the performance of an activity freely and independently and the position of employee presupposes legal subordination and dependency towards the employer;

on the other hand, it is noticed a lack of correlation of the dispositions from the Labour Code – art. 1 para. (2) – which establish that "this code also applies to the labour relations regulated by special laws, only to the extent to which they do not contain specific derogatory dispositions" and art. 15 letter a) of Law no. 51/1995 – which regulates the possibility of the existence of the labour legal relation through the performing of an activity paid in the form of a salary, by an attorney within his profession, without

[1] Republished in Official Gazette no. 98 of 7 February 2011, as subsequently modified and completed.

the special law establishing specific derogatory dispositions from the Labour Code (Naubauer, 2013).

not least, in the specialty doctrine the opinions are divided: part of the specialists go in the direction of qualifying this contract as an "atypical labour contract"(L.Dănilă, 2008), while others claim "we are in the presence of a contract different from the labour contract, having a special legal regime, regulated by the Statute of the attorney profession"(T:Briciu, 2012).

In our opinion, in general, the liberal professions, especially that of attorney, cannot be exercised as employee, except as exception; attorneys may cumulate the capacity of member of the liberal profession with that of employee only in higher education.

Situation of Trainee Notaries

According to art. 1 of Law no. 36/1995, *the notary activity ensures to the individuals and legal entities the establishment of their non-litigious civil or commercial legal relations, as well as the exercise of their rights and the protection of their interests.*

The notary activity is performed by public notaries (art. 2) who have the statute of an *autonomous function* (art. 3).

The activity of public notaries is performed in offices, where one or several associated public notaries may act.

The full tenured notary of the office may hire trainee notaries and administrative staff (art. 14).

According to the Statute of the profession, it is stated that the trainee notary is employed through an individual labour contract, concluded for a determined period of 2 years, respectively, for the duration of the traineeship (art. 55). Thus, trainee notaries are employees of the notary offices, being in typical labour relations with their employers (full tenured notaries), are in a subordination relationship with them and receive a salary for the work performed.

After passing the public notary exam, they lose the capacity of employee, becoming tenured in notary offices.

The Situation of the Trainee Officers of the Court

According to art. 12 of the Statute of the National Union of Officers of the Court, this profession is *liberal and independent*.

The officers of the court exercise a public interest service, consisting in the forced execution of the civil dispositions in the executory titles (art. 1 of the Regulation for the enforcement of Law no. 188/2000 regarding the officers of the court[1]).

The officers of the court are appointed by the minister of justice and fulfill a public interest service; still, they are neither public servants, nor employees. Officers of the court can organize and operate either in an individual office (a single officer of the court) or two or more officers of the court may associate within a professional society (the association is of civil nature and excludes the subordination of the associates).

However, in either of the organization forms, the tenured or associated officers of the court may hire trainee officers of the court and auxiliary staff. The trainee officers of the court are those who have

[1] Published in the Official Gazette no. 64 of 6 February 2001, as subsequently modified and completed.

been admitted to the profession and who will conclude an individual labour contract for a determined period of 2 years with the tenured officer of the office or the professional society. Hence, they are in typical labour relations; subordinating to their employers and receiving a salary for the work performed. The duration of the individual labour contract is equivalent to the duration of the professional training period, which is calculated from the moment of concluding the labour contract.

After passing the profession tenure exam, the trainee officer of the court loses his capacity of employee and starts exercising a liberal profession (Popescu, 2014).

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The Transfer of Sentenced Persons Held in Third Countries, in order to serve the Sentence or the Measure of Deprivation of Liberty in a Penitentiary or a Medical Unit in Romania. Critical Observations

Ion Rusu[1]

Abstract: In the current study we have examined the institution Sentenced Persons Held in Third Countries, in order to serve the sentence or the measure of deprivation of liberty in a penitentiary or a medical unit in Romania, focusing on the recognition of the foreign judgment by the competent courts in Romania. The conducted examination has revealed some shortcomings of the Romanian special law, which refers specifically to the absence of the convicted person from hearing to the appeal of the case, and his inability to defend. Also, it has been highlighted the fact that no Romanian legislator has taken into account the possibility of requesting the transfer of a minor convicted in a third State to a penalty or an educational measure of deprivation of liberty. The novelty of the work covers both examining the institution in the light of the Romanian jurisprudence and the formulated proposals de *lege ferenda*. The work also continues other studies published in some journals or volumes of international or national conferences, achieved in the context of researching the institution of international judicial cooperation in criminal matters. The paper can be helpful to scholars, master students and practitioners in this field.

Keywords: The procedure for recognition of the foreign judgment; circumstances; obligatory grounds for non-recognition.

1. Introduction

Regarded as perhaps one of the most important form of international judicial cooperation in criminal matters, the recognition and enforcement of judgments in other states, in time it has appeared to be also one of the most complex forms of cooperation with major implications in terms of bilateral relations between the countries involved in the process.

As argued in doctrine, when we examine the particularly complex institution of recognition of criminal judgments and foreign judicial documents, they should cover the criminal judgments emanating from the Romanian judicial authorities and those emanating from the competent judicial authorities of other State. (Boroi & Rusu, 2008, p. 347)

On the other hand, it should be considered that a person (usually a Romanian citizen), convicted in another state, has the right to request his transfer for the enforcement of a criminal law sanction of deprivation of liberty in Romania.

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We specify that the transfer of a person in this situation and therefore enforcing the sanction of criminal law in Romania cannot be achieved until after the judicial authorities recognize the criminal ruling which has been applied to the person concerned in the third state.

Consequently, when according to the Romanian law, such a judgment is not recognized, transferring the person concerned cannot be achieved as this person would execute on the Romanian territory a sanction of criminal law applied by a court of a third country, that cannot produce legal effects on the Romanian territory.

The institution of transferring a convicted person held in third countries, in order to serve the sentence or measure of deprivation of liberty in a penitentiary or in medical unit in Romania is governed by the provisions of Title V, Chapter II, Section 1 of Law no. 302/2004 on international judicial cooperation in criminal matters.[1]

In the present study we proceed to examine this institution in the light of the Romanian law and internal jurisprudence, with some critical comments; in order to avoid repeating the judicial act framework, i.e. Law no. 302/2004, whenever we refer to it we will use the phrase "The Special law".

2. Measures Prior to Court's Apprehension

After receiving the documents and information provided by law (referred to inarticle132 mentioned above), the directorate of the Ministry of Justice sends them to the office attached to the court of appeal in whose territorial area resides the convicted person for the purpose of referral to the Court of Appeal with territorial jurisdiction.

We mention that the documents and information referred to the special law provisions concern the following:

- Name, surname, nickname, the used alias only if there is knowledge of it, as well as gender, nationality, identity card number or passport number, date and place of birth, photograph and last address or known residence, the languages that the person understands;

- Information about family, social or professional ties that he has in Romania;

- Total length of sentence, the date of commencement of the sentence, the date on which the sentence would be deemed as served, time served, if applicable, number of days to be deducted from the penalty due to the effects of amnesty or previously granted pardon;

- Information on parole or early release, if applicable;

- A copy, certified as appropriate of the criminal ordinance or judgment passed in the first instance and, where appropriate, in exerting the ways of appeal;

- The applicable legal provisions;

- Except the case where the sentenced person is in Romania, the declaration of the convicted person on the request of execution in a penitentiary or medical unit in Romania of the sentence imposed by the issuing State;

[1] Published in the Official Monitor of Romania, Part I, no. 594 of 1 July 2004, subsequently supplemented and amended by several acts, republished, published in the Official Monitor of Romania, Part I, no. 377 of 31 May 2011, the last change being promoted by adopting Law no. 300/2013 for amending and supplementing Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official Monitor of Romania, Part I, no. 772 of 11 December 2013.

- If appropriate, any expertise, report or other medical documents attesting the physical and mental state of the convicted person, the treatment undergone in the territory of the issuing State and any recommendation for further treatment in Romania and, in the case of a convicted minor, a copy of the social inquiry report;

- Information on the possibility of exercising by the sentenced person, after his transfer, an extraordinary way of appeal against the conviction sentence;

- in the case of judgments given in absentia, when the convicted person is in the territory of the issuing State, the information about a person's right to pursue a way of appeal that has the effect of re-examination of the case in his presence (art. 132 of the special law).

After receiving the file the prosecutor appointed by the competent general prosecutor has the duty to verify that:

a) the execution of the foreign judgment does not cause a breach of the non bis in idem principle;

b) the convicted person is prosecuted in Romania for the same offense/s for which it was passed the foreign judgment which is to be recognized;

c) the convicted person is prosecuted in Romania for offenses other than those for which the foreign judgment was passed;

d) it is incident any of the grounds for refusal provided for inarticle136, par. (2);

e) the convicted person benefits from the effects of the specialty rule.

The provisions relating to the specialty rule applies only where provided for in the treaty applicable in the relation with the issuing State or if appropriate the reserve or declaration given by the issuing State to a multilateral treaty, accepted by Romania, the transfer being conditioned by this rule (of specialty).

The law requires *that the information necessary for the verifications provided for in par. (2), letters b) and c) are communicated to the prosecutor within 5 days since the date of the request*.

Also, in the case where the prosecutor finds that the person benefiting from the effects of the specialty rule, it will inform the prosecutor who performs or supervises the criminal prosecution. This applies to the case against the convicted person where there are conducted criminal investigations for committing other crimes than those for which he was convicted abroad.

In the situation where, until informing the competent court, the application is withdrawn, the case prosecutor will decide ranking and returning the file to the specialized directorate of the Ministry of Justice.

In recent doctrine it was argued that, as shown by the case prosecutor there must be verified some data absolutely necessary to solve the case.

Relating to the case law, we find that all checks to be made by the case prosecutor refer to the consultation of records held by the National Police or local police units, or other institutions.

Thus, when verifying for possible incidence of the principle of *non bis in idem*, the case prosecutor must seek information from the Information and Operational Register Department of the police unit on whose territory the convicted person resides.

This applies for Romanian citizens, foreign citizens who are resident or have domicile in Romania cannot be verified in this manner.

In this context, how will the Romanian prosecutor verify the incidence of this principle, in the case where the convicted person is a foreigner residing in Romania, and for that citizen, the Romanian judicial authorities have no record of the committed offenses, except possibly those committed in Romania?

We believe that in such a situation that can be seen frequently in the judicial practice, the case prosecutor will have to request written information from the home state of the convicted; if he is not acting in this way, it is possible to breach of the *non bis in idem* principle.

In order to verify if the convicted person is prosecuted in Romania for the same offense/offenses for which he was finally convicted in the foreign state (in the case of a Romanian citizen), the case prosecutor must seek information from the police of the place of residence. The same situation applies also in the case where it is verified whether the convicted person is being investigated in Romania for other crimes.

The situation becomes more complicated however when it is about a foreign citizen who resides or has resided in Romania, the procedure to be followed is the one mentioned above.

A particular problem arises when verifying the incidence any mandatory reason for refusing the request, the reasons being set out in article 136, paragraph (2) of the law.

We take into consideration the concrete situation in which the case prosecutor has at his disposal only documents and information available in the file.

In case some of them might not seem difficult, however others are almost impossible to achieve, requiring complex checks, leading to the passage of a certain period of time.

Thus, as the Romanian prosecutor will verify if the person has been convicted on grounds of race, religion, gender, nationality, etc., as all courts in states that often violate these provisions try to disguise these convictions, focusing them towards offenses of common law? The mere reading and interpretation of the judgment is not sufficient to persuade the prosecutor.

The same situation can be incidental and related to political offenses or others related to it or military.

Addressing these situations requires for the case prosecutor to study and interpret the state's legislation that issued the final judgment of conviction.

Given the importance of the institution of recognition of foreign criminal judgments, especially the frequency of such requests in the future, we believe that it is necessary the specialization of at least one prosecutor in each prosecutor's office attached to each court of appeal in this very complex domain; we equally believe that it is useful also in the case of courts of appeal regarding judges (Boroi, Rusu & Rusu, 2016).

In addition to the opinion, some being criticized, we believe that the way in which they were written, such texts exclude the possibility of transferring a minor who is serving a custodial educational measures.

We support this hypothesis by highlighting the text section title, which refers only to convicted persons held in third countries, to serve the sentence or measure involving deprivation of liberty in a penitentiary or health facility in Romania.

We note that the legislator excludes minors, since there is no reference to educational measures of deprivation of liberty or the execution thereof, even if in article 132, letter h) of the special law speaks of the *convicted minor*.

3. Conditions for Recognition and Enforcement of Judgment

The recognition of a foreign judgment by the competent Romanian authorities (courts of appeal), makes it necessary for it to be liable to legal consequences according to the Romanian criminal law, and to be fulfilled cumulatively the following conditions:

- The decision is final and enforceable;
- To establish the existence of double incrimination; if the foreign judgment regards several offenses; the verification on being fulfilled the condition of double incrimination is achieved for each crime separately;
- The person has agreed to serve the sentence in Romania, except the case where after serving his sentence should be expelled from Romania; in special circumstances concerning age, physical or mental health of the convict, the consent can be given by its representative;
- It is not incident any of the mandatory reasons for non-recognition and non-enforcement provided by the Romanian law (which we will examine below); as an exception to this rule, the court may recognize the foreign judgment if it considers that the execution of the sentence in Romania would contribute significantly to the social reintegration of the convicted person (in the judicial practice, this situation will be incident most often, when the convicted person is a Romanian citizen or resident and has his family in Romania);
- the execution in Romania of the sentence of life imprisonment, prison or custodial measure is likely to facilitate the social reintegration of the convicted person.

In the judicial practice the competent court (Court of Appeal) should first verify the cumulative fulfillment of these conditions.

In this regard, the judicial practice was decided that "In the *case there have been fulfilled the conditions set by the law for recognition of a judgment passed abroad - including assuming such a duty of recognition to be made in an international treaty to which both countries are party and the right to a fair trial - the court will substitute the unenforced punishment applied by judicial Swiss authorities with appropriate punishment in the Romanian law, applying at the same time also the provisions of the Romanian Criminal Code on additional punishment and those relating to deduction of penalty of the period enforced in the preventive detention in Switzerland".* (George-Sorescu, in Morar, 2012, p. 280).

If it is found that it is not fulfilled even one of these conditions (with one exception) the competent court of appeal will not recognize the ruling.

The exception to which we refer regards the case in which, although it is incident one of the reasons mandatory for non-recognition of the judgment, the court is satisfied with serving the sentence in Romania, which would contribute significantly to the social reintegration of the convict (Boroi, Rusu & Rusu, 2016).

The mandatory reasons which as they are established by the Romanian Court lead to the non-recognition of foreign judgment are as follows:

a) recognition and enforcement of foreign judgment is contrary to the fundamental principles of the legal system of the Romanian state; although quite generic formulated, this plea is of major importance in terms of respecting the fundamental principles of rule of law in Romania; there are considered primarily the fundamental principles laid down by the Constitution, and then the criminal law and the Romanian criminal trial;

b) the foreign judgment concerns a political offense or an offense connected with a political offense or a military offense which is not an offense of common law; this reason is therefore current, as we consider here the recognition and enforcement of judicial decision passed in any country in the world except the Member States of the European Union; this applies to the possibility for the courts in Romania to be put in a situation to recognize a judgment given in a State where there are criminally sanctioned the political offenses or those related to them;

c) the sentence has been imposed on grounds of race, religion, sex, nationality, language, political or ideological opinion or membership in a particular social group; opinions expressed on the reason why from the letter b) they are incident in this case as well;

d) the person has been finally convicted for the same criminal offenses in Romania. However, the Romanian court may order partial recognition, if the other conditions prescribed by law are fulfilled; Therefore this reason is provided in all international legal instruments to which Romania is a party, representing in its essence the principle of *non bis in idem*;

e) the person has been convicted in another state for the same crimes, and once the foreign judgment is passed in that state was recognized in Romania;

f) a convicted person benefits in Romania from immunity from prosecution;

g) the sentence has been imposed on a person who is not criminally liable under the Romanian law;

h) the penalty consists of a measure of psychiatric or health assistance that cannot be enforced in Romania or, where applicable, it provides for medical or therapeutic treatment which cannot be supervised in Romania, in accordance with the national legal or healthcare system;

i) the convicted person has left Romania and established domicile in another state, and its links with the Romanian state are not significant;

j) the convicted person has committed a serious crime, which would alarm the society, or has had close relations with members of criminal organizations, likely to cast doubt upon his social reintegration in Romania;

k) there is objective evidence that the judgment was given in breach of fundamental rights and freedoms, in particular, that the sentence has been imposed to penalize the convicted person on grounds of sex, race, religion, ethnic origin, nationality language, political beliefs or sexual orientation and the convicted person had no possibility to challenge these circumstances to the European Court of Human Rights or other international bodies (Boroi, Rusu & Rusu, 2016).

So, being mandatory, whenever it will be found any of these reasons, the foreign judgment shall not be recognized and implicitly enforced in Romania.

We should mention that these mandatory grounds leading to rejection of a foreign judgment are not inventions of the Romanian legislator, they can be found in an almost identical wording in some international legal instruments and bilateral or internal laws of some states with recognized democratic regimes, especially in Europe.

In the judicial practice it was decided that “A State may not claim the application of a provision of the European Convention on the International Criminal Judgments by another state, as long as it has a reservation concerning the refusal of enforcement of judgments in absentia.

Regarding the assessment of the decision whose recognition is requested, from the perspective of "in absentia" phrase, found in the Convention, the judgment was passed in absentia as the person sought was not present at any hearing or at trial nor on appeal.

The request for international judicial assistance regarded the communication towards the Romanian citizen of the summons for a hearing, being mentioned also the subsequent hearings, but the request for international judicial assistance does not cover the absence of the defendant at trial, which concerns exclusively the communication of some procedural relations by the Romanian citizen". (Juverdeanu, in Morar, 2014, p. 225).

However the Romanian legislator foresaw one exception, that even if it is incident one of the mandatory non-recognition reasons and non-execution of a foreign judgment, it will still be recognized by the competent court in Romania.

This exception aims the case where the Romanian court, after examining the foreign judgment and the documents in the file, is convinced that the execution of the sentence in Romania would contribute significantly to the social reintegration of the convicted person.

Such situations occur frequently in the judicial practice, and it should be considered by the courts in Romania, in particular, when the convicted person abroad is a Romanian citizen and lives with his family in Romania, or though he is a foreigner he lives with his family in Romania or is a family member of a Romanian citizen who lives in the country.

On the other hand, the Romanian court must take into consideration the conditions of detention and those ensuring the social reintegration of the convicted in the issuing State.

In addition to mandatory reasons for non-recognition and non-enforcement of a foreign judgment, the Romanian law provides some optional reasons, namely:

- The person is under investigation in Romania for the same offense for which he was convicted abroad. If the judgment has been given for other criminal offenses, the court may order partial recognition of it, if the other conditions are fulfilled;
- When the issuing State has refused an application in order to supplement the requested information.

If the convicted person is under investigation in Romania for the crime for which he was convicted abroad, instead of refusing recognition, the court may order either the recognition of the foreign judgment or the suspension of the proceedings until a decision is made in the criminal proceedings before the Romanian judicial bodies.

Also, the foreign judgment shall not be recognized or, if recognized, would not be enforced when the criminal law Romanian intervened amnesty, decriminalization of the offense and any other cases provided by law (Boroi, Rusu & Rusu, 2016).

4. The Duration and the Object of the Procedure for the Recognition of the Foreign Judgment

Under the Romanian special law, within 10 days from filing the complaint, the presiding judge or the judge of the court fixes a judgment term (within that term). The total duration of the procedure for recognizing a foreign judgment is 60 days from the date of registration of the case to court.

The provisions of article 135, paragraph (2) of the special law provide that the *court judges in a different panel made up of one judge in Council chamber, without summoning the parties. The prosecutor is mandatory*.

As we expressed in other papers, we maintain our view according to which the depositions where the trial procedure without summoning the parties is established but with the mandatory participation of the prosecutor is unconstitutional.

Considering the Constitutional Court Decision no. 506 of 30 June 2015[1] and legal practice completed by some opinions of doctrine, we consider that these provisions are inapplicable.

As until the date of the publication of this paper the Romanian legislator has not made the necessary changes, it is naturally to question the mode of action of the court, meaning they will quote or not the convicted person. We believe that by the implementation of Decision No. 506/2015 of the Constitutional Court, the court will summon the convicted person.

We believe also that to the convicted person it must necessarily provide the legal assistance, in the case where the person concerned has not hired a lawyer.

The court is obliged to check within the hearing, the requirements provided by the Romanian law for recognition and enforcement of foreign judgment, and if it finds that they are satisfied, it assigns enforceable foreign judgment in Romania and it decides the transfer into a penitentiary or medical facility in Romania of the sentenced person.

In the judicial practice it will be checked whether the conditions were laid down in article 136, par. (1) of the special law, and it is not incident one of the cases provided for in article 136, paragraph (2) thereof. We note that in article 136, paragraph (2) of the law there are mentioned reasons for non-recognition and non-execution of a foreign judgment. On the reasons for non-recognition and non-execution options provided by the law, they will be examined separately by the court, and then it will decide.

We appreciate that in the judicial practice, this examination will take place on three levels, in the order mentioned above, namely: cumulative verification of the fulfillment of the conditions referred to in article 136, paragraph (1), establishing the lack of any mandatory reason for non-recognition provided for in article 136, paragraph (2) and optional verification of the reasons provided for in article 136, paragraph (3) which requires the appreciation of the court in relation to the effect of any of these reasons.

The provisions that may regard the pecuniary penalties, or the legal expenses or insurance measures and others in the foreign judgment are not under the jurisdiction of the Romanian court, but only in the case where the issuing State expressly requests it.

[1] Published in the Official Monitor of Romania, Part I, no. 539 of 07/20/2015.

In the situation where the foreign State requests to be considered by the Romanian court provisions other than those expressly provided for in the Romanian law, and the court will rule also on the recognition and enforcement of other criminal provisions of the judgment.

When by the judgment the person has been convicted for several offenses, the Romanian court will check the fulfillment of the conditions stipulated by the Romanian law for each of them; in the case it is found that the conditions only for certain of these offenses, it may be ordered the recognition of the foreign judgment, but before passing it, the court may consult the issuing State through the specialized directorate of the Ministry of Justice.

In the judicial practice situations can occur while the procedure for recognition of the foreign judgment is pending before the Romanian courts, the issuing State withdraws the application; in such circumstances, the court noting the withdrawal of the application, the Romanian court rejects it as being unsubstantiated.

Within the procedure for recognizing foreign judgment after examining and verifying other documents in the file, Romanian court will decide one of the following solutions:

- it decides by judgment the recognition and enforcement of the sentence imposed by final judgment to a foreign court; or
- it decides the judgment, rejecting the application for recognition and enforcement of the foreign judgment; in this situation, the application of the sentenced person or the issuing State may be reconsidered if new elements emerge.

In the judicial practice it may also occur the situation where, when examining foreign judgment, the court finds that the nature or duration of the sentence imposed by the foreign court does not correspond to the nature and duration of the punishment provided by the Romanian law for the same offense or similar offenses.

In this first case, the Romanian court will tailor the sentence to imprisonment imposed by a foreign court when:

- The nature of this punishment does not correspond in terms of denomination or of executing regime with punishments stipulated by the Romanian law;
- The penalty duration exceeds, where appropriate, the maximum special limit of the punishment provided by the Romanian criminal law for the same offense or the duration of the penalty imposed by the foreign court exceeds 30 years, or when the resulting penalty duration are applied in the event of multiple offenses it exceeds the total penalties established for competitive offenses or general maximum of the prison sentence provided for under the Romanian law.

In the legal sense, adapting the sentence imposed by the foreign court consists in reducing the sentence to the maximum limit allowed by the Romanian criminal law for similar offenses.

Following the adjustment (re-individualization), the penalty established by the Romanian court, it should correspond as far as possible, in terms of nature or duration with the one applied by the issuing State and it shall not aggravate the situation of the sentenced person. Also in the process of adaptation, the Romanian court cannot modify a prison sentence into a monetary punishment.

In the second situation, the Romanian court establishes and applies by the penalty sentence for the committed offense.

Thus, within the process of determining and applying the punishment for the committed crime, the Romanian court is bound by the findings of fact, the conditions and circumstances in which they were committed, as shown explicitly or implicitly in the foreign judgment.

In the judicial practice it was decided that *in the application ofarticle6 of the Criminal Code, of the Decision No. 1/2014 and Decision No. 13/2014, issued by the High Court of Cassation and Justice - unraveling points of law in criminal matters, the Romanian court may not reduce under the provisions of article 39, paragraph (1), letter b) of the Criminal Code, the resultant penalty applied, concurrently arithmetic, in the case of a series of offenses, the judgment of conviction rendered by a foreign court, as, pursuant to article 135, paragraph (7), letter b) of Law no. 302/2004, adapting the resulting penalty imposed for a series of offenses is permitted only if it exceeds the total of the punishments established for concurrent offenses for crimes or the general maximum limit of the punishment of imprisonment.*

Therefore, in the hypothesis where the foreign court applied the resultant penalty by the arithmetic average, if the Romanian court has reduced the penalties established by the sentencing decision handed down by a foreign court for crimes competing under Decision No. 13/2014 of the High Court of Cassation and Justice - for unraveling points of law in criminal matters, the new resultant penalty does not apply according to article 39, paragraph (1), letter b) of the Criminal Code, but by maintaining overlapping the arithmetically average applied by the foreign court as a judged authority. (I.C.C.J., Criminal Division, 2014, www.scj.ro).

Please note that by Decision No. 13 given by the Panel for unraveling some matters of law in criminal matters of the High Court of Cassation and Justice, on 5th June 2014, the Supreme Court ruled that the *provisions of article 6, paragraph (1) of the Criminal Code concerning the more favorable law after the final judgment of the case are applicable on the sentence pronounced against Romanian citizens, if it was recognized in the procedure regulated by Law no. 302/2004 on international judicial cooperation in criminal matters* (I.C.C.J., criminal section, 2014 www.scj.ro).

However, the High Court of Cassation and Justice, for unraveling points of law in criminal matters, by the Decision no. 1/2014 of 14 April 2014 decided that in *the application of more favorable criminal law, after the final judgment of the case before the entry into force of the new Criminal Code, offenses for the hypothesis of offenses contest, in a first stage, it is verified the incidence of the provisions of Article 6 of the Criminal Code regarding the individual penalties*. In the second stage, it will be verified it the applied resulting penalty under the old law exceeds the maximum that can be reached under the new law, according to article 39 of the Criminal Code. If the resultant penalty imposed under the old law exceeds the maximum that can be reached on the basis of article 39 of the Criminal Code, the resulting punishment will be reduced to that maximum (I.C.C.J., criminal section, 2014 www.scj.ro).

In connection with the application of more favorable criminal law in case of transfer of the sentenced person in order to enforce the sentence of deprivation of in Romania, it raises the question of applying the more favorable criminal law, respectively, while acknowledging the foreign criminal judgment and re-individualization of the sentence applied or subsequently by the enforcement court?

In this case, we believe that the application of more favorable criminal law is for the national court to decide, before which it is the recognition of the foreign judgment.

From the interpretation of the provisions of article 135, paragraph (9) of the special law, it results that the Romanian court has no jurisdiction to examine and evaluate the evidence based on which the conviction was imposed by the foreign court, but only the final decision of that court.

On the occasion of adjusting the sentence in this case, the Romanian court will not have jurisdiction to change a custodial penalty into a financial penalty and it will not worsen the situation of the convicted person, but it will not be bound by the minimum punishment provided by the Romanian law for the committed offense.

Also, the Romanian court has jurisdiction to deduct the full sentence imposed by the foreign court from the executed period by the person convicted in the issuing State.

These provisions do not apply in the case where the treaty applicable in the relation to the issuing excludes the conversion of the conviction or if the issuing State has expressly stated that it will provide transfer only if the Romanian state will execute either the sentence imposed by the foreign court or the punishment adapted by the court Romanian.

Each time, the conversion of the conviction will not only target the main sentence imposed by the foreign court, but also the supplementary sentences.

In this regard, the judicial practice has decided that *the court seized for the recognition of a foreign criminal judgment of conviction and transfer of the convicted person to perform custodial sentence in a penitentiary in Romania shall decide on imprisonment also on the penalties of deprivation of liberty imposed by foreign the criminal judgment of conviction. In the case where the types of imposed supplemented punishments are inconsistent with the Romanian law, the court shall adapt, pursuant to the provisions of article 159, paragraph (1) of Law no, 302/2004 – the provisions regarding the conversion of conviction - these penalties apply to the penalties provided by the Romanian law to the acts upon which the sentence was passed. Therefore, in this case, the court decides the recognition of foreign criminal judgment of conviction on both the deprivation of liberty punishment and on additional punishments, according to article 159, paragraph (1) of Law no. 302/2004, republished, decides the conversion of additional punishments recognized in the additional punishments corresponding to those provided in article 64, paragraph (1) of the Criminal Code.*

Court's failure to rule the additional punishments imposed by foreign criminal judgment of conviction is not an obvious clerical error within the meaning of article 195 of the Criminal Procedure Code, the procedure ruled in these provisions are not incident, as it involves a process of deliberation on the compatibility of additional punishments imposed by the foreign criminal judgment of conviction with the Romanian legislation. (Stanciu, Popa, Rotaru in Radu, 2014, p. 205)

Even with the change of the Romanian law the number of articles listed in the decision no longer correspond, in its substance it is current.

After the ruling, the sentence will be drafted within 5 days and it will be sent to the specialized directorate of the Ministry of Justice for transmission to the convicted person. This sentence can be appealed within 10 days, by a prosecutor, ex officio or at the request of the Minister of Justice and by the convicted person. For the prosecutor term starts from the ruling, and for the convicted person it starts from the date of informing on the decision. The file will be submitted to the appellate court within three days, and the appeal shall be heard within 10 days, in closed session, without summoning the convicted person, and the presence of the prosecutor is mandatory.

We consider that these provisions which exclude the presence of the convicted person in the court of appeal are unconstitutional, which is why we consider that the person should be summoned, so that in the conditions where the person had not hired a lawyer, it should be assured also legal support.

The enforcement of the sentence shall be achieved according to the Romanian Code of Criminal Procedure.

The final decision and a copy of the warrant for the execution of the punishment of life imprisonment or imprisonment it shall be communicated to the specialized directorate from the Ministry of Justice.

In the case where after the releasing the warrant for executing the penalty of life imprisonment or imprisonment, the issuing State informs that the transfer may not take place, the court seized with such provision shall order the cancellation of the warrant. In such a situation, the recognition sentence of the foreign criminal decision will produce legal effects only in terms of recidivism of the convicted person, unless the transfer is not possible due to granting amnesty or as a result of the fact that it was later established that the person is not guilty of the offense, or following the death of that person in the issuing State.

If after issuing the warrant for executing the penalty the issuing state makes a new decision of execution of another punishment, the depositions of the Code of Criminal Procedure referring to execution, which are not contrary to the provisions of the special law is applied properly. In this circumstance the enforcement court is the court of appeal that passed the sentence.

In the case where, after transferring the convicted person, the issuing state a new court decision in order to be executed another punishment, the procedure for recognition and enforcement differs (this will be examined in the next subsection).

In the case where after issuing the warrant, the issuing State communicates that the sentenced person's transfer cannot take place as the convicted person has revoked the consent for transfer, all expenses being sustained by the person based on the deposition adopted by the Ministry of Justice or the General Inspectorate of the Romanian Police.

In the judicial practice it was decided that "In the case where by a foreign criminal judgment it was ordered both conviction to imprisonment and sentencing to fine penalty, the court may, on the recognition of judgment of foreign criminal conviction in its entirety and transferring the sentenced person to continue the execution of the measure of deprivation of liberty in a prison in Romania, decide both on the deprivation of liberty punishment and on foreign criminal fine imposed by the conviction judgment, pursuant to article 122 of Law no. 304/2004". (Î.C.C.J., Criminal Section, 2010 www.scj.ro).

Even if the provisions invoked by the Supreme Court are not in the article to which the reference is made, the decision is up to date.

We should specify, however, that the Romanian court must verify that the conditions laid down by Romanian law for each of punishments are fulfilled, not being obliged to recognize also the fine penalty, in the case where it has been applied for another offense.

In the case where the foreign court pronounced for the same offense imprisonment and fine, the recognition will be achieved in full in the sense that there will be recognized both penalties. (Boroi, Rusu & Rusu, 2016)

We note that although the title of this subsection referred to the special law is *transfer of sentenced persons held in third countries, to serve the sentence or the measure involving deprivation of liberty in a penitentiary or medical facility in Romania*, specifically those provisions concerning the *procedure of recognition and enforcement a judgment passed in third countries*, and some concrete provisions also concerning the transfer of the concerned person.

Starting from the wording used by the legislator in the very title mentioned above, we find that, making claims referring only on punishment or custodial measures in order to enforce them in a penitentiary or medical facility in Romania, the legislator entirely ruled out the recognition and enforcement, including the transfer in Romania of a minor against whom it was decided an educational measure involving deprivation of liberty.

We believe it is necessary to complete the legislative act framework with express provisions in order to include procedures for the recognition, enforcement and implicitly transferring to Romania the minors in detention on the territory of another State in order to serve the sanction of criminal law in Romania. This is absolutely necessary as regards the minors who have Romanian citizenship.

5. Conclusion

Consistent with its policy in the domain of international judicial cooperation in criminal matters and taking into account the obligations undertaken with the ratification of international legal instruments, Romania has regulated separately in its national law the institution of recognition and enforcement of judgments by which there were set punishments or measures involving deprivation of liberty in order to enforce those penalties in a penitentiary or medical unit in Romania.

The conducted examination revealed the procedure before the court in Romania and the conditions that must be met in order to recognize and enforce such a decision.

We note that this time, compared to other forms of judicial cooperation in criminal matters, the recognition aims at transferring the convicted person for the purpose of executing the penalty or the measure involving deprivation of liberty in a penitentiary or in a medical facility in Romania.

Following this analysis there were also highlighted some inadequacies of the law which generally aim at breaching the rights of defense of the convicted person, both in the judgment phase at first instance and on appeal.

The provisions of the law are not considering transferring minors against whom a third State has imposed a criminal sanction of deprivation of liberty.

Despite these shortcomings of the law, which in time will surely be improved, we consider that the legislative act is in its essence an important step made by Romania, in the domain of enhancing the concrete activities on judicial cooperation in criminal matters with other world states other than the states of the EU.

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THE 11TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

Trust Regulation in the Czech Republic: the Model Law for Introduction of the Trust Instrument in the Republic of Latvia?

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Abstract: In the last decades, thanks to the process of globalization, there is the diversification of forms and kinds of the economic relations. Therefore the trust instrument is used more and more in the countries where before it was practically unknown legal instrument. The author has defended dissertation paper "The Essence of Trusts, its Recognition and Legal Regulation in the Roman – German Law System Countries and Possible Introduction in Latvia" on September 12, 2008. In this dissertation paper it was advised to introduce trust instrument in the Republic of Latvia I order to improve the existing regulation in Latvia; draft law on trusts was prepared. The Czech Republic had introduced trust instrument from January 1 2014. This article will be devoted to the comparative analysis of the Czech regulation on trusts; therefore it is a very important both from academic and practical point of view. Till now there are a few researches on this theme. The survey and comparative analysis are the main methods used in the present article. Based on the comparative analysis it is recommended to use regulation of the Czech Republic and Province of Quebec in order to draft similar legislation in the Republic of Latvia. The present research is a very topical for the academics, Members of the Saeima (Latvian Parliament), practitioners in the financial and legal field. This is unique research on comparative basis, using Civil Code of the Czech Republic and Province of Quebec, the Principles of European Trust Law , the Hague Convention on the Law Applicable to Trusts and on their Recognition and existing regulation and prepared draft legislation on trusts of the Republic of Latvia.

Keywords: trust; Civil Code of Quebec, Civil Code of Czech Republic; Hague convention; Principles of European Trust Law.

Introduction

The trust is one of the most popular legal institutions for wealth management in Common law jurisdictions. In recent decades and years there has been a significant burgeoning of interest in the reception of the trust in civil law jurisdictions, which have fuelled enthusiasm in the comparative study of trusts around the world (Lupoi, 2000; Hayton, 2010). The trust law is a legal mechanism by which English law recognizes and enforces a separation between the legal ownership of property and the right to enjoy the benefits of that property. When a trust has been created, the trustee holds legal title to the property, but the beneficial entitlement to the property rests in the hands of the trust beneficiaries (Cane & Conaghan, 2008). Probably the declaration by the M.S. Amoss that "English trust are spread throughout like eggs of the Cuckoo in the Continental law countries" (Amos, 1937) is exaggerated, however this expression has a truth. Also in the law systems, which is not based on the English common law and equity, there are law instruments by its essence similar to the Common law trust.

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The Parliament of the Czech Republic adopted the New Civil Code on February 3, 2012. It entered into force from 1 January 2014, and created a new legal instrument in the Czech Republic: trust funds ('svěřenský fond'). The norms of international private law have also enabled the recognition of foundations, trusts, and similar foreign trust-like structures in the Czech Republic (Ronovská & Lavický, 2015). The author of the present Article defended dissertation paper "The Essence of Trusts, its Recognition and Legal Regulation in the Roman – German Law System Countries and Possible Introduction in Latvia" on September 12, 2008. The shortened version of the dissertation paper is published in the monograph in Latvian "Legal regulation of the trusts and its possible introduction in Latvia." (Grasis, 2008) In the mentioned dissertation paper and monograph, considering that trust instrument is not incompatible with Continental law system, the author has prepared special draft law on trusts for the needs of the credit institutions in Latvia. The Czech Republic was more pro-active to introduce trust instrument in its domestic regulation, and therefore it has adopted trust regulation quicker than the Republic of Latvia.

Problem Statement

As Latvia would like to join Organization for Economic Cooperation and Development (OECD), in the recent years Latvian state institutions, especially Ministry of Finance, has negative opinion on introduction of the trust instrument in the internal legislation. The main argument is that OECD as an organization is against trusts. Therefore this article briefly outlines the fundamental characteristics of the new legal regulation in the Czech Republic, which already is the Member-state of OECD. In the present work comparative analyze is done in order to prepare similar regulation in the Republic of Latvia.

The New Regulation of Trust Instrument in the Czech Republic

The essence of the economic function of the trust is to divide management from enjoyment of property. For this to happen, a trustee should have basic power to manage and dispose of the trust property just as a full owner would. While there are several ways to endow the trustees with powers of management and alienation, this is achieved in the English trust by requiring the settlor to do everything within his power to transfer the title of trust property to the trustee. By vesting ownership of the trust property in the trustee, the arrangement allows him to act in his own name without inconvenience of regularly seeking authorization from the settlor or beneficiary for his dealings with the property (Ho & Lee, 2013).

Section 1448 of the Civil code gives the following definition of the trust: "A trust is created by setting aside part of the property owned by the founder in such a way that the owner entrusts the trustee with the property for a particular purpose through a contract or disposition *mortis causa*, and the trustee undertakes to keep and administer the property" (The Civil Code of the Czech Republic, 2012). The creation of a trust establishes separate and independent ownership of the part of property and the trustee is obliged to assume the property and its administration. The rights arising from the right of ownership in the property in a trust are exercised by the trustee in his own name and on the account of the trust; however, the property in a trust is not owned by the administrator or the founder, or the person entitled to receive a performance from the trust.

We have to compare the mentioned definition with the definitions given in the Principles of European Trust Law (Hayton, Kortmann & Verhagen, 1999) and in the Hague Convention on the Law

Applicable to Trusts and on their Recognition (Hague Convention, 1985). According to the European Principles of Trust Law, trust is defined as follows: "In a trust, a person called the "trustee" owns assets segregated from his private patrimony and must deal with those assets (the "trust fund") for the benefit of another person called the "beneficiary" or for the furtherance of a purpose." Article 2 of the Hague Convention on the Law Applicable to Trusts and on their Recognition contain the following trust definition: "The term "trust" refers to the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose. A trust has the following characteristics –

a) the assets constitute a separate fund and are not a part of the trustee's own estate;

b) title to the trust assets stands in the name of the trustee or in the name of another person on behalf of the trustee;

c) the trustee has the power and the duty, in respect of which he is accountable, to manage, employ or dispose of the assets in accordance with the terms of the trust and the special duties imposed upon him by law." (Hague Convention, 1985). In general the definition in the Czech Civil Code corresponds to the definitions of the trust in the European Principles of Trust Law and Hague Convention on the Law Applicable to Trusts and on their Recognition. However there is one small difference: the trust itself is by definition a separate autonomous entity, and the assets of the trust does not all vest in the trustee. Probably, this nuance could create some practical problems in dealing with persons outside the Czech Republic. Simultaneously such approach is not innovative in the world – Czechs follows the same way like in the Quebec: under the Quebec Civil Code, ownership is not vested with the trustee or indeed any party. Instead, the Code grants the trustee the full set of powers that are typically available to the owner. According to the Articles of 1261, "The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right" (Civil Code of Quebec 1994); and Article 1278 "A trustee has the control and the exclusive administration of the trust patrimony, and the titles relating to the property of which it is composed are drawn up in his name; he has the exercise of all the rights pertaining to the patrimony and may take any proper measure to secure its appropriation" (Civil Code of Quebec 1994). It means that a trustee acts as the administrator of the property of others charged with full administration. The Civil Code gives to the trustee, in the broader terms, the "exercise of all the rights pertaining to the patrimony".

Establishing the Trust Instrument in the Czech Republic

In order to establish trust according to the Czech Civil Code founder must create a public instrument, which must contain at least:

a) the designation of the trust (The designation of a trust must express its purpose and contain the words "svěřenský fond"),

b) identification of the property that constitutes the trust upon its creation,

c) definition of the purpose of the trust (It may have a publicly beneficial or private purpose - a trust established for a private purpose serves the benefit of a certain person or in his memory; such a fund can be established and for the purpose of investing to make a profit to be distributed among the founders, employees, shareholders or other persons,

d) the conditions to provide a performance from the trust,

e) information on the duration of the trust; in its absence, the fund is conclusively presumed to be established for an indefinite period, and

f) the identity of the ultimate beneficiary or the manner of his determination if a performance is to be provided from the trust to a particular person as to the ultimate beneficiary.

European Principles of Trust Law does not provide specific minimal demands for the content of the trust instrument. The same principle is also in the Hague Convention on the Law Applicable to Trusts and on their Recognition. The only precondition for the validity of the trust is only that it applies only to trusts created voluntarily and evidenced in writing under this Convention (Article 3 of the Hague Convention, 1985).

In the Latvian draft law the obligatory requirements for the trust agreement were the following:

a) identification of the parties;

b) identification of the beneficiary(ies) or adequate information in order to identify beneficiary(ies) in the future, in case if beneficiary has not yet born or established;

c) initial trust assets to be transferred for trust management;

d) term of the trust;

e) trust is revocable or irrevocable;

f) the rights of the beneficiary and his share from the trust assets in case of multiple beneficiaries.

Additionally the following could be included in the trust agreement:

h) special rights and duties of the trustee;

i) special conditions for the management of the trust assets;

j) the name of the trust;

k) appointment of the trust protector;

l) action with trust assets after termination of the trust agreement;

m) another conditions by will of trust settlor and the trustee, which regulates legal relations between trust settlor, trustee, beneficiary and protector of trust (Grasis, 2008, p. 144). If we compare a minimum demands for the trust instrument, then in the Czech Civil Code and Latvian draft law they were very similar.

A trust in the Czech Republic is created when a trustee accepts the authorization to administer it; in case there are several trustees, acceptance of the authorization by at least one of them shall suffice. However, if a trust has been established by a disposition mortis causa, it is created upon the death of the decedent. This regulation again is very similar to the regulation in Quebec: “A trust is constituted upon the acceptance of the trustee or of one of the trustees if there are several. In the case of a testamentary trust, the effects of the trustee's acceptance are retroactive to the day of death (Article 1264 of the Civil Code of Quebec 1994)”.

Trustee could be:

(1) Any person with full legal capacity.

(2) A legal person may be a trustee, where provided by a law.

Under the certain conditions, the founder of a trust or the person who is to receive a performance from the trust may also be a trustee. In this case, however, a trust must have another third-party trustee; the trustees must make juridical acts jointly.

Normally a trustee is appointed and removed by the founder. A founder may determine another method of appointment or removal of the trustee in the trust instrument. On the application of a person with a legal interest therein, a trustee is appointed by a court if the person authorized to do so fails to appoint him within a reasonable period.

As mentioned already before, like in the Quebec, a trustee is entitled to exercise full administration of the property in a trust. A trustee is registered in a public or other register as the owner of the property in a trust with the note "svěřenský správce" (trustee).

Ultimate Beneficiary

The trust beneficiaries each have an enforceable right to compel proper administration of the trust by the trustee in accordance with the terms of the trust and the trustee's powers and duties (Cane & Conaghan, 2008). According to the section 1457, a founder has the right to appoint the ultimate beneficiary and determine the performance to be provided to him from the trust, unless the instrument of the trust determine otherwise (The Civil Code of the Czech Republic, 2012). If the founder fails to exercise his rights to appoint beneficiary of the trust, the trustee shall appoint the ultimate beneficiary and determine the performance to be provided to him from the trust. In the case of a trust established for private purposes, a trustee may exercise that right if the trust instrument determine the group of persons from which the ultimate beneficiary may be appointed. An ultimate beneficiary may be granted the right to the fruits and revenues from the trust, or the right to property from the trust, or, where appropriate, the share therein.

In case, a person, who is authorized to appoint the ultimate beneficiary or determine the performance to be provided to him from the trust, shall proceed in accordance with the trust instrument and at his own discretion. He may change or cancel his decision under the conditions determined by trust instrument. No one person is authorized to appoint the ultimate beneficiary or determine the performance to be provided to him from the trust for his own profit.

If a trust has been established for private purposes, an ultimate beneficiary's right to such a performance is created no later than after one hundred years from the establishment of the trust, even where the trust instrument determine a later time. However, even after one hundred years, an ultimate beneficiary may acquire the right to such a performance if he is entitled under the trust instrument to get a share of the property no later than upon the extinction of the last right to the fruits or revenues, as well as if he was a contemporary of the founder or a child of the founder or of his contemporary, provided that, according to the trust instrument, he is to succeed no later than upon the death or termination of the ultimate beneficiary who, given his order, precedes him, in order to be the following ultimate beneficiary to acquire the fruits or revenues; throughout his life, other persons may acquire fruits or revenues along with him.

If a trust has been established for private purposes, an ultimate beneficiary's right to fruits or revenues is extinguished no later than after one hundred years from the creation of the trust; however, in the case of individuals, such a right may last until his death. Similarly also in Quebec "The right of beneficiaries of the first rank opens not later than 100 years after the trust is constituted, even if a longer term is stipulated. The right of beneficiaries of subsequent ranks may open later but solely for

the benefit of those beneficiaries who have the required quality to receive at the expiry of 100 years after the constitution of the trust (Article 1272 of the Civil Code of Quebec 1994)".

During the existence of a trust, an ultimate beneficiary has the right to request that in conformity with the trust instrument he be provided with a relevant performance. An ultimate beneficiary of a trust established for private purposes may waive his rights by means of a declaration made in the form of a public instrument. In the case of a right to fruits or revenues and in the absence of any other ultimate beneficiary to whom such a right could pass, it passes to the ultimate beneficiaries who are entitled to the right to property from the trust.

Supervision over the Administration of a Trust

Supervision over the administration of a trust is exercised by the founder and a person designated as the ultimate beneficiary, or by other persons if so determined by the trust instrument. In the cases provided by a statute, the administration over a trust is supervised by another person or a group of persons, or a public body. If a trust has been established for the benefit of the ultimate beneficiary who does not yet exist or cannot be determined on the date on which the fund is created, the founder shall appoint a person authorized to supervise the administration of the trust in the interests of the ultimate beneficiary. If this is not possible, or if the founder is inactive, a court shall appoint such a person on the application of the administrator or a person with an interested therein.

According to the Section 1465, The trustee shall, without undue delay, deliver to the person with a statutory right to supervise the administration of the trust a notification in which he shall state at least the designation, purpose and duration of the trust and his name and address. The notification is not necessary if the person authorized to supervise is already aware of these facts (The Civil Code of the Czech Republic 2012). On the request of the person with the right to supervise the administration of the trust, the trustee shall allow the documents of the trust to be checked and submit to him the requested accounts, reports or other information.

The founder, an ultimate beneficiary or any other person with a legal interest therein may apply to the court to order or prohibit the trustee to perform a certain act, or to remove the trustee and appoint a new one. These persons may also invoke invalidity of a juridical act whereby an administrator damages the trust or a right of the ultimate beneficiary; however, if a third person has acquired a right in good faith, it must not result in its detriment. On the application of the person, a court shall authorize such a person to initiate or pursue proceedings in the interest of a trust instead and in the name of a trustee, if the trustee is inactive without sufficient cause. If a trustee, founder or ultimate beneficiary participates in acts aimed to intentionally harm the rights of the founder's creditor or harm the trust, they are liable jointly and severally. Also according to the law in Quebec, "The court may, at the request of an interested person and after notice has been given to the persons it indicates, appoint a trustee where the settlor has failed to do so or where it is impossible to appoint or replace a trustee" (Article 1277 of the Civil Code of Quebec 1994)". In case of fraud by the trustee, settlor of beneficiaries, law in Quebec provide solidary liability: "The trustee, the settlor and the beneficiary are solidarily liable for acts in which they participate that are performed in fraud of the rights of the creditors of the settlor or of the trust patrimony" (Article 1292 of the Civil Code of Quebec 1994)".

Modification of a Trust

According to the new Czech regulation of the trust, on the application of a person with a legal interest therein, a court may decide that a trust be cancelled if it is impossible or difficult to achieve its purpose, primarily due to circumstances which are unknown or unpredictable to the founder. Where a trust has been established for a publicly beneficial purpose, a court may decide to replace its original purpose with a similar one. If, in accordance with the original intention of the founder, it is possible to achieve or better benefit the purpose of the trust by changing the fund's instrument, a court shall amend the trust instrument. Before making such decision, the court shall seek the opinion of the founder or his legal successor, the trustee, ultimate beneficiary and the person entitled to supervise the trust, unless they are applicants. Similarly it is stated also in the Civil Code of Quebec: "Where a trust has ceased to meet the original intent of the settlor, particularly as a result of circumstances unknown to him or unforeseeable and which make the pursuit of the purpose of the trust impossible or too onerous, the court may, on the application of an interested person, terminate the trust; the court may also, in the case of a social trust, substitute another closely related purpose for the original purpose of the trust" (Article 1294 of the Civil Code of Quebec 1994).

Termination of a Trust

As indicates M. Lupoi, the final term of trusts is a serious problem in English law, where it is seen more specifically as the period within which the vesting of the right transferred to the trustee must take place in favour of the final beneficiaries. This is typical of "family" trusts, where the settlor wishes the trust to terminate only when certain circumstances have come to pass and not simply after the lapse of a certain period of time, which might be insufficient or excessive with respect to his intensions (Lupoi, 2000). According to the Czech approach, the administration of a trust shall end upon the expiry of the period for which a trust has been established, by achieving the purpose for which a trust has been established, or by a decision of a court (Article 1471, The Civil Code of the Czech Republic 2012). If a trust has been established for private purposes, its administration shall also end in case all ultimate beneficiaries waive their right to receive a performance from the trust.

Upon the extinction of the administration of a trust, a trustee shall surrender the property to the person entitled thereto. An ultimate beneficiary and, in his absence, the founder of the trust are presumed to be entitled to the property; in the absence of both, the property passes into the ownership of the State.

If the administration of a trust established for a publicly beneficial purpose is extinguished because it is impossible to fulfil that purpose, a court shall, on the application of the trustee, decide that the property will be transferred to another trust or into the ownership of a legal person aiming to achieve a purpose which is as close as possible to the original purpose of the trust. Before making the decision, the court shall obtain the opinion of the person entitled to supervise the administration of the trust. But in case, the trust instrument provides for another manner in which property should be disposed of upon the extinction of the trust, then the later will be in force.

If we compare regulation in the Czech Republic and in the Province of Quebec, we again could find similarities: "A trust is terminated by the renunciation or lapse of the right of all the beneficiaries, both of the capital and of the fruits and revenues. A trust is also terminated by the expiry of the term or the fulfilment of the condition, by the attainment of the purpose of the trust or by the impossibility, confirmed by the court, of attaining it. (Article 1296 of the Civil Code of Quebec 1994).

Conclusions

The Czech Republic has become one of the first countries in the Eastern Europe, which has modernized internal civil laws (Civil Code in the Czech Republic) by introducing a trust instrument. It is not a quasi- trust, when trustee manages trust assets based on civil contract. Example of quasi- trust we could find in Latvia. According to the "Regulations on the Performance of Trust operations" passed by Financial and Capital Market Commission of the Republic of Latvia on December 21, 2001, trust operations performed by Latvian commercial banks are based on the contract signed between the settlor and the trustee (Latvian commercial bank) and therefore the settlor of the trust remains the legal owner of the trust assets. In order the commercial bank could offer trust operations, the contract must in writing, where clearly is indicated the rendered services, powers, obligations and liability of the parties. In the Article 6 of the Regulations it is stated that trust contract shall specify the following matters:

1) which party brings market risks,

2) the total amount of the trust assets,

3) possible investment types and total amounts,

4) on which behalf – the credit institution or the client – the acquired financial instruments shall be registered,

5) beneficiary and the procedure how the profit shall be distributed,

6) procedure of how information regularly shall be provided to the beneficiary about changes of the value of trust assets,

7) that credit institution are obliged to manage the trust assets as a careful owner (Regulations on the Performance of the trust operations 2001). In Latvian case, there is not the transfer of the ownership from trust settlor to the trustee – credit institution; it means that settlor remains the legal owner of the trust assets. Practical examples approves that legal regulation is imperfect also. In the Article 1 of the Credit Institutions Law it is stated that credit institution is liable only for separation of the clients trust assets from the assets of the credit institution. (Law on Credit Institutions 1995) Therefore there must be amendments that credit institution is liable to the client for damages resulting from the trust management, in cases of evil intent, gross negligence or in case of breach of the trust agreement. Just now in the bilateral agreement credit institution could put the client in less favourable situation.

According to the Czech regulation the trust assets are separated from the assets of the founder or trustee. In the classical Common law trust, once the trust has been constituted, the settlor no longer has any enforceable rights in respect of the trust property unless the settlor reserved such rights at the outset. For example, by making himself or herself one of the beneficiaries of the trust, or by including a right to revoke the trust as one of the terms of trust (Cane & Conaghan, 2008). It also corresponds to the main principles of the Principles of European Trust Law and definition of the trust in the Hague Convention on the Law Applicable to Trusts and on their Recognition. The Czech regulation on trusts is based on the sample of the similar legislation in the Canada – Province of Quebec, which has civil law jurisdiction. Therefore we could use the Czech regulation on trusts as model for the introduction of the trust instrument in Latvia.

Future Work

The results of this analysis will be used for legislation process in the Republic of Latvia in order to improve trust regulation in Latvia and to persuade Ministry of Finance of the Republic of Latvia, that OECD is not against introduction of the trust instrument in the OECD Member-states. OECD demands only strong rules against money laundering, also relating to the trusts.

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THE 11TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

Legal Nature of Criminal Proceedings Regarding the Length of the Appeal

Constantin Tanase[1]

Abstract: The appeal regarding length of criminal proceedings represents a new institution of Romanian criminal procedure system, born from the need to align the procedural rules to the constitutional requirements and other internal rules, but especially from the need for harmonization with European Community rules, namely the Convention for the Protection of Human Rights and Fundamental Freedoms. To the same extent, it was aimed at forming a legal institution in line with the jurisprudence of the European Court of Human Rights. The new institution has its registered matter in art. 4881-4886 Criminal Procedure Code., Introduced by Law implementing the Code under Title IV – "Special Procedures" which recommends it from the beginning as a derogation from the common procedure. Nevertheless, given the position of remedy for excessive and unjustified extension of the criminal proceedings, as well as the judicial review, which it triggers in this regard, it raises the question of the legal nature of the appeal regarding the length of criminal proceedings. The answer to this question may affect the correct application of the institution and the improvement of judicial practice.

Keywords: new institutions of the criminal proceedings; appeal; Convention for the Protection of Human Rights and Fundamental Freedoms

1. Introduction

The celerity of the criminal proceedings, reducing the length of the case settlement and streamlining the procedures of criminal judicial trial were the core elements of the objectives taken into account by the authors of the Criminal Procedure Code. (Explanatory memorandum …) In achieving this, there have been introduced new institutions and new guarantees, while the ones kept from the old regulatory were redefined, reshaped, upgraded and adapted to new realities.

In this regard we must note the provisions of art. 8 Criminal Procedure Code, which have value of principle, regarding the need for criminal proceedings within a reasonable time limit. (Neagu & Damaschin, 2015, p. 493)The introduction of this new principle has been driven by the need to align the procedural rules to the constitutional requirements and to other internal regulations targeting the issue of criminal proceedings within a reasonable time limit, and especially the need for harmonization with the European Community legislation and the jurisprudence of the Court of Strasbourg. Therefore, art. 21 paragraph (3) of the Constitution provides that the parties are entitled to a fair trial and to settlement of cases within a reasonable period. The same regulation is found in art. 10 of Law no.

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304/2004 regarding the judicial organization[1], and art. 91paragraph (1) from Law n. 303/2004 concerning the statute of judges and prosecutors[2]imposes judges and prosecutors the obligation to solve the cases within the given timescales and to resolve cases within a reasonable time.

Art. 6 paragraph 1 from the Convention for the Protection of Human Rights and Fundamental Freedoms states that everyone has the right to a fair trial, publicly and within a reasonable timeframe of its cause (…).

While establishing the legal framework to ensure the speed and effectiveness of the criminal proceedings took first place in the intentions of upgrading the new regulations, When it came to the time of implementation of Law no. 135/2010 on the Code of Criminal Procedure[3]it was found that the text of the new law did not contain sufficient rules to guarantee the achievement of such an objective. As a result, by Law no. 255/2013 for the implementation of Law no. 135/2010 on the Code of Criminal Procedure and for modifying and completing certain normative acts which should contain provisions regarding the criminal procedure law[4]there were inserted six articles, namely art. 488^1-488^6, which constitute Chapter 1 of Title IV – "Special Procedures", entitled "The appeal concerning the length of criminal proceedings."

The new provisions represent the guarantees of deployment and completion of the criminal proceedings within a reasonable time limit, which is the principle enshrined in art. 8 Criminal Procedure Code. - "Fair and reasonable term and nature of criminal proceedings. "In equal measure, those provisions constitute the procedural means at the hands of the parties, of the main procedure subjects and, in certain circumstances, of the prosecutor, through which they can determine judicial bodies to complete the prosecution or trial within a reasonable time limit. In other words, through the appeal concerning the length of criminal proceedings, the persons concerned, by law, can induce a limited judicial control while verifying the extent of criminal proceedings, which is on the work from this point of view, of the prosecuting authorities and the courts, as appropriate. At this point adding the denomination (*nomen juris*) of appeal, the question arises whether it can be considered a remedy, in other words, what is the legal nature of the institution in question.

Including the appeal about the length of the criminal proceedings among special procedures is justified only by way of exercise and solving subsequently regulated by the path of exceptions to the ordinary procedure. But this does not spell out fully the issue of its legal nature. Besides the fact that it takes place according to a special procedure, the procedure in question generates a genuine judicial control, and this one goes quite close to the area of appeals.

2. Purpose of the Institution and Conditions of Exercise

As noted in the scientific literature, the appeal concerning the length of criminal proceedings is a procedural tool by which the parties and the subjects of the main proceedings, and the prosecutor, in certain circumstances, can submit to the control of the court, the unreasonable nature of the process in terms of the behavior of the judicial bodies. (Neagu & Damaschin, 2015, p. 494) In the same respect was the view that the institution in question aims to protect persons involved in criminal proceedings against its excessive slowness. (Udroiu, 2015, p. 581) Paragraph (1) of art. 488^1Penal Procedure Code provides that if the work of prosecution and judgment is not met within a reasonable time, an appeal

[1]Republished in the Official Gazette of Romania, Part I, n. 827 from September 13, 2005.
[2]Republished in the Official Gazette of Romania, Part I, n. 826 from September 13, 2005.
[3]Published in the Official Gazette of Romania, Part I, n. 486 from July 15, 2010.
[4]Published in the Official Gazette of Romania, Part I, n. 515 from August 14, 2013.

can be made, requesting acceleration of the procedure. Therefore, the goal of this institution, as it is clear from text of the legislation, is to avoid delays in the prosecution or trial and to expedite proceedings.

Naturally, the assessment of the duration of proceedings will be reported within a certain period. The text of the law cited above uses the expression of reasonable duration, which led the Romanian doctrine to resort to the jurisprudence of the Strasbourg Court (CEDO) in the application of art. 6 paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms, which provides the right to trial within a reasonable time limit of the causes. Thus, it admitted that the concrete assessment of the reasonable period envisaged mainly four criteria: conduct of the parties, the importance for the parties of the object of the procedure, the conduct of the authorities and the complexity of the case. (Udroiu, 2015, pp. 583-585) Some authors considered that, of those criteria, the conduct of judicial bodies is the main cause of delay in administration of justice and, therefore, would substantially influence the reasonableness of criminal proceedings. (Neagu & Damaschin, 2015, p. 494)

Paragraph (3) of art. 488^{1}Penal Procedure Code sets deadlines on reasonable length of criminal prosecution and trial, in which, in our opinion, a trial court vested with such challenges, it is dispensed to assess the reasonableness of the length.

According to procedural law provisions, an appeal can be formulated as follows:

a) at least one year from the opening of criminal investigations, for the cases existing during criminal investigations;

The law does not distinguish whether the prosecution was begun *in rem* or *in personam*, which is why we consider that the one year period begins to run from the opening of criminal investigations even if it was only triggered *in rem.* In practice frequently arise situations when the offender is not identified, being necessary to identify him time periods greater than one year, sometimes the offender remaining unknown until the expiry of limitation for criminal liability. The appeal concerning the length of criminal proceedings may be exercised under such circumstances; the court with jurisdiction can dispose in relation to the facts.

b) after at least one year from the indictment, for proceedings pending the first instance judgment;

The moment of prosecuting coincides with the date of registration of the case in court, including the procedure for preliminary chamber thus because it is a procedural stage preparatory to judgment at first instance (Neagu & Damaschin, 2015, pp. 494-496) at the end of which the decision is to start the trial and not the prosecution.

c) at least 6 months from the notification of the court of appeal for proceedings pending ordinary or extraordinary remedies.

Since the declaration of appeal must occur within 10 days from the notification of the copy of the minutes (art. 410 paragraph(1) Penal Procedure Code), and the judgment shall be drafted within 30 days from the pronouncement (art. 406 paragraph (1) Penal Procedure Code) and only after this time the file is submitted to the court of appeals, the question is referring a case to appeal.As it appreciated in the scientific literature (Neagu & Damaschin, 2015, p. 497), the period of six months shall run from the date of registration of the case on appeal.Such reasoning is true for all the other legal remedies.

According to art. 488^{1}paragraph (2) Penal Procedure Code, the appeal may be lodged by the suspect, defendant, injured party, civil party and civilly responsible party. During the trial, the appeal may also

be entered by the prosecutor. From the economy of the text, it results that during the prosecution the appeal may be exercised by the parties (accused, civil party and civilly responsible party) by the subjects of the main proceedings, (suspect and the injured party). In the trial phase, together with these active subjects comes the prosecutor in his capacity as representative of the general interests of society and the defender of the rule of law, rights and freedoms of citizens (art. 131 par. (1) of the Romanian Constitution.

Some authors have considered inadmissible the appeal formulation solutions complaint procedure against filing in meeting a request for merger or an execution appeal procedures that exceed limits criminal trial or procedure for preliminary chamber. (Udroiu, 2015, p. 591)

Paragraph (4) of art. 488^1 Penal Procedure Code provides that until settlement, the appeal may be withdrawn at any time and cannot be repeated during the same procedural phases in which has been withdrawn.

3. Jurisdiction and Procedure for Settlement

According to art. 488^2Penal Procedure Code, the jurisdiction to settle the appeal belongs to:

a) in criminal cases during criminal investigations, the judge of rights and liberties from the court that would receive the authority to hear the case at first instance;

b) in criminal cases during trial or appeal, ordinary or extraordinary, the higher court before which the case is pending;

c) when judicial proceedings, which are formulated on appeal is pending in the High Court of Cassation and Justice competence to settle the appeal completely belongs to another judge within the same divisions.

The appeal is filed in written and must include the identification of the individual or of the entity who completed it, the quality involved, the identification of the representative (if lawyer, he must also indicate the address of his professional office), mailing address, information regarding the prosecutor or the court file number of factual and legal grounds on which the appeal is based, date and signature.

To settle the appeal, the judge of rights and liberties or the court order the following preliminary measures***:***

a) inform the prosecutor supervising or conducting the criminal investigation or the court before which the case is pending, on the objection raised, mentioning the possibility of formulating an opinion on this;

This measure, referred by art. 488^4paragraph (1) lit. a) Penal Procedure Code, shows that the notification containing appealing against the length of criminal proceedings directly addresses to the rights and freedoms judge or to the competent court and no to the court before which the case is pending.

b) Request the file or request a certified copy thereof, the prosecutor or the court has the obligation to send it within 5 days of receipt of the request;

c) informing the other parties to the proceedings and, where appropriate, of other subjects of the main proceedings, on the objection raised and the right to express their views within the time granted for this purpose by the judge of rights and liberties or the court;

Contrary to some solutions adopted in judicial practice, we consider that the perpetrators (individuals indicated as authors of the crime, but against which the authorities did not start prosecution *in personam*) should not be informed of the appeal, since they are not parties in the proceedings, or primary procedure subjects.

If the suspect or accused person is deprived of liberty in the case or in another case, information will be made both to him and to the lawyer chosen or appointed ex officio. Failure to transmit the point of view by the prosecutor or court, the suspect, defendant or by the injured party, as applicable, shall not preclude the solving of the complaint. The judge of rights and liberties or the court shall examine the appeal not later than 20 days after the registration, the term is one of recommendation, for its overcoming not being provided any sanction.

To resolve the appeal, the judge of rights and liberties or the court verifies the length of the proceedings on the material and the work of the file and the views presented by the prosecutor, the court, the parties and the main procedure subject as appropriate. On the appeal, the judge of rights and liberties or the court decides by the closing statement.

In assessing the reasonableness of the length of judicial proceedings are taken into account the following elements:

a) nature and object of the cause;

b) complexity of the case, including by considering the number of participants and the difficulties of taking evidence;

c) extraneous elements of the case;

d) stage of the proceedings in which the case is pending and during earlier stages;

e) the behavior of the appellant in the analyzed judicial process, including in terms of its procedural rights and procedural exercise and with regard to meeting its obligations in the process;

f) behavior of other participants involved, including of the authorities involved;

g) interference of applicable legislative amendments in question;

h) other factors likely to influence the length of proceedings.

If the judge of rights and liberties or the court considers the appeal to be well founded, admit it and the period within which the prosecutor will have to solve it, respectively the court entitled to settle. It also will establish the term within which an appeal could be lodged. Naturally this second term will be longer than the first and an appeal cannot be made before the expiry date.

Although the provisions of art. 4886 Criminal Procedure Coded not expressly provide other solutions, from economy of the text in question and the other from the chapter I1 of Title IV, results that the rights and freedoms judge or court may adopt the following solutions:

-dismisses the complaint as unfounded; the solution resulting from the *a contrario* interpretation of the provisions of paragraph (1) of art. 488^6 Criminal Procedure Code; in the scientific literature it was appreciated that after rejecting an appeal a new appeal may be filed anytime; (Udroiu, 2015, p. 595); according to art. 275 paragraph (2) Criminal Procedure Code, following the rejection of the appeal, the person who made it will be liable for legal expenses to the state;

- rejects the appeal as inadmissible; the solution can occur when the appeal was made which did not have *locus standi* or by exercising the appeal was not pursued solve the problem of lack of expeditious trial, or has been made on criminal trials started before the date of February 1, 2014;

- Notes withdrawing the appeal; solution resulting from the provisions of art. 4881 par. (4) Criminal Procedure Code; in that case, the appeal cannot be repeated during the same procedural phases in which has been withdrawn.

The law penalizes abuse of rights consisting of the formulation in bad faith of the appeal with a judicial fine from 1,000 lei to 7,000 lei and legal costs incurred to pay.

The conclusion after making a decision on the appeal shall be communicated to the appellant and forwarded for information to all interested parties or persons concerned, it is not subject to appeal.

Whichever solution is adopted, the judge of rights and liberties or that the court that settle the appeal cannot give advice nor dispensations on certain issues of fact or law to anticipate how to handle the process, or to bring any prejudice to the freedom of the judge to decide the case according to law, on the solution to be given.

4. Legal Nature of Criminal Proceedings on Appeal

As already underlined, the inclusion of the claim of length of criminal proceedings among special procedures does not clarify the issue of its legal nature. Besides the fact that institution name (*nomen juris*) places it in the same category with the complaint - as an ordinary appeal (art. 425^1Criminal Procedure Code), the appeal regarding length of criminal proceedings, like appeals or complaint against the measures or acts of criminal investigation involves checking the activity of the prosecution or the courts in terms of the length of proceedings, in other words, judicial review in this regard.

This judicial review brings it closer to remedies, but it cannot give this quality because remedies are means provided by law which promote judicial review in which court rulings are verified, in order to dismantle those that contain errors of fact and law and their replacement with lawful judgment and truth. (Theodoru, 2007, p. 715) The appeal concerning the length of criminal proceedings, although requires judicial review, it cannot be equated to appeals because, according to art. 129 of the Romanian Constitution, they can be exercised *only against judgments* (s.n.)

But among the remedies regulated by law as such, meet the complaint, as an ordinary appeal that, in the matter of precautionary measures imposed during criminal investigations can be exercised against decision of a prosecutor which was provided for the measure or on the record of fulfilling the measures ordered by the prosecutor. (Udroiu, 2015, p. 302-303) We have therefore an appeal provided for by law, which is not exercised solely in connection with judgment. From this perspective, we can say that the complaint concerning the length of criminal proceedings, although it is not considering a judgment, since it triggers a judicial review, takes the appearance of appeal.

But, besides these similarities, between the complaint concerning the length of criminal proceedings and appeals there are essential differences. Thus, through the appeal concerning the length of criminal proceedings is not intended or abolished any law or any measure emanating from a judicial body (the prosecution or trial). Also, if admission the appeal concerning the length of criminal proceedings takes place a retrial nor imposes a solution, but only set a reasonable deadline by which you have to complete the prosecution or judgment, where appropriate.

Considering these aspects, the appeal concerning the length of criminal proceedings appears as an instrument of judicial control over the activity of judicial bodies in terms of reasonable time of completion of a phase or phases of the criminal proceedings. Nevertheless, it cannot be treated as appeal, since it is not exercised against a judgment or exercise of any measure ordered by the court.

Consequently, the legal nature of the appeal concerning the length of criminal proceedings is special that can be called as *a tool for judicial review sui generis.*

5. Conclusions

The appeal concerning the length of criminal proceedings is a new institution, useful to carry out the activity of judicial bodies (the prosecution and judgment) at the disposal of the parties and participants in the process, without targeting any given solution. This is, moreover, the essential feature, which distinguishes means of appeal, giving it its own judicial nature. Therefore, we consider that the name of appeal appears to be inadequate, generating confusion among others and that it is not disputed by something, but rather requested for making the process faster. A name like *speeding application* or *notification regarding length of criminal proceedings* would certainly avoid any uncertainty.

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Improving the Regulatory Framework for the Legal Status of Applicants for International Protection in the Context of the implementation of Relocation Mechanisms

Tache Bocaneala[1]

Abstract: The unprecedented refugee crisis facing the European Union, the impossibility of some Member States unable to cope and to process the massive flow of people on their borders and blocking the "Balkan Route" that moved towards the states where they wanted to reach, led the pressing need for putting in place new instruments to manage the situation. The mechanisms of relocating refugees, the principle of solidarity through quotas imposed on member states put to the authorities in these countries, implicitly in Romania, a number of issues with great difficulty in solving them. By the present study we have highlighted some of these issues in connection with the specific legal status of refugees resettled in other countries in Romania and any possible solutions to solve them.

Keywords: refugees; migrants; relocation, asylum application, restrictive measures

1. Introduction

Both in everyday language and in the specialized literature it does not always make a distinction between the term refugee as defined by the Convention on the Status of Refugees, signed at Geneva on 28 July 1951[2] and the term of "migrated" which means, usually, the person moving to another country for economic reasons.

In 2015, according to official statistics, more than 1.25 million refugees, driven out by wars, persecution or poverty, have sought asylum in EU countries.

The expansion of the ISIS terrorist group and the extension of the devastating war in Syria have caused exponential growth of refugees in this area[3]. These refugees were added to the growing number of refugees from other conflict zones such as those in Afghanistan, Libya, and the multitude of immigrants from other countries and especially from Pakistan, Eritrea, Iran, Algeria, Tunisia, Egypt, Nigeria, etc.

In the recent years and especially during 2015, the complex consisted of Mediterranean See and the Aegean Sea has become the "epicenter" of migration towards the developed countries in Europe, the

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[2] Convention on the Status of Refugees, signed at Geneva on 28 July 1951, to which Romania adhered by the Law no. 46/1991 for Romania's accession to the Refugee Convention and Protocol on Refugees.
[3] According to Eurostat, in 2015 the number of asylum seekers from Syria has doubled and reached 362 775 people and the number of Iraqi refugees has increased seven times and reached 121 535.

island of Lampedusa in Italy and the Greek islands[1] becoming gateways for those fleeing the wars, persecution and poverty.

Beyond the challenges that the European states had to face, both countries of entry of refugees and transit countries on the Balkan route and those of destination, the drama of the situation, unprecedented in the modern and contemporary history has revealed also the high risks of crossing the two seas in boats more or less improvised, made available by unscrupulous traffickers, an approach which resulted in thousands of human casualties.[2]

The European Union is still bruised by an enhanced and damaging bureaucracy (Savenco, 2011, pp. 103-111) while the Member States have had different positions and still have positions different from the refugee's crisis even reaching to serious dimensions. Simultaneously we assist also to a radicalization of societies in these countries, the terrorist attacks having members of ISIS groups, having in turn a complication effect and even more of the situation so that a Europe as a free society, without borders, being economic, political or social, it could remain a project without achieving the prospects.

Romania was so far off the main route of travel of refugees towards countries economically prosperous, but this has not excluded it from being part of the problem. Following the decisions taken by the European Council on implementation of the mechanisms relocation it was decided that our country must receive a total of about 6,200 refugees over the years 2016-2017, as a quota. Beyond the anticipated and declared institutional incapacity of "hosting" of these refugees, Romania is in a position to be in agreement with the majority of EU countries in tackling and solving the refugee crisis solidary manner.

2. International Protection Granted by the Romanian State

According to the asylum law in Romania[3], in accordance with the Geneva Convention of 1951[4], the refugee status is recognized, upon request, to an alien who, after a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinions or membership of a particular social group, is outside the country of origin and is unable or, owing to such fear, is unwilling of receiving protection of that country and those persons without citizenship who are outside the country of his former habitual residence due same reasons mentioned above, is unable or, owing to such fear, is unwilling to return.

According to the legislation in force, the receipt, recording and processing asylum applications, providing assistance to asylum seekers during the procedure and assistance for integration are activities taking place at regional centers for accommodation and procedures for asylum seekers located in Bucharest, Galati, Timisoara, Giurgiu, Radauti and Maramures, territorial structures

[1] In 2015, Greece reached almost 860,000 refugees and now their number is close to one million people, after only the first two months of this year were registered more than 130,000 refugees.
[2] This results from the data of the International Organization for Migration (IOM), which reveals that in 2015, no less than 3,770 migrants have lost their lives trying to cross the sea. Of these, 800 died in the Greek islands and the rest after trying to reach Europe on the north coast of Africa.
[3] Law no. 122 of 04.05.2006 on asylum in Romania (last updated by Law no. 331 of 16 December 2015 published in the Official Monitor no. 944 of 21 December 2015).
[4] Convention on the Status of Refugees, signed at Geneva on 28 July 1951, to which Romania adhered by the Law no. 46/1991 for Romania's accession to the Refugee Convention and Protocol on Refugees.

specialized in asylum issues, totaling 1,500 seats[1] and which are organized and function according to art. 3 paragraph (2) of Law no. 122 of 04.05.2006 on asylum in Romania (updated).

In order to align our country to the requirements imposed by the specifics of the issue newly created by the shares of distributed refugees, it was necessary to amend and supplement the legal framework regulating the legal status of persons in a position of benefiting from some form of international protection from the Romanian state.

Thus, by Law no. 331/2015 amending and supplementing certain legislative acts in the foreigners domain[2] have brought changes and additions to the legal framework ruled by Law on asylum in Romania. It was provided so that, on the basis of decisions made at EU level or bilateral agreements concluded by Romania with other Member States of the European Union, the Ministry of Internal Affairs, the General Inspectorate for Immigration may propose taking over by Romania of the following categories of aliens:

a) refugees on the territory of third countries, whose status was recognized according to the Geneva Convention;

b) asylum seekers and beneficiaries of subsidiary protection granted by a Member State of the European Union.[3]

Legislative amendment provides that the number and conditions for taking foreigners subject to decisions taken at EU level or bilateral agreements concluded by Romania with other European Union member states are established by Government decision.

These people have the same rights and obligations in Romania as the applicants who have applied for asylum in Romania, that is beneficiaries of international protection in Romania, being practically assimilated.

3. Legal Instruments for the Protection of State

Starting from the need to provide the authorities the legal instruments to prevent cases at risk of absconding, those endangering the national security and limiting the abuse cases to the asylum procedure, the amendments to the asylum law in Romania have included a series of restrictive measures that can be taken to applicants for international protection, based on an individual analysis, namely: a) obliging to appear at the headquarters of the General Inspectorate for Immigration structure; within the meaning of this provision, during the performance of asylum procedures, the General Inspectorate for Immigration may provide, by a reasoned decision, the compulsoriness for the applicant for international protection to report periodically at established dates and hours and upon request to the headquarters of one of its territorial structures.[4]

b) establishing residence in a regional center of procedures and accommodation of asylum seekers;

This restrictive measure is to establish a place of residence for the applicant for international protection in a regional center of procedures and accommodation of asylum seekers, even if he has

[1] Centers are in Bucharest (470 seats), Giurgiu (200 seats), Maramures (250 seats), Galati (300 seats), Radauti (180 seats) and Timisoara (100 seats).
[2] Published in the Official Monitor no. 944 of December 21, 2015.
[3] Art. 3, paragraph 5 of Law no. 122 of 04.05.2006 on asylum in Romania (updated).
[4] Art. 19, paragraph 3 of Law no. 122 of 04.05.2006 on asylum in Romania (updated).

means of subsistence, and compulsoriness of not to leave the place except after informing the Head of the center.[1]

c) placing in enclosed spaces specially arranged;

Within the regional centers for procedures and accommodation of asylum seekers already established or newly established, the General Inspectorate for Immigration has the obligation to establish specially designated enclosed spaces as places for temporary accommodation of applicants for international protection. The applicant for international protection can be placed in such an enclosed space specially arranged with temporary restriction of freedom of movement only in the following circumstances[2]:

- for verifying the identity declared;
- for establishing the elements underlying the application for international protection, which could not be achieved without taking action, especially where there is a risk of circumvention of the applicant;
- at the request of one of the institutions with responsibilities in national security, indicating that the applicant for international protection presents danger to national security.

d) taking or, where appropriate, keeping into public detention.

Detention of applicants for international protection may be ordered only if there are insufficient or not possible other restrictive measure in relation to the procedure in which it would be decided also the the purpose for their decision.

Both the *measure of placement in closed spaces specially arranged* and the *taking or, where appropriate, keeping into public detention* can be ordered in writing, for a period of 30 days, by a reasoned order in fact and according to the law by the prosecutor specially assigned in the office attached to the court of appeal in whose jurisdiction the accommodation is to be placed in the applicant for international protection after a reasoned request to the General Inspectorate for Immigration.[3]

With these new rules adopted, the competent authorities are obliged to ensure access to the asylum procedure to any foreign citizen or stateless person on the Romanian territory or at the border, from the moment of the manifestation of will, expressed in writing or orally, showing that it seeks the protection of the Romanian state, except as expressly provided and listed exhaustively in the law when the asylum application can be rejected as being inadmissible, by a reasoned decision, namely:

- Art. 50^1 – the request for asylum of an alien who benefits from international protection granted by another Member State;
- Art. 91, par. (2), letter b) – the application for access to a new asylum procedure;
- Art. 95, par. (2) - If after an individual analysis it shows that the criteria under which a country can be considered first country of asylum and if the alien is readmitted by this country;
- Art. 96, par. (2) - when the stranger tried to enter or has entered illegally into Romania coming from a European safe third country and this country expressed its agreement on readmission;
- Art. 97, par. (2) - when there is a safe third country with which the applicant has a connection and the third country has agreed on receiving the alien in its territory;

[1] Art. 19 paragraph 4 of Law no. 122 of 04.05.2006 on asylum in Romania (updated).
[2] Art. 19 paragraph 5 of Law no. 122 of 04.05.2006 on asylum in Romania (updated).
[3] The applicant for international protection to which it was ordered the placement in a space or taking or, where appropriate, keeping in detention may submit, within five days, a complaint to the Court of Appeal in whose territorial jurisdiction the accommodation center is situated, it is required to solve within 3 days from the receipt. The complaint does not suspend the measure and it is exempted from judicial tax. The court decision is final.

- Art. 120, par. (2), letter a) - when it finds the existence of another Member State's responsibility for examining the application, under the Dublin Regulation.

Despite the progress in the improvement of the legal framework, it is obvious that, as the European Union is not ready to meet the major challenge of refugee crisis, Romania fits into the same category.

It requires a substantially budgetary effort to increase the capacity of Regional Centers for accommodation and procedures for asylum seekers and eventually the establishment of new ones, for the development of enclosed spaces specially designated as places for temporary accommodation of applicants for international protection in these centers and also to complete organizational charts with qualified personnel and fit for performing such tasks in this area.

4. Conclusions

From the brief analysis we can summarize that Romania has made great strides on the line of improving the legal framework required to manage the flow of refugees and it will have to implement its provisions, especially regarding the expansion of accommodation facilities and development of others as needed, setting up premises closed specially designed as places for temporary accommodation of applicants for international protection, the necessary budgetary allocation for operating and personnel required to complete the organizational charts necessary for a smooth operation.

But it is increasingly obvious that the European Union must act with far more determination to consistently succeed in facing the challenges of the refugee crisis. Without believing that the mandatory quotas for refugees formula is the best solution, we appreciate the solidarity union should urgently exceed the level of political statements.

The relocation mechanisms are only a momentary palliative that highlight the inability of the EU decision-making bodies to understand the causes and act to prevent and counter it at the starting point.

Issues such as the transformation of FRONTEX into an agency to manage effectively the guarding of the external borders to no longer permit the uncontrolled access to any categories of persons, refugees or migrants, the establishment and operationalization of the European Passenger Name Record or implementing the regulation establishing a European Public Prosecutor are measures that no longer be postponed.

It is imperative to find the formulas the necessary to ensure effective cooperation and collaboration structures between intelligence and law enforcement agencies from all EU member countries for combating terrorism, organized crime and human trafficking.

Last but not least the EU must approach concrete policies in the domain of conflict prevention at international level and to reduce regional development disparities.

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THE 11TH EDITION OF THE INTERNATIONAL CONFERENCE
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Recognition and Enforcement of Foreign Judgments if the Convicted Person is in Romania. Critical Observations

Minodora Ioana Rusu[1]

Abstract: In this paper we have examined the institution of recognition and enforcement of foreign judgments, if the sentenced person is in Romania, according to the Romanian special law provisions in force. We have also considered the formulation of critical observations aiming at identifying failures of the law and hence the proposal of amending and supplementing the texts. Among these drawbacks of the Romanian law we mention the absence of compulsory insurance of defense in the trial stage of the application for recognition to the trial court and the absence of the person from hearing an appeal, the obligatory presence being only for the prosecutor. The paper continues the research of the international judicial cooperation forms in criminal matters conducted by the publication of other similar studies, and the innovations consist precisely in the examination of institution and identification of provisions of the law that can cause dysfunctions in the procedure of recognition and enforcement of such judgments. The paper can be useful to academics, theorists, practitioners and the legislator in terms of introducing amendments and additions in the text of the law.

Keywords: Sanction of criminal law; mandatory grounds for non-recognition; judgment procedure; call

1. Introduction

As highlighted in the recent doctrine, examined individually, each of the forms of judicial cooperation in criminal matters adopted at EU level has its importance, on a first examination it is quite difficult to establish a hierarchy of their importance.

This hierarchy is difficult to achieve also due to the fact that in practice, each of the mentioned forms is important because of the moment in which it is applied or it requires its application by another Member State (Rusu & Balan-Rusu, 2013, p. 83).

On the other hand, when we examine the particularly complex institution of recognition of criminal judgments and foreign judicial acts, it must include both criminal judgments emanating from the Romanian judicial authorities and those emanating from the competent judicial authorities of other countries (Boroi & Rusu, 2008, p. 347).

Our opinion, acquired from the general European and Romanian doctrine, is that, in terms of judicial cooperation in criminal matters between Member States of the European Union and the recognition and enforcement of judgments and other judicial acts emanating from another competent institution in another Member State is the most important form of cooperation (Rusu & Balan-Rusu, 2013, p. 83).

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This form of international judicial cooperation in criminal matters in Romania's relations with countries other than the EU members has certain features which are regulated point by point in the Romanian law.

Thus, the Romanian legislator has regulated distinctly the institutions of recognition and enforcement of foreign judgments, if the person is serving a criminal law sanction in another Member State or in Romania.

In the present work we undertake an examination on the procedure for recognizing foreign judgments if the person convicted in a third State, is on the territory of Romania.

We mention that this institution is governed by Title V, Chapter II, Section 2 of Law no. 302/2004 on international judicial cooperation in criminal matters.[1]

2. The Procedure for Recognition of the Foreign Judgment and Taking Preventive Measures

After the transmission of the documents and information provided by law (art. 132 of the special law) by the issuing State, the Ministry of Justice through its specialized directorate submits them to the office attached to the court of appeal in whose territorial jurisdiction resides the sentenced person or, in the case where he is in detention, in the territorial jurisdiction of the detention place for the purpose of referral to the competent court of appeal.

After receiving the file, the assigned prosecutor verifies if:

- the enforcement of the foreign judgment in Romania would be contrary to the principle of *non bis in idem*;
- the convicted person is prosecuted in Romania for the same offenses for which the foreign judgment was rendered;
- the convicted person is prosecuted in Romania for crimes other than those for which the foreign judgment was rendered;
- It is incident with any of the refusal grounds established in art. 136 par. (2) of the special law [art. 134 par. (2) a) -d) of the special law].

Also, the prosecutor will check the possibility of provisions governing the specialty rule, meaning to ascertain whether the person benefits from this rule.

After performing the mentioned above checks and declaring that the provisions of the law are met, the prosecutor notifies the competent court of appeal to decide.

The court is assembled by one judge, in the council chamber, summoning the convicted person, the prosecutor's presence is mandatory.

Although the law does not expressly provide it, we consider that at least at the request of the convicted person it should be assisted by the chosen attorney.

[1] Published in the Official Monitor of Romania, Part I, no. 594 of 1 July 2004, subsequently supplemented and amended by several acts, republished, published in the Official Monitor of Romania, Part I, no. 377 of 31 May 2011, the last change being promoted by Law no. 300/2013 for amending and supplementing Law no. 302/2004 on international judicial cooperation in criminal matters, published in the Official Monitor of Romania, Part I, no. 772 of 11 December 2013.

We believe that in conducting this procedure, given its importance and complexity, the convicted person must be provided with mandatory legal assistance, which is why we suggest supplementing the law with such provisions.

The object of the procedure for recognition of the foreign judgment is to check the following conditions:

- The judgment is final and enforceable;
- There is double incrimination; if the penalty was imposed for several crimes, this condition is checked for each crime separately;
- it is not incident any grounds for non-recognition and non-execution of a foreign judgment under art. 136, par. (2); if the court finds the incidence of any of the compulsory grounds for non-recognition and non-execution, the court may still decide the recognition and enforcement, if they are confident that the execution of the sentence in Romania would contribute significantly to the social reintegration of the convicted person;
- the execution of the sentence of life imprisonment or imprisonment or the custodial measure in Romania is likely to facilitate the social reintegration of the convicted person;
- There are no mandatory or optional reasons for refusal of recognition and enforcement of foreign judgment (Boroi, Rusu & Rusu, 2016 p ....).

The mandatory reasons for which according to the Romanian law the foreign judgment shall not be recognized and implicitly enforced are:

- the recognition and enforcement in Romania of the foreign judgment would be contrary to the fundamental principles of the legal system of the Romanian state;
- the judgment relates to a political offense or an offense connected with a political offense or an military offense that is not an offense of common law;
- the sentence has been imposed on grounds of race, religion, sex, nationality, language, political or ideological opinion or membership in a particular social group;
- The person has been finally convicted in Romania for the same criminal offenses. If the foreign judgment has been passed for other offenses, the court may order partial recognition of it, if the other conditions are met;
- the person has been convicted in another state for the same crimes, and the foreign judgment passed in this state has been previously recognized by Romania;
- the convicted person benefits in Romania from immunity from prosecution;
- The penalty was imposed on a person who is not criminally liable under the Romanian law;
- The penalty is a measure of psychiatric or medical treatment that cannot be enforced in Romania or, where applicable, it provides for medical or therapeutic treatment that cannot be supervised in Romania, in accordance with the national legal or healthcare system;
- The sentenced person has left Romania establishing his domicile in another state, and his links with the Romanian state are not significant;
- The convicted person has committed a serious crime, such as to alarm the society, or has had close relations with members of criminal organizations, likely to cast doubt upon his social reinsertion in Romania;
- There are objective indications that the judgment was given in breach of fundamental rights and freedoms, in particular, the sentence has been imposed to sentence the convicted person on grounds of sex, race, religion, ethnic origin, nationality, language, political beliefs or sexual orientation and the convicted person had no possibility to challenge these circumstances to the European Court of Human Rights or an international court.

So whenever the court shall determine the incidence of a single case of the ones mentioned above, it will refuse the recognition and implicitly the enforcement of foreign judgment, even if the other conditions required by the Romanian law are met.

At the same time, the court will also examine the possibility of the following optional grounds for refusing recognition and enforcement:

- The person is under investigation in Romania for the same criminal offense for which he was convicted abroad. If the judgment has been passed for other offenses, the court may order partial recognition of it, if the other conditions are met;
- When the issuing State has refused the application under art. 134, par. (1) of the special law.

No doubt when the court becomes aware of any optional reason for refusing the recognition and enforcement, the recognition and enforcement of the decision may be taken if all the conditions provided by law are met. So, unlike the mandatory reasons, in the case of optional reasons court may decide the recognition and enforcement of the foreign judgment.

Also, in the case where the convicted person is under investigation in Romania for the crime for which he was convicted abroad, instead of refusing the recognition, the court may order either the recognition of the foreign judgment or suspending the proceedings until a decision is passed in the criminal case found before the Romanian judicial authorities.

At the express request of the issuing State it may be taken against the convicted person one of the preventive measures provided by the Romanian Criminal Procedure Code.

For choosing preventive measures it will be taken into account the sentence imposed in the issuing State, the nature of the crime, health, age, history and other circumstances of the person against whom the action is taken.

Under the Romanian law, the *remand measure may be taken against the convicted person if the committed offense is one of the categories of offenses mentioned in art. 96, para. (1) and the following circumstances exist:*

a) the sentenced person has fled from the issuing State in order to evade prosecution, trial or imprisonment and took refuge in Romania; or

b) the sentence imposed by the foreign court or to execute the remainder is at least one year in prison [art. 137, par. (5) of the special law].

We note that the provisions of art. 96, para. (1) from the special law thee are provided the offenses and serious crime groups, which do not require verification of double incrimination in the case of the execution of a European Arrest Warrant.

The duration of any preventive measure is of no more than 180 days, and the preventive measures rightfully cease:

- At the deadline prescribed by law or the deadline stipulated by the Romanian judicial authorities;
- When, before passing a judgment for recognition of the foreign judgment, the preventive arrest or house arrest reached the duration of imprisonment sentence imposed abroad; or
- Whether the remand was ordered prior to receiving an application for recognition and enforcement of foreign judgment when, within 30 days of the remand it was not received by the directorate of the Ministry of Justice the information provided by the Romanian law (we consider the information provided in art. 132 of the special law).

The legal situation of the convicted cannot be aggravated as a result of the duration of the preventive measure of deprivation of liberty imposed by the Romanian judicial body.

From the study of legal rules governing the conditions in which there are taken preventive measures In the case of the procedure for recognition and enforcement of a final judgment in a third State and the convicted person is identified in Romania, it follows a number of features that exceed the Romanian Code of criminal procedure.

First we find that there are significant differences in the general conditions to be met in order to order one of the preventive measures provided by the Romanian law.

Thus, the court must consider the following issues:

- the existence of a specific request of the issuing State, which it calls for a preventive measure against the sentenced person;
- which are the reasons supporting the request for the issuing State, which is the preventive measure that is requested to be applied by the Romanian judicial authorities and if this measure is provided in the Romanian law;
- the special conditions in which the convicted person is, namely those concerning the imposed sentence, the nature of the crime, health, age, criminal record or other situations which involve the convicted person.

In the case where the issuing State through its judicial authorities expressly calls for remand of the convicted person or house arrest, in addition to finding whether the conditions are applicable to all categories of preventive measures mentioned above, the Romanian court should meet the following conditions:

- The offense for which the person was convicted is part of the group of crimes for which it is not required the existence of double incrimination in the case of executing a European Arrest Warrant;
- The convicted person fled in order to evade the enforcement of the sentence imposed in the issuing State and he was identified in Romania;
- The sentence imposed by the foreign court or the remaining is of at least one year;
- The legal status of the convicted cannot be aggravated as a result of the preventive measure of deprivation of liberty ordered by the Romanian judicial body.

In the case where the Romanian court finds that these conditions are not met, the remand or house arrest cannot be arranged.

The interpretation of the depositions of the Romanian law raises a question of law, which is the possibility of the Romanian court to take against the convicted person one of the preventive measures of the Romanian law, when there is no specific request of this kind from behalf of the issuing State.

Our view is that while the issuing State does not explicitly request taking a preventive measure, the Romanian court may not order such a measure.

Significant differences related to the Romanian law provisions, appear also on the duration of the preventive measures which, regardless of their nature it cannot be longer than 180 days.

Under the law, *the sentence shall be drawn up within 10 days of the ruling, and against it, it may appeal within 10 days, the prosecutor, ex officio or at the request of the Minister of Justice and the convicted person. In the case of the convicted person the time flows from the decision or, in case he did not attend both the debate and the pronouncement of the decision, from the communication copy on the device. The file will be submitted to the court of appeal within three days, and the appeal shall*

be heard within 10 days, in closed session, without summoning the convicted person, the prosecutor's presence is mandatory (Boroi, Rusu & Rusu, 2016, p ....).

We maintain constant opinion about the unconstitutionality of the provisions that relate to hearing an appeal in the boardroom without summoning the convicted person.

We appreciate that not only the convicted person should be summoned, but it must also be ensured proper defense.

We believe that until establishing the unconstitutionality of this text or changing it by the legislator, in the judicial practice, the courts in Romania in line with the decisions promoted by the Constitutional Court will have to summon the person concerned, assisted by lawyer chosen or appointed ex officio. If it is not possible to ensure the person's presence in court of appeal, it has to be represented by the lawyer chosen or appointed ex officio.

3. The Notification of Foreign Judgment and the Appeal of the Sentenced Person

If the prosecutor on the case, after checking the file notes that the judgment was given in the absence of the convicted person shall notify the person convicted on the decision. The notification must include the following:

- It was received a request for recognition and enforcement in Romania of the sentence established by the court decision;
- Is entitled to challenge the foreign judgment and to file appeal in this regard, if this right is conferred by the law of the issuing State;
- That the appeal is subject to the jurisdiction of the issuing State;
- That the appeal is submitted to the competent prosecutor or prosecutor attached to the court of appeal in whose area is resident or if he is in detention in the constituency of which the detention place is;
- The deadline for appeal is 30 days and it shall start from the date of receipt;
- The failure to file the appeal within the deadline of 30 days has the consequence of considering the foreign judgment as being passed in his presence.

A copy of the notification will be sent to the specialized directorate within the Ministry of Justice.

If, within 30 days the convicted person has not filed for an appeal, the prosecutor will inform the competent court of appeal.

If on the expiry of the 30 days it is found that the convicted person submitted an appeal, the prosecutor decides its ranking and returns the file to the specialized directorate of the Ministry of Justice, with the appeal and other documents filed by the convicted person (Boroi, Rusu & Rusu, 2016, p ....).

4. Conclusion

The conducted examination highlights the way in which Romania has regulated the institution of recognition and enforcement of criminal law sanctions of deprivation of liberty imposed by a court of a foreign state and the sentenced person is in Romania.

At the same time, we found certain legislative inconsistencies causing some failure in carrying out the procedures established by the law.

A first critical remark concerns the need to mention in the law the compulsoriness of insuring the legal assistance of the person subject to this procedure, in the trial court. We appreciate that the mere mention that the person concerned is summoned is not sufficient because this person should be compulsorily provided with legal aid, given the complexity of the procedure and its effects even bilaterally, although extrajudicial.

Another issue that will cause some failure in the interpretation and enforcement of proceedings before the appellate court is related to the depositions of the law according to which, hearing an appeal is made in the boardroom without summoning the convicted person.

We believe that, given the need to respect the fundamental principles of Romanian criminal trial, and some recent decisions of the Constitutional Court, the convicted person must be summoned, ensuring the right to defense.

As a general conclusion, we consider that regulating a procedure for recognition and enforcement of a judgment by which a foreign court imposed a criminal penalty of deprivation of liberty and the sentenced person is in Romania, was absolutely necessary.

Undoubtedly the critical remarks in this work, as well as others that will be promoted in the future doctrine will be likely to promote a series of amendments to the law in force.

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About the Just Cause of the Revocation of a Mandate Contract

Angelica Rosu[1]

Abstract: We hereby propose to identify the limits where it can be assessed as just cause of the revocation of a mandate contract, as it is stipulated by the provisions of art. 1431, paragraph (4) from Law no. 31/1990, being known that the revocation without just cause of the mandatory (administrator / director of the Board of Directors) entitles him/her to payment of damages. The analysis starts from jurisprudence solutions and it has been necessary as the problem has been treated differently in practice, this collocation "just cause" being interpreted either restrictively, by reporting only to the mandatory, or extensively, by reporting to the subjective – objective resorts of the mandator.

Keywords: mandate contract; revocation; jurisprudence

I. We hereby propose to identify the limits where it can be assessed as just the cause of the revocation of a mandate contract, as it is stipulated by the provisions of art. 143[1], paragraph (4) from Law no. 31/1990, being known that the revocation without just cause of the mandatory (administrator / director of the Board of Directors) entitles him/her to payment of damages.

The aspects under analysis start from a different interpretation of the legal provisions which regulate the possibility to grant some damages in case the mandate given to the administrator of a company, respectively to the Director of the Board of Directors, is revoked before the expiration of the term contractually convened.

II. Accordingly, it is known the fact that, according to art. 143[1] from Law no. 31/1990, "*the directors can be anytime revoked by the Board of Director. Is case the revoking comes without just cause, the director under discussion is entitled to payment of some damages*".

This provision of the special law is corroborated with the provisions from Title III entitled "*Companies' activity*" of Law no. 31/1990 on companies, namely with the provisions of art. 72, according to which: "*the obligations and the responsibilities of the administrators are regulated by the provisions regarding the mandate and by those especially provided by this law".*

Next, the provisions of the general law, Law no. 287 / 2009 regarding the Civil Code, respectively art. 1914, paragraph (2), show that: "*the administrator can be revoked according to the rules from the mandate contract, in case it is not provided otherwise in the company contract*".

Art. 2032, paragraph (2), Civil Code, provides that "*when the parties declared the mandate irrevocable, the revoking is considered to be unjustified in case it is not determined by the fault of the*

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mandatory or by a fortuitous case or by a force majeure case".

We underline, at the same time, the essentially revocable character of the mandate contract, as art. 2030, paragraph (1), letter a) Civil Code states the revoking of the mandate by the mandator among the special causes of mandate termination.

The legal provision is justified by the *intuitu personae*[1] character of this contract and by the circumstance that the mandate is concluded in the interest of the mandator.

Thereby, according to art. 2031 Civil Code, "*the mandator can anytime revoke the mandate, expressly or tacitly, no matter the form in which the mandate contract was concluded and even if it was declared irrevocable*".

It results that the director of a company, the administrator / the mandatory, in generic sense, cannot oppose to this revoking, the only possibility for this being the one to request to the mandator to execute the obligation provided by paragraph (1) of art. 2032 Civil Code, according to which the "*mandator is compelled to repair the prejudices suffered by the mandatory due to unjustified or tempestuous revoking*".

III. Usually, the parties insert in the mandate contract a criminal clause which quantifies the prejudice in case of revoking the mandate contract without just cause[2], stating at the same time the circumstances which delimit this notion (just cause).

In this case, we consider that, being on the domain of the contractual provisions, whenever the parties have actually identified the just causes of contract termination, meant to absolve the mandator from paying damages, they cannot be extended to other situations than those expressly stated.

IV. There are cases when the parties do not identify in the content of the contract the causes which would justify revoking the contract or when they indicate a single situation which represents (or which does not represent) a just revocation cause.

In this case, the check points that stay at the basis of classifying a revocation cause as being just or unjust must be identified. With other words, by reporting to the jurisprudence, the following question must be answered: Should the rightfulness of the revocation cause be regarded from the mandator's point of view or from the mandatory's point of view? Or, more practically: Is it possible that an objective and unavoidable situation in which the mandator is found is appreciated as just revocation cause (for example, redrawing the operating permit of the defendant entity by the Financial Monitoring Authority).

V. Accordingly, it was analysed the problem that marks the explaining of the just cause notion, in a jurisprudential[3] solution.

The object of this request was represented by the plaintiff's request according to which the defendant is compelled to pay damages, according to a contractual clause with the following content: "*in case*

[1]Please see on these lines, (Schiau, 2009,p. 450).

[2] In the sense that „*a tempestuous revocation, without just cause, of the directors' mandate, can give rise to damages in favour of the revoked director, damages that can be established in advance, in the mandate/administration contract, with a title of criminal clause*", please see (Cărpenaru, David, Predoiu, Gh. Piperea, *The Law of trade companies. Comments articles wise*, 4th Edition, C.H. Beck Publishing House, 2009, p. 584.

[3] Please see the Arbitration sentence no. 100 from September 29th, 2015, given in the File no. 69/2015 by the Court of Commercial Arbitration attached to the Chamber of Commerce and Industry of Romania (not published).

the leader's mandate is revoked before the expiration period of the contract, without just cause, to pay to it damages amounting to a sum equal to the gross fixed remuneration which it was entitled to collect until the end of the mandate. Not fulfilling the performance criteria represents a just reason for revocation".

The reason for revoking the mandate contract, contract established for a certain date, was represented by the circumstance that the defendant, which was an entity subject to authorisation by the Financial Monitoring Authority, decided, within the same meeting of the General Meeting of Shareholders, in which it was decided upon the content of the mandate contract of the plaintiff, not to increase the share capital of this entity, increasing claimed by the provisions of the European Union Regulation no. 648/2012 of the European Parliament and Council from July 4th, 2012, on OTC derivatives, central counterparts and trade repositories[1].

It must be mentioned that the defendant entity was not dissolved and it did not stop its activity, but operating changes in what concerns the object of activity of this company, this entity not developing activities of the nature of those that imposed the authorisation by the Financial Monitoring Authority.

VI. Our opinion is in the sense that the object of the mandate contract, as it is configured from contractual point of view, does not superpose with the object of the company contract, least of all with the company's object of activity.

Accordingly, while the object of the mandate contract is represented by the services to which both parties committed (the mandator – to pay the remuneration, the mandatory- to fulfil the obligations committed), the object of the company consists in the activities, which the company is going to achieve.

Indeed, there are some activities of the trade company which are included in one of the categories allowed by the law and for which the company is compelled to obtain the preliminary permit / the authorization of the state organization with competency in the respective area, as it was in this case.

Redrawing the authorisation had not lead to the disappearance of the legal person, but only to changing / modifying the company's object of activity, circumstance which cannot be appreciated as being a just cause of revoking the mandate contract, previously to the date which was convened, so that to be removed the obligation to pay the remuneration to which the defendant committed through the criminal clause.

In case the above mentioned opinion would be allowed, it would result that anytime an entity changes the object of activity and finds that, in regard to this change, a mandate contract is of no use, it might denounce it, being absolved at the same time by the obligation to pay the remuneration.

More so, changing / modifying the object of activity of the defendant was not mentioned as just cause of revocation / contract termination cause although, at the same this contract was signed, both parties knew the evolution which the company was going to have in the future, from the point of view of the European regulations and of the content of the General Meeting decision, meeting which took place in the same day when the mandate contract was signed.

Accordingly, we can note that the revocation of the defendant, following to activity reorganization, as a matter of fact a predictable reorganisation, it was not instituted as cause for terminating the mandate contract, nor it represents a just cause for revoking it.

[1] Published in the European Union's Official Gazette no. I 201/1 from 27.072012.

This event being a sure thing, nothing stops the mandatory to institute it as contract termination cause.

We consider as irrelevant the conviction, which the mandatory had at the moment of signing the mandate contract, meaning it considered that this contract will be terminated at the moment the permit was redrawn.

Accordingly, the essential defence of the defendant done in this cause was that we do not find ourselves in the situation of revoking the mandate contract, but this contract was rightfully terminated, following to redrawing the operating permit.

At the same time, it was requested to be noted that, in case it would be thought it was about revocation, it would be done with just cause.

We appreciate that while the rightful termination of a contract presupposes the termination of the legal relations, by effects of the law, independently from the will of any party, the unilateral revocation / denouncement presupposes a manifestation of will which is conscious and without undue influence, with the purpose of obtaining the legal effects which the revoking act generates.

This is due to the fact that, while the mandator conviction was it would be rightfully terminated at the moment of redrawing the permit, at the moment when it had signed the contract, the mandatory's conviction was that, since there was no culpability from its part, its remuneration would be paid until the end of the contractual period, in case of unilateral revocation / denouncement.

More so, we appreciate that, as long as it is noted that this conviction was founded on a wrong representation of the law norms and not being identified any grounds for the rightful termination of this contract, it cannot have the effect shown and namely, the exoneration of the defendant from the obligation to pay a remuneration, as it was established at signing the contract.

In the judicial practice that comes from the highest Court of law, it was noted that its revocation and implicitly, its tempestuous and abusive character is appreciated not by reporting to the mandator and concretely, to the necessities imposed to it by its internal reorganization, but to the mandatory (in this sense, please see Decision no. 3237 from October 11th, 2013, of the High Court of Cassation and Justice[1]).

It was also noted[2] that, even if "*the temporary impossibility to exercise the responsibilities by the president of the Board of Directors does not represent a cause for mandate's termination, so that its revocation without just cause from the function held entitles him/her to payment of some damages*".

Indeed, it can be considered as being stated one single hypothesis of individualization of the just cause, the clause from the mandate contract under litigation, through which the parties have convened that not fulfilling the performance criteria represents a just reason for revocation, it cannot and it must not be interpreted as a restriction of the revoking reasons only to the hypothesis mentioned.

But from the content of the mentioned clause it results that the just reason for revocation must be appreciated by reporting to the mandatory and not to the mandator.

Also, we mention that by this interpretation, it is not harmed in any way the principle of the mandate contract revocability, principle provided by art. 2031 Civil Code, corroborated with art. 1431,

[1] Decision available on the Internet, at the address: http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=82851.

[2] Please see to this sense Decision no. 3156/2012 given by the High Court of Cassation and Justice, available on the Internet, at the address: http://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key=id&customQuery%5B0%5D.Value=82929.

paragraph (4) from Law no. 31/1990.

It is and it stays a revocable contract, the problem of the just cause being of interest only under the aspect of the incidence of the criminal clause, respectively under the aspect of the obligation of the defendant company to pay the remuneration convened in advance, remuneration established taking into consideration the term for which the contract was concluded.

As we have already shown, we consider that the unfavourable economic circumstances, as well as the insufficiency of the funds caused by changing the company's object of activity cannot represent just causes for revoking a mandate contract with a term, which would have as effect the exoneration of the defendant from paying the remuneration convened in advance.

VII. In conclusion, we plead for a restrictive interpretation of the notion of just cause, by reporting to the mandatory and not extensively, by reporting to the subjective or objective resorts of the mandator, mentioning that for the objective resorts we do not have in view the fortuitous case or the force majeure.

This interpretation is in agreement with the jurisprudence of High Court of Cassation and Justice and with the legislative provision e (art. 2032, paragraph (2) Civil Code) which shows – it is true, in case of the irrevocable mandate – that "*the revoking is considered as being unjustified in case it is not determined by the mandatory's fault or by a fortuitous or force majeure case".*

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The Leasing Contract. Harmonizing National Legislation with the Lease Specific International Norms

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Abstract: By elaborating the proposed work, we want to bring theoretical contributions and enter a scientific domain which may not be at the beginning of its course to Romanian society, but which we consider to be able to handle improvements under doctrinaire and practical aspects. Objectively, we intend to reinforce the "statute" of leasing operations on a national level, operations which are still searching for their own identity, lacking any "legacy" gained from experience or historical post-December accumulations, and what has been gained has been assumed in a rush, under the influence of the Romanian society's processes of democratization and European integration and are mechanical accumulations/teachings which resulted from the enforcement and necessity of complying with certain treaties and agreements which have not been sufficiently analyzed. Because they were taken in fractions, a series of norms resulted, lacking the consistency and sufficiency needed to improve education in the leasing domain, which has often led to contractual imbalances and a considerable decrease of the leasing market in Romania.

Keywords: leasing; contract; convention; financier; user

Among the judicial realities of international commerce, the lease has proved to be the most important financing method of investing in assets and services. The lease along with the factoring, construction and fitting and the international tourism contract, are all part of complex international contracts group. Starting from the premise that the current society is quasi acquainted with the notion of leasing, I will not support the presentation of the judicial aspects of leasing contracts as the main purpose of this paper, however I consider it essentially necessary to stop over the elements which have been defined by international norms as defining for an ongoing leasing contract and which have been partially or not at all embedded in national norms losing their essence, as well as clear up some antagonistic legal aspects which have destabilized the Romanian leasing market.

We consider that the punctual explanation of legal aspects which leave room for personal interpretation and not judicial ones is our obligation, therefore we will not propose to solve and equation which has already been solved, but to compare national norms with international ones and thus answer the questions regarding leasing operations in Romania of recent years.

The benefits of this contract will become reality only within a firm legislative framework, clear and concise, which does not leave any room for personal interpretation, and this framework will be

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established only after an objective analysis of national norms in comparison with international norms under a judicial aspect, but also an economic one.

Due to its special judicial structure, as well as the alternative executory conditions of the leasing contract, it is positioned in a particular framework compared to other contracts, being considered individually from current international economic and financial application norms point of views. The main problem that leasing encounters in Romania is poor legislation. As a possible definition, from an economic point of view, the lease represents a investment funding method available to both judicial persons of public and private rights, as well as individuals. From a judicial point of view, the lease represents a complex contract which contains several judicial operations through which the person or entity gains the right of use over an individual asset, as well as the guarantee of purchasing this asset at a certain term, at a determined or determinable price at the date in which the contractual provisions are in effect. According to the doctrine, the lease is defined as a commercial operation through which a party named locator/financier transmits on a determined period the right of use of an asset whose owner is another party known as tenant/user, at its request for a period payment known as lease installment, and towards the end of the leasing the locator/financier obliges itself to respect the user's right of purchasing the asset, of extending the lease contract or of ceasing the contractual relation (Clocotici & Gheorghiu, 2000). We can observe that by definition, through its repeated use in nation legislation as well as in specialized literature of the specific terms locator and tenant and defining when it comes the rental contracts, the similarity of this contract with a rental contract is imposed. However, the leasing contract is not a rental contract – in our opinion the replacement of the terms locator/financier and tenant/user is imposed with the real parts of the leasing contract which are strictly the **financier** and the **user**.

The financier will always transmit the right of use over an asset it owns to the user, and the user will benefit from this right for a determined period for a periodic payment known as a leasing installment (not rent).

The international judicial and economic society, as a recognition of the importance and, of course, benefits the lease contract has developed over the years, has elaborated and adopted a series of specific norms dedicated exclusively to this complex operation, which often constituted not only a source of research and information, but also the source of controversial conflicts.

Thus in 1988 at the initiative of the International Institute for the unification of international private law[1], the UNIDROIT Convention was adopted at Ottawa regarding international financial leasing (Ottawa, May 28 1988), with the purpose of unifying the norms which govern this domain[2].

Also we retain as a reference the International Accounting Standard 17 elaborated by the International Accounting Standards Board (IASB) in the 1973 – 2001 period whose purpose was to standardize the accounting records referring to leasing operations, financial or operational. The objective of this standard, therefore, is to establish some proper accounting politics for this operation as well as to define some notions and specific and essential elements belonging to this transaction. All quoted commercial companies of the EU are obligated to keep records and to give statements in compliance to these standards.

[1] UNIDROIT has 59 members, including all the states within the European Union.

[2] Although all these efforts to develop national legislations have the UNIDROIT Convention as a reference point, we retain the provisions of the Conventions were not elaborated specifically to answer the necessity of having an internal legislative frame. As was shown through the Swedish Parliament's Commission's report regarding leasing, the balanced judicial framework proposed by the Convention constitutes an authentic model which is the base that makes effort possible to reform the internal legislation in this domain.

1. Without wanting to be exhaustive, by a comparative analysis of leasing specific terms defined by the national legislation[1] with consecrated definitions from IAS17 it can be observed that some of these have been partly assumed or they are completely missing, thus:

a) **Fair value** is the sum for which an active can be traded or a debt recovered, willingly, between parties who are aware, within a tranzaction in which the price is objectively determined, term taken from GO 51/1997 as *input value* and reprezenting the acquisition cost of the asset;

b) **The leasing term** represents the irrevocable period of time for which the tenant has contracted the leased asset [...], with or without any additional payment, the exertion of this option by the user is certain, within reason, at the beginning of the lease – this notion has been included in GO 51/1997 under the denomination of *leasing period*, but whose definition, although very important, cannot be found within the body of the Ordinance.

c) **Economic life duration** is the period in which it is estimated that an asset is used economically by one or more users; - term that cannot be found in the national leasing legislation, the legislator probably considers that this duration is solely the financier's concern.

d) **Useful life** is the estimated use period from the beginning of the leasing term, without being limited by it, on the course of which the economic benefits are expected to be consumed by entity; - term which cannot be found in the national leasing legislation, the legislator considering it opportunistic that this period is strictly the user's concern;

e) **Minimum leasing payments** are those payments along the lease term which the user must and can be obligated to make, excluding contingent rent, service costs and tax that the financier's will pay and which will be reimbursed for – term which we find similar with the *leasing installment*, defined by the OG 51/1997 as a "share of the value of the asset and the leasing interest, which is established based on the interest rate agreed on by both parties"- in the case of financial leasing.

f) **Rezidual value** is the estimated real value or the market value of the leased asset at the end of the contract; only that this notion had been included in the 287/2006 law as: "*the residual value is the value for which, after the user finishes all his payments established by the contract, as well as all the other sums owed according to the contract, the transfer of the ownership of the asset towards the user and is established by the parties of the contract."*, this interpretation evidently raises and will raise some question marks to interested parties being an ambiguous and generic definition, which has nothing to do, from an economical or judicial point of view, with the difinition that can be found in the international norms mentioned earlier. In article 2 letter c of OG 51/1997, with all the ulterior alterations, the rezidual value is considered as an alleatory value, which is established based on the two parties'agreement, a fact which is completely incorrect because from an economical point of view this value is imperatively established by specific norms of the domain[2].

g) In case the asset is returned at the end of the lease term, to protect itself from the various risks which hover over its activity and which can affect the value of the asset, at the financier's request, the

[1] Ordinance nr.51 of 28 august 1997 regarding leasing operations and leasing companies, published in the Official Monitor no. 224/30 Aug. 1997; approved and modified by law 90/1998 regarding the approval of the Government Ordinance no. 51/1997 referring to the leasing operations and the leasing companies, published in Romania's Official Monitor, Part I, no. 170 of April 30 1998.

[2] To calculate fiscal depreciation the fiscal value of the assets will be taking into account, at the date of their entry within the entity's possession, value represented by the acquisition cost, the production cost or the market value of the assets gained gratuitously or which constitute an added value in nature to the social capital. The normal functioning period is the use period in which, from a fiscal point of view, the entry value of the assets is recovered through depreciation. The normal functioning periods of depreciating corporeal assets are taken from the Catalogue approved through HG 2139/2004, published in the Official Monitor nr. 46 of 13 January 2005.

user will guarantee a rezidual value of the asset, up to a certain value, agreed upon with the financier, known as the **guaranteed rezidual value**. This guarantee of the rezidual value can be directly made by the user or indirectly through a party affiliated to the user. However, in our legislation this term, I have to add, was completely overlooked despite the fact that it is of major importance to the protection, from an economic point of view, of the financier. IAS 17 defines the **guaranteed rezidual value** as being: "*a) in the locator's case, the part of the rezidual value which is guaranteed by the user or by a affiliated party (the value of the warranty representing the maximum value which becomes payable, in any situation); and b) in the financier's case, that part of the rezidual value which is guaranteed by the user or a third party not affiliated to the financier which is capable, financially speaking, to honor the obligation taken on through the guarantee."*

2. In GO 51/1997, article 6, point (2), letter c, it is imperatively specified that the value of the advance payment needs to be inserted in the body of the leasing contract, which implicitly admits the collection of a sum of money as advance payment. International norms (IAS17 or UNIDROIT Convention) do not make any reference to registering within the financier's accounting of any sums cashed as advanced payment and which they can demand at the beginning of the ongoing leasing contract. *Unlike credits, the essence of leasing is to assure the complete financing of an investment, therefore of the entire acquisition cost of the asset which makes the object of the contract.*

All leasing companies in Romania demand from their clients, in virtue of the ordinance's specifications, a payment with the role of an advance payment, and this previous to the acquisition of the asset which makes the object of the contract. Under these circumstances, the financed value becomes inferior to the acquisition cost of the asset, being reduced by the client's advanced payment, with which he practically self-finances.

It is my opinion that through the financier's demand of advance payment, as well as through the payment of the rezidual value simultaneously with the leasing installments – the leasing contract receives the form of a purchase agreement paid in installments starting from the cashing in of the advance payment, the financier losing its financing quality and becoming a promisor seller, while the user by accepting the advance payment as well as the rezidual value simultaneously with the leasing installment receives the statute of promisor buyer, thus the essential and defining characteristic of the contract is eliminated, that of temporary transfer of the right of use, with the right of opting between buying or returning the asset which makes the object of the contract, because the payment in advance offers the user not only a precarious right of possession but also an effective right of ownership.

Supposing a user, after accepting the conditions of a contract regarding the payment of the advance and the partial or total inclusion of rezidual value within the leasing installment, due to certain factors dependent of independent of their will, renounces their option of buying the asset or of continuing the leasing contract while it is still ongoing, in this case the sums representing the advance, as well as the rezidual value collected by the financier simultaneously with the leasing installment, can constitute an unjust enrichment, these being outside the object of a *stricto sensu* leasing contract.

3. Within GO 51/1997, article 14 paragraph 2[1] mentions that the financier will be exonerated of responsibility if the asset is not delivered by the supplier technically adequate or on term to the user. However, the UNIDROIT Convention, on article 8, paragraph 1 derogates the following cases from this rule (Tita-Niculescu, 2006, p. 254):

[1] Party responsibility; Article 14. – (1) in case the user/tenant refuses to receive the asset at the agreed term with the supplier and/or the leasing contract or if he is in the middle of judicial reorganizing and/or bankruptcy, the locator/financier has the right to rescind the leasing contract with damages. (2) The locator/financier is not responsible for the delayed of inadequate delivery of the assets to the tenant/user by the supplier.

- In the case the user suffered a prejudice caused by the financier's intervention in choosing the assets, of their characteristics or of the supplier;

- In case the leasing contract specifically states that the financier will answer for the asset's vices.

Moreover, article 12, paragraph 1 letter "a" of the UNIDROIT convention states the user's right of ending the leasing contract or refusing the assets which do not comply with his requests. This way, the user will be returned all his leasing installments which were paid in advance up to that date, and if the delivery of the asset is made with delayed of inadequate and the financier is responsible for it, then the user can invoke other claims as well. This is a regulation which also has not been included in our national legislation regarding leasing operations, which also proved opportune when it came to clearing up the expansion of the effects of the contract over the parties.

We also need to keep in mind the following obligations which are imposed to the financier and from which he cannot derogate when the parties belong to member states of the Convention:

Per article 13.2, letter b and 13.3, the financier cannot capitalize a contractual clause which permits him to claim anticipated payments of the leasing installments from the user, in case the contract was terminated, however he has the right to claim this value under the form of damages, which will evidently need to be proven. Although in the ordinance we cannot clearly find this provision, we consider that through the corroboration article 15[1] of OG 51/1997 with article 1549[2] of the Civil Code, the same judicial effects can be obtained.

Through a doubtful interpretation, in our opinion, there have often been encountered in jurisprudence cases in which the financier prevails, after the termination of the contract, over the benefit offered to the leasing contract by article 8 of OG 51/1997, respectively the executory title[3]. Obviously, this fact, although often encountered in jurisprudence, is practically impossible, because by termination the creditor loses the benefit offered by the power of the executory title of the leasing contract, because it practically ceases to exist (by declaring dissolution the executory title is disbanded), through dissolution the contract no longer produces future effects, starting from the date the dissolution was declared[4]. Thus, if the user refuses to willingly surrender the asset or to pay the due and unpaid installments accumulated up to the date of the dissolution, after it was declared, the financier will only

[1] Article 15- "If the contract does not say otherwise, in case the tenant/user does not execute the entire payment obligation of the leasing installment for two consecutive months, calculated from the due date provided by the leasing contract, the locator/financier has the right to rescind the leasing contract, and the tenant/user is forced to return the asset and to pay all owed sums up to the due date compliant with the leasing contract."

[2] Article 1549, paragraph 1 – The right to dissolution of termination specifies: "If he does not request the foreclosure of the contractual obligations, the creditor has the right to dissolute or rescind the contract as well as the right to damages, if he is entitled to them."

[3] "The contract being terminated the issue that rises is if the debtor still owes the creditor any unpaid monthly installments up to the date of the termination, as the creditor claims. The court considers that she does not because such a claim from the creditor equals with an execution of the contract when the creditor itself opted for its termination. According to article 1021 of the Civil Code, the party which has fulfilled its contractual obligations is given the choice of forcing the other party to execute the convention is possible or to request the termination of the convention with damages. Thus, if the creditor opted for the termination of the convention she can no longer request from the debtor anything else but damages, damages that will have to be proved evidently. The court appreciates that the debtor's foreclosure for contractual obligation which are not executed considering the contract was terminated, is illegal reason for which the foreclosure has been dismissed". Civil Sentence no. 83 or 07.04.2010. Execution Contestation. The possibility of contractual obligation foreclosure, after the contract's termination.

[4] The same solution has been retained in judicial specialty literature. Thus in the paper Industrial, Commercial and Realty leasing, elaborated within the Center for Company Law of the University of Lausanne, it is considered that in case of non-payment of the leasing installments by the user, the financier can opt for one of the following possibilities: 1) to request the execution of the contact, requesting the payment of the owed leasing installments; 2) of keeping the ongoing contract, renouncing all future demands and requesting damages; in this situation he takes the asset and sells it, requesting the value of unpaid installments from the user, with penalties plus any yet due installments, out of which he subtracts the net value obtained from the selling of the asset; 3) Termination of the contract with damages. (Tita-Niculescu, 2006, p. 208)

be able to use common law. The financier however, can surrender its right of requesting the dissolution of the contract, and can request the execution of the contract by the user, obligating the user to pay damages for the delayed execution of the payments he owed, over the contract's term, taking advantage of the executory title enforced by the law to the leasing contract. Therefore if, the financier will opt to keep the ongoing contract, the asset will stay in the user's possession, and the financier will be able to enforce in virtue of this title, the entire value of the leasing contract, minus the residual value, in my opinion, because up to the payment of this value the user has the right to choose the finality of the leasing contract (Tomescu, 2015).

- The financier, however, per article 13.5 from the UNIDROIT convention has the right to claim an anticipated payment of the leasing installments from the user and the dissolution of the contract, only if he can prove, without a doubt, that he offered the debtor the possibility of taking remedial actions for this situation;

- The supplier will not be able to terminate the supplying contract, without the financier's consent (art 10.2);

- The user has the right to retain the payment of the installments until the financier will execute his obligation of delivering the assets which are the object of the leasing contract under the condition that the user's does not lose the right of refusing the asset (art 12.3);
- Without bringing any damage to the user's rights to turn against the supplier (art. 10.1), in case of failed or inadequate delivery, he can turn against the financier as well, but only if it is shown that this resulted from the financier's action or omission (art. 12.5);

Thus, hoping towards a revitalization of the Romanian leasing marker, we consider opportune to revise the current legislation and to complete it according to international norms, a starting point for this would be the provisions of the current Civil Code, which has already started to produce effects.

Taken from the occidental practice, the leasing contract has gained in the years 2005-2010 an expansion worthy of taking into consideration, save the fact that the legislation, being at the beginning of its road, has left room for various interpretations which, in the years after that, has led to the – justified – propagation of the already high number of trial cases in our country as well as to a considerable decrease of leasing operations according to the Financial Societies Association's published statistics – ALB Romania[1].

Considering all of the above, although between theory and practice major inconsistencies appear, sometimes even discouraging, I continue to believe that the leasing option, financial or operational, offers the user a series of incontestable advantages, in comparison to other methods of purchase of rental.

[1] http://www.alb-leasing.ro

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Considerations Regarding the Motion to Notify the High Court of Cassation and Justice in order to Issue a Prior Decision for Solving certain Law Issues in Preliminary Chamber Procedure

Sandra Gradinaru[1]

Abstract: The present paper aims at sustaining the concept regarding the possibility of examining the lawfulness, in the preliminary chamber, of court orders issued by a judge for rights and freedoms through which technical surveillance measures were authorized. This work is of great interest given the obvious discrepancy between the object of preliminary chamber procedure, in the light of the legality and validity of evidence acquired during prosecution and the non-challengeable nature of the warrant as provided by the Romanian Criminal Procedure Code. The jurisprudence of national court decisions reveals that the rulings issued by a judge for rights and freedoms trough which a measure of technical surveillance is authorized are subject to judicial control in the preliminary chamber, but there also are several courts in Romania that states on the contrary.

Keywords: Preliminary chamber; technical surveillance measures; ruling; judicial control

1. The Factual Situation

In fact, the defendant X brought in the preliminary chamber procedure, under article 344 par. 2 of the Criminal Procedure Code, requests and exceptions concerning the lawfulness of evidence and of the acts conducted by criminal investigation authorities in case no. .../P/2015, requesting the exclusion of data derived from conducting technical surveillance measures due to the fact that the decisions by which these measures were authorized are void.

In front of the Preliminary Chamber judge it was revealed that the means of evidence consisting of recordings of telephone conversations, rendered in the reports of the case file are obtained in flagrant violation of criminal procedural law, based on rulings and warrants given in flagrant violation of the law and therefore it is necessary to exclude them from the evidentiary material.

The rulings of judges for rights and freedoms, based on which were issued and extended over several months the warrants for technical surveillance that led to administration of evidences intrusive into the private life of the defendant were motivated considering different facts than those prosecuted in the present case, ignoring the very motivation of the prosecutor`s requests.

Meeting all essential conditions stipulated by articles 139-140 of the Criminal Procedure Code, for a lawful technical supervision, namely proportionality, necessity and subsidiarity, conditions designed to ensure compliance with fundamental rights and freedoms were not reviewed by judges of rights and freedoms based on present facts. They were based on a completely different subject than those of the case file. Therefore, the "considerations shown" by the judges refers to different crimes than those who were prosecuted in file no. ... /P/2015.

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The preliminary chamber judge rejected defenses arguments arguing that the rulings of judges for rights and freedoms are not subject of the preliminary chamber procedure. It shows that the lawfulness and validity of the rulings by which were approved the technical surveillance measures during a criminal investigation cannot be analyzed in this procedure.

Given these considerations, in statutory term, according to article 425^1, the defense filed an opposition against the ruling dated 15.02.2016 passed by the preliminary chamber judge in case no./99/2015/a2 of Iasi County Court. The opposition was sent to the Court of Appeal Iasi.

From the exposed factual situation is shaping as an issue of law, the matter of the possibility of analyzing in the preliminary chamber procedure the lawfulness and validity of the rulings given by a judge for rights and freedoms, by which technical surveillance measures were authorized. In this context, we believe that the conditions provided by article 475 of the Criminal Procedure Code regarding the motion before the High Court of Cassation and Justice.

2. Admissibility Conditions

Regulating the conditions of admissibility of the motion before the High Court of Cassation and Justice in order to give a ruling for unraveling an issue of law, the legislator has established in article 475 of the Criminal Procedure Code the possibility of certain courts, including the Court of Appeal, entrusted with solving a case as a last resort, if during the trial is ascertained the existence of an issue of law of whose settlement depends the ruling of the case and upon which the Supreme Court has not ruled yet by a prior decision or an appeal on points of law nor is subject to any such appeal, to refer the matter to the High Court of Cassation and Justice in order to give a ruling by which to settle as a matter of law principle the given legal issue.

The legislator has conditioned the admissibility of such motion by cumulative fulfillment of three conditions, namely: a) the existence of a case that is pending judgment as last resort on the role of one of the courts expressly provided in the previously mentioned article, b) settlement of that case depends upon unraveling of the issue of law subject of motion, and c) the legal issue has not been yet unraveled by the High Court of Cassation and Justice through legal mechanisms that ensures consistent interpretation and application of the law by the courts or are not subject of an appeal on points of law.

a) In the present case, the condition of the existence of a case pending judgment as a last resort is fulfilled given that the Court of Appeal Iasi is vested in file no. ... /99/2015/a2 with the appeal filed by the defendant X against the ruling of the Preliminary Chamber judge dated 15.02.2016 whereby the County Court Iasi rejected the motions and exceptions raised by the defense.

b) Also, the solution of the case depends on the legal issue that the defense intends to bring before the Supreme Court. By Decision no. 11 of June 2, 2014, pronounced by the panel of judges for unraveling certain issues of law in criminal matters, the High Court of Justice held that the admissibility of the motion for a preliminary ruling is conditioned, both if the case targets a rule of substantive law, or when is concerning a provision of procedural law, given that the fact that the interpretation given by the supreme court have legal consequences on how to resolve the case.

Between the legal issue whose enlighten is required and the resolution on the criminal prosecution and/or civil action by the court of last instance must be a relationship of dependency, meaning that the High Court decision rendered in proceedings according to articles 476 and 477 of the Criminal Procedure Code to be likely to have an actual impact on the judgment of the principal case. This requirement is the expression of the utility that the required unravel of the issue of law has on the settlement of the substantive criminal dispute.

Moreover, both in Supreme Court`s jurisprudence and in the doctrine, the majority outlined opinion is in terms of a broad interpretation of the term "substance of the case". "The use by legislator of the phrase "solving the case as a last resort", in conjunction with the provision that this work can be carried by the county court, it allows us to see that the unraveling of an issue of law may start not only

after judging the substance of the case, meaning settling criminal proceeding and possibly civil action. Thus, due to the rules of functional competence, the county court does not have the functional ability to judge the substance of a criminal case as a last resort, this competence thereof being offered, exclusively, to the Court of Appeal and High Court of Cassation and Justice, as courts of appeal. However, the county court can ultimately resolve a case. We consider, for example, the hypothesis given by article 341 par. 9 of the Criminal Procedure Code" (Neagu & Damaschin, 2015, p. 455)

In terms of the meaning of "solving the substance of the case," High Court of Cassation and Justice held: "the phrase "solving the substance of the case" should not be understood, necessarily, as just solving criminal action and civil action. Thus, in the example mentioned above, the county court can judge as a last resort the complaint against the ruling by which it was ordered the commencement of a trial, without thereby being judged the criminal case or the criminal procedure"[1].

The subject of this release is the ability of examining in the preliminary chamber procedure of the lawfulness and validity of the rulings by which were approved the technical surveillance measures during a criminal investigation. On that clarification depends the solving of the preliminary chamber phase and at the same time, the settlement of the civil and criminal action.

Thus, whether the rulings of judges for rights and freedoms can be subject of the preliminary chamber judge analysis, then they may be canceled as illegal during the procedure provided by article 346 of the Criminal Procedure Code, and the evidence thereof administrated may be excluded as unlawful.

Given that the records for playback carried out under warrants for technical surveillance issued by the judges for rights and freedoms, whose ruling were challenged in the preliminary chamber phase, are the main means of evidence underlying the prosecution, it follows that their exclusion could influence in a substantial manner the ruling on the prosecuted crime and therefore the very substance of the case.

In the previous criminal procedures code, what according to the new Criminal Procedure Code constitutes as subject of the preliminary chamber, thus checking the competence and lawfulness of the indictment and the verification of the legality of evidence and carrying out the criminal investigation, was conducted in a single phase of the trial which it began with the defendant sent before a court by drafting the act of indictment.

Since 01 February 2014, checking the legality of the indictment, the administration of evidence and the criminal investigation as well as the judgment of the case by administering and evaluating the evidence, was divided by the legislator in two distinct phases, but their subjects were left interdependent. A proof of this consists precisely in the fact that the solution given in the preliminary stage can prevent the transition to the phase of the judgment by returning the case to the prosecution and leaving the criminal action unresolved by the court.

c) In terms of the subject of the proposal for the Supreme Court, the issue of law in this matter is genuine, materializing in different ways of interpreting and correlating legal texts among them, these ambiguities preventing the coherent and correct application of the law. Thus, in practice, conflicting opinions were expressed upon which the Supreme Court has not ruled by a prior decision or by an appeal on points of law, opinions affecting the predictability of the justice act.

Regarding the nature of the issue of law subject of the motion, we believe that from both the preliminary rulings given by the Supreme Court and the opinions expressed in the doctrine, results that the legislator intended to regulate through the procedure prescribed by the provisions of article 475 of the Criminal procedure code a remedy for unraveling any issues, either from material or procedural law. *"It is difficult to accept that the legislator`s intention had been to limit the law issues that can be unraveled by this procedure only to the material law because there would be no reasonable justification for such a solution."* (Neagu & Damaschin, 2015, p. 455)

In fact, the provision of article 475 of the Criminal Procedure Code does not define the term "issue of law". In the doctrine it was revealed, however, that in order to be an real issue of law, when it targets a

[1] High Court of Cassation and Justice, the Panel for a dispensation of law issues, decision no. 24/2014.

legal rule, it requires that the legal text to be doubtful, imperfect (incomplete) or unclear. The debated issue of law must be linked to the ability to interpret a law differently, either because this text is incomplete either because it is correlated with other statutory provisions.

As withheld by the Supreme Court *"on this issue, the doctrine also revealed that, within the meaning of the law, the issue of law, whose unravel is required, must be specific, following the punctual interpretation of a legal text, without exhausting the meanings or the applications; the question for the court must be one qualified and not purely hypothetical and generic. At the same time, the issue of law must be real and not apparent to regard different interpretation or antagonistic uses of the text of the law, of a rule of customary law that is unclear, incomplete or, as appropriate, uncertain or the incidence of broad principles of law, whose content or whose sphere of action are controversial."*[1]

In the present case, the question addressed to the High Court of Cassation and Justice targets precisely such a question of law punctual and tangible, as we highlight hereinafter.

3. The Issue of Law

On 12/11/2015was held at the headquarters of the Court of Appeal Iasi, the quarterly meeting of non-unitary practice in criminal matters, completed by "The record of quarterly meeting of non-unitary practice in criminal matters which took place at the Court of Appeal Iasi at the date of December 11, 2015 - the third and fourth quarters - No. 5202 / A / 2015."

During the meeting, the first item on the agenda was solving the following aspect:

"The possibility to review in the preliminary chamber procedure the merits of court orders issued by the judge for rights and freedoms by which were authorized technical surveillance measures, given that, according to article 342 of the Criminal Procedure Code, the very subject of the procedure is to check after indictment, the competence and legality of the court as well as the verification of the lawfulness of the evidence and of acts of the prosecution."

On this occasion they were expressed several opinions

In the first opinion, it was claimed that during this procedure, the judge can only check the lawfulness of evidence and of acts of the prosecution, but not the merits of court orders issued by the judge of rights and freedoms by which were authorized technical surveillance measures, given that the subject of the chamber preliminary provided in Article 342 of the Criminal Procedure Code (limited to verify after indictment, the competence and legality of the court as well as the verification of the lawfulness of evidence and of acts of prosecution) and cannot be extended to other issues that have not been contemplated by the legislator in the regulation of this procedure.

A second opinion showed that one of the conditions of lawfulness provided by article 139 of the Criminal Procedure Code is related to rationality, which requires its verification during this procedure, especially when it is invoked by the defendant's lawyer that there were no evidence to support a reasonable suspicion of his involvement in a crime and thus not justifies the approval of technical surveillance; in this context, the preliminary chamber judge examines aspects of rationality of the court orders by which were authorized technical surveillance measures by considering the evidence provided to the judge for rights and freedoms at the date of the prosecution`s motion; therefore, a minimum reference to evidence is required in the contents of the judge's confidential ruling, being helpful to take into consideration the arguments of the prosecutor`s motion.

The solution was adopted unanimously meaning that: *"In the preliminary chamber, the judge can only check the lawfulness of evidence and of the acts of prosecution, but not the merits of court orders issued by the judge for rights and freedoms by which were authorized technical surveillance measures, given the subject of the preliminary chamber, provided in art. 342 Criminal Procedure Code (unanimous opinion)"*

[1] High Court of Cassation and Justice, Decision no. 1/2016.

On the other hand, in the experience of other courts of law, the solutions were antinomian: "in applications submitted by defendants they invoke unlawfulness of evidence obtained through interception warrant dated 03.06.2014 ordered by the Prosecutor of the Attorney's Office of Olt County court and confirmed by the judge for rights and freedoms by ruling no. 7 of 03/11/2014.

To these considerations, under article 345 par. (1) of Criminal procedure code were partially admitted the requests submitted by the defendants. It excluded interceptions and recording on magnetic tape of telephone conversations and the audio-video recordings of conversations held in the environment resulting from the warrant of 06/03/2014 issued by the prosecutor, confirmed by ruling no. 11/03/2014 given by the judge for rights and freedoms in case no. .../104/2014 wiretaps and records pursued up to 10.04.2014"[1]

"In order to rule so, the preliminary chamber judge, examining the motion for nullity of criminal ruling no. 29/I/22.09.2014 given by the judge for rights and freedoms of the District Court Z. (case no._) and for the exclusion of evidence, formulated in terms of article 345 par. 1 of Criminal procedure code, found that it is not substantiated, according to article 141 of the Criminal procedure code.

Therefore, arguing on the lawfulness and the merits of the criminal ruling no. 29/I/09.22.2014 issued by the judge for rights and freedoms of the District Court Z., has rejected the motion for nullity of this decision and for the exclusion of any evidence obtained as a result of a temporary authorization for the use of technical surveillance measures, namely the interception and recording of calls made from phone no. station belonging to the defendant"[2]

In the doctrine there were sought different opinions which indicates that: "The ruling of the judge for rights and freedoms to authorize technical surveillance measures is not challengeable; However, we appreciate that within the competence of the preliminary chamber judge lies the analysis of the lawfulness of the ruling by which technical surveillance measures are authorized, namely the means of evidence obtained in the process" (Udroiu, 2015, p. 356).

So, given the evident aspects highlighted for the panel of judges from the High Court of Cassation and Justice, pursuant to articles 475-477 of the Criminal Procedure Code, in order to issue a prior ruling to unravel an issue of law regarding the possibility to review in preliminary chamber proceedings, the rulings given by judges for rights and freedoms by which were authorized technical surveillance measures, given that, according to article 342 of the Criminal Procedure Code, the subject of preliminary procedure consists in the verification of the indictment, of the competence and legality of the motion, as well as verification of the lawfulness of evidence and of the acts of prosecution.

4. Adjournment of the Proceedings

At the same time, given the factual and legal situation exposed above, we believe that is incident the case ruled by the legislator in article 476 par. 2, second sentence, of the Criminal Procedure Code that states the compulsory suspending of proceedings: *"If the adjournment is not ordered at the same time with the motion filling and the judicial investigation is completed, prior to the High Court of Cassation and Justice`s ruling on the motion, the court has to suspend the debate until a ruling as specified in article 477 par. 1 of the Criminal procedure code is issued."*

We appreciate as obvious that the legislator intended by the legal text mentioned above, to prevent the court of last instance to enter into the debate phase "on the substance of the case" within the general meaning typical for the procedure provided by article 475 of the Criminal Procedure Code, precisely so they don`t issue an unlawful ruling that does not take into consideration the law as unraveled within the prior decision of the Supreme Court.

[1] Decision 51 of 02.09.2015 delivered by the Court of Appeal Craiova.
[2] Conclusion no. 86/2015 Cluj Court of Appeal pronounced on 02.12.2015 in case no. 2758/84/2014 / a4.

Given that the High Court of Justice has not yet ruled on the issue of law in question, if the court empowered to solve the case as a last resort would give the floor to the parties to plead "on the substance of the case" they would be unable to relate to the unraveling given by the supreme court.

As we mentioned above, the solving of the case depends on the issue of law raised. If the court which filed the motion for the High Court of Cassation and Justice would deliberate and would decide on the "merits", the motion procedure before the High Court of Cassation and Justice would remain with no purpose.

5. Conclusions

Considering that the preliminary chamber procedure as part of the criminal trial, that aims to verify the entire prosecution phase, we highlight the fact that the ruling by which technical surveillance measures were authorized, as part of the evidentiary ensemble, falls within the functional competence of the preliminary chamber judge, allowing him to verify these ruling, issued by the judge for rights and freedoms, as for their lawfulness and merits.

To consider at this moment that through the preliminary chamber is possible to evade the warrants from the examination conducted by the judge of preliminary chamber leads to deprivation of content of the object of preliminary chamber itself.

Thereby, considering that the exclusion of evidence is a sanction that might be applied by the judge of the preliminary chamber, according to the above reasoning, can be ascertained inclusively the nullity of the ruling by which has been duly authorized the evidentiary method. In other words, preliminary chamber judge can ascertain the nullity of the ruling given by a judge of rights and freedoms by which it authorized conducting technical supervision measures.

Given all these considerations it has been requested that the proposal formulated should be admitted and the motion to be filed at the High Court of Cassation and Justice in order to give a prior ruling for unraveling the indicated issue of law.

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The Difference between the Offenses of Deceiving and other Offenses with Fraudulent Feature

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Abstract: Frequently in the judicial practice but also in the doctrine there have been difficulties in delimiting the computer offense from the deceiving offense. Often this relationship was interpreted in the sense that it was about two competing offenses affecting different social values - namely those of patrimonial type and those referring to normal operation of information systems. The doctrine observes that with the technological revolution, the opportunities to commit crimes against patrimony have multiplied. Goods that are represented or taken from information systems (electronic funds, deposits, etc.) have become targets of manipulation, as the traditional forms of property. Such offenses usually are done by entering incorrect data into a system through manipulation programs or other interference during processing. This article aims at incriminating any act of free handling as in data processing with the intention to operate an illegal transfer of property. Such offenses are usually achieved by entering incorrect data into a system through manipulation of programs or other interference during processing data. This article aims at incriminating any act of manipulation without the right in the data processing with the intention of operating an illegal transfer of property. (Dobrinoiu, et al., 2012)

Keywords: act of manipulation; data processing; illegal transfer of property

The offense was provided in almost identical legislation in art. 49, Ch. III, Title III, Book I of Law no. 161/2003 and in the new Criminal Code is provided by art. 249 with the following content: "Insertion, modification or deletion of computer data, restricting access to such data or preventing in any way the operation of a computer system, in order to obtain a financial benefit for himself or another, if it has caused damage to a person".

The relationship between the two crimes, especially under the new regulations falling within the same legal object is very well captured in a decision of the High Court of Cassation and Justice[2]. Having the value of principle in that decision, the court shows that the online fictional sales of goods, achieved through platforms specialized in trading goods online, causing prejudice to persons injured misled by the introduction of computer data on the existence of property and determined in this way, to pay the price of nonexistent goods meet the constitutive elements of the offense of computer fraud. In this case, they are not met also the constituent elements of the offense of deceiving, since the crime of computer fraud is a variant of the offense of deceiving committed in the virtual environment, and art. 49 of Law no. 161/2003 (currently repealed and adopted in art. 249 Criminal Code) constitute the

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[2] I.C.C.J., Criminal Division, Decision no. 2106 of 14 June 2013, www.scj.ro.

special rule in relation to art. 215 of the 1969 Criminal Code, which is the general rule, being applicable only to special norm.

Penetrating further into the depth of the problem of law, the court found that the provision defining the offense of computer fraud, in relation to that provided for in art. 215 of the 1969 Criminal Code (244 Current Criminal Code) constitutes the special rule governing a particular form of fraud i.e. in the computer system. Clearly this means that as the material element, conducting specific activities (insertion/modification/deletion of data, restricting access to such data, preventing the operation of a computer system) in order to obtain a patrimony and the resulting in the determination of damage. The court, in its decision, found that the normative variants of the offense - with reference to the many ways in which it can be achieved the objective side in terms of material element of it – have as common point and effect, on the one hand, the fraud with harmful consequences for the passive subject, and secondly obtaining manifestly unfair and unlawful the use of an asset by the active subject. Also, it is obvious that the fraud of the passive subject involves inducing it in error because, otherwise, the assertion of the crime would be impossible. Moreover, the conclusion that fraud computer is actually a variant of deceiving committed in the virtual environment results also from the penalties prescribed by the rules of incrimination. (Boroi, 2014, p. 271)

However, the court observed that achieving constitutive content of the offense provided for by the special rule on incrimination produces the same prejudice that might retain corollary the appreciation for the purposes of the committed offense provided for by the general rule (art. 244 of the Criminal Code). So, given the principle according to which the special rule derogates from the general rule and that it is inadmissible the possible unjust enrichment of the civil party by the double repairing of the prejudice both by the effect of detaining the crime of special law and that of the general rule, i.e. the Criminal Code, it must be concluded that in case of contest between special and general rule, it will be effective the special rule. Moreover, a contrary conclusion would have as effect the double sanctioning (due to an excess of regulation) at the level of civil and criminal law, which is inadmissible.

As these are the facts and being in full agreement with the reasoning included in the quoted decision, we will show that the computer fraud (just as any fraud offense) has a special character in its relation to the offense of deceiving, a reason for which they are unable to achieve an offense contest.

Other Delimitations on the Crime of Deception

In some situations, it was even proceeded into separating *the offense of deceiving by the tort liability* engaged for the non-compliance of the contractual obligations. Constantly in such situations it was considered that the mere breach of a civil obligation cannot have criminal consequences as long as a party has not used deceptive means to persuade the other party to perform the agreement on term. (Hâj, 2000, p. 351)

In jurisprudence there were also pointed out other distinguishing features. We will briefly present some of these solutions:

1. Trying to get without the right sums of money as reimbursement of value added tax on the basis of carrying out fraudulent transactions in the accounts of a company committed before the entry into force of art. 8 of Law no. 241/2005, it meets the constitutive elements of the offense of the attempted deception offense. The distinct incrimination of the offense, by the provisions of art. 8 of Law no. 241/2005 – the special law for preventing and combating tax evasion – does not lead to the conclusion that until the entry into force of art. 8 of Law no. 241/2005 the act is not provided by the criminal law,

in relation to the contents of the Criminal Code, but it concludes that the committed acts until the moment mentioned, it is applicable to the depositions of Criminal Code.

High Court of Cassation and Justice held that the deed - consisting of trying to get without the right the amount of 33116.41 lei in reimbursement of VAT, after the conducting the accounting status of the A company of fraudulent transactions - at the time of committing, in 2004, it was incriminated and sanctioned under criminal law, by the provisions of the criminal Code offense, representing attempted to the offense of deception, being provided for in art. 20, reported in art. 215, par. (1) of the 1969 Criminal Code. The conclusion is based on the special nature of the existing legal tax relationship, in relation to the state and not by the special quality of defendants, i.e. as taxpayers, leading to the conclusion that the defendants were convicted for an offense which in 2004, was not provided by the criminal law, given that the legal provisions of the criminal Code that incriminated deception were not circumstanced to certain people or certain legal relationships between passive and active subject of the subject offense. The fact that, subsequently, by art. 8 of Law no. 241/2005 were incriminated separately, through a special law, acts of the nature of the one committed by the defendants in 2004 does not mean that by that time they were not provided by the criminal law, in relation to the contents of the Criminal Code.[1] After interpreting this decision we conclude that the offense defined by art. 8 of Law no. 241/2005 has special character in relation to the offense of deceit of the Criminal Code, for which the norm of special law enforcement takes precedence.

2. On the same matter, it was considered that the act of misleading by presentation, using false documents, the trade acts as acts performed in the country as documents of export, in order to evade excise duty and VAT, constitute offense of **tax evasion** and not the offense of deceiving[2]. To determine this, the court found that the defendant, Management councilor at a company and owner of a commercial firm, in order to avoid paying excise duty and VAT levied on internal trade in alcohol, in September 1998 agreed with the representatives of foreign companies to conclude fictitious contracts of alcohol export, in reality the commodities were sold in Romania. To give the appearance of real contracts, the defendant was favored by a customs official also condemned in the concerned offense, confirming the fictitious exit of the alcohol tanks. For these fraudulent schemes the defendant damaged the state budget with the amount of 581 625 578 lei, representing unpaid excise duty and VAT. His act is an act of deception, but because there is a special regulation, it can no longer retain also the charge of deceiving from the Criminal Code.[3]

3. The deed of the administrator of a company, to purchase merchandise of inferior quality, exempted from taxes and duties, the right to sell it as top quality products, bearing taxes and duties, and to retain the value of these latter components of the price represent the offense of deception, perpetrated at the expense of buyers, not crimes of embezzlement and deceiving on the quality of goods provided for in art. 297 of 1969 Criminal Code. The court concluded that the two offenses cannot be accepted as the company is not prejudiced by the committed offense and the goods were not adulterated or substituted.[4]

[1] I.C.C.J., Criminal Division, Decision no. 1341 of 17 April 2013 www.scj.ro.
[2] Provided for in article 12 of Law no. 87 / 1994 repealed and replaced by Law no. 241/2005.
[3] I.C.C.J., Criminal Division, Decision no. 2287 of 8 May 2002 www.scj.ro.
[4] I.C.C.J., Criminal Division, Decision no. 5524 of 27 November 2003, www.scj.ro.

In order to decide, the court noted that the defendant, administrator of a company having as main activity the sale of petroleum products, acquired during July 1999 - February 2000 large quantities of oil of lower quality, exempted from excise duty and FSDP tax and resold them as premium gasoline and diesel fuel with taxes and excise. The money obtained in this way has not been paid to the state budget, being appropriated by the defendant. Considering that since the defendant has not had the quality of official personnel, he cannot be the active subject of the crime of embezzlement, the court acquitted him on the absence of elements of crime. During the appeal it was requested the change of the legal classification of the crime of embezzlement and deceive on the quality of goods.

The court concluded that the evidence provided in the case that the offense committed by the accused it was not prejudiced the company whose administrator was; he did not stole money from the company's heritage and there is no shortage in its management. This is why it is also considered that to the defendant it cannot retain any offense of cheating on the quality of goods nor under the form of the direct participation, or by the improper participation, from the lack of constituent elements, there was no falsification or substitution of goods or products.

In the case of petroleum products have not been forged or altered or substituted, but received a new name and a price that gave them the appearance of authenticity. The defendant, by his actions deceived buyers who are confident that it was delivered Premium gasoline and diesel, purchasing in reality lower quality products.

Whereas the label under which it was sold this oil of lower quality, tax exempt FSDP and excise, was gasoline and diesel products bearing taxes and duties, the price paid by buyers included these unjustified surcharges, being misled about the quality and cost of purchased product.

The amount of taxes and excises are not due, amounting to 2,568,102,252 lei, included in the paid price, there are obligations to the state budget, but, as noted, is the damage caused to buyers and unjust material benefit gained by the defendant fraudulently.

The facts, as described, meet so the elements of the offense of deceiving.

4. The acts of the manager of a company, to falsify documents of the company and, on that basis, to obtain a loan on forged documents failing it would not have been achieved otherwise and which he did not returned, constitutes the offense of forgery of private documents and the offense of deceiving and in art. 271, pt. 1 of Law no. 31/1990 which incriminates it, among other things, the act of the manager of the company, which has, in bad faith, in the prospects, reports and communications to the public, untrue data on the formation of a company or on its economic conditions.

In order to decide, the court held that the defendant, as manager of a company in order to obtain a loan of 3 billion lei, falsified the balance sheet of the company and the balance of verifying it, thereby obtaining the loan in question.

In the first instance, the defendant requested the change of the legal classification of the offense, from the offense of deceiving into the offense under article 271, point 1 of Law no. 31/1990, republished. The request to change the legal classification of the offense was considered unfounded, since art. 271 pt. 1 of Law no. 31/1990, republished, states that there are punishable by imprisonment of one to five years the founder, manager, director, chief executive or legal representative of the company that presents, in bad faith, prospects, reports and communications to the public, false data on the formation of a company or on its economic conditions or hides, in bad faith, in whole or in part such data. Or, the court of first instance held that the act of the defendant to present the case of lending, accounting

documents forged without which the bank would not have granted the credit of 3 billion lei requested by the defendant under these fraudulent means, misleading the bank, it is the offense of deceiving and not a presentation, in bad faith, of false data on economic conditions of the company of which he was the manager.

The High Court of Cassation and Justice has found on this situation that an offense under article 271, point 1 of Law no. 31/1990, republished, has as special legal object the social relations in connection with acknowledging generally by the public – the people regarded as undetermined, generically - of data and information on companies - constitution and economic conditions thereof.

In this case, the defendant committed the offense means - forgery of private documents under private signature - to achieve the conditions of committing the offense, purpose – deceiving/deception, which goes beyond simply misleading the public about the economic conditions of the company.

It is clear that a particular banking institution does not constitute as being "public" within the meaning of art. 271 pt. 1 of Law no. 31/1990, republished, and the fact that the false documents were not a general purpose, were not addressed to the "public" in general, but were called for a banking institution and that their presentation is not seeking a general purpose of unreal information, but a specific purpose, namely misleading the banking institution in order to obtain a loan through circumvention of conditions known by the defendant in the conduct of previous contracts.

The concrete way of conceiving and executing criminal activity reveals the intention of the defendant of misleading the banking institution, i.e. the direct intent in the sense of art. 19, point 1, letter a) of the Criminal Code.

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Granting the Right to Asylum – the Implications on the National Security

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Abstract: Given all the implications it entails the obligations under relevant international conventions on asylum and the need to harmonize them with national interest, at the level of each state has led to the development of international standards on asylum procedure. Thus, at European level there were developed a series of concepts, the legislative and institutional measures, which aimed at, on the one hand the people in need of international protection, enjoying effective protection and a standard of appropriate support and secondly discouraging any form of abuse to the institution of asylum.[2]

Keywords: international conventions on asylum; EU; international protection

Besides the directives[3] and of others existing regulations, currently there are under discussion and / or pending for adoption several other migration directives, plans and programs set out in the European Union[4] in the field. A special place is occupied by the asylum regulations. In this sense it should be mentioned first the distinction between asylum seekers and other migrants categories. Thus, while the migrant has opted to leave their home for economic, social, cultural, family, etc. reasons, the asylum seeker/the one who received a form of protection (refugee status, subsidiary or temporary protection) is forced to leave home because his life or freedom are threatened.

The International agreements establish the obligation of signatory states to ensure unhindered access to the asylum procedure and the principle of non-returning (i.e. prohibition of measures of return, expulsion, extradition) of an applicant or person who is during the procedure to apply for asylum, accompanied by providing the necessary assistance during the course of the asylum procedure and then, for those who receive some form of protection. The European policies and legislation on asylum represents a distinct field of European regulation in the migration domain.

The simplest difference is that, while the asylum seekers or persons who received a form of protection were forced to leave their countries of origin as their life or freedom was threatened, in the case of migrants, they choose for various reasons, to leave their countries of origin and settle temporarily or permanently in another state, these reasons may be economic, social, cultural, family, etc.

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[2] All these measures were covered by the documents that make up the acquis in the field of asylum and it concerns: Creating a Common European Policy in the Asylum domain (Tampere Programme); The Hague Programme - setting out measures aiming at assistance and cooperation with the countries from the origin and transit regions with EU neighboring countries, and particular emphasis on the measures of social integration of foreigners.
[3] www.europa.eu.int/.
[4] www.euractiv.ro/uniunea-europeana/articles.

Starting from these premises, though the international documents to which Romania is a party[1] it was established the obligation of states to ensure the unhindered access to the asylum procedure and the principle of non-returning (prohibition of measures of return, expulsion, extradition, etc. of an asylum applicant or a person who received a form of protection) and appropriate assistance to these persons during and after the asylum procedure, in the case of those who receive some form of protection.

All these measures have started on the one hand from the need to fight a secondary migration phenomenon of asylum seekers, known as "shopping asylum". This phenomenon consists in that a person before completing an asylum procedure in a European country leaves to another European country to start a new procedure and so on, in some cases there were people who prepared up to 8 procedures which allowed them a stay and free material assistance in Europe for over 10 years. Analyzing this phenomenon it was observed that in some cases this secondary movement of asylum seekers was justified by the standard differences existing from one Member State to another, differences in procedures, level of assistance, the existence of national communities, opportunities for integration, etc. the Romanian Immigration Office of the Ministry of National Affairs has helped in creating a policy of Romania in the field of asylum and refugees, as part of a policy in the immigration domain, which respects the obligations assumed internationally by the legal instruments to which our country joined, and the national interest by achieving a balance between the rights and obligations of these categories of people.

Often, the asylum has been considered an obstacle in the fight against illegal immigration, a cause of frustration for the competent authorities in border control or the legality of the stay of foreigners on Romanian territory, whereas by asylum applications, those caught in such situations prevented the return or removal measures from the territory. Thus such assessments are not real and asylum should not be regarded as a tool to facilitate illegal migrants, but as part of national[2] and international law to be respected in all measures taken to combat illegal immigration measures that the Romanian Immigration Office contributes substantially.

Thus, asylum law was amended successively since 1996, to be consistent with the acquis communautaire that has undergone many changes.

In 1999, Tampere, formulated a series of common policies on migration and asylum, and an eloquent proof of the fact that the issue related to migration is a priority in the EU's agenda is the discussion of the European Council in Seville in 2002 and Council Informal European at Hampton Court in October 2005. The need for the formulation of such policies has been determined that currently there are used more and more important mass expulsions as a weapon of war and as a means to create homogeneous culturally or ethnic societies and increasingly more often as a direct or concealed reason to support territorial claims or self-determination of massive flows of population - refugees or forced move, both in the pre-crisis, and especially post-crisis period.

There is currently an ongoing process of adaptation and diversification of the routes and routes of illegal migration and foreign mafia networks operating in Romania have specialized in committing illegal acts at the border. To combat these phenomena it was concluded the "Schengen Plus" Treaty on 20 May 2005 between Germany, France, Austria, the Netherlands, Luxembourg, Belgium and Spain with the aim of effective cooperation in the fight against terrorism, crime and illegal immigration, was

[1] See in this respect the 1951 Geneva Convention on refugees

[2] The Legislation with influence on migration in the EU is contained in the Accession Treaty of Romania and Bulgaria to U.E. signed on 25 April 2005 in Luxembourg.

issued an endpoint security software that is generically called ISPS - the International Code for the Security of Ships and port facilities.

Compared to the above, we can see that in the recent years, the European migration policies are focused on illegal migration and the development of repressive measures.

After the events of 11 September, the UNHCR called for the US to rigorously apply the exclusion clauses, as defined by article 1 (F) of the Refugee Convention, since the Convention was not designed to create an environment for crime, but rather its purpose is to protect persecuted people. It was banned the appliance of the provisions of the Geneva Convention to the persons who are guilty, before being recognized as refugees, of committing serious crimes, including the terrorism actions. In the new context created by the events of September 11 in the United States it was necessary to regularly review, by the U.E. Member States, the files of those who obtained protection whenever there were new elements, especially when there are notified bodies with responsibilities in national security domain, about the existence of signs in this respect and the need to determine accordingly who meets the requirements of the Geneva Convention, so as to ensure effective implementation of this international document. It was agreed in principle that all asylum claims to be assessed and not rejected as being inadmissible in certain cases, on grounds of public order and safety, giving thus substance of the principle of non-returning as through Geneva Convention enshrined certain situations where asylum seekers cannot commonly use this benefit due to the fact that their deeds are unworthy to benefit from international protection. A major concern of the Romanian Immigration Office was a failure to register any case of denied access to proceedings, if it was valid or any case of returning a person in real need of international protection. RIO, moreover, is in direct contact with the Border Police and other institutions in the area in order to solve all applications for asylum.[1] There have been efforts for staff in all institutions who come into contact with persons seeking asylum to know what to do and react wisely, by distinguishing unmistakably situations when a person asks for protection status or not, or completed protocols with other structures of the defense, public order and national security, with specific reference to measures to combat illegal migration.[2]

The threats in security matters which Europe is facing are multifaceted, interrelated, complex and increasingly international as regards their impact and increasingly inseparable feature of internal and external security.[3] No Member State can ensure its security alone. Nearly nine of ten European Union (EU) citizens believe that security should be dealt with not just at national but also at EU level.[4]

A series of community measures taken in the recent years and their unforeseen effects on short and medium term equally shake these foundations. For example, the most "subversive" proves the reduction of agricultural subsidies in EU countries that, for many years, have received huge funds and

[1] However, a particular concern of the Romanian Immigration Office is the concrete activities undertaken on countering illegal migration. In this regard we highlight the following: the principle of safe third country, the application of the accelerated procedure for manifestly unfounded applications, reducing the time of processing an asylum application (95% of cases are analyzed in a period of not exceeding 30 days - one the lowest period compared to procedures for processing applications from EU countries) operative communication at IGPF of people leaving the centers, an agreement with the International Organization for Migration for voluntary repatriation of people who went through the asylum procedure.

[2] Official statement on combating illegal migration of foreigners, in the attention of the Romanian Border Police, 15 July 2008 www.politiadefrontiera.ro.

[3] The Commission will further analyze the extent and manner in which the results of conducted activities in this communication can support and supplement the guidelines on external actions and relevant tools in this regard. The Commission is currently preparing a Communication on better coordinating the EU's external assistance role in security. Source: Statement from the Commission to the European Parliament and the Council on public-private dialogue in research and innovation in the security field (SEC-2007/1138) and (SEC-2007/1139) Brussels, 11.09 2007.

[4] Special Euro barometer, "The role of the European Union in policies regarding Justice, Freedom and Security", Fieldwork: June-July 2006, Publication: February 2007.

attracted cheap, foreign labor force.[1] In this context, one of Europe's main objectives is to preserve its values of open society and civil liberties, while responding to the growing threats to security. At the same time, Europe must secure its economy and its competitiveness against an increased threat of disruption to its basic economic infrastructures, including industrial assets and transport networks, energy and information. The security issues of a State arise from the report, existing at a given time, between the threats with which it is confronted and its ability to seize them appropriately, to interpret them correctly and to counter them effectively. It is understood that the perception of the concept of security in a democratic society cannot be equated with the official security perception of a totalitarian, dictatorial, terrorist state. The latter cannot be discussed, as the concept of security in this case refers to defend the ideology that underpins the very existence of these types of state other than democratic. In the process of analyzing the premises of expression, it must focus on integrated analysis, the only one able to contain the complexity of the problems that lead to the ways of preventive identification of challenges, risks and unconventional threats.[2]

Conclusion

It may be said that the main threats to national security are expected from the non-military and unconventional domain, such as: political, diplomatic, technological, commercial, financial pressure, media campaigns on different themes and aggressions (pressure that is already becoming violent) information, psychological actions, economic, financial and technological actions/aggression, computer hostile actions, cultural and religious penetration (defeatist and fundamentalist), intelligence and disinformation, massive population migration with destabilizing effects and loss of national identity.

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[1] We list a few: crops of oranges, olives, strawberries and grapes in Greece, Italy, Spain and France.

[2] The main threats consist of: challenges - actions, steps, statements, reactions to actions made directly, indirectly or obscure, from abroad or from within, by a potential opponent that could generate tension in the whole state security; risks - actions, approaches, positions, own statements, made by the political, legislative, executive central power and local government aiming at internal life of the country and the foreign policy domain that expose the national security state.

THE 11TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

The Contribution of the European Convention on Consular Functions to the Development of International Law

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Abstract: In this paper we have analyzed issues concerning the contribution of the Council of Europe to the codification of consular law by adopting the European Convention on Consular Functions of 1967 and the Protocols to this Convention, in order to standardize the experience and European cooperation in this matter. We have highlighted the regional regulatory nature of this international act and the complementarity and compatibility with the 1963 Vienna Convention on Consular Relations, to the extent that the latter includes only a summary regulation of the consular functions. For the elaboration of the paper we have used as research methods the analysis of problems generated by the mentioned subject with reference to doctrinal views expressed in treaties and papers, the documentary research, the interpretation of legal norms in the matter.

Keywords: consular functions; international law; Council of Europe

1. Introduction

The topic on consular protection occupies an important place in specialized literature, and consular responsibilities developed along with the challenges generated by the increase of demand for consular services and the interest of states to materialize into international agreements, multilateral and bilateral cooperation to meet concrete needs of beneficiaries of consular assistance.

Consular functions represent all the attributions that their consulates and consular staff have and they represent the contents of consular relations. They have generated the appearance of consular institution and they have been the basis for its further development. Maresca believed that consular functions' system is able to reveal multiple and complex relationships created by the consular law (Maresca, 1972, p. 135).

The responsibilities of consular representatives were established by customs, treaties and multilateral and bilateral consular conventions, depending on the interests of the states (Malita, 1975, p. 258; Oppenheim, 1920, p. 837). Ion M. Anghel believes that the consular officer "focuses on his own person" within the consular circumspection where he has the right to act, "all the skills of the authorities who are in charge to solve various situations that may arise concerning the interests of the sending State and its citizens" (Anghel, 2011, p. 594), which makes them difficult to inventory

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(Bonciog, 2000, p. 39), but also difficult to determine the precise scope of duties and consular functions (Sen, 1965, p. 227).

If the establishment of the international framework for regulating consular relations and, consequently, for the exercise of consular functions was performed by the *Vienna Convention on Consular Relations* of 1963 (VCCR), which represents at the same time the common law for the non-signatory countries, the European experience in this matter has been codified by the *European Convention on Consular Functions* 1967 (ECCF), a document which highlights the Vienna Convention on Consular Relations limits since 1963 on the consul's attributions, but it reveals new challenges and opportunities for developing international cooperation.

2. European Convention on Consular Functions – General Presentation

The European Convention on Consular Functions represents a regional coding, it does not cover all countries, but it is applicable only to the states in this geographical area and we appreciate that it is a partial and complementary coding (in relation to Vienna Convention on Consular Relations of 1963), covered matters being limited themselves to consular functions (Anghel, 2011, p. 529; Maftei, 2010, p. 30).

The European Convention on Consular Functions and its protocols are the result of activity of a committee of governmental experts who have worked under the supervision of the European Committee on Legal Co-operation (CDCJ), a body under the authority of the Council of Europe Committee of Ministers. The decision for drafting a regional treaty to regulate consular relations between the member countries of the organization was made in 1961, and the activity of the of the Committee of Experts to draft a European Consular Convention, led by the French expert M. Heumann was conducted over five years and it required approximately 120 days of assembly. The adoption in 1963 of the VCCR within the UN had effects over the activity of the Expert Group, which decided to limit to regulate only consular functions, renouncing at approximately 100 articles already drafted (Wiebringhaus 1968, pp. 770-771).

ECCF and its protocols have been opened for signature to the member states of the Council of Europe and for for accession by European States which are not member States on December 11, 1967.

The entry into force of this Convention is regulated in art. 50, paragraph 2 and it is subject to serving a period of three months from the date of deposit of the fifth instrument of ratification or acceptance: *The present Convention shall enter into force three months after the date of the deposit of the fifth instrument of ratification or acceptance*." As a result, although signed in 1967, ECCF began to take effect only after 44 years, i.e. on 9 June 2011, three months after the date of deposit by Georgia of instruments of ratification (March 8, 2011), the fifth state to ratify it (the other four countries are, in chronological order of ratification of the Convention, Norway - November 29, 1976, Greece - 25 august1983, Portugal - January 11, 1985 and Spain - July 16, 1987, which also formulated reservations about art. 6 and 13).

From a structural viewpoint, the ECCF includes: preamble, six chapters, two annexes and two protocols: : Chapter I – Definitions (1 article), Chapter II – General consular functions (15 articles), Chapter III – Estates (11 articles), Chapter IV – Shipping (14 articles), Chapter V – General provisions (7 articles), Chapter VI – Final provisions (9 articles), Annex I - specifies the 4 reservations which may be made, Annex II states that it cannot be applied Austria "*the provisions of Chapter IV of the present Convention relating to shipping*", Protocol to the European Convention on Consular Functions concerning the Protection of Refugees (ETS No. 061A). Protocol to the European Convention on

Consular Functions relating to Consular Functions in respect of Civil Aircraft (ETS No. 061B) (Europe, Details of Treaty No.061, European Convention on Consular Functions).

3. The Consular Functions Regulated by the European Convention on Consular Functions

Although it was initially desired for the convention to regulate all areas of consular law, the committee entrusted with its elaboration decided that under the effect ruling of the Convention to regard only the consular functions, as other issues such as "consular privileges, immunities and relationships" were already included in the Vienna Convention on consular relations 1963 (Council of Europe, Details of Treaty No. 061, Explanatory Report to the European Convention on consular Functions).

As a result, the final decision on this issue has concerned the insertion in the Preamble of a reference to the Vienna Convention of 1963: *Taking note of the fact that consular relations, privileges and immunities are dealt with in the Vienna Convention on Consular Relations signed on 24th April 1963, and in other conventions*". The Committee considered that this statement and the one related to the fact that "*the rules of customary international law continue to govern matters not regulated by the present Convention"* are sufficient and comprehensive in this matter.

The reason for developing the European Convention on Consular Functions is stated in its preamble: "*the conclusion of a European Convention on Consular Functions will further the process of European unification and co-operation*" and it is integrated into the overall objective of the Council of Europe, that of achieving a greater unity between Member States in order to protect and promote common ideals and principles and to facilitate their economic and social progress, a goal which can be achieved by the conclusion of international agreements.

While the 1963 Vienna Convention enlists the consular function in article 5, letter a-m, the European Convention on Consular Functions details them in its structure divided into six chapters and 57 articles. In line with the 1963 Vienna Convention, the European Convention on consular functions reiterates consular functions already specified in article 5, letter a-l of the Convention, which is the common law in the matters of consular law, but added other functions, compatible with the regulations of the latter according to letter m, article 5, which grants to consuls the ability "*to exercise any other functions entrusted to a consular post of the sending State, which are not prohibited by the laws and regulations of the receiving State or to which the State of residence does not preclude, or which are listed in the international agreements in force between the sending State and the receiving State*." The list is not, however, exhaustive, art. 44, paragraph 1 allowing the consul "*to exercise any other consular functions entrusted to him by the sending State which are not prohibited by the law of the receiving State or to which no objection is taken by that State.*"

Considering the contemporary requirements and multilateral and bilateral conventions of the time, the committee that drafted the text EECF stated in the *Explanatory Report to the European Convention on Consular Functions* that the expression "*shall be entitled*" should be understood as conferring consuls the power to serve the protection function and not that where it would constitute an obligation for them.

Article 2, paragraph 2 of ECCF regulates one of the important functions of the consul, a political function, namely ***to maintain and develop the friendly relations*** between the two states, maintain consular relations, the sending State and the receiving State, a function that expresses a clear political feature: "*...to promote and develop co-operation between the sending and the receiving States*…" The

collaboration concerns, according to the rule mentioned above, different areas of bilateral relations: c commercial, economic, social, professional, touristic, artistic, scientific, educational and maritime matters and civil aviation and the listing is not exhaustive, the words "*in these and other fields*" leaving for the Member states to broaden the scope of activities. We note that this provision entitles the consul to perform acts in connection with any matter arising from the conduct of consular relations (of course, except diplomatic documents). It is obvious the correlation between the provision in article 2, paragraph 2 of ECCF and that of art. 5, letter b of VCCR "*furthering the development of commercial, economic, cultural and scientific relations between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention*"

The task of the consul in terms of ***cultural and scientific activity*** is regulated in Article 2, item 2 of ECCF and it entitles the right to favor the interests of the sending State in the artistic, scientific, education domain, to promote these areas, to develop cooperation between the State and the sending State. Basically, this activity may result either in the participation of the consul in the preparation, negotiation, conclusion and application of treaties on the cultural-scientific domain or to create associations, institutions to conduct activities in this area or to organize events for his countrymen, etc. And VCCR indicates this function in art. 5, letter (b) "*furthering the development of commercial, economic, **cultural and scientific relations** between the sending State and the receiving State and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention*".

Consular function in passports and visas matters is clearly and precisely regulated in art. 7 of ECCF, providing the consul the following tasks:

"*b) issue and renew to nationals of the sending State and to any other persons entitled to receive them:*

i. identity documents;
ii. Passports or other travel documents;
c) grant and renew visas for entry into the sending State."

This competence of the consul is an administrative one and the provision has the character of principle, the corresponding activity in this field is an attribute of the sending State, that it is exercised by specialized bodies, according to national regulations. By the national law there are set concrete tasks of consuls in this matter, which of course must be in accordance with the international provisions.

Less concise coding is the coding convention of consular relations, which mentions in article 5, letter d mentions: *"(d) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State*".

Functions in jurisdictional matters and transmission of documents. Article 5, letter j of VCCR establishes the right of consular officer for "*transmitting judicial and extrajudicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State"* This task must be consistent with the existing international agreements. In their absence, the achievement of this task should be according to the laws and regulations of the receiving State.

The ECCF 1967 regulates this function in Article 9, and the more clear provision refers to the attributions of the council in civil and commercial matters:

- to serve judicial documents;
- to transmit extra-judicial documents;

- to take evidence on behalf of the courts of the sending State.

And article 9 of the ECCF refers to the existence of compliance "*with international agreements in force or, in the absence of such agreements, if no objection is raised by the receiving State*".

Functions in matters of civil status. If the 1963 VCCR establishes in article 5, letter f, all with the value of principle, that among the duties of the consul is also that of acting as an officer of civil status and to exercise similar functions to the extent where the laws and regulations of the residence state do not object it, the 1967 ECCR regulates this function in more detail in article 13 and it authorizes the consul to: "*a) draw up or record documents on the birth or death of nationals of the sending State or any other documents concerning the civil status of such nationals; b) celebrate a marriage, provided that at least one of the parties is a national of the sending State, that neither of them is a national of the receiving State and that there is nothing in the law of the receiving State which would prevent the celebration of the marriage by the consular officer*". The provision is the result of codifying the international practice according to which, as the consular officer, the consul keeps civil records (births, marriages, deaths), under the laws of the sending State. We consider it necessary to make some remarks about the possibility for the consul to solemnize marriage. If the provision of VCCR may be interpreted in the sense of including the marriage ceremony by the consular officer, in the performance by him of the civil status documents (Matscher, 1986, p. 259), to the extent that the laws and regulations of the receiving State do not oppose it, thereby making it "a finding of the previous practice of coding" (Anghel, 2011, p. 613), the ECCF expressly mention this attribution in article 13, letter b, empowering the consul to officiate a marriage "*that at least one of the parties is a national of the sending State, that neither of them is a national of the receiving State*". We should highlight that it should be considered also the final thesis "*there is nothing in the law of the receiving State which would prevent the celebration of the marriage by the consular officer*".

In VCCR, ***the consular matters of succession*** are set out in brief in article 5, letter g *safeguarding the interests of nationals, both individuals and bodies corporate, of the sending States in cases of succession mortis causa in the territory of the receiving State, in accordance with the laws and regulations of the receiving State*". The ECCR determines the contents of consular function in matters of succession extensively in the wording of 11 articles (art. 17-27) in Chapter ***Estates***. There are regulated, for example, the obligation of the receiving State's authorities to inform consular officers "*of the death within his district of any national of the sending State*", and similarly, if the consular officer "*... is the first to have knowledge of such a death or the existence of such an estate",* he „*shall inform the competent authorities of the receiving State*" (article 17); the right of the consular officer to take immediate custody amounts of the money and personal effects of the *de cujus* in order to protect them (article 18); the permission granted to the consular officer to receive and distribute an estate of small value without power of representation (article 19); the right of the consular officer to represent a citizen of the sending State "*who is not resident in the receiving State and is not legally represented there has or may have an interest"* in connection with the ownership of a building that belonged to the *de cujus*, or when it although resident in the receiving State "*is incapable of exercising his rights*" (article 20); the power granted to consular officer to intervene *to the protection and preservation of the interests of the person whom he is entitled to represent*" (article 21); the possibility to send "*money or other property*" by a national of the sending State, who is not resident in the receiving State "*as a consequence of the death of any person*" (article 26), etc.

Functions related to citizenship. Perhaps one of the most important tasks (in fact the citizen of the sending State is the main recipient of the consular activity), this function encompasses a range of responsibilities of the official consular, activities conducted for his countrymen. ECCF expressly

refers to citizenship in article 12, paragraph 1: "*A consular officer shall be entitled to receive such declarations as may be required by the law of the sending State, particularly as regards nationality"* (S. N.). Although it is not expressly mentioned, the consular functions regarding citizenship, but by reference to customary law in the Preamble, there are used formulas which show that it is addressed to nationals of the sending State, and VCCR covers this matter as well. (Anghel, 2011, p. 619)

This consular function involves the performance of duties such as: setting a record of its own citizens who have domicile or are occasionally in the State of residence, within the consular circumscription, reflected in the consular record, an activity which is directly related to that of issuing and renewing identity documents; granting assistance and consular protection, consular representation, etc. Achieving this function is closely linked to the right / freedom of communication, which the VCCR expressly mentions in article 36, paragraph 1, letter a "*consular officers shall be free to communicate with nationals of the sending State and to have access to them. Nationals of the sending State shall have the same freedom with respect to communication with and access to consular officers of the sending State"*. The ECCF noted in article 5 the right of citizens of the sending State to have at any time the possibility to communicate "*the appropriate consular officer… and … to have access to him at his consular post"* and in article 4, letter a) - the right of consular officers to communicate with their citizens: *a consular officer shall be entitled to have access to, communicate with, interview and advise, any such national*. The problem of consular representation is regulated in article 5, letter 1 of the VCCR, as being specified the situations where we can call him ("*because of absence or any other reason, such nationals are unable at the proper time to assume the defense of their rights and interests*"), the limits of exercising this power *representing or arranging appropriate representation for nationals of the sending State before the tribunals and other authorities of the receiving State, for the purpose of obtaining ... provisional measures for the preservation of the rights and interests of these nationals*") and the obligation to observe practices, procedures, laws and regulations of the receiving State. The ECCF mentions representation in article 4, letter d: "*to assist him, provided that there is nothing contrary thereto in the law of the receiving State, in proceedings before the judicial authorities referred*", and Article 4, letter e, in which case the consular officer consular shall be entitled "*to arrange legal representation for him if necessary*". The two conventions contain special provisions relating to protecting the interests of minors and incapable persons, with full capacity of being citizens of the sending State. If in the VCCR the function is specified briefly in article 5, letter h, supplemented by art. 37 b, protecting the interests of minors and other incapable persons who are nationals of the sending State is explained in detail in the contents of article 14 of the ECCF.

Consular function in civil navigation matter is regulated by ECCF in Chapter IV - Shipping, art. 28-41 much more detailed than in the VCCR (Article 5, letter l), which provides a very general way that competence. The complexity of the shipping issue requires an explicit way for solving issues concerning the attribution of the consul in this matter and we intend to look at how this was achieved through ECCF regulations, and other attributions within the jurisdiction of the consul, which we will include into a future paper.

4. Conclusions

The question is: has the Convention contributed to the development of international? Undoubtedly, the text of the Convention provides an added value in this matter, being obvious "*the clear superiority of the Strasbourg text*" (Green, 1972, p. 182). ECCF reflects the position of European states on the exercise of consular functions and it produces effects for the states that have ratified it, compared to

the states with which they maintain consular relations. It is true that only a small number of states have ratified it, unlike the 1963 VCCR agreed by 179 countries (Nations). The motivation might count on the fact that the higher degree of generality of 1963 VCCR provides more possibilities to adapt to the changing circumstances in the field of consular activity, a greater flexibility in the development of new areas within the consular relations framework.

If States Parties will consider a future amendment to VCCR "*to clarify some of the issues left open in 1963*" (Buys 2013, p. 72), to bring it to the current development level of the international society, for making its provisions more precise, it could consider and develop the European experience regarding the consular functions, as it was recorded in 1967 ECCF.

Given that in 1963 VCCR the consular functions were given a summary, perennially regulation, given that Romania has committed to develop the relations with the European member countries of the European Union, up to integration, including in the consular domain, maybe our country should ratify the 1967 ECCF.

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THE 11TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

The Analysis of the Functions of Civil Liability

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Abstract: Occupying a prime position next to the current national law, within the new civil regulations, the civil liability claims the same two classic functions, the reparative and the preventive-educative one. Enacted under the general desideratum of maintaining social order, and in particular the defense of subjective rights of man, of respecting the rules of conduct that the law or local custom impose, the first two paragraphs of article 1349 of the Civil Code shall formulate, without being ambiguous, the ideational content of the two functions governing cumulatively the civil liability: the preventive and reparative function. Using content analysis, through documentary descriptive research and rich analysis of the specialized literature, this study aims at identifying the contents of the above mentioned concepts, presenting a point of view on the regarded issue.

Keywords: civil liability; prejudice; preventive-educative function, restitutio in integrum; reparative function

1. The Current System of Civil Liability and its Inherent Functions

Finding ourselves at the crossroads of two major forms of liability of equal importance to civil law, it is noted the classical vision of addressing the issue, meaning that the current Civil Code establishes, traditionally, the same two forms of civil liability, permanent standards for specialized literature and jurisprudence – tort liability[2] and contractual liability[3].

In this context, the overall pattern of civil liability (Pop, 2010, pp. 425-516) completes better its shape, "*without daring novelties*" (Vasilescu, 2012, p. 569), but with a new and an applicable broader regulatory structure. The quoted author analyzes the advantages and disadvantages of maintaining the same civil liability cases, as the common law legal system of liability, applicable whenever special norms do not intervene. It finds equally the failure that would have generated another approach, the futile effort to modernize something that has never become obsolete. The common denominator of civil liability remains the same: the restoration owed to the one who suffered a prejudice, regardless the forms of expression of this principle, as "*every effort of intellectual unification of the liability becomes more a chimera than a win for the main coherence of the legal issues raised by the liability*." (Vasilescu, 2012, p. 570)

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[2] The tort liability is based on mandatory provisions of art. 1349 Civil Code, par. (1): "Everyone has the duty to respect the rules of conduct which the law or local custom requires and without bringing prejudice, through its actions or inactions, legal rights or interests of others."

[3] Regulated by article 1350 Civil Code, the contractual liability supplements the legal support and by the rules enshrined in Book V has, in Chapter II, "Compulsory execution of obligations" under art. 1516-1548. It consists of contractual obligation of the debtor to restore the damage caused to the creditor by his act, consisting of unlawful non-enforcement of creditor's performance due to its creditor, under the concluded contract.

The literature of civil liability was, is and will be a "passionate" one, the supporters of the idea agree (Delebecque & Pansier, 2008, p. 1)[1]. The list of civil analysts who have dedicated their entire evolutionary study research approach of this institution is large, varied, both at national and European level. The analyzed problems have the same range. Speaking of the dynamics of the law, driven by the one of the society, obviously they have developed a real research lab of the liability, culminating (at European level) with concerns to find a common denominator through the establishment of the *liability of the European law* resulting from primary and derivative law of the European Union. The approach is not at all easy and not too soon achievable.

Internally, the registered office is common to both forms, the developing Chapter being generically called *Civil liability*, included in Title II (*Sources of the obligations*) of Book V of the (*About the obligations*) of the Civil Code. This chapter comprises six sections presenting mainly (Pop, Popa & Vidu, 2012, p. 389) the legal framework of the two forms, over approximately 50 items, from art. 1349-1395. The two forms are dominated also by the *common idea of repairing the caused damage* by presenting numerous common points[2] in terms of conditions, modes, causes excused from liability, and that both relate to the same functions, the preventive-educative and the reparative functions, which are subject to the analysis.

2. The Functions of Civil Liability

As previously stated, the wide range of discussions and opinions that characterize the institution of liability could not go around the theme of identifying, defining and determining the content of the principles and functions of civil liability.

It could not be avoided such a theoretical approach, but it even constitutes a fundamental stage, sine qua non, as we cannot deny the evolution of ideas that generated throughout time certain theories, sanctions etc., which led to the unanimous identification of principles and functions of civil liability. The moral, the identity and the religious factors have also played a leading role which is now in the substance and in the constant identification of the functions of the civil liability. The fact that we currently seek other and other facets of the legal concepts represents only a synthesis effort of the ideas progressively exposed, conceptualized at social, historical level and reflected in the principles, values.

By the conjugated contribution of the specialized literature with that of the force emanating from the judicial practice in civil liability, the civil liability develops two important functions, namely, **preventive and educative function and reparative function**, which are closely related. These must be seen in conjunction with the principles governing the legal liability, namely, the principle of full compensation for the prejudice (restitutio in integrum)[3] and the principle of reparation in nature of the prejudice[4]. Moreover, it is estimated that these functions are derived from the essence and the purpose

[1] Supporting the idea, the author invokes various considerations which establish to the study of the liability an interdisciplinary feature: the philosophical reasons (the principle of freedom), jurisprudential reasons, economic, cultural and social reasons.

[2] The major difference between the two forms of liability is the different source, the law or the will of the contracting parties.

[3] This principle requires the removal of all harmful consequences of an illegal act, in order to restore the balance by putting the victim in the previous situation and it is deducted from the very essence of the idea of civil liability: restoring the balance disrupted by prejudice and the re-occurrence of the victim in the previous situation. The direct effect of the principle of restitutio in integrum corresponds to the reparative function: indemnity obligation for the suffered damage.

[4] The legislator formulated *expressis verbis* the specifics of this principle, by the provisions of art. 1386 Civil Code "(1) *Compensation is made in nature by restoring the previous situation, and if this is not possible or if the victim is not interested in the reparation in nature, by paying a compensation established by agreement or in absentia by a court decision."*

of civil liability (Adam, 2014, p. 302). This last assertion creates the opportunity to say that, in concreto, by the functions it performs, through the principles to which it constantly relates, the civil liability is a form of expression, defense, protection of legitimate rights and freedoms of the person, as the holder of rights and obligations in the field of civil law and beyond. The purpose of this institution is that of restoring the patrimony in the situation preceding the illegal act.[1]

2.1. Preventive-Educative Function

If at the beginnings of history, the priority was the implementation of a punitive function, sanctioning, in its various forms of manifestations, the evolution of society and educative factor generated a change of perspective, so that it remains strictly the attribute of criminal liability, the sanctioning function loses its consistency on the civil law field, leaving room for another essential principle, that of reparative principle. The latter finds its application in direct relation to reparative function.

However the previous moment of producing the harmful act, that arises implicitly the obligation to repair, to reconsider the situation when it is still possible, in nature or, alternatively, the equivalent, in either case judiciously, for the victim concerned, it was established *a priori* way of softening the factors that may cause the production of losses, damages. In this context we speak of preventive and educative function that meets the civil liability.

After a careful semantic analysis, this concept implies a double substantiation hypothesis: the first is based on prevention factor, to warn, to predict consequences, etc. and the second one involves the educative stimulus, contained or not in each individual through the acquisition of skills and qualities of a good citizen. In a judicious manner, this function transpires in the provisions of art. 1349 Civil Code, which provides that "everyone has the duty to respect the rules of conduct that the law or local custom requires…" In other words, the criteria envisaged for fulfilling this function are: rules of conduct, law and the customs.

The role of preventive-educative function consists of reducing the number of prejudice as a result of the awareness of the obligation to repair, as any prejudice is entitled to compensation. The right conduct, adapted to rulings based, if not on the balanced conscience of the individual, at least on the fear of not being put into a position of decreasing their patrimony. Being liable does not mean necessarily that the damage was produced in order to be repaired. Equally, or rather, primarily being liable presupposes to assume any permanent damage and being conscious of future prejudices, the state of not producing them, depending only on our conduct. Only then we can prevent their happening (Costache, 2013, pp. 508-509). "*Mieux vaut prévenir, que guérir*" says the Frenchman (it is better to prevent than to repair – s.n.).

The educative feature happens by educating the society on respecting the fundamental social values, deriving also from the good faith and sense of duty of the citizen to act with care, not to damage the interests of others, in fact, to obey the law (Eliescu, 1972, p. 29).

On the prevention it was stated that it strengthens the contracting discipline (Pop, 1998, p. 164) and it consists in that voluntary conduct of abstention from committing future illegal acts. In fact, these issues reside in our nature to respect legal norms, to act always carefully, to reflect closely the relevance and legality of certain actions, to appreciate them and they grasp the risks, to prevent the

[1] On the topic under review, the relevant point of view is reflected in the work of the author Mangu 2014, pp. 50-64.

recurrence of damage. Prudence and diligence become landmarks that protect the individual from any deviations from the social conduct, which would be subject to infringements to indemnity.

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2.2. The Reparative Function

The reparative function is the basis of civil liability[1]; it is intrinsic, resulting from the provisions of articles 1348, 1357 and 1381 Civil Code. Only the factual existence of the prejudice[2], a proved prejudice, real, by fulfilling its living conditions[3] it requires to repair it, because in its absence, the idea of civil liability is no longer sustainable.

We can say that this repairing function makes clear the demarcation between the content of the civil liability and criminal liability. While in the case of first forms the idea of prejudice arises at the same time with the idea of full repairing, the criminal liability imposes the punitive idea, punishing those who violated the norm of law, that is the one who committed a crime within the meaning of criminal law, the punishment acquiring a personal nature. The principle of full compensation for the damage emerges as a direct consequence of this function, relying, according to expert opinion, on the "exigencies of commutative justice" (Vasilescu, 2012, p. 565). Any patrimonial imbalance claims to be solved through the intervention of the law, which protects the victim, and through the effect of coercion (if necessary), the prejudice will be repaired entirely by the one who is guilty. This is the only "penalty" that the civil law provides: the payment of the entitled compensation to pay them for the judicious referral of the situation, differing from other forms of legal liability (administrative - the system of fines, criminal –the punitive system).

The reparative function is only relative as it is often impossible to replace those prejudices, in their specific nature, and when it is possible, it requires a reinvestment of social work, a new employment expense to complete the damaged values. We refer to the non-patrimonial rights (rights concerning the existence, physical, moral integrity of the person or referring to the identification elements of the person) whose possibility to repair them in nature cannot be questioned, intervening the compensation of the affected value. Some authors have stated that in this situation we can speak partly of the reparative feature, and more about the compensation and arbitrary estimators. (Vasilescu, 2012, p. 565)

In this context, it was said that no damage can be absolutely repaired, as we do with the memory of supporting its achievement? Physical suffering experienced as a result of an accident or of moral nature due to loss of a loved one, are "repaired" financially through the payment of some compensation, but that amount will never be able to erase the suffering of the victim, or even to alleviate. The equilibrium of lost values will not be restored. That is why we believe that those amounts are rather financial penalty for the perpetrator. Here is actually the limit of this principle which is actually within the limit of human beings. From this perspective, in the French positive law it speaks increasingly of the granting damages-interests with the role of "compensation" and not repairing the prejudice.

[1] Within the same meaning, the specialized literature said that the "reparative function is the essence of civil liability, i.e. the idea of repairing the prejudice." (Lupan & Motica, 2008, p. 396).

[2] By prejudice it is understood the result of the negative effect suffered by a certain person, as a result of the misconduct of another person or the deed of an animal or thing, for which it is the liability of a certain person. (Stătescu & Bîrsan, 2000, p. 145)

[3] In order to be imposed the idea of repairing, there is a certain number of conditions which the prejudice must accumulate them: to be clear, to be direct, personal and to result from the breach or infringement of a right or a legitimate interest.

At European level, these two functions were adopted differently by the legislation, with a focus mainly on one of them, either the compensating feature of the civil liability, after payment (as in the case of France) or the preventive-educative feature, specific to the English legal system. The German legal system combines the two directions, assuming both the corrective justice principles of the English law, but also those of reparative justice. (Pricope, 2013, p. 19)

3. Conclusions

According to the above, we believe that adding the two functions of legal liability grants legal substance to this institution, it restores the idea of fairness, it removes the negative consequences of harmful act by arising the obligation of full repairing of the suffered prejudice. The role of prevention and of the factor to achieve an educative mechanism is a priori assumption of possible negative consequences, in the sense of an obligation of not doing anything to prejudice the legitimate interests of another person. Without establishing a hierarchy between the preventive-educative and reparative functions, both in terms of ruling one of them or of the importance that both meet in the context of civil liability, the community of the two above-mentioned functions claims the active role of defending the idea of fairness, justice, defense of what civil law designates by the subjective right of the physical or legal entity.

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