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THE 12TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Legal Sciences in the New Millennium

Face-To-Face with Terrorism: Experience of Kosovo

Ylber Aliu[1], Nagip Skenderi[2]

Abstract: One of the main problems of Kosovo today is facing with the phenomenon of extremism and violent religious radicalism. The main purpose of this paper is to analyze the phenomenon of radicalization and violent religious extremism in Kosovo and confronting of the state and our society with this phenomenon. Paper records were collected from various sources, such as reports, publications, and analysis of state institutions, civil society, and religious organizations. Conclusion of the paper is that, facing of Kosovo with extremism and violent religious radicalization that leads to terrorism, viewed from the perspective of short-term is a success story because the number of Kosovars who came to join terrorist organizations in Syria, after the adoption of law and strategy, is zero; however, there is no room for enthusiasm because, Kosovo remains a hotbed of individuals and groups with extremist and radical orientation.

Keywords: Kosovo; extremism; radicalism; terrorism confrontation

1. Introduction

The main thesis of this paper is that, *facing of Kosovo with extremism and violent religious radicalization that leads to terrorism, viewed from the perspective of short-term is a success story because the number of Kosovars who came to join terrorist organizations in Syria, after the adoption of law and strategy, is zero; however, there is no room for enthusiasm because, Kosovo remains a hotbed of individuals and groups with extremist and radical orientation*.

This is not the only problem of Kosovo. In fact, Kosovo faces an extremism and violent ethnic radicalism, especially in the northern part of the country where they continue to operate parallel structures of Serbia. Kosovo faces a significant level of unemployment and poverty. It is the only Balkan country that still use visas for its citizens to travel to EU member countries. However, these problems will not be elaborated in this paper. In this paper, we have chosen to treat the phenomenon of extremism and violent radicalization of Islamic religion. Why are we defined to treat these topic? We are defined for this topic because it is a new topic and still untreated as other topics are treated. Also to a great extent the story of extremism and violent religious radicalism in Kosovo is a success discreet story. It is prevented getting of Kosovars in Syria, but the activity of individuals and groups with conviction and radical extremist activity in the country is still present.

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The data of the paper were collected through very different resources. In the theoretical framework the data are gathered from the opinion of some international policy scientists that elaborate terrorism in a sense that suits this phenomenon in Kosovo. In the practical framework used reports, publications, analyses, studies and various researches of state institutions, civil society, religious institutions, etc. A part of data were taken from media. The data are of the qualitative character as well as the quantitative character. Also, the data are less theoretical and more practical which are referred to Kosovo. The practical data refers more to the state approach and Kosovo's society to confront the phenomenon of radicalism and religious extremism. Our main goal is to analyze extremism, radicalism and terrorism in Kosovo from a theoretical context to show clear signs of identifying the stakeholders, processes and strategies on how to deal with this phenomenon. And in the end, it should be noted that Kosovo has never had to face in its history with the extremism and violent religious radicalism that leads to terrorism is a new "war" to us.

2. Theoretical Framework

In political science literature there are various definitions of the concept of terrorism. Thus, "Terrorism is basically just another notch in the diversity of violent impacts, ranging from total war to guerrilla war" (Goldstein, 2001, p. 230). Terrorism "... has to do with the political violence which is carried deliberately indiscriminate on citizens" (Ibid). In essence, "The purpose of terrorism is to reduce the citizens morality of population in order to its dissatisfaction to be used as an impact tool on the government or other parties in conflict" (Goldstein, 2001, F-231). This definition, however, is more academic and scientific, and insufficiently elaborate and exhaustive about terrorism in today's times. For this reason we need to seek other opinions about terrorism which are practical and tangible level.

Thus, according to another opinion, some of the main features of terrorism are: " – dangerous, because now the terrorists have shifted their attention from the violence theatrical acts looking for publicity alarms toward the deliberate destruction of civilian objects, noncombat, to kill as many as possible by instilling fear to as many people as possible; - carried out by civil, not having obstacles on their way and using tools to extinguish the boundaries between terrorism and a war so-called between states; - based on the most advanced technology of modern civilization...; - Orchestrated by traditional non-governmental organizations" (Kegley, 2009, p. 196). This opinion summarizes the main characteristics of terrorism faced by modern societies.

One of the main features of modern terrorism is the fact that terrorist groups are not operating only within one country, but in several countries simultaneously. The problem is compounded when we consider the nature of the international system that is anarchic. Thus, "The policy being developed between countries, there isn't a central position of authority" (Shiveley, 2012, p. 512). Consequently, "States involved in the dispute need to settle conclusively their differences through the negotiations or through the war" (Shiveley, 2012, p. 512). International organizations or other countries "...can give valuable advice and put pressure on the parties in the dispute, but there is no central authority that can impose solution" (Shiveley, 2012, p. 512). This international reality makes it difficult combating global terrorism because it is a phenomenon that operates in several countries at the same time and in different ways and forms. The problem is greater when we consider the fact that there isn't a strong global organization which at the main agenda has policies and strategies anti-extremist and anti-radical; Current world organizations, though they treat problems of security and peace in the world, does not have specific agenda anti extremist and anti-radical.

Although the phenomenon of terrorism as early and diverse, Islamic terrorism is specific and late. In academic aspect, Henry Kissinger is among the first scientists while investigating the challenges of the United States after the Cold War and the destruction of the Soviet Union, emphasized that, "It is impossible to say at this writing, which forces conceivable rising will be more dominant or threatening, or in what combinationi: whether it will be Russia, China or fundamentalist Islam" (Kissinger, 1999, p. 826). The same author, but later, after the terrorist attacks of 11 September 2001 on the Twin Towers, still analyzing the role of America in the world, observes that "terrorists are ruthless, but not numerous. They do not any control territory for a long time. If their activities pursued by security forces and administrative organs – if no country accommodate them – they will become illegal, forced to devote their efforts to survive, Key to the strategy against terrorism is to eliminate shelter places" (Kissinger, 2004, p. 443).

Zbigniew Brzezinski was even more specific about Islamic terrorism. Brzezinski noted that, "Nearly every state with predominant Muslim population, regardless of whether they name themselves Islamic or not, faced with some form of religious defiance, often accompanied by a request for imposition of Sharia (strict Islamic code of behavioral)" (Brzezinski, 2006, p. 67). Brzezinski summarizes elaborates some of the main factors that may affect the increasing demand for imposition of Sharia in Muslim-majority countries. These factors are: political instability secular institutions, the weakness of civil society, prevention of intellectual creativity, late decolonization, political riots, corruption, distribution of wealth unevenly, poverty, etc. (Brzezinski, 2006, p. 67).

3. Practical Context

On 20 May 2016, the Basic Court in Ferizaj (a city in southern Kosovo) convicted the imam of the mosque "El Kuddus" from Gjilan for the criminal offense of recruitment and incitement of terrorism in Kosovo. Imam was sentenced to eight (8) years effective imprisonment. Together with imam was sentenced four (4) other Kosovo citizens for criminal offenses "...inciting religious hatred and terrorism in the country" (*Ferizaj summary judgment and punishment of seven persons for terrorism*, Telegraph portal, Accessed on: 29. 07. 2016. Time: 09:00). In another decision, a few months later, Basic Court in Pristina (Kosovo's capital) convict five (5) citizens of Kosovo on charges of having committed the criminal offense "...preparation of terrorist acts" (*All that happened in court, where were sentenced the accused of "Badovc"*, Telegraph portal, Accessed on: 29. 07. 2016. Time: 09:32). The court found that, "The group was found guilty on charges that in July last year, had gone to the lake of Badovci, near Pristina, in order to record a video propaganda, in which planned to read the oath to the leader of the terrorist organization "Islamic State", known as ISIS" (Ibid). In both cases, the defense announced they will appeal.

In the second half of 2014, at a joint press conference, the Kosovo Special Prosecution and Kosovo Police announced that, "Besides arresting 40 people suspected of taking part in the fighting in Syria and Iraq alongside terrorist announced organizations ISIS and Al-Nusra, investigations are continuing for other people among whom were crimp imams" (*Special Prosecutor's Office is investigating the imams inciting terrorism*, Kosovalive portal, Accessed on: 29. 07. 2016. Time: 11.30). Most of the arrested and the suspects were either members of terrorist organizations such as ISIS and Al Nusra, or recruiters for these organizations. Police investigations and prosecution led to arrest the Imam of the Grand Mosque in Pristina, as suspected for "...inciting hatred, national discord or intolerance, racial, religious or ethnic" (*Special Prosecutor's Office is investigating the imams inciting terrorism*, Kosovalive portal, Accessed on: 29. 07. 2016. Time: 11.30).

These are the first cases to mark the beginning of a "war" of society and state of Kosovo against extremism and violent radicalization that lead to terrorism.

In the aspect of religious affiliation, the majority of the population of Kosovo belong to Islamic religion (90%), a part belonging to the Catholic religion, and some are Orthodox. In ethnic aspect, the Muslim includes the majority of Albanian population, Turks, Bosniaks and Gorani. A small part of the Albanian population and Croats belongs to the Catholic religion. While all Serbs belong to the Orthodox religion. Traditionally, Islam preached in Kosovo has been tolerant and promote cultural development and emancipation of the Kosovars in the style of Western civilization. A special role in the cultural orientation of Kosovars towards Western values have also had the religious institutions. Furthermore, various studies have shown that citizens have "had respect for religious institutions in Kosovo, but do not necessarily their views reflect on the work that these institutions are doing" (Qendra Kosovare për Studime të Sigurisë, 2016, p. 10). However, it is noted that, "...there are differences between rural and urban areas in terms of trust in religious institutions. For example about 65 percent of the interviewed citizens who live in rural areas have more trust in religious institutions, compared to 49 percent of those living in urban areas. However, contact with religious institutions is at a low level". (Qendra Kosovare për Studime të Sigurisë, 2016, p. 10)

The origin of the spread of extremism and violent religious radicalism in Kosovo should be investigated by the period after the war. Many non-governmental organizations from different countries of the world especially from the Eastern countries began to operate in Kosovo in the name of solidarity and humanity. Suspicious activity of these organizations forced the Kosovo institutions to close sixteen (16) non-governmental organizations. It was suspected that these organizations, "... were involved in recruiting activities of the fighters for ISIS, the financing of extremist activities and spreading propaganda in favor of extremist activities" (*Here are suspicious Islamic organizations in Kosovo, which closed by the state*, the portal Telegraph, Accessed on: 15. 08. 2016. Time: 14:36). Closed organizations to suspicious activities were, "Sinqeriteti (Sincerity) from Prizren, "Rinia Istogase (Istog youth)" from Istog, "Pema e Bamirësisë (Tree Charity)" from Peja, "Parimi (Principle)" from Kaçanik, "Njëshmëria (Oneness)" from Gjilani, "KAD" im Podujev, "Gjurma (Footprint)", "Nektari-HE(Nectar-HE)", "Kalliri i Mirësisë (ears of corn)", "Çelësi (Key)", "Al Waqf Al Islami", "Argumenti (Argument)", "AKEA" (*Here are suspicious Islamic organizations in Kosovo, which closed by the state*, the portal Telegraph, Accessed on: 15. 08. 2016. Time: 14:36).

Going of Kosovars of Islamic faith to fight in Syria was motivated primarily by religious and human feelings. The idea was to join the war against the regime of Bashar al Asaad. Many young people who had no religious feelings but driven by humanism, pious believers of traditional Islam, and other categories of Kosovo society that had no connection with terrorism, who had gone to Syria to fight against the regime of Assad's, without their knowledge and consent was found on the side of the first cells of terrorist organizations. However, another part were fully aware of ISIS ideology or Al Nusra. Lavdrim Muhagjeri is an extreme example of the last group.

In dealing with terrorism and the growing number of people from the country in fight alongside Syrian terrorist organizations like ISIS and Al Nusra, Kosovo adopted the Law on the Prohibition of the Union in Armed Conflict outside the territory of the country. This law was approved with "In order to protect the national interest and national security, the law defines the criminal offense of joining or participating in foreign military or police formations, in foreign paramilitary or police, in organized group or individually, any form of armed conflict outside the territory of the Republic of Kosovo" (The Republic of Kosovo, *Law on Prohibition of Joining the Aemed Conflicts outside State Territory*. F-1). However, critics point out that the law represents the strong hand of the state in dealing with this

phenomenon. While our priority is to the discovery of the causes which are pushing the Kosovars to join terrorist organizations.

Besides law, Kosovo has drafted soft approach towards extremism and violent religious radicalism through drafting and approval of the Strategy to Prevent Violent Extremism and Radicalization that leads to Terrorism 2015 - 2020. This strategy contains four main targets in the treatment of this phenomenon. Thus, "By achieving four strategic objectives: early Identifying – of causes, factors and target groups; Prevention - of extremism and violent radicalization; Intervention - to prevent the risk of violent radicalization; De-radicalization and reintegration - of radicalized people" (Republic of Kosovo, 2015, p. 5). It is interesting that, in the section that talks about the analysis of the situation and the extent of the problem, the strategy recognizes that, "The spread of the phenomenon of extremism and radicalism violent in the Republic of Kosovo has happened through some NGOs, local and foreigners associations and individuals who have embraced radical currents" (Republic of Kosovo, 2015, F-10). Also note that "A special role in the spread of radical extremist teachings continue to play influential public people who have attained the title of spiritual leaders" (Republic of Kosovo, 2015, F-10).

After starting the implementation of the Strategy and in particular the law, and after investigations and convictions of citizens who have returned from foreign terrorist wars, like: Syria, Kosovo Police has announced that, "In the last eight months neither a person has gone to Syria from Kosovo to join the fight for terrorist attacks" (*This is the number of Kosovars in Syria in the past eight months*, portal gazeta online, Accessed on: 30. 07. 2016. Time: 22.15). However, even though there has not been a single case in 2016 when the citizens of Kosovo aimed at joining the war in Syria, yet the activity of individuals and organizations who make propaganda in order to extremism and radicalization of violent religious does not ceased. Thus, in an action held in August (2016) reported that Kosovo police have arrested two men who "...suspected that they were involved in spreading terrorist propaganda in Kosovo ... broadcast religious lectures of imams who were convicted today inciting terrorism" (*Owner of radio Peja was arrested because broadcast lectures on jihad of sentenced imams*, Accessed on: 01. 08. 2016. Time: 13.20).

A special role in the spread of anti extremist ideology and anti radical have even the political and religious state leaders. Kosovo Islamic community was accused of employing imams with extremist views and radical ideologies. KIC was accused because at least has not verified employed imams in mosques and other religious institutions in Kosovo. However, when the number of Kosovars participating in the war in Syria continued to grow, Tërrnava Naim, chairman of KIC, in a public lecture urging young people not to go to Syria. According to him, "There isn't Syria the country where whoever dies there takes shahid or martyr degree... that since all parties are involved in this war have different personal interests and the war is between members of one faith... going to Syria in this case does not correspond with Islamic norms therefore I invite all those who are there to come back and none from Kosovo try to go to Syria... driven by different motives or by the motive of going there he will win the pleasure of God let them know that this is not true. I invite you to stay in Kosovo because we have a lot of work to do in our place and not to go and loss the life through the different deserts in this case in Syria" (*Syria did not make you "martyrs", the fight there is for personal interests*, Telegraph portal, Accessed on: 05. 08. 2016. Time: 10:25).

4. Data Analysis

If we compare the case of extremism and radicalization that lead to terrorism in Kosovo with the theoretical explanations given by scientists of international politics, then we have these conclusions:

Kosovo, as it is with majority of people of the Islamic faith, there will be demand and constant movement, individuals or groups with a radical view, who will tend in permanent form to impose Sharia or tempered variants of this ideology within the state and society of Kosovo. Similarly, as it happened in the other countries with the Muslim majority population, there will always be individuals and groups with the radical and extremist ideology that would try through terrorist methods to realize or advertise their ideas. This is a forecast built upon the experiences of other countries with Muslim majority population. In the case of Kosovo, this ideology is in complete contradiction with the basic principles of the political system (democracy) and economic system (free market economy), proclaimed in the Statement of Independence of Kosovo and the Constitution of the Republic of Kosovo. Individuals or groups that are oriented towards radical Islam will not stop proving that, or to impose Sharia or certain parts of this ideology in Kosovo or Kosovo will be part of the agendas of groups operating in other countries. These groups at least need to impose Sharia here in Kosovo as they need to recruit new members, and logistical support for their activities in other contries. The reason for this is that Kosovo is practiced an Islam who they say "moderate Islam" and some other "soft Islam", but that is not characterized by a strict interpretation and application of the rules of Islam. In Kosovo you may be Muslim but do not fast the Ramadan, do not go to the mosque or do not pray, and yet people define themselves but also others recognize as Islam believers. In Kosovo you may be a Muslim and do not keep veil, may shake hands with other men, to have a bank account, the right to vote, to travel alone (without the presence of a man of the family), and yet define themselves but also others recognize as Muslim. This tradition built from generation to generation is being threatened by individuals and extremist groups with the radical views that require strict rules for Muslims. State and society in general have been fanatical in maintaining this tradition, except some imams who after the war started to practice strict interpretations of Islamic rules.

The activity of individuals or groups that promote radical Islam using also terrorist methods it is not only locate in a state or territory, but operates in several countries at the same time. Considering this fact, Kosovo needs to strengthen cooperation with the international security institutions or with other countries in an effort to fight these groups. Needs coordination of activities, recognition and monitoring of movements of individuals who are members of terrorist groups, and constant communication with other countries. Fighting terrorism in Kosovo alone is not sufficient because terrorist groups in quick time periods move and mobilize in other countries where they find safe environments. And, because the international system is anarchic almost in the treatment of this phenomenon, there must be organization of states affected by terrorism to build mechanisms of cooperation and to set and widespread anti-terrorist agenda. Clearly this is not the sole responsibility of Kosovo and does not depend on the will of Kosovo institutions. Kosovo has its role in international politics in the implementation of agendas anti-extremist and anti-radical, but this role is more refers to the fact that we are dealing with a considerable number of Kosovars struggle in Syria than any other special feature that we have as a state. Kosovars can be good mates in this game. Kosovo's main contribution may refer to her experience in coexistence between different religious communities and religious harmony. As a rare case in the world in Kosovo within the yard you can find a mosque, a Catholic church and the Orthodox Church. Although there were and still have ethnic problems, ethnic problems are never identified by religious agenda, although the Albanians in majority are with Islamic faith and Serbs are mainly with Orthodox faith. Coexistence between different religious communities

is also due to the fact that within the Albanians have three religions: Islam, Catholic and Orthodox. Albanian nationalism is not built by invoking or based on religious identities, but linguistic, cultural, historical; moreover there was an exceedance of religious identities.

Strengthening political institutions and the secularism of these institutions, strengthening civil society and other non-society players, and specifically enter religious institutions, schools, family and society, the growth of creativity and intellectual debate in society related to terrorism in general, in other words: lack of silence in the treatment of why is happening and what is happening, then, political instability and lack of political riots, fighting corruption in state institutions, and up to increase equity in the distribution of public goods in order to reduce the poverty and increasing employment, are factors influencing in fighting the terrorism. So, if we have political unrest (position - opposition), riots ethnically motivated, unstable political institutions, corruption in state institutions, lack of intellectual debate, weak civil society, poverty and unemployment, all these are factors which leaves the door open for growth and development of individuals and groups with a view of the radical extremist ideologies that lead to terrorism. Establishment and implementation of anti-extremist agenda, anti-radical and anti-terrorist requires mobilization of the attention of state institutions and non-state. Kosovo has new institutions which are in their maturity and strengthening period. These institutions should govern and administer some agenda at the same time. Talks and regulation of relations with Serbia. Economic development and fighting poverty and unemployment. Fulfilling the criteria and European integration. These are only some of the processes that are taken by the Kosovo institutions. These agendas is added the phenomenon of extremism and violent religious radicalization that lead to terrorism. An entirely new phenomenon with which we are never faced before. This requires experience, material resources and human resources to address all dimensions of the phenomenon of extremism and violent religious radicalism. Even states with traditions and life expectancy greater than Kosovo have problems in dealing with this phenomenon.

Regardless of why until now, Kosovo has not been the target of terrorist attacks, but is used more as a source of recruitment of new members to terrorist groups and as logistics of these groups, this does not mean that in the future there will not have actions from terrorist groups of the uniformed civilians in order to sow fear, lowering the morale of the population, increased publicity, creating unsafe environment, and drawing attention. Similar terrorist actions against civilians as they occur in other countries, such as airports, public squares, religious institutions, etc., can also occur in Kosovo. The main factors that may encourage terrorist groups to organize actions in Kosovo are very different and diversified. Kosovo has a small military and international civil presence. Kosovo is the most pro-American country in the world. Unlike other countries, Kosovo has adopted a law that prohibits the union in wars in other states and national strategy against extremism and radicalization that lead to terrorism. Then, because of the role that had the United States in the liberation and independence of Kosovo All these realities can serve as sources for adverse effects. Can produce realities contrary to the initial goals. In a public presentation, Lavdrim Muhaxheri a Kosovar from Kaçanik fighting in Syria alongside ISIS has torn Kosovo passport. In another case, some Albanians from Kosovo and Albania are fighting alongside ISIS, have warned of possible terrorist attacks in Kosovo and Albania. Targets of terrorist attacks except civilian may also be the state institutions. So far we have not seen such attacks mostly because, targets of terrorist groups have been in Western Europe, but this does not mean that in the future there will be no terrorist actions, or at least attempt to organize such actions.

The main problem that Kosovo will be face is the integration of returnees from Syria. Development and implementation of programs and projects aimed at integrating and re - socialization of persons returned from Syria, or those who come out of prison after serving their sentences, is a key component

in anti-extremist agendas, anti-radical and anti-terrorist. Their departure from Kosovo daily routine and embrace an ideology radical, extremist and terrorist that are part of a world revolution, as is the idea of establishing the Sharia or the creation of Islamic caliphate, prevents re - socialization and their re-integration into society. Someone who has believed for a time that is part of a global agenda with the aim of establishing a new world order its problem for him to return to everyday life that had until he was joined that organization. Such people often have had a criminal record before they become part of these organizations. So, they have had problems with the law before. There is also a category of persons who joining these organizations perceive as a new moral birth after consecutive failures they have had on their personal lives. For this reason it is important to build and develop programs and projects in order to integrate these people into society. In the case of Kosovo, the majority of those who joined terrorist organizations like ISIS and Al Nusra are from the poorest categories of society. They either living on social assistance, or have not had any material assistance from the state. For a while circulated a propaganda that individuals or families who join ISIS will receive good salaries. For some of those who are today in Syria this was a sufficient promise to join this organization. The promise of a regular monthly salary and the idea that we are becoming part of a "revolution" world, are enough reason to take a vital decision to join terrorist groups. There are also a small category of persons from Kosovo who despite good material conditions that have had here, have decided to join terrorist groups. The motives of the latter category are very different, but mostly it is believed that fanatical religious belief has been the main driver to join with these groups. This diversity of different categories of society who have joined terrorist groups requires a diversity of programs and projects with which should intervene state institutions for integration and re - socialization of returnees from Syria and other countries where are conducted terrorist wars. They must become a normal part of society again without being stigmatized and differentiated from the rest of society.

It is created an ideological opinion of action of individuals and organizations with extremist and radical orientation in the period after the war until now. Kosovar society and Provisional Institutions of Self-Government just have never had on the agenda ever anti-extremism and violent anti-religious radicalism because there was a period of institution-building and rehabilitation of the consequences left by the war. This ideological opinion simply cannot be undone only by the activity of the state organs. Need a multi-dimensional approach, where they have a key role religious communities to promote an anti-extremist and anti-radical ideology. If extremism and religious radicalization have spread its roots through imams funded by the suspicious organization, then we must have the same access: moderates Imams, who know and accept the traditional Islam practiced in Kosovo, to spread an ideology anti-extremist and anti-radical among Islamic believers in Kosovo. The extremism and violent religious radicalism cannot be fought from prisons or other state offices. Extremism and violent religious radicalism should be fought from the mosque. Religious institutions, and particularly the mosque have a key role in anti-extremist agenda and anti-radical.

5. Conclusion

Kosovo Dealing with violent extremism and religious radicalization that leads to terrorism, as seen by the short term is a success story because the number of Kosovars who join terrorist organizations in Syria, after the adoption of law and strategy, is zero (0). However, there is no room for enthusiasm because, Kosovo remains a hotbed of individuals and groups with extremist and radical directions. Actions of state police argue more clearly that there are still individuals and groups, although small and operating without a clear structure of command, which carry out actions, and in most cases propaganda on behalf of terrorist organizations, such as ISIS and Al Nusra. Until this is done, we

should know that this is the beginning and not the end. We must learn to live with the feeling that any moment may be the victim of attacks and terrorist actions. At the same time we must prepare to push forward the agenda of anti-extremist and anti-radical in order to create a safer environment. Traditional Festival of beer in the square "Zahir Pajaziti" in late July in Prishtina, where were present thousands of citizens, was created panic for any possible attack by ISIS, because two young people were shot with guns among the crowd. Someone shouted that we are dealing with a terrorist attack and it was enough to Empty Square within a few minutes; crowds crushed each other to try to get away as quickly as possible from the square. Such events we can have in the future. We live face to face with terrorism. In this confrontation we are building our experience.

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REALITIES AND PERSPECTIVES

Financial Inclusion through Mgnregs in Virudhunagar District

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Abstract: Financial inclusion is the key to empowerment of poor & underprivileged rural households as they constitute 70 percentage of the total Indian population. Financial Inclusion can help the down trodden to improve their financial condition and the standard of living. To provide greater financial inclusion, the Government of India in 2008 declared that wage payments, under the Mahatma Gandhi National Rural Employment Guarantee scheme be made through banks and post offices. It is in this context, the present study has been conducted to know how the scheme is helping in promoting financial inclusion in virudhunagar district. It will also highlight that workers employment participation. Besides these, the study also makes few recommendations for enhancing better financial inclusion.

Keywords: Financial inclusion; MGNREGS; Banking; post office

Introduction

Financial inclusion is the delivery of financial services to all the people in a fair, transparent and equitable manner at an affordable cost. Financial inclusion has the potential to improve the standard of living of the poor and the disadvantaged people. It is essential to make available the basic banking services to the entire population without any discrimination. In order to increase the number the Reserve Bank of India and the Government of India take various innovative steps. Financial inclusion mainly focuses on the poor who do not have formal financial institutional support and getting them out of the clutches of local money lenders. In this point of view MGNREGA is more successful one.

Financial Inclusion is one of the desirable goals of the Mahatma Gandhi National Rural Employment Guarantee Act, 2005 (MGNREGA), which provides 100 days of wage employment in a financial year to any rural household whose adult members are willing to participate in unskilled manual work. The Act is an important step towards realization of the right to work and aims at enhancing people's livelihood on a sustained basis, by developing the economic and social infrastructure in rural areas. To fasten the pace of financial inclusion Government of India in 2008 declared that wage payments, under Mahatma Gandhi National Employment Guarantee Act, would be made through banks and post office. Since then nearly ten core banks and post office accounts have been opened and around 80 per cent of MGNREGA payments have been made through formal financial institutions, it is expected to have resulted in enhancing the financial inclusion of poor and marginalized sections of the society.

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Review of Related Literature

- Ramesha **(**2015**)** has published an article entitled **"A STUDY ON FINANCIAL INCLUSION AND MGNREGP".** The author said that low literacy levels, irregular incomes and lack of trust on banking institutions is the reason for financial exclusion. He suggested that there is a need for co ordination among the stakeholders like sectoral regulators, banks, government, civil societies and NGO's, etc., MGNREGS has contributed to the financial inclusion drive in rural India. It is observed that a significant proportion of the households especially in rural areas are still outside the formal hold of the banking system.
- Gupta and Fearooz Ahmed (2014) have published an article entitled **"MGNREGA & FINANCIAL INCLUSION- A CASE STUDY"**. The author describe that some constraints faced by banks and post offices in accelerating the speed of financial inclusion. And has been tremendous growth in opening of bank accounts in the study area. We also suggests that more and more awareness camps should be organized in villages to make full awareness of basic banking services among rural people in villages.
- Nagaraju (2015) have published an article entitled **"FINANCIAL INCLUSION AND MGNREGA".** The researchers said that the MGNREG scheme contributed to perhaps the largest financial inclusion drive in rural India in recent times. Workers with individual MGNREGA bank accounts are highest in Kerala (73%) followed by Andhra Pradesh (61%), Tamil nadu (49%), and Himachal Pradesh (39%). We believe that financial inclusion drives when linked to social security schemes such as MGNREGA can increase the financial inclusion.
- Ashish Kumar Mishra and Manisha Dudey (2015) have published an article entitled **"FINANCIAL INCLUSION AMONG MGNREGA WORKERS IN CHHATTISGARH".** The authors concluded that majority of the MGNREGA workers are opening bank account after joining the MGNREGA scheme. While MGNREGA played an important role regarding the financial inclusion of rural people of Chhattisgarh and findings indicated that MGNREGA has changed the scenario of financial inclusion in rural area but as for concern insurance, it increased marginally.

Objectives of the Study

- To understand the concept of financial inclusion;
- To analyze the role of MGNREGS in Financial Inclusion;
- To highlight the various factors affecting access to financial service and make suitable suggestions for enhancing better financial inclusion.

Sources of Data

The study is purely based on the secondary data. The data required for the study are collected from books, journals, articles, newspapers, internet, record from Ministry of Rural Development and MGNREGA website (www.mgnrega.nic.in).

Profile of the Study Area

The study has been carried out in virudhunagar district in which MGNREGA was notified in the Year 2008. As per 2011 census the district is having 11 blocks with 450 Panchayats and with a total population of 1286543 in which 315796 is SC population and 1197 is ST population and remaining are others. There are 644952 numbers of beneficiaries/workers working under MGNREGA scheme in

the year 2015-16. The number of people who have been connected to banks & post offices in relation to MGNREGA payments has been 470731 in the year 2015-16 which is 73%.

Table 1. Mgnregs account information

S.no	Block Name	Bank			Co operative and others	Total	Post office	Total
		Commercial bank	RRB's	Total				
1	Aruppukottai	17964	607	18571	0	18571	0	18571
2	Kariapatti	14525	8136	22661	0	22661	0	22661
3	Narikudi	17146	4792	21938	0	21938	0	21938
4	Rajapalayam	17087	1612	18699	0	18699	0	18699
5	Sattur	17404	1956	19360	0	19360	0	19360
6	Sivakasi	17620	3129	20749	0	20749	0	20749
7	Srivilliputhur	18107	1779	19886	0	19886	0	19886
8	Tiruchuli	21880	1185	23065	0	23065	0	23065
9	Vembakottai	19954	421	20375	0	20375	0	20375
10	Virudhunagar	16621	5274	21845	0	21845	0	21845
11	Watrap	11137	11157	22294	0	22294	0	22294

Source: www.mgnregs.nic.in

From the above table clearly exhibits that Tiruchuli blocks having more number of account holders followed from Kariapatti, Watrap, Narikudi blocks. Aruppukottai, Rajapalayam, Sattur blocks having low number of account holders.

Table 2. Ranking of block on the basis of employment participation and financial participation

S.no	Block name	No of registered workers	No of MGNREGA workers with Bank account	Employment Participation	Financial Participation
1	Aruppukottai	24083	18606	83.12 (4)	77.26(3)
2	Kariapatti	30001	22664	84.30 (2)	75.54(4)
3	Narikudi	29427	21932	83.58 (3)	74.53(5)
4	Rajapalayam	32066	18687	67.35 (7)	58.28(10)
5	Sattur	29749	19359	64.33 (8)	65.07(7)
6	Sivakasi	29737	20737	71.82 (6)	69.73(6)
7	Srivilliputhur	31982	19886	64.07 (9)	62.18(9)
8	Tiruchuli	28352	23065	87.39 (1)	81.35(1)
9	Vembakottai	39813	20374	57.78 (11)	51.17(11)
10	Virudhunagar	35088	21893	60.76 (10)	62.48(8)
11	Watrap	28351	22287	81.04 (5)	78.61(2)

Source: Author's calculation based on official website of MGNREGA(www.mgnrega.nic.in)

From the above table Tiruchuli, Kariapatti, and Narikudi have a decent score in Employment participation. Srivilliputhur, Rajapalayam and Vembakottai blocks are having low level of Employment participation. Comes to the financial participation the Tiruchuli, Watrap and Aruppukottai blocks are having decent score in financial participation. without greater employment participation better financial participation is not possible. But in reality the Watrap blocks are getting 5 rank in Employment participation at the same time this block get 2 rank in financial participation. It is concluded that all workers enrolled for MGNREGS do not have bank or post office account.

Table 3. Growth rate of amount of wages disbursed through bank and post office account in mgnregs

Block name	Year							
	2013-14		2014-15		2015-16		2016-17	
	AWD	AGR	AWD	AGR	AWD	AGR	AWD	AGR
Aruppukotaai	**512.59**	-	**534.24**	4.22	**822.47**	53.95	**628.78**	-23.55
Virudhunagar	**503.27**	-	**421.53**	-0.16	**723.06**	71.53	**509.24**	-29.57
Kariapatti	**790.94**	-	**542.58**	- 31.40	**808.36**	48.98	**517.62**	-35.97
Tiruchuli	**844.55**	-	**692.94**	- 17.95	**1089.68**	57.25	**537.55**	-50.67
Narikudi	**701.59**	-	**351.7**	- 49.87	**683.84**	94.44	**499.02**	-27.03
Rajapalayam	**741.15**	-	**613.65**	- 17.20	**720.65**	17.44	**538.44**	-25.28
Srivilliputhur	**732.54**	-	**599.7**	- 18.13	**606.09**	1.06	**574.65**	-51.87
Watrap	**799.2**	-	**583.76**	- 26.96	**671.09**	14.96	**484.51**	-27.80
Sivakasi	**601.36**	-	**392.53**	- 34.73	**724.6**	84.60	**483.29**	-33.30
Vembakottai	**385.57**	-	**337.75**	- 12.40	**623.75**	84.68	**564.88**	-9.44
Sattur	**857.15**	-	**692.42**	- 19.22	**780.32**	12.69	**800.66**	-2.61

Source: Author calculation based on official website of MGNREGA (www.mgnrega.nic.in)

Note:

- **AWD** means amount of wages disbursed through bank and post office account in MGNREGS (in lakhs);
- **AGR** means Annual Growth Rate.

From the above table shown that annual growth rate of amount of wages disbursed through bank and post office account in MGNREGS in various block in virudhunagar district. During the year 2014-15 the annual growth rate of amount of wages disbursed through bank and post office account in MGNREGS was declined but in the year 2015-16 the growth rate was increased and in the year 2016-17 all blocks growth was declined.

Financial Exclusion

Financial exclusion is the inability of individuals, households or groups to access financial services in an appropriate form. Financial exclusion can be defined as the unavailability of banking services to people with low or non-income.

Financially Excluded People in India

Marginal farmers

Landless laboures

Urban slum dwellers

Migrants

Ethnic minority and socially excluded groups

Senior citizens

Rural women

Factors Affecting Access to Financial Services

Legal identity: Lack of legal identity proofs like voter ID, Driving license, birth certificate, employment identity card, etc.

Limited literacy: Particularly financial literacy and lack of basic education prevent people to have access from financial services.

Level of income: Level of income decides to have financial access. Low income people generally have the attitude of thinking that banks are only for rich.

Terms and conditions: While getting loans or at the time of opening accounts banks places many conditions, so the uneducated and poor people find it very difficult to access financial services.

Complicated procedures: Due to lack of financial literacy and basic education, it is very difficult for those people who lack both to read terms and conditions and to fill in the account forms.

Psychological and cultural barriers: Many people voluntarily exclude themselves due to psychological barriers and they think that they are excluded from accessing financial services.

Place of living: As the name suggests that commercial banks operate only in commercially profitable areas and they set up branches and main office only in that areas. People who live in under developed areas find it very difficult to go to areas in which banks are generally operating.

Lack of awareness: Finally, people who lack basic education do not know the importance of the financial products like insurance, finance, bank accounts, cheque facility, etc.

Recommendations

- Without greater employment participation better financial inclusion is not possible. So the government of India and ministry of rural development motivate the MGNREGS workers for increase the employment of participation;
- More and more awareness camps should be organized in villages to make full awareness of basic banking services among rural people in villages;
- There should be easy access to get works under MGNREGA so that people may easily work under the scheme and also may be connected to the banks for financial inclusion;
- Wage payments under MGNREGA scheme should be increased so that more and more people are ready to do work under the scheme which may result in greater financial inclusion;
- It is recommended that more and more MGNREGA workers should be motivated to make regular operations in their accounts as it will lead to inculcating of savings habits among them;
- It is enviable that the accounts of MNREGA workers should be linked with Pradhan Mantri Suraksha Bima Yojana, Pradhan Mantri Jeevan Jyoti Bima Yojana etc., on the bases of their acceptance. It will cover risk and uncertainty of their life.

Conclusions

In conclusion, it can be said that the amendment in MGNREG Act stipulating that the wage payments under the scheme be made to the accounts of the beneficiaries introduced a paradigm shift and has resulted in providing greater financial inclusion to the rural poor. To sum up all we can say that the programme MNREGA played an important role regarding the financial inclusion of rural people. Access to credit at an affordable cost, for instance, provides the poor with the means to improve their lot through investment in income generating assets. The opening of a bank account which is of no-frills in nature and followed by provision of financial services like the general purpose credit cards,

overdraft in small amounts, micro insurance etc. are essential features of financial inclusion. Thus MGNREGA scheme has resulted in the spread of greater financial inclusion.

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REALITIES AND PERSPECTIVES

Considerations on the Legal Regime Applicable to the Romanian Government Ordinances

Vasilica Negruț[1]

Abstract: In preparing the current article we have started from the facts established by the adoption by the Government Emergency Ordinance no. 13/2017 amending and supplementing Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Code of Criminal Procedure. The Romanian Constitution amended in 2003, in Article 115 par. (1), provides that the Government, the executive authority issues orders under a special law of habilitation, in areas that are not covered by the organic laws. Also, the Government may adopt emergency ordinances "only in exceptional cases, the regulation of which cannot be postponed, having the obligation to motivate the urgency in their content" (art. 115, par. (4) of the Constitution). Among the objectives of this work we have aimed to clarify some aspects referring: the specifics of government ordinances (simple and emergency ordinances); their legal effects; the legislative delegation; control of constitutionality. To this end, we have analyzed the acts that refer to this field, the doctrine and jurisprudence. Finally, after examining and empirical research, the paper details the general conclusions on the legal regime applicable to the ordinances of the Romanian Government.

Keywords: ordinances; emergency ordinances; legislative delegation, legal regime, constitutionality control

1. Context of Development

In the elaboration of this article we have started from the factual situation created by the Government's adoption of the Emergency Ordinance no. 13/2017 for amending and completing the Law no. 286/2009 on the Criminal Code and Law no. 135/2010 on the Code of Criminal Procedure, abrogated shortly by the Emergency Ordinance no. 14/2017. The enactment of this normative act has generated countless interpretations of some legal institutions regulated by the amended normative acts, especially the job abuse (article 297 of the Criminal Code), but also street protests, considering that the adoption of an emergency ordinance for the modification of the two codes, since, by adopting it, only the harmonization with decisions passed prior to the adoption by the Constitutional Court of Romania was envisaged.

2. The Constitutional Regime of Ordinances and Emergency Ordinances

The matter is represented by art. 108 of the revised Constitution and article 115 devoted to legislative delegation.

According to the doctrine, the Constitution has opted for the term of *ordinance* in order to identify the normative act by which the Government carries out the *legislative delegation* (Apostol Tofan, 2014, p.

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237), seen as a way of its participation in the exercise of legislative power. In our constitutional system, the Government does not have the right to primary regulate the social relations, and this right rests solely on the Parliament, the sole legislative authority.

Government Ordinances may be simple Ordinances, adopted on the basis of an enabling law and emergency ordinances, adopted in accordance with the provisions of art. 115 of the Constitution. The meaning of the *habilitation law* phrase is that of a provision established by law to empower the Government in order to issue ordinances (Iorgovan, 2005, p. 406). Although by its content the ordinance has legislative feature, it is an administrative act specific to the Government (Apostol Tofan, 2014, p. 237). And the legislative character is even more pronounced in the case of ordinances that are subject to Parliament's approval.

Ordinances only intervene in areas that are not subject to organic laws (article 115, para. (1) of the Constitution republished).

Although not expressly provided for in the Constitution, the Government's power to adopt ordinances is usually made during the parliamentary holiday.

The habilitation law obligatorily determines the scope and date until which ordinances can be issued. The Ordinances shall be subject to the approval of Parliament, according to the legislative procedure, until the fulfillment of the term of empowerment, if the habilitation law requires it. Therefore, the rule is that the ordinances are not subject to approval. However, if the law provides for the obligation of approval, non-observance of the term leads to termination of the effects of the ordinance (article 115, paragraph (3) of the Constitution republished).

The Parliament may, by law, approve or reject, amend or supplement Government Ordinances. According to art. 12, par. (1) of Law no. 24/2000 regarding the normative technical norms for the drafting of normative acts, republished, the ordinances issued by the Government on the basis of a special law of enforcement come into force 3 days after the date of its publication in the Official Monitor of Romania, Part I, or at a later date provided in their text.

In case the ordinance is approved in its original form, it will take effect from the date of its publication in the Official Monitor of Romania, Part I, or at a later date stipulated in the text of the Ordinance.

In the case of publication in the Official Monitor of Romania, Part I of the Law of Rejection of the Ordinance, it will no longer produce legal effects from the date of publication of the rejection law.

In the case where the ordinance was approved by law with modifications and additions, it will produce the effects established by the law of approval, from the date of its publication in the Official Monitor of Romania, Part I.

With regard to *emergency ordinances*, they are adopted in situations where Parliament is unable to meet for law-making (Ionescu, 2003, p. 190). Therefore, the emergency ordinances intervene in extraordinary situations, the regulation of which cannot be postponed (Constantinescu, Iorgovan, Muraru & Tănăsescu, 2004, p. 223) the government has the obligation to motivate the urgency in their content (article 115 (3) of the Constitution). As it results from art. 115, par. (5) of the Constitution, the final thesis, the Emergency Ordinance containing norms of the nature of organic law is approved by the majority provided for in article 76, par. (1), which means that emergency ordinances can also intervene in the field of organic laws (Vedinaş, 2017, p. 155). According to par. (6) of art. 115, the emergency ordinances cannot be adopted in the field of constitutional laws, they cannot affect the regime of the fundamental institutions of the state, the rights, the freedoms and the duties provided by

the Constitution, the electoral rights and it cannot refer to measures of forced passage of goods in public property.

Unlike the simple ordinances, *all emergency ordinances are subject to the approval of the Parliament,* and only come into force after being submitted for debate in an emergency procedure to the competent Chamber to be notified after the publication in the Official Monitor of Romania. The Constitution also provides that if within 30 days of the filing, the Chamber concerned does not rule on the Ordinance, it shall be deemed adopted and shall be sent to the other Chamber, which shall also decide in an urgent procedure. The approval or rejection of the emergency ordinance is done by a law.

The doctrine states that both the habilitation law (in the case of ordinances) and the laws of approval or rejection of ordinances are *ordinary laws*, not mentioned in art. 73, par. (3) of the Constitution governing the areas reserved for organic laws.

3. The Constitutionality Control

By adopting some individual emergency ordinances, the Government practice has created a new issue, although individual decisions, administrative acts that have been legally controlled by the administrative contentious court (Tofan, 2014, p. 246).

What is to be borne in mind is that ordinances cannot be censored through administrative litigation, as they are part of the category of acts adopted by the Government in relation to Parliament, acts exempt from the judicial control of administrative acts of public authorities, by way of administrative litigation, according to art. 126, par. (6) of the Constitution. However, the private individuals may request the administrative contentious instance to annul administrative acts issued on the basis of ordinances declared unconstitutional, according to art. 1, par. (7) in conjunction with art. 9 of the Administrative Contentious Law no. 554/2004.

The action promoted under art. 9, par. (5) of the Law no. 554/2004 may have as its object: granting compensation for the damages caused by Government Ordinances; the annulment of the administrative acts issued on their basis; require to a public authority to issue an administrative act or to carry out a particular administrative operation.

The plaintiff will not be able to request the court of administrative contentious to find the unconstitutionality of the ordinance or the provision in the Ordinance, so as its action will be dismissed as inadmissible, according to art. 9, par. (1) of Law no. 554/2004 (Trăilescu, 2017, pp. 9 et seq.).

Therefore, in order to promote an action in administrative contentious with the object established by art. 9, par. (5), it must be accompanied either by the Constitutional Court's Decision to declare the unconstitutionality or by the exception of the unconstitutionality of the ordinance or provision in the Ordinance.

As it can be seen, there are two situations: the order or provision in the Ordinance[1] was declared unconstitutional as a result of the admissibility of the unconstitutionality exception in another case;

[1] By Decision no. 1960/2011 "*The High Court finds that the legislator provided that, assuming admittance of the exception to the unconstitutionality of the Ordinance in another case, the effects arise from the date of admittance of the exception and in similar cases, which have the same legal basis as those declared unconstitutional" (http://legeaz.net/spete-contencios-inalta-curte-iccj-2011/decizia-1960-2011).*

The Government Ordinance or a provision of the Ordinance was not declared unconstitutional, but the applicant claims that it contravenes some constitutional provisions.

In the first case (the declaration of unconstitutionality following an exception in another case), the action may be brought directly to the competent administrative court within a one-year limitation period, calculated from the date of publication of the Constitutional Court's decision in the Official Monitor of Romania, Part I.

In the second situation, the administrative contentious court verifies whether the exception fulfills the conditions provided by art. 29, par. (1) of Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished, which states that it decides on "*the exceptions raised before the courts or commercial arbitration regarding the unconstitutionality of a law or ordinance or a provision of a law or of an ordinance in force, which is connected with the settlement of the case at any stage of the dispute and whatever is its subject matter"* and par. (3) of the same law, which states that the provisions found to be unconstitutional by an earlier decision of the Constitutional Court cannot be the subject of the objection of unconstitutionality "the provisions found as unconstitutional by an earlier decision of the Constitutional Court".

If these conditions are found to be fulfilled, the Constitutional Court shall be notified by a reasoned decision and the case shall be suspended on the merits.

After the pronouncement of the Constitutional Court, the administrative contentious instance shall put the case back to court and give notice, with the summons of the parties. If the order or provision of the order has been declared unconstitutional, the court shall settle the merits of the case; otherwise, the action is dismissed as inadmissible (article 9, par. (3) of Law no 554/2004).

It should also be emphasized also that the decisions of the Constitutional Court do not apply retroactively, as it is evident from the provisions of art. 147, par. (4) of the revised Constitution, as well as those of art. 11, par. (3) of the Law no. 47/1992, according to which the decisions of the Constitutional Court have effects only for the future.

In this respect, the High Court of Cassation and Justice established, by Decision no. 19 of June 13, 2016[1], that "*according to the provisions of art. 147, par. (4) of the Constitution, the decision of the Constitutional Court is generally binding both for public authorities and institutions and for individuals and only effects for the future and not for the past, the consequence of applying this principle being that it cannot be prejudiced to some rights definitively gained or legal situations already established*".

In relation to the above-mentioned aspects, we agree with the views expressed in the doctrine that the assessment of the lawfulness of the contested administrative act is based on the *tempus regit actum*[2] principle, namely the government order in force at the time of the issue of the contested administrative act, whose constitutional deficiency still existed from the date of its adoption, not from the date of the

[1] Decision no. 19 of 13 June 2016 regarding the examination of the appeal filed by the Iasi Court of Appeal - Labor and Social Security Litigation Division in File no. 7.521 / 99/2014, on giving a preliminary ruling on the following question of law: in interpreting and applying the provisions of art. 52 par. (2) of Law no. 53/2003 - Labor Code, republished, as subsequently amended and supplemented (Labor Code), in relation to the effects of the Constitutional Court Decision no. 279 of 23 April 2015 on the objection of unconstitutionality of the provisions of art. 52 par. (1) letter b) from the same law, the determination of the patrimonial liability of the employer (for the purposes of the text, equal compensation of salary and other rights) must be instituted from the date of the decision to suspend the labor relations, when the decision of the Constitutional Court was not published in the Official Monitor, or from the date of publication of the Constitutional Court's decision in the Official Monitor, published in the Official Monitor no. 1010 of December 15, 2016.

[2] The Act shall be adopted in accordance with the law in force at the time of its adoption.

publication of the Constitutional Court's decision (Trăilescu, 2017, p. 217). As a result, the administrative contentious instance will not be able to solve the case with which it was invested until after the Constitutional Court's decision on the constitutionality of the government ordinance underlying the issuing of the contested administrative act.

4. Conclusions

The Government Ordinances are presented as "the result of a collaboration between the legislative and the executive power", borrowing from each trait through which it is individualized (Tofan, 2014, p. 241). We can talk about a normal, *constitutional regime of ordinances evoking the rule of empowerment and about an exceptional constitutional regime, the regime of emergency ordinances* (Iorgovan, 2005, p. 407).

In the Romanian legal system, the Government ordinances (simple or urgent) *can only be subject to constitutional control achieved by the Constitutional Court* under art. 2, par. (1)[1] of Law no. 47/1992 on the organization and functioning of the Constitutional Court, republished, without being possible a direct control exercised by the administrative contentious court.

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[1] Art. 2, par. (1) provides: *The Constitutional Court ensures the constitutionality control of the laws, of the international treaties, the regulations of the Parliament and the ordinances of the Government*.

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Local Power Valences in Rural Communities

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Abstract: The analysis of the local power valences in the rural communities was realized by implementing different methods of community development. Which are the mechanisms that encourage a community to engage actively and effectively in a deliberate process focused towards community development? What does provide the sustainability of such initiatives and processes? Who has the power? How does it use the power? What can be done to obtain a growing number of individuals with power in a community? Such questions have also resulted in the efforts focused to research of the power dynamics in the rural communities, topic explored in this paper.

Keywords: governance; initiatives; authority

1. Introduction

The power games, the mechanisms that made some to have powers while others not, the unseen world behind them: social norms, values passed from generation to generation, traditional customs, have always caused intrigue.

The changing of the political system in 1989 has generated a number of challenges and opportunities. At both macro and micro level, Romanian citizens were in a position to make decisions, in which their value system, their own and community interests found forms of expression. In the same time with this freedom a number of problems appeared. If until then the society was governed by a system in which the locus of control was predominantly external to the individual, he has suddenly seen himself in the context in which the locus of control is internalized and in the same time in the position in which he has to assume the responsibility of the taken decisions. All of a sudden the government and governance (theoretically) no longer held the entire responsibility of the individual because they had been freely elected as representatives of the people. A similar challenge also occurs in rural areas where the mayor, the priest, the teacher and the doctor are no longer the only important "voices", but other voices are heard as well.

The present paper aims to analyze the "voices" that are allowed to influence the rural community area where community development initiatives have been implemented, respectively to what extent the implemented community development models create the necessary framework for multiplying the "voices" that influence community.

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2. Theoretical Perspectives with Emphasis on the Theories of Weber, Parsons, Giddens

The power and its valences at the rural communities level brings into question the concept of power and influence exerted by the individual - or individuals at the community level.

A special attention was paid to the study of democratic values (tolerance, trust, participation), of the impact of the spiritual dimension on the power, respectively of community development, as well as of the control and participation mechanisms at the local level.

The theories of Weber, Parsons and Giddens are important for explaining the dimensions of power.

Table 1. Power Model Analysis Tool

Attitude towards:	Weberian theory	Parsonsian theory
Decision making	One or more individuals make decisions, others are affected by them.	All the persons affected by a decision participate in the decision making.
Giving an account	Absence of an accounting system that allows the community members to monitor and assess the progress made and the distribution of the related resources.	Joint monitoring and assessment of community projects.
Corruption	Corruption is publicly tolerated.	There are created structures and opportunities where corruption can be addressed openly.
Trust	The community does not trust the character of leaders; in their turn, they do not trust the ability of community members to develop.	The existence of an environment of mutual trust among members, between members and leaders.
Inclusion	Intimidation of those with a lower level of education by external leaders and facilitators through the use of modern technology, complex terminology, by assuming leadership and the related status.	It is encouraged the interaction of all individuals with all individuals in the community regardless of their economic and social class, their ethnic, religious, gender, age groups.
	Certain categories of individuals are deliberately or otherwise excluded from opportunities and benefits.	It is encouraged the participation of all community members in existing opportunities and benefits.
Access to resources	Elitist groups are favored in terms of access to information and resources.	There are granted equitable rights to control community resources.
Interests	First the interests of the elite are promoted, and if possible, of other community members as well.	There are promoted the common interests of all members of the community, or of as many as possible, including vulnerable groups.
Implication	Community is involved only occasionally, very rarely in major decisions.	Community is actively involved in all phases of the DC process.
	It is observed the apathy of the majority to the needs and opportunities of community development due to the belief of their own helplessness.	It is encouraged and appreciated the individual contribution to the collective good.
Solidarity	Solidarity and creation of a common vision are not seen as goals.	There are promoted common principles, values.
Power	The power distribution imbalance is accepted as a status quo.	Deliberate efforts are made to decrease the power distribution imbalance.
	A teaching-learning relationship is implicitly promoted.	A reciprocal learning relationship is promoted: one learns from another and all learn together.
Constructive criticism	It is discouraged or avoided the creation of a platform where solutions proposed by formal or informal leaders can be criticized.	It is encouraged cooperation among community members, critical analysis of proposed solutions to the existing problems.
Governance	Governing is performed through authoritative social and political systems or structures that do not allow community members to be involved in community decisions.	Governing is performed through social and political systems and structures to allow community members to be involved in community decisions.

In Weber's conception, those who hold power can realize their own will when they are in a group context, even when it means going against those who disagree with them. In other words, for someone to have power, someone else is deprived of power.

Parsons believes power is a general resource for the society as a whole and it belongs to everyone. Power is neither limited nor consumable. The more individuals develop their potential by exercising their power, the more the society as a whole benefits from it.

Giddens, in opposition to Weber, defines power as *the transformative capacity of human beings.*

Throughout their lives, individuals have the opportunity to develop this capacity by collectively mobilizing various resources (information, material resources, skills, local resources) in order to achieve certain goals without negatively affecting others.

3. Power: from "power over" to "power together with"

Based on the theories of Weber, Parsons and Giddens, various expressions have been formulated to capture how much power of change an individual has.

Power over someone (based on Weberian theory): it occurs when one or more individuals make a choice that affects someone else. It is the most common form of power expression.

Power together with (based on Parsons' theory): it is exercised when a group of individuals make a choice that affects everyone by promoting collaboration and mutual support.

Inner power (anchored in Giddens' Theory): refers to situations in which an individual makes a choice that primarily affects himself, using his unique potential to influence his own destiny and the surrounding environment (Giddens).

4. Leaders and Leadership

In the Romanian countryside, the concept of power seems to be most often understood and applied in a Weberian way of seeing things. An immediate consequence is that most individuals are not involved in politics, in local initiatives because they do not think they can generate change.

Muller also brings a development of knowledge and understanding of the power, of its intrinsic valences when he introduces into the equation the perspective of men on the world and life.

Each culture, the political behavior of individuals, the way in which they relate to power are based on one of the three value continuums described below or the combination of two of them:

a) guiltand innocence;
b) shame and honor;
c) fear and power.

The Romanian rural communities are still deeply marked by the 50 years of communism, the transition period and the post-accession period to the European Union. Consequently, the peasants' perspective on the world and life is given by a combination of elements of the fear-power continuum (mainly inherited from the communist period) and guilt-innocence (introduced together with the transition period and the post-accession period to the European Union).

In the community development equation, the term "empowerment" was introduced to describe the form of expression of power among the various social actors involved in the process. In Romanian language, this term has been translated both as capacity - a meaning which shows the increase of the inner power of individuals, of their confidence in their own forces to influence their own destiny - and

as empowerment - meaning which shows more explicitly a power transfer towards those who are in the process of being equipped with various abilities and knowledge to increase their inner strength.

The empowerment process also conveys the transfer from a form of *power over* to a form of *power together with*, from a *Weberian* understanding of power to a *Parsonsian* one. The result is that the person empowered has acquired new skills, abilities, and also confidence that he/she can use them appropriately. In this way the capacity of the community grows and its social capital together with it, thus generating the necessary premises for sustainable change in the community.

This paradigm brings important changes in the operation way of development agencies that are dared to rethink the help they offer to the communities they invest in, so that they are not only helped for the moment in a paternalist way that perpetuates dependence but empowered to be able to solve their own problems without being dependent on external intervention.

The social and power structures existing in the Romanian society, especially in rural areas, limit to a certain extent the capacity of the village inhabitants. Yet, there is some flexibility that allows individuals to exercise their power, to change existing structures, and to create new structures (for example the local initiative groups, the telecenters, etc.).

In the rural area, the leaders who benefit from the trust of community members are the village intellectuals (priests, doctors, teachers) followed by local authorities: some of them are respected for their knowledge, for the answers they give to soul problems, and others for the power they have to manipulate resources and act to solve community problems. The success of the initiatives requires trust (generalized and especially in leaders), and now priests seem to be the most trustworthy persons, followed by physicians, teachers, local authorities, I propose exploring the ways in which the priests, together with the other soul leaders, be active actors without increasing their capital of power but, on the contrary, increasing the power capital of the community members by the use of the resources they have.

The participatory methods used by many models are instruments good to consider when trying to promote a greater degree of tolerance, inclusion, empowerment, trust. However, their efficiency is questionable in the absence of an intentional process of reflection on the present situation, the own values, emotions, antecedents that support an intolerant behavior towards community members that are different, of establishment and commitment to common goals in order to increase tolerance. To make a lasting change at this level, addressing symptoms may be an ineffective means.

For being successful, one needs constant, effective information, initiated long before the actual change, and risk reduction strategies.

Although participation is weak, local initiatives are often missing, Romanians remain optimistic about the success of community projects if they were started. On this optimism, local authorities can build actions to involve the village inhabitants in public decisions, create frameworks where their decisions can be criticized constructively, where there are platforms to account for actions taken and resources used, etc. In other words, if they desire to support community development, both political and soul leaders must avoid exercising power over citizens as often as possible and instead exercise power together with them.

Because the purpose of community development is not to maintain the power of the rich or influential, and to increase the helplessness of the poor, but to favor the creation of new power structures that allow all members of the community to strengthen their inner power generating change, it is recommended that increased attention and special efforts be made to avoid the perpetuation or the

establishment of an elite that exercises the monopoly over the decision-making process. The decision-making process should, as far as possible, include everyone, or as many as possible, of the people involved / affected.

The created instrument can be used to test any community development model to determine the concept of power it promotes.

The purpose of any community organization action is to acquire power by people, so that the community can know its needs, be able to organize them and be able to fight for fulfilling them. For gaining power, victories are needed, because only those who like to suffer will persevere in a lost cause.

The involvement in a community involvement action makes sense if the inhabitants of the community are permanently facing results or victories.

Victory seems pretty easy to define: the football team with the most scored goals wins; the golf player with the fewest penalty points gets the victory. In the community organization things are not that simple! Goals change, negotiations take place, and victory leads to another goal.

5. Conclusions

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Victoria seems pretty easy to define: the football team with the most scored goals wins, the player with the fewest penalty points gets the victory. In the community organization things are not that simple! Goals change, negotiations take place, victory leads to another goal.

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The Concept, Traits and Functions of Judicial Values

Gabriel Ichim-Radu[1]

Abstract: The concept of value is central to the legal phenomenon. Reviewing the core values that are promoted, protected and guaranteed, the author presented the concept, specific features and functions of legal values. As a conclusion to this paper, the author emphasizes the role of legal values in the development and application of the normative acts (entire Law). This role can be considered as being the indicator of legal culture and civilization.

Keywords: value; legal value system of values; the characteristics of value; legal value functions

The concept of value has a central role in Law, considering the fact that it is a normative science. The act of establishing judicial rules mainly supposes and imposes the research of social values which Law intends to study in depth and to promote. In Law we find a trilogy of judicial values. (Ceterchi & Craiovan, 1993, pp. 22-25). The author Barac L., considers that this trilogy consists of the following values: *security* (reliability, stability), *justice* and *social progress*. (Rigaux, 1974, p. 337) Craiovan I. considers that, apart from these values, we should add another one – *the public good*. (Djuvara, 1995, p. 310)

Commenting on the role of social values as a configuration factor of Law, professor Ceterchi I., stated that, the values which guide the Law are not strictly and exclusively judicial values. On the contrary, they have a larger dimension, that of a moral, political, philosophical and social nature, which needs to be understood through their socio-historical dynamics. Although some of them can be found in all Law systems, such as Justice, their historic peculiarity and particularity mark them as special. A society's social values must be inferred from the philosophy (social, moral, political, judicial) which presides over and gives direction to the social forces existing in that society.

Referring to the social values which give direction to Law during this era, I. Ceterchi lists, together with justice, *democracy, human dignity, security (judicial certainty), human rights, the constitutional state, property* in its various forms, *civil society, national sovereignty*. (Roubier, 1986, p. 187) According to another author, the Belgian Fr. Rigaux, Law expresses the supreme values of our society nowadays. The fundamental value of Law, together with the existent ones, in his opinion, which we agree with, is the *perspective*. "If Law has a meaning, it would be that of offering a project of our future society and playing its part through its various methods to accomplish the project. Law has the mission to insert the future into the present, guaranteeing that the social system will work. Law is a social project, which aspires to equality (freedom for all) and justice". (Roubier, 1986)

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The philosopher M.Djuvara believes that one of the values promoted by the Law is also the human dignity. "The fundamental idea, which is at the basis of Law is (...) the respect for the human dignity, the respect towards every man, the warm-heartedness towards your fellow men, meaning the respect towards the people's legitimate rights, that is to say, of those which do not represent the violation of other people's freedom" (Dabin, 1953, p. 165).

Another author, Paul Roubier points out that, the positive law rule, which aspires to govern the human societies, has to be pursuant to a certain *ideal of justice*, meaning that the rule will not be respectable or respected if it rejects this ideal too much. Law, this author states, forms value judgments founded on the idea of a finality, there is a concept that is the most important and in which you find the origins of the imperatives of Law, that is the value. "The issue is that, to set the judicial rules, in search of the social values, they have to be embodied in Law for it to accomplish the finalities, to establish a harmonious order and solve disputes between people" But which are these values? P. Roubier, together with the other authors mentioned before, state that the values which guide Law are: *judicial safety* (which set a series of beneficial consequences in society, authority, peace, order); *justice* (as an essential value of good order between human relations, with its own qualities of equality and generality); *social progress* (well-being, abundance, culture). (Craiovan, 1993, p. 26)

The Belgian author, J. Dabin shows that, as Law is co-substantial to the ideas of society, the finality of the Law rule will be the value of society itself – the common good. As the common good for the society-state is *the common public good*, the value of the Law rule is the public good. The subject – the instant addressee and beneficiary of the public good is the public in general, without any reference to the characteristics of individuals, of social categories and of specific communities, considering current and future generations.

The public good comprises a series of biological, economical, moral, intellectual aspects, which present the values that make the individual and the community better, "including in itself the universality of the values of human interest". In case of a value conflict, the author suggests that the answer be inspired by truth and the abiding to Christian tradition and he summarizes three points:

- the spirit is more important than matter (and by spirit we understand more than the intellectual values, but more importantly, the moral values – virtues and character);
- the human/the individual is more important than the collectivity;
- the whole society is more important than the society-state (Bergel, 1985, p. 13).

Going through the main values, which are promoted, defended, guaranteed and preserved by Law, as an objective of the judicial mechanism, and the studying of the judicial phenomenon through these values we can formulate main directions of action of the system of social values promoted by Law:

- accomplishing contemporary social progress,
- accomplishing a desirable social project;
- defending human dignity, rights and fundamental liberties of man;
- solving conflicts in interhuman relationships, accomplishing justice of a certain historic time;
- configurating, developing, ordering, orienting fundamental social relations;
- assuring coherence, functionality and self-adjustment;
- repression and preventing antisocial acts.

The complexity of the values of Law must not constitute a reason for pessimism towards knowing them and their role. We support prof. I. Craiovan's opinion, who believes that, only starting from the coming together of different suggested perspectives, taking into account the central position of the human personality, when we discuss the values of Law, but making sure that the game of inequality and the non-correlation between individual liberties doesn't lead to anarchy, protecting society, social life, but blocking the possibility of abuse and tyranny from the state, cultivating civilization and culture, but not as a purpose in itself, but for the real human, it can lead to contemporary understanding of rationality of being of Law, of the meaning of its values. (Craiovan, 1993, p. 26)

The reflections on social values, promoted by Law at the level of generality and integrity, approaching "*law as law*", do not exclude, on the contrary, they suppose investigating the values of Law at the level of department of Law or even judicial institution. As J.L. Bergel stated, there are situations in which Law is indifferent to the idea of justice, some rules of Law or judicial institutions having a purely technical role, like those regarding the civil state of a person or land publicity[1].

Professor I. Craiovan considers that this way we can shape a system of the values of Law, which integrates the subsystem as a department of Law and the judicial institution, between which there are complex relationships and whose contemporary features cannot be ignored in the process of elaborating and applying the Law and by the judicial doctrine". (Craiovan, 1993, p. 66)

By accepting the social character of values and value systems, it becomes obvious that to solve the value problem it is necessary to build a model of research based on a systemic approach. The fact that the human field can be approached through different perspectives, gives us diverse possibilities of choosing the success of the component parts, of the reference domains, of the types of relationships and hierarchic levels. Thus, the judicial values are and remain the object of reflection for all judicial sciences, which have as a purpose the research the domain of the human.

We also conclude that the values of Law as semantic entities contain terms and the significations which correspond to them. The reliability of terms is due to the constant character of the types of situations or processes. Thus, the terms which designate values are taken from generation to generation, continue to express the same types of values and change any time new criteria or new rules of evaluation appear. This situation is signaled by a great number of studies made by sociologists, philosophers, anthropologists, psychologists and also in the ethics treaties.

Judicial values, like other types of values, are characterized by *diversity, historicity, autonomy, normativity, hierarchy and polarization*, as specific traits

1. *The first trait* of the judicial values is diversity. Judicial values (equity, justice, lawfulness, constitutionalism, independence, equal rights, civic conscience, rights, liberties and civil duties and so on) govern the relationship of the individual with the constitutional order, the constitutional institutions.

2. *Another trait* is historicity. The contemporary axiological perspective regarding the Law has to benefit from the "value experience" of Law to which we present some "sequences" just to illustrate philosophy and judicial doctrine. Philosophy and judicial doctrine show a true temporary kaleidoscope of the evolution of judicial values. To this we mention: the good (Plato), justice (Aristotle), order (Cicero), peace (Saint Augustine), the common good (Saint Thomas), the power (Machiavelli), certitude (Bacon), security (Hobbs), equality-democracy (Rousseau), freedom (Kant), general use (Bentham), the state (Hegel), foreknowledge (Compte), solidarity (Duguit).

[1] Fully in: (Speranția, 1946) and the following (Craiovan, 1993, pp. 52-66).

Thus, as we can see, value appears in different aspects of the judicial world, it is placed in the center of the judicial doctrine or lessened, involved in controversial positions, or rejected, but all in all, being an important part of the judicial phenomenon.

The judicial concepts presented, regarding values are subject to contemporary evaluation and reevaluation and they fully participate or "reverberate" to a major synthesis through multidisciplinary view of the Law, able to show the actual mutations of the judicial phenomenon, to contribute to judicial progress.

3. *Autonomy*. Socio-historic determinism of judicial values is not a rigid one, values showing an independent relationship. Autonomy also expresses itself through the specific features of every type of values, for example, public good, peace, order, power – these being values found in any community, in the same historic moment, thus influencing, having a specific content and dynamic. Judicial values through law, influence society through the relationships they establish between values and norms, facts, judicial relation. Values are not independent but interdependent (the connection which bonds the values of knowledge and social action, the moral, religious, political, judicial), the possibility of values to go from one category to the other (false-truth, good-bad, political freedom-judicial freedom, moral freedom-religious freedom), their mutual settlement (the values of knowledge settle the values of action, moral values settle religious values and viceversa)

4. *Normativity*. Judicial values play the role of rules of social life. When a judicial norm is constituted this implies an inherent valoric dimension, because it sets itself in relationship with the whole of possibility and virtuality, keeping something from the field of possibility, the will being in relationship with what it might be, an ideal to which a reality aspires. Judicial norms can be seen as "abstract and general models of intervention in interindividual and group relationships, so that, they obtain the coordination of individual behaviour with the objective valorical aspirations estimated and at the same time, to satisfy material and spiritual interests of the majority of individuals in the community." (Dobrinescu, 1992, p. 35)

Having at the basis the Law norms, many values become ideals (for example justice, freedom, equality), they give direction to the human behaviour, individual or collective. A separation must be made between the norm and the value, norm having the statute of means, value being an end in relationship to the norm. Not every norm constitutes a value (for example, people driving on the left or the right side of the street) as not every value is sustained by a system of norms.

5. *Hierarchy*. Values have verticality, according to the individual's interests. All through history, the human has not seen itself the same way in relationship to the judicial values, he gave importance to the way and to the degree in which different values contributes to satisfying certain necessities, needs, aspirations of humans in that specific historic moment.

Introducing the concept of value in the center of the judicial theory, states M. Virally, is not an useless act, or orientation towards idealism, or philosophical or moral speculations, on the contrary, it means appreciating with accuracy the way in which Law protects individual and collective interests (Virally, 1960, p. 62).

6. *Polarity*. Value is made of two polar terms: value and non-value. The axiological field is not a neutral one, absolute positive or absolute negative, that is why we talk about positive and negative values. The valoric operation imposes accepting or rejecting certain values, approving or not approving them (the public good appears in connection with the public evil, truth with falseness, justice with injustice). Going through the traits of the valoric justice we will set some of their functions. Judicial values have the following social functions:

- the normative-educational function motivates the action of subjects in Law, sets the development of personality;
- the adapting, integrating in the judicial field function, it sets the behaviour and the human existence, because human existence takes place under the values' horizon;
- the communication function provides communication between generations and communities;
- the leading with the society function. Values, constituting a factor of judicial progress, ensure cohesion and order in society, determine continuity and the dynamics of judicial values through conflictual situations, cohesion and promotion. Judicial values are an indicator of the degree of judicial civilization and culture.

As a conclusion, we will mention that, the attempt made in this article to make some notes on judicial concepts and the values of Law, from an axiological perspective, makes us observe implicitly or explicitly, a certain axiological attitude. Value appears in a diversity of aspects of the judicial world, it is placed in the center of the judicial doctrine or lessened, implied in controversial positions or rejected, but it constitutes a significant guiding mark of the judicial phenomenon.

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Norms and Legal Instruments on Preventing Violence against Women and Domestic Violence. Highlights from the Istanbul Convention

Marcela Monica Stoica[1]

Abstract: Women's rights are human rights and violence against women is actually a violation of human rights and a form of discrimination. For many decades, a form of violence against women is so called "intimate partner violence". This kind of violence includes physical, sexual, and emotional abuse and even the control of behavior by an intimate partner. Thus, this paper aims at analyzing, in a legal and sociological paradigm, the Istanbul Convention on preventing and combating violence against women and domestic violence, developed by the Council of Europe, an instrument that could lead to a growing integration of human rights combating the biases that accept the violence against women. Through these norms, instruments and education women should be empowered to break the cycle of accepting subordination and violence. Therefore, the conclusions resulting from the study are that cultural and religious customs and traditions that are used to justify violence against women must be forbidden. A lot of campaigns for raising awareness on this issue have to be launched aim aiming at challenging their acceptance in society.

Keywords: Istanbul Convention; women; violence; victims; bias

1. Introduction

The present study is based on the legal documents and statistics published by international and European organizations in the field of human rights.

The women's rights issue preoccupied the whole world but the first steps in their defender were made only after the international organizations like United Nations, African State Organization, Latin and South American Organizations and recently, the regional organizations from Europe such as Council of Europe and the European Union got involved. All these entities created legal binding instruments aiming at preventing, combating and protecting the human rights. Thus, this study is divided in three parts that approach, chronologically and historically, the phases in which the problematic of women was subject of debates in the public sphere as a unique entity with rights and duties able to act at every level of a society and in all fields of life. The important successes of today wouldn't be possible if it hadn't been guided by the principle of equal opportunities, non-discrimination and the day to day fight against prejudices, cultural habits, and religious belief. From all forms and actions that break the women's rights we focus on violence against women and on domestic violence in this relation being involved the intimate partner violence.

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1. The Legal Framework Evolution on Women's Rights

In a great number of legal documents, the women's rights, generally, and the principle of equal opportunity and nondiscrimination, specially, are defined and legiferated. United Nations World Conference on Human Rights held in Vienna, in June 1993, is considered as a cornerstone in the women's rights movement. Before the World Conference in Vienna, women's human rights were unrecognized on a large scale and merely absent from the international human rights agenda. At that time, the main approach was to divide the public sphere from private. Thus, the human rights agenda concern itself only with acts taking place in the public sphere which, principally, included those affecting the men.

One of the main objective, at the twentieth anniversary of the adoption of the Beijing Declaration and Platform for Action, was a recognition that the women's rights issues are at a turning point. It had to be accepted that realizing gender equality, the empowerment of women and the human rights of women and girls must be a pressing and central task.

In this context, Dr. Phumzile Mlambo-Ngcuka said: "Gender equality is a shared vision of social justice and human rights. Everyone has a responsibility to act, particularly governments as the primary duty bearers. We must seize all opportunities at national, regional and global levels and give new impetus to the achievement of gender equality, the empowerment of women and women's and girls' enjoyment of their human rights".[1]

An important global actor and women's right defender is UN Women that supports UN member states as they set global standards for achieving gender equality, and works with governments and civil society to design laws, policies, programmes and services needed to implement these standards. It stands behind women's equal participation in all aspects of life, focusing on five priority areas: 1.increasing women's leadership and participation; ending violence against women; 2.engaging women in all aspects of peace and security processes; 3. enhancing women's economic empowerment; 4. making gender equality central to national development; 5. planning and budgeting. UN Women also coordinates and promotes the UN system's work in advancing gender equality.

Also, European Union made steps in the direction of human rights defense, focus on women's rights, by adopting reglementations, and here we could mention, in 2004, the Guidelines on Human Rights Defenders (revised in 2008) to provide support to defenders and their work. The EU has also adopted Guidelines on violence against women, which specify that "(T)he EU will ensure that it gives appropriate consideration to the synergies between the implementation of these guidelines and other EU guidelines on human rights, in particular those relating to children's rights and human rights defenders."[2]

2. Definitions and Approaches on the Concepts of "*Violence against Women"* and *"Domestic Violence"*

Literature in the field of human rights, and, mainly, of equal opportunities and nondiscrimination use the terms of vulnerable persons or groups. Cook and Cusack used the term "vulnerable groups" to refer to "persons made vulnerable by particular circumstances". The sources of vulnerability are rather to be found in social, economic and cultural processes and inequalities that are changing and shifting

[1] Dr. Phumzile Mlambo-Ngcuka, Under-Secretary-General, Executive Director UN Women (www.un.org/UNwomen).
[2] European Union. EU guidelines on violence against women and girls and combating all forms of discrimination against them, para. 3.2. 2008. Web. February 4, 2014. http://www.consilium.europa.eu/uedocs/cmsUpload/16173cor.en08.pdf.

over time, so that indeed certain groups are "made" vulnerable. Stereotyping is part of human nature being a way people categorize individuals, often unconsciously, into particular types or groups, in part to simplify the world around us.[1] Stereotypes are both descriptive (perceiving all members of a certain group to have the same attributes regardless of individual differences) and prescriptive (setting the parameters for "acceptable" behavior). Gender stereotypes perpetuate myths about women and men as "truths". For example, in many societies and cultures, women are thought to be more "emotional" and less rational and, consequently, less reliable and trustworthy than men.

Such notions often reflect historic and contemporary discriminatory (patriarchal) attitudes and perceptions of women. These attitudes are frequently rooted in cultural, religious and traditional values. Stereotyping becomes problematic when it is used as a vehicle to degrade and subjugate women both in general and in particular.[2]

The General Recommendation of the United Nations (UN) Committee on the Elimination of Discrimination against Women (CEDAW Committee) established, in 1992, that gender-based violence could be considered as "violence that is directed against a woman because she is a woman or that affects women disproportionately" (Article 6) and that it "is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men" (Article 1).[3]

"The UN General Assembly stated that "*violence against women"* refers to any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[4]

Accordingly, violence against women encompasses but is not limited to the following:

(a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

(b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

In spite of fact that in many families, domestic violence, including sexual violence in marriage, is still treated as a private matter in some countries. Insufficient awareness of the consequences of domestic violence, how to prevent it and the rights of victims still exists. Although improving, the legal and legislative measures, especially in the criminal justice area, to eliminate different forms of violence against women and children, including domestic violence and child pornography, are weak in many countries.

[1] (Cook & Cusack, 2010, p. 1) apud Marianne Hester, Sarah-Jane Lilley, Preventing violence against women: article 12 of the Istanbul Convention, Council of Europe, September 2014, p. 8.
[2] (Cook & Cusack, 2010, p. 1) apud Marianne Hester, Sarah-Jane Lilley, Preventing violence against women: article 12 of the Istanbul Convention, Council of Europe, September 2014, p. 14.
[3] UN, CEDAW Committee (1992), General Recommendation No. 19 on Violence against women, adopted at the 11th session, 1992, A/47/38, 29 January 1992.
[4] UN General Assembly, Declaration on the Elimination of Violence against Women, A/RES/48/104, 20 December 1993, art. 1.

On the first of August 2014, the Council of Europe's Convention on preventing and combating violence against women and domestic violence came into effect. The treaty, commonly known as the "Istanbul Convention", covers violence against women, in all its manifestations, and supports policy measures to help victims and supporting organizations that seek to eliminate violence against women. It states, clearly, that no form of violence against women is acceptable, and that law enforcement agencies need to react to domestic and other kinds of gender-based violence. The Convention also stresses the necessity for coordinated action between policy makers, government agencies and civil society, and emphasizes the need to promote the principle of gender equality and legislate against gender-based discrimination. It is underline the will to combat and prevent violence linked to harmful practices, such as female genital mutilation, forced or early marriage or forced sexual relationships, and so-called "honour crimes" committed against women, young people and children.

The Convention gives a definition to domestic violence "(b) "*domestic violence"* shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim."[1]

An important challenge to the realization of women's fundamental rights is intimate partner violence which, unfortunately, is experienced by women from all over the world. In many women's issues, such as intimate partner violence is put on the private agenda, treated like a private issue and so it seems that does not involve human rights violation.[2] The different types of violence often coexist, meaning that a woman may be subjected to multiple forms of abuse by her partner. Globally, almost one third of all women who have been in a relationship have experienced physical and/or sexual violence by their intimate partner. In some regions, nearly 40% of women have experienced intimate partner violence. Globally, 38% of all murders of women are committed by intimate partners. Intimate partner violence denies or impacts upon the enjoyment of the victim's fundamental rights to life, liberty, and security of the person, the right to be free from torture and ill-treatment, the right to equality in marriage and family relations, and to an adequate standard of living as well as to the highest attainable standards of physical and mental health. Where tolerated by the state, intimate partner violence denies the victim the right to equal protection of the law and perpetuates a culture of impunity. Unfortunately, some studies indicate that a vicious cycle exists whereby children exposed to intimate partner violence against their mother or female career are more likely to perpetrate or experience intimate partner violence in later life.[3]

Thus, basic victims of domestic violence are children who are deprived of their childhood, the right to play, education and recreation and as the New York Convention on the Rights of the Child stipulates, "The child should grow up in a family environment, in an atmosphere of happiness, love and understanding."[4]

[1] Council of Europe, Convention on preventing and combating violence against women and domestic violence, CETS No. 210, 2011, p. 8.
[2] In-depth study on all forms of violence against women, Report of the Secretary-General', UN doc. A/61/122/Add.1, 6 July 2006, §112 apud The Situation of Women's Rights 20 Years after the Vienna World Conference on Human Rights, Geneva Academy of International Humanitarian Law and Human Rights, June 2014., Academy in-brief No. 4, 2014, p. 33.
[3] WHO, Understandings and addressing violence against women, Intimate partner violence, Geneva, 2012.
[4] Apud Tamara Dorina Ciofu, "Domestic Violence and its Consequences on the Psychological Development of Children. Aspects from the Istanbul Convention in Guarranting a Happy Childhood" in Exercitarea dreptului la nediscriminare şi egalitate de şanse în societatea contemporană. Lucrările celei de-a VIII-a Conferinţe a Nediscriminării şi Egalităţii de Şanse/Exercising the right to non-discrimination and equal opportunities in contemporary society. The Works of the Ninth Conference on Non-discrimination and Equal Opportunities, NEDES, 2014, Bucharest: Prouniversitaria, p. 313.

3. Provisions of the Istanbul Convention on Prevention Domestic Violence

Unfortunately, prevention strategies remain fragmented and reactive and there is a lack of programmes on these issues. It is also noted that, in some countries, problems have arisen from the use of new information and communication technologies for trafficking in women and children and for purposes of all forms of economic and sexual exploitation. As FRA has noted in the past, the current lack of comprehensive data hinders the development of targeted policy to combat gender-based violence. The Convention's stipulation that countries need to collect detailed data on all aspects of violence against women on a regular basis is therefore also to be welcomed.

The Council of Europe, in Convention on preventing and combating violence against women and domestic violence, from the four core pillars of the comprehensive approach to violence against women underlies the area of prevention The gender inequality is a cause and consequence of violence against women and is the reason why the Convention provides for an entire prevention chapter that envisages measures to stop violence against women from happening by achieving greater gender equality.

The Istanbul Convention expounds this long-term vision and, as an overarching principle for all prevention measures, it requires states parties to promote changes in the social and cultural patterns of behavior of women and men in order to eradicate prejudices, customs and all practices based on negative gender stereotypes.[1]

Article 12, called "General obligations", in paragraphs 1 and 5, focused on the matter of raise awareness. "(1) Parties shall take the necessary measures to promote changes in the social and cultural patterns of behavior of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men.

(5)- Parties shall ensure that culture, custom, religion, tradition or so called "Honour" shall not be considered as justification for any acts of violence covered by the scope of this Convention."

As it is known, the European Union has a closed cooperation with the Council of Europe in the field of human rights. Many studies and researches are made by the European Fundamental Rights Agency (FRA) and an interesting and useful research on violence against women and domestic violence was conducted by this agency and published in 2014. The biggest ever such comparative study, FRA's report was based on a survey of 42,000 women in all 28 EU Member States, and revealed the extent of abuse suffered by women from childhood through to old age, at home and at work, in public and online. Also, it showed that the fear of becoming a victim of gender-based violence has a negative impact on many women, leading them to restrict their movements and behavior. The survey found that 33% of women in the EU have experienced physical or sexual violence since the age of 15, which corresponds to some 62 million people. Of those who suffered domestic violence, 67% had not reported the most serious incident to the police or any other organization, demonstrating that much still needs to be done to increase victims' trust by measures such as training police to react appropriately and sensitively to victims' needs. The survey asked women about their experiences of physical, sexual and psychological violence, including incidents of intimate partner violence ("domestic violence"), and also asked about stalking, sexual harassment, and the role played by new technologies in women's experiences of abuse. These questions were necessary to take into account

[1] Marianne Hester, Sarah-Jane Lilley, Preventing violence against women: article 12 of the Istanbul Convention, Council of Europe, September 2014.

the specificities of intimate partner violence: the fact that it may involve violence by the same perpetrator over a long period of time; that it can play a part in the decision to end the relationship; and that, for some women, violence continues after they have separated from a violent partner.[1] As indicated in FRA survey, in half (49 %) of the cases where women have separated from their violent previous partner, violence was the main reason for separation. In a further 19 % of the cases, violence contributed to the decision to end the relationship[2].

4. Conclusions

There are many economic, social, cultural and geographical factors that affect how a woman experiences a violence. These factors include class, religion, age, language, sexual orientation, location, race and ethnicity. Women's human rights are denied through religious and cultural practices in a number of ways and on an alarming scale.

The Istanbul Convention asks states parties to develop "integrated policies", which are "State-wide effective, comprehensive and coordinated policies encompassing all relevant measures to prevent and combat all forms of violence". It is important to ensure that prevention of violence against women and domestic violence is indeed an integral part of the national policy in the field, whether that is laid out in a national action plan, a national strategy or several interrelated policy documents. This could include: policies and programmes; implementing laws and policies that respond to and prevent violence; addressing impunity and ensuring women's access to justice.

The Istanbul Convention is currently the most comprehensive international legally binding instrument on violence against women and domestic violence. This is a key aspect of this convention's visionary nature. It is an "all-rounder". The response is multi-disciplinary with long-term preventive actions as well as measures to ensure the prosecution of perpetrators and protection of survivors.[3] It explicitly defines violence against women as a human rights violation. It recognizes unequal power relations between men and women as the root cause of violence against women, and it advocates a gender-sensitive perspective in tackling it.

Also, we have to underline one of the FRA survey conclusion that "The state must treat intimate partner violence as a public matter rather than a private one".[4]

The zero tolerance policy was the guiding "mantra" that led and must lead the states in their strategies on preventing and combating violence against women. In order to prevent intimate partner violence, states must adopt an anti-tolerance policy and enact criminal legislation prohibiting intimate partner violence in all its forms and establish adequate sanctions for it in domestic law.

[1] Violence Against Women: an EU- wide survey (www.fra.org. fra-2014-vaw-survey-main-results-apr14_en), p. 42.W.
[2] Violence Against Women: an EU- wide survey (www.fra.org. fra-2014-vaw-survey-main-results-apr14_en), p. 45.
[3] Speech by UN Women Executive Director Phumzile Mlambo-Ngcuka at the Inter-Parliamentary Union Assembly in Geneva on 14 October, 2014 - See more at: http://www.unwomen.org/en/news/stories/2014/10/ed-geneva-ipu-assembly speech#sthash.2cAUgOMo.dpuf.
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REALITIES AND PERSPECTIVES

Cloning and the Creation of Saviour Siblings from the Perspective of Criminal Law and Ethics

Florentina Pușcă[1]

Abstract: In this paper we have examined the role of criminal law and ethics regarding the creation of saviour siblings, since there is no European or international settlement for this field, only for IFV technique. The concept of a saviour baby or saviour siblings means a child who is born to provide an organ or cell transplant (through the donation of body fluids, umbilical cord blood, a non-vital organ or tissue) to save a sibling from illness or death. Cloning ensures that the new child is an appropriate match for the existing person, since they would be genetically similar. Creating a child for the purpose of saving another child violates the formula of humanity because the child is created for this end. The results of this research are of interest to law school students, teachers and researchers in the legal field.

Keywords: saviour siblings; cloning; humanity; criminal law

1. Introduction

We are dealing in the third millennium with a world whose development has taken an unprecedented momentum in which science and technology open up new horizons that give hope to improving the quality of life and even the prospect of interventions on the course of one's own destiny.

The world goes through the third industrial period, one based mainly on the applications of informatics, chemistry, biology and medicine. Human society faces a series of questions that often seem to have been unresponsive or sometimes given too many answers based on considerations of the most varied (scientific, ethical, religious) and subjective opinions, so that they become a confrontation of opinions and ideas that engage large masses of supporters, without being able to provide general satisfying solutions to these issues and current questions of particular importance. They divide the society and give rise to conflicts.

Genetic research, culminating in the decoding of the human genome, the cloning issues have prompted a particular response from the public opinion and the media, triggering discussions and responses to these delicate issues from all social groups, both at national and international level. (Pattinson, 2005, p. 3)

Man desires more and more to be credited into creator, to decide his own fate, to hold power over life and death. However, in search of these possibilities, the man does not know where he is heading, if the result of these researches and changes is beneficial or harmful to him and the society.

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Can we intervene on the human genome through biomedical techniques and where can our intervention go without becoming a threat to the very existence of humanity?

In this context, the right is called upon to react and respond to the changes made and can no longer be neglected or treated with the patented solutions at a time when these issues did not show the importance they had today.

2. Science has discovered that life arose when matter, in its eternal attempt to find the pair of lone electrons, combined three lifeless molecules in a biomolecule. These three molecules were nitrogen, a pentose and a phosphate.

The biomolecule created macromolecules representing proteins, carbohydrates and lipids, which, acting as enzymes, transporters, hormones, receptors and antibodies, were organized into a cell. The man is composed of tens of thousands of such cells, and the brain of one hundred billion. The cell is the biological unity of life. The inorganic matter is infinite. Life is the transient biological phenomenon where organically grown inorganic remains independent until it returns to the inorganic matter. (Askenasy, 2007, p. 133) Human life is concomitantly and indissolubly bodily and spiritually. By virtue of its substantial communion with the spiritual element, the human body cannot be considered to be only a complex of tissues, organs and functions, nor can it be placed in the same plane as the animals' body, but it is the constituent part of the person who manifests through it is expressed. Every human person is constituted not only from the soul, but also from the flesh, so that in the body and through the body the person itself is achieved in its concrete reality. (Moldovan, 2002, p. 152)

Since ancient times, great importance has been attached to the human body, Greek civilization has depicted it in artistic works, and Christianity has also emphasized the importance of the soul. The human body was considered at that time a component of the human person, his protection being considered important only after two millennia. This "delay" was due to the action of two factors, one of religious origin and the other of a philosophical nature, both of which denied the role and place of the human body in favor of the spirit. (Reuter, 2003, p. 53) In contemporary doctrine, it was argued that the human body can be considered a thing, but not all kinds of things. The Civil Code provides that only things that are commercially available may be subject to the conventions, which has led to the following statements: "In the situation where the human body cannot be the subject of the conventions, it would be because it would be one thing besides commerce - only one thing." It is the person the owner of his body or a simple usufructuary? The human body is not one thing, it is the person itself. If we recognize the individual as a property of his or her body, we should consider all of his acts, devices that concern him. (Francioni, 2007, p. 389)

The elements of the human body are the organs, the tissues, the blood that can be detached from it and can acquire the character of things, but not patrimonial assets, since these elements must grant the same regime as that assigned to the body. Thus, the human body cannot be an object of law, and the man, assimilated to a physical person, can only be a subject of law and not an object of law. (Friedman, 2008, p. 106)

In this sense, the whole and viable human body in the present conception of doctrine and jurisprudence cannot be sold or donated, as it would mean restoring the slavery and transforming the person into an object of patrimonial rights, while elements of the human body may, in exceptional cases, to be the subject of provisioning in so far as the law allows them, as they are not a person in the

legal sense of the word. This situation can be analyzed from the perspective of personalist anthropology, according to which the fetus and the embryo have the value of a person, yesterday's slave, deprived of the value of the person and the recognition of the dignity of the person, can now be the frozen embryo used for experiments. (Reuter, 2003, p. 101)

The lawyers opposed the accreditation of the person's right to dispose of his own body, motivating that such recognition would lead to the self-degradation of man. The right of the person on his own body is limited by the necessity of observing public order and good morals, the "measure" of which is given by law.

The ban on marketing the human body or parts of it is expressly provided for in the French Bioethics Law as well as in the European Convention on Human Rights and Biomedicine adopted by the Council of Europe.

In Romania, the civil legal status of the human body is regulated by Law no. 95/2006 on health reform, with subsequent amendments and in the Code of Ethics of the College of Physicians in Romania.

3. The technique of creating saviour siblings is not a cloning technique, it is designing or creating a saviour sibling (brother or sister capable of donating vital tissues to another pre-existing child) (Sheldon & Wilkinson, 2004, p. 533) to save the life of another previously born brother who suffers from a serious, even fatal illness. This child is created using the genetic material of the same parents, the genetic dowry being similar to the pre-existing, but not identical child.

The doctrine has identified four categories of saviour siblings:

- children naturally designed to provide cellular material for a bigger brother;
- children conceived in vitro fertilization and submitted to the embryonic phase for a pre-implant genetic diagnosis and leukocyte antigen test to ensure that: a) the future child does not suffer from the same illness as his brother; b) that the future child is compatible for a future transplant of cells or tissues; Within this category, two subgroups can be distinguished: saviour siblings created for the purpose of harvesting umbilical cord blood stem cells and saviour siblings created for post harvesting of cells and tissues. (Stănilă, 2015, pp. 177-178)

From an ethical point of view, cloning violates the uniqueness of human genetic identity, family principles, the principle of sexual reproduction between a man and a woman, the principle of kinship relations violates the right to human dignity, the clones being simple lab products without genetic identity.

Saviour siblings are copies whose genetic features can be chosen by parents to become simple consumer products, appreciated for their characteristics and not for their value as human beings. Saviour siblings would be simple medical instruments used to save the life of another human being, violating the Kantian principle that humans are not mere objects, but their intrinsic value is closely linked to the value of their existence as human beings. (Dickens, January 2005, pp. 91-96)

If the creation of saviour siblings assumes the purpose of only harvesting umbilical cord blood stem cells at birth, it remains only the ethical and emotional dilemma of the purpose of bringing it into the world. If the creation was made for post-birth sampling, cells and tissues, we can discuss physical integrity by conducting sampling procedures and psychological integrity, as the child will find out what the purpose of his or her birth was, and the relationship with the family could be seriously affected.

An alternative procedure for the creation of saviour siblings would be the development of umbilical cord blood storage banks, umbilical cord blood stem cells being used later if it is discovered that the infant is suffering from any disease.[1]

Regulating cloning and procedures to create a sibling saviour is necessary in light of the medium and long-term consequences that these procedures might have on the minority.

At this time, there is no European or international regulation covering the creation of saviour siblings, with only provisions governing the technique of in vitro fertilization and the use of PGD techniques (genetic pre-implantation diagnosis) and HLA (compatibility test of different tissues of origin based on the antigenic characteristics on which the success of a graft depends). (Stănilă, 2015, p. 185)

Regarding the creation of human embryos, the Committee of Ministers of the Council of Europe approved in 1997 the text of the "Convention for the Protection of Human Rights and Dignity of Human Being" with reference to the application in biology and medicine, which in Article 18 recommends adequate embryo protection where that country permits in vitro research. The second part of the article contains the provision: "the creation of embryos for research purposes is prohibited". The Oviedo Convention (1997)[2] provides for the prohibition of obtaining any financial profit from the use of any part of the human body.

In response to successful mammalian cell cloning attempts, in particular by embryo separation and nuclear transfer, the Council of Europe has developed the Protocol on the *Prohibition of Human Cloning*, which entered into force on March 1, 2001, in order to prevent any abuse of such technologies by their application to human beings on the grounds that it is contrary to science for the intentional creation of genetically identical human beings.[3]

The Romanian law does not allow reproductive cloning or the production of embryos for research, incriminating eugenic practices in article 62 of the Romanian Civil Code. There are prohibitive provisions provided for by a civil law, without any associated sanctions, and without any reference to a criminal norm of criminality in the event of non-compliance with these imperatives. In Romania, assisted human reproduction is not regulated and embryo research is not prohibited. Law no 95/2006 on health reform incriminating the trafficking of cells, tissues or organs, the procurement and transplantation of organs, tissues or cells of human origin without the consent under the law. (Stănilă, 2015, p. 194)

4. Conclusion

The field of cloning and the creation of saviour siblings are turning points in drawing the lines of bioethical argumentation, which may or may not favour the development of unprecedented scientific research. Although the perception of lawmakers in different countries differs in terms of allowing techniques or prohibiting others, their concern is to ensure that legislation is suited to the progress of biomedical and genetic research. (Stănilă, 2015, p. 194)

[1] Roșu, Raluca (2013). *Saviour Siblings – Should the law allow such a burden to be imposed on a child*?, http://thestudentlawyer.com/2014/04/08/saviour-siblings-should-the-law-allow-such-burdens/.

[2] The convention on Human Rights against Applications of Medicine and Biotechnology, ratified by the Romanian Parliament on 20.02.2001, by Law no.17, published in the Official Monitor no.103/23.02.2001.

[3] In the content of the document it is given the meaning of a human being that is genetically identical to another as the carrier of the set of nuclear genes identical to the other being. So the meaning of the act is not interpretable by the notion of identity.

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Bioterrorism a Threat on Public Health and Food Safety

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Abstract: This article tackles a subject related to the field of public order and national safety, since it focuses on realities and perspective of the current security environment, from the perspective of the impact of bioterrorism on public health and order. With the beginning of this century, security has turned more and more into an extended concept and, at the same time into a security of synthesis, defined as a concept of complex integration, namely at a state, regional and global level, by the more and more powerful, evident and necessary multitude of interdependencies. The current world situation is extremely favorable to the spread of contagious diseases by means of agro-food products, taking into account the demographic explosion and the geopolitics of food in the last century. The set in of new diseases or reoccurrence of older ones, deemed eradicated, suggest that in the future we might face a recrudescence of infectious diseases of an epidemic or food nature, that is with possible bioterrorist or bio-security attacks.

Keywords: bioterrorism; security; food; health; weapon

1. Bioterrorism and Public Health

Health plays a central part in people's life and it should be supported by efficient measures and policies in the member states, at the level of the European Community (EC) and worldwide.

The member states have the main responsibility for the policy in the field of health and the delivery of medical assistance services to the European citizens. The role of EC is to reflect or double their activity. However, there are certain fields in which the member states cannot act efficiently in an independent manner and in which the common action at the level of the Community is a must. Among these, one can list the major threats against health and the trans-border or international issues, such as epidemics and bioterrorism, as well as those related to the free circulation of goods, services and people[2].

Along the history, natural (epidemics) of infectious diseases have caused many more fatalities than wars: almost one quarter of Europe's population (approximately 25 million) died during the plague epidemics (bubonic plague) in the 14th century (Gostin, 2002).

A recently declassified report in the USA, issued by **National Intelligence Council for the Central Inteligence Agency** (CIA), concludes that "infectious diseases are not only a public health issue, but also a national security one" (Cavon, 2000), the population of the United States being vulnerable both to emerging and re-emerging infectious diseases (4).

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[2] http://eur-lex.europa.eu/legal-content/RO/TXT/?uri=CELEX:52007DC0630.

The risks of bioterrorism spread worldwide. There are no barriers in the path of smallpox, anthrax or plague. **The threat is global** and, therefore, the response should be global as well. The United Nations (UN) considers the *cooperation between international, regional and sub-regional organizations* of a paramount importance. The international community must prevent the possession or use of mass destruction weapons (MDW) by non-state groups or entities (Ciobanu, 2008).

Bioterrorism and biocrime are real risks of the modern society and we need to be well-prepared, including with medical countermeasures, in the fight against bioterrorism. As it results from the specialized literature, from all groups of biologic agents, bacteria are most likely to be used as **bioterrorism agents**, since they can be easily cultivated in industrial quantities, on artificial culture environments and for a small price.

Among all bacteria, *Bacillus anthracis* is most likely to be used, since it spores naturally and remains viable, it can be stored as a chemical, radiologic or explosive agent. As a matter of fact, the bioterrorist attacks from the beginning of this century used anthrax spores. Out of several reasons (medical, military, industrial, etc.) anthrax has been and probably will remain the agent of choice for biological attacks.

These agents are, in fact, microorganisms that can cause serious diseases, deadly most of the time. One of them is the infamous anthrax, of which we have heard frequently in the recent years. It can make its way to the organisms through the skin, by inhalation or through the digestive tract. The cutaneous form of the disease is the most "benign", manifesting itself under the form of necrotic and hemorrhagic ulcerations which, with early treatment, can heal in several weeks. The pulmonary form debuts with high fever, intense feeling of suffocation and within 24 hours from the occurrence of the symptoms, the disease leads to death by hypoxia and septic shock. The digestive form is not milder either, making its debut with nausea, vomiting, digestive hemorrhage, followed by ascites (large amount of liquid in the abdomen) and, after 2-5 days, death.[1] The viral hemorrhagic fever (Lassa & Ebola) are not less dangerous. It is mostly transmitted through rodents, but the virus can enter the organism by inhalation or direct contact with the infected material; it produces modifications at the level of small blood vessels and death occurs mostly due to hemorrhagic and neurologic complications. Botulism, another biological weapon, acts through the botulinum toxin that attacks the nervous system, leading to paralysis, followed by respiratory shock. Botulism spreads through food, taking the form of food poisoning. There is an anti-toxin, but it is only efficient in case of early administration. Smallpox is a disease deemed extinct 25 years ago (the last case was reported in 1978), but of interest at the moment due to the possibility to use it as a biological weapon. It is a deadly viral infection with horrid cutaneous manifestations (vesicles covering the entire body), death being caused by pneumonia or septicemia. There is an anti-smallpox vaccine, which offers protection for 5-10 years, but we couldn't find out whether our county has it or not.[2]

Therefore, some of these diseases can be treated if an early treatment is administered, but they can easily escalate to serious complications and death. Their prevention by the mass vaccination of the population sounds nice in theory, but in practice we don't have vaccines to fight these rather rare diseases.[3]

The biological weapon is an invisible one. It can be transported, without being detected, across borders or "in cultures" to obtain the required quantity for committing a massacre. The microorganisms can be

[1] www.armyacademy.ro/reviste/3_4_2002/r27.pdf.
[2] http://www.bioetica.ro/bioetica/ie2/info.jsp?item=9691&node=1395.
[3] http://www.bbc.co.uk/romanian/afghanistan_anthrax/biological.htm.

released without a noise and without causing immediate effects. The disease cannot be determined until the symptoms of the infection and the triggering agent aren't identified. If these agents, such as smallpox, can propagate easily from one individual to another, the number of victims can reach thousands of cases[1].

These diseases can be transmitted in several ways, among which two are susceptible of reaching a large number of people: a) through the digestive tract. Certain microorganisms induce the disease not so much through their multiplication as through the action of toxins. Toxins are produced by bacteria. The ingestion of toxins induces the disease. This type of contamination is not considered "practical" except for the population agglomerations that have common water reservoirs in which these toxins could be discharged. It is about, first of all, about the botulinum toxin, responsible for botulism, whose gravity is related to muscular and respiratory paralysis; b) airborne. Most agents used in bioterrorism can be transmitted by air. They multiply, inducing the disease after a certain incubation period. The higher risk of contamination of thousand or even tens of thousands of people is the dissemination during public or sports manifestations, using airplanes similar to the ones spraying insecticides on crops or by the use of aerosol type devices.[2]

The threat of bioterrorism, meaning the use of a biological weapon in terrorist purposes in the urban environment is much more disturbing. Or, in this field there is an unsettling accumulation of symptomatic events. As far as terrorism escalation using **nonconventional means** is concerned, the most spectacular remains the sarin gas attack of Aum Shinrikzo sect in the Tokyo subway from March 20, 1995. If botulinum toxins had been used instead of sarin, several thousand or tens of thousands of people would have died under the same conditions.[3].

2. Genetically Modified Organisms

Scientific and military scientists warn on the danger represented by the creation of these genetically modified germs which, being resistant to any treatment and insensitive to any vaccine, and showing an increased virulence and an unexpected capacity of destruction, could be the "absolute weapon" of the future[4].

With genetically modified organisms we move from the field of small or clandestine labs to that of top of the line technologies. These involve the identification of the genes responsible for the resistance, virulence or specific harmfulness of certain toxins, followed by their integration in the genome of a biologic agent that can preserve their capacity of proliferation. The addition to this gene is often done to the detriment of the host's metabolism, a common problem of the genetic engineering in its attempts of producing proteins of therapeutic or industrial interest through modified bacteria (Ioan Zanc).

At the moment, the "classic" toxicological approach based on foreign poisons introduced in the organisms is about to be replaces by the use of hormones or human peptides that regulate most of the biological functions and whose genes have been isolated. The genetic therapy – an object of intense research – is a source of potential vectors for toxic molecules[5].

Numerous teams of researchers and clinicians work especially on cancer, in the idea of introducing a

[1] http://www.forum-criminalistic.ro/1%20of%202008.pdf, page 30.
[2] www.presamil.ro.
[3] www.presamil.ro.
[4] www.presamil.ro.
[5] www.presamil.ro.

lethal gene (for instance, by coding a cellular toxin, such as ricinus) in tumor cells, by the use of viral vectors that recognize their specificity. A "weak" vector whose toxic gene integrates in any cell constitutes a potential agent of biological war.

A strong point of the new biological weapons is their difficult detection. However virulent it might be, a biological agent needs to escape detection and countermeasures to be an efficient weapon. Modern diagnosis tools use mono-cloned antibodies specifically oriented against proteins from the surface of the detection microorganisms. Or, in the future, the sequence of the genes that code these proteins can be modified, which renders the carrier organism undetectable[1].

But due to the same scientists, Saddam Hussein's warehouses were well "supplied" with paralyzing gases and spores of killer bacteria. Science is the one that can bring happiness or destruction of humanity and it becomes more and more accessible due to the communication technologies and the internet. The virus that stood at the basis of the military biological program of Iraq was obtained with a simple post order from one of the Western labs that delivered such merchandise on request[2].

3. Conclusions

Remember to thank those that have supported you and your work. Use the singular heading even if you have many acknowledgments.

Bioterrorism is a phenomenon that has gained importance and international dimensions in the last decade. In view of preventing it, the UN deems as fundamental the cooperation among international, regional and sub-regional organizations.

Along time, humanity has gathered impressive knowledge in chemistry and biology. Due to well-known scientists, mankind was able to leave behind the miserable living conditions and the average life expectancy has doubled.

Terrorism is a war waged during times of peace, without frontiers and fronts, a war that terrorism considers just. Terrorism is a given fact, but also a creation of the human society, of men obsessed with power. What is unfair is that terrorist actions, of any nature whatsoever, affect the human being first of all. To achieve their purpose, terrorists engage in a fair fight from their perspective and use new weapons and technologies[3].

Such a weapon is the biological one, an invisible, yet extremely efficient and dangerous one. Bioterrorists create these arms effortlessly, in common locations and with minimum costs. The reality of our times shows that the fear of biological weapons exceeds the fear of the former nuclear war. Starting from these aspects, this article aims at triggering attention on an uncontestable fact: bioterrorism is a topical threat with serious implications against security[4].

[1] www.presamil.ro.
[2] http://www.scoalarosu.ro/RO-FILES/Info_pub/revista_pdf/14/Bioterorismul.pdf.
[3] http://buletinul.unap.ro/pagini/pdf/buletin-1-2012.pdf, page 13.
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Misdemeanors and Offenses Covered by G.E.O. No. 60/2001 Regarding Public Acquisitions. Aspects of Unconstitutionality. Case Study

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Abstract: The present paper aims to analyze the unconstitutionality found within art. 98 para. 1 of G.E.O. no. 60/2001 regarding public acquisitions, legislative text that establishes both contraventions and offenses committed by different people in public acquisitions procedures. The analyzed expression is a phrase predominantly used by the Romanian legislator in various special laws, namely: "constitutes contraventions and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions". The implications of this analysis focuses mainly on public acquisitions but its effects may occur on absolutely any enactment containing the phrase mentioned above. Academic and practical importance of this approach is that although legal rules invoked are abrogated, they continue to produce their effects in the criminal cases of the National Anticorruption Department which are still pending before the courts. Furthermore, the arguments can be used, inclusively for lodging an unconstitutionality objection concerning this phrase in other criminal or civil cases that directly or indirectly concern the public acquisition procedures.

Keywords: objection of non-constitutionality; abuse of office; infractions relating to public acquisition procedures

1. Introduction

In fact, the National Anticorruption Department (hereinafter DNA) sent to trial the management bodies of the Company Nuclear Electrica SA (hereinafter SNN) for crimes of abuse of office consisting in infringement of formal procedures of public acquisitions foreseen by G.E.O. no. 60/2001. Jurisdiction of DNA to pursue this was justified by invoking the text of art. 98 para. 1 of G.E.O. no. 60/2001 containing the phrase "constitutes a contravention and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions". Even though in the present case had been carried out an inspection by ANRMAP[2], control completed with an inspection report which ascertained that the acts committed represent contraventions, the Court of Accounts of Romania decided in parallel the referral of DNA for the same deeds, considering, however, that these are infractions and not contraventions. DNA ordered the initiation of prosecution for the mentioned offenses.

In the present case it has been drawn up and submitted for judging a bill of indictment at the Bucharest District Court, indictment that contained numerous references to G.E.O no. 60/2001 and G.D. no.

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[2] National Authority for Regulating and Monitoring Public Procurement.

461/2001 for implementing G.E.O no. 60/2001. However, the bill of indictment targets allegedly acts of abuse of office and not specific crimes in the public acquisitions procedure.

In the following, we will analyze the unconstitutionality drawn from the text of article 98 para. 1 of G.E.O. no. 60/2001.

The mainly targeted aspects regard the fact that the phrase used by the legislator has an uncertain and unpredictable character which can result in inconsistent application of these provisions nationwide. Emphasis is placed on the lack of objective criteria to differentiate deeds that may be considered misdemeanors of those who meet the elements of the crime.

This legislative gap has as its leading cause the fact that when adopting G.E.O no. 60/2001 the legislator did not have in mind that criminal law does not contain provisions to sanction certain offenses as crimes committed in the public acquisition procedure.

In this context, we see that the same deeds, committed by the same person at the same time and under the same conditions, can be seen by the public institutions as mere misdemeanors, while in the view of judicial bodies, they acquire a criminal character.

The procedural proposed solution is invoking an objection of non-constitutionality before the court that hears the merits of the penal case with the purposes of delivering by the Constitutional Court of Romania of a decision by which either it pinpoints the criteria or limits to which the misdemeanor becomes an offense or to declare the unconstitutionality of these provisions and accordingly by changing them by the legislative authority.

The natural consequence of such a decision is to clarify all situations in the which the Romanian legislator used the phrase "constitutes a contravention and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions" but failed to establish in the criminal legislation corresponding crimes for misdemeanors.

Without wishing to be an exhaustive approach, this paper aims to present a number of arguments in the favour of the admissibility of the objection of unconstitutionality regarding the phrase itself, regardless of the legal text that contains it.

2. General Conditions of Admissibility

Regarding the general conditions of admissibility provided by the framework law on the Constitutional Court of Romania, in order to file an unconstitutionality exception in front of the Constitutional Court of Romania, any motion must meet the following general conditions:

- *the motion should regard a legal provision applicable in the case;*

Regarding the incidence of art. 98 of G.E.O no. 60/2001 in the present study is relevant is that this legal text is the one that led to the the notification act of law enforcement agencies.

Thus, the Court of Auditors, after inspection, decided to lodge a complaint to the DNA for offenses of abuse of office concerning the public acquisition contracts signed by SC Nuclear Electrica SA with various suppliers, due to the fact that it was not respected the legislation for public acquisitions, namely, art. 98 of G.E.O. no. 60/2001 which states that "constitutes a contravention and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions".

Correspondingly, the indictment was based on provisions G.E.O. no. 60/2001, the prosecutor considering that the alleged deeds adduced against the defendants, according to art. 98, constitutes offenses within the criminal law and not misdemeanors in the legal sense provided by the public acquisition legal framework.

- *The exception must be invoked before a court of law or commercial arbitration and*

Since the exception was raised before the Court of Appeal Bucharest into a pending case, we consider that this condition is met.

- *The provisions relied upon has not been found to be unconstitutional by an earlier decision of the Constitutional Court*.

Given that up to this point, regarding the provisions of art. 98 of G.E.O no. 60/2001 there was no objection of non-constitutionality invoked and that following the investigations carried out we have not identified any decision pronounced the Constitutional Court in this regard, we consider that this condition is also met.

- *the provisions challenged in an objection of unconstitutionality to be in force at the time the objection.*

Not only in the this case, but in other similar legal situations, subject to different laws in force illo tempore, have been generated legal situation but remained to be decided after these legal provisions were no longer into force.

Following the principle of tempus regit actum and applying lex mitior, such cases are to relate effectively to the legal provisions, so although abrogated the legal provision still applies in this case.

Otherwise, by applying rigid condition that law or ordinance to be in force at the date of lodging the objection, as well as at the date of its settlement by the Constitutional Court, it removes the relevant legal provisions from the control of constitutionality.

In this regard, the Constitutional Court issued the Decision no. 766/15.06.2011 regarding the term "in force" of the provisions of art. 29 para. (1) and Art. 31 para. (1) of Law no. 47/1992 on the organization and functioning of the Constitutional Court. On this occasion, CCR held that this phrase "in force" "is constitutional to the extent that is interpreted in the sense that they are subject to constitutional review also the laws or ordinances or provisions of laws or ordinances whose legal effects continue to occur after their abrogation".

On the other hand, the Constitutional Court has ruled in several cases on the legal provisions that were no longer in force at the date of the decision of the Court. A precedent is the Decision No. 1221/12.11.2008, published in the Official Monitor of Romania, Part I, no. 804 of 2.12.2008, in which the Court held that the unconstitutionality of an emergency ordinance found by the Constitutional Court strikes the legislative act as a whole so that the abrogation of certain provisions of the normative act criticized after the objection of non-constitutionality was filed, has no relevance on the outcome of the unconstitutionality. The same solution was adopted by CCR trough the Decision no. 842/02.06.2009, published in the Official Monitor of Romania, Part I, no. 464 of 06.07.2009, Decision no. 984/30.06.2009, published in the Official Monitor of Romania, Part I, no. 542 of 04.08.2009, or by Decision no. 989 din 30.06.2009, published in the Official Monitor of Romania, Part I, no. 531 of 31.07.2009.

Therefore, we consider that art. 98 of G.E.O. no. 60/2001 contravenes to Art. 1 par. 5, regarding supremacy of the Constitution and the law compulsoriness, Art. 16 para. One regarding equality of

rights, art. 21 para. 3 on the right to a fair trial and Art. 23 para. 12 regulating the principle of legality of criminal offenses, of the Romanian Constitution revised.

3. The Merits of the Exception of Unconstitutionality

Art. 98 of G.E.O. no. 60/2001, is devoid of predictability and contrary to art. 1 par. 5 of the Constitution, because the public servant, who could become an active subject of this incrimination, has difficulties to anticipate which are the actual conditions, for the breaching of his duties, against the provisions G.E.O. no. 60/2001, may lead to criminal liability.

The provisions of the law criticized are devoid of predictability and accessibility because from the way of defining the crime cannot be determined accurately the conduct of the material criminal element. We believe that the legislator established an incrimination that has a general character; the provisions criticized having an ambiguous character, with the preposterous hypothesis that exactly the same facts are considered misdemeanors but at the same time, the criminal investigation bodies to order the initiation of criminal action and prosecution, virtually for committing misdemeanors.

The Constitutional Court ruled in its case-law (e.g. Decision no. 1 of January 11, 2012, published in the Official Monitor of Romania, Part I, no. 53 of January 23, 2012) that, in principle, any piece of legislation must meet certain qualitative conditions, among them being the predictability, which means that it must be sufficiently precise and clear in order to be implemented.

With regard to the same compliance requirements of the law, as a guarantee of the principle of legality, European Court of Human Rights, through judgments in Rotaru against Romania (para. 52), Sissanis against Romania (para. 66), Dragotoniu, Militaru-Pidhorni against Romania (para. 34) and Beyeler against Italy (para. 109) retained the obligation to ensure these quality standards of the law as a guarantee of the principle of legality under art. 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

European court ruled that can be considered "law" only the norm formulated with sufficient precision in order to enable the citizen to control their the conduct; resorting to expert advice in the field, he must be able to foresee, to a reasonable extent, in regard with the case circumstances, the consequences that might result from a particular deed.

The text of Article 98 of G.E.O. 60/2001 is against Art. 23 para. 12 of the Constitution, as establishes both administrative liability and criminal liability of legal subjects without making a gradual differentiation of the deed and without establishing objective criteria under which a specific deed can be considered a criminal offense.

The Constitutional Court, in its jurisprudence, held that the provisions of criminal law are an expression of art. 23 para. 12 of the Constitution, according to which "Any punishment can be established or applied only in accordance with and pursuant to the law", as well as those of art. 73 para. 3 h), which regulates the legislator competence to establish criminal offenses, punishments and the execution thereof.

Furthermore, legal texts criticized are deficient in terms of lack of correlation with other similar provisions of the Criminal Code and those regulated by special laws, which is likely to cause confusion, uncertainty and difficulties regarding the interpretation and its application. Therefore, the flaws of drafting the criticized laws determines the violation of a fair trial because the withholding or not of an offense is carried by the court in an arbitrary manner based on subjective appreciations. The

norm criticized also determines infringement of the principle of non-discrimination, since the same act can be interpreted by a prosecutor as a crime, and by another as a misdemeanor.

Relating the argument presented above with the present case, we note that the legislator has fulfilled only in a formal manner its constitutional jurisdiction to legislate, given that the content of art. 98 of Ordinance no. 60/2001 fail to establish with clarity and precision the material object of the crime, causing a lack of predictability of it.

Text under the control of constitutionality does not meet quality conditions of the law, namely, from the phrase "constitutes a contravention and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions" cannot be determined which are specifically the conditions in which the deeds may constitute a misdemeanor and what are the conditions in which the same acts as the material element of the objective side, represents an offense.

The provisions at issue does not comply with any requirement of accessibility of the law considering that do not define themselves the conditions for the existence of the offense and do not even refer to a normative act of equal rank who would be in connection with, respectively to indicate the conditions under which a deed transcends the contraventional illicit and enters in the scope of criminal illicit.

As an example, in the matter of driving a vehicle under the influence of alcohol, we are in the same situation, and basically the same act is considered a contravention and offense at the same time. But the legislator has expressly provided alcohol limits up to which an act can be considered a contravention and especially the limits from which a deed can be considered a crime.

Thereby, we see that the text of art. 102 par. 3 letter a) G.E.O. no. 195/2002 states that is a misdemeanor and is punishable by the fine provided in the fourth grade of sanctions and the additional sanction of suspension of the right to drive for a period of 90 days, the deed of the driver of a vehicle, agricultural or forestry tractor or tram driving under the influence of alcohol, if the act is not according to the law an offense.

Apparently in this situation the legislator used a generic formulation, that "if the deed is not according to the law a criminal offense". But analyzing the criminal legislation in force, we find that the text of art. 336 of the Criminal Code regulates the crime concerning the driving a vehicle under the influence of alcohol or other substances text states that: "Driving on public roads of a vehicle for which the law requires holding a driving license to a person who, at the time of collection of biological samples has an alcohol concentration of more than 0.80 g/l of pure alcohol in the blood is punished with imprisonment of one to five years or a fine".

Hence, applicable law that sanctions driving a car under the influence, includes clear and objective criteria explicitly delineating crimes from contraventions by setting a threshold value of the detected alcohol concentration.

Incidentally, this is the opinion expressed by the Constitutional Court which showed that "prohibited conduct should be imposed by the legislator in the text of the law and not deducted from reasoning of the judge". (CCR Decision no. 405/06.15.2016)

In criminal matters, the principle of legality of criminal offenses, nullum crimen sine lege, nulla poena sine lege requires that only the primary legislator (Parliament by Law and Government by Emergency Ordinance) can determine the conduct that the recipient of the law is obliged to respect.

According to the regulation contained in art. 98 lit. a) G.E.O. no. 60/2001, "conducting a public procurement by evading or violating the provisions of this Ordinance and the regulations issued for its

application, constitutes a contravention and is sanctioned unless they are made under such conditions as to be considered according to criminal law as infractions".

We observe that the same action is either misdemeanor or a criminal offense, depending on a number of criteria not specified in absolutely no criminal law. In other words, the legislator has not made an explicit distinction in the sense of specifying explicit circumstantial elements under which a deed must be analyzed. It is not disputed that it can not be predictive a rule that does not give nor to a court of law nor the public prosecutor an exact description of the offense, unpredictability affecting also the judicial independence.

According to art. 8 par. 4 of Law no. 24/2000 on legislative technique for drafting new legislation, "form and aesthetic of expression must not prejudice legal style, precision and clarity of the provisions" and, according to art. 36 para. 1 of the same law, "legal documents must be written in a language and style specific legal regulatory, concise, sober, clear and precise to exclude any ambiguity with strict adherence to grammar and spelling."

In such circumstances, we consider that, in drafting laws, the legislator must ensure that the use of terms is performed in a rigorous manner, in a legal language and style which essentially is a specialized and institutionalized language.

We observe that the text of art. 98 of G.E.O. no. 60/2001 violates the provisions of art. 16 para. 1 of the constitution. The text of Article 98 creates a clearly discriminatory situation even between the same subjects given that the actions or inactions of the same person may be regarded as a contravention by ANRMAP and by DNA as crimes. In this situation it would bear a positive conflict of jurisdiction that may not be solved by any court because, as we have shown, the judge cannot set himself up as a legislator and determine where the contravention ends and where the offense begins.

Article 98 of G.E.O. no. 60/2001 violates inclusively the provisions of article 21 para. 3 of the Constitution concerning the right to a fair trial considering that you cannot claim a subject of law to comply with a law that is not clear, precise, predictable and accessible, because he fails to adjust his conduct according to the hypothesis of the normative text. Correspondingly, any subject of law cannot defend properly without knowing exactly what are the charges against him.

Thereby, the phrase "unless committed in such conditions as to be considered, according to criminal law, infractions" from art. 98 of G.E.O no. 60/2001 violates the right to a fair trial because it cannot warn the receiver of the law about the seriousness of the consequences of breaching the law.

Relevant to the present study is the ultima ratio principle applicable in criminal policy of the state of law. By virtue of this general principle the legislator has an obligation to intervene and prosecute a illegal act only as a last resort to protect social values. But it is not enough to find that facts alleged affect protected social value, but this interference must present a certain degree of intensity, severity justifying the criminal sanction.

The unconstitutionality of art. 98 of G.E.O. no. 60/2001 is motivated by the position of the very state institutions with control responsibilities in public procurement and the position of law enforcement agencies.

Another argument in support of the above is the opinion expressed by the Legislative Council when considering legislative proposal concerning the vouchers holiday context in which showed that "provision that states that constitutes a contravention and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions" is in contradiction with the definition of the misdemeanor in Government Ordinance no. 2/2001 on the

legal regime of misdemeanors which provides that the act described as a contravention in the law can only be a contravention, an one cannot, through interpretation, to change its legal characterization. Precisely to eliminate any confusion between misdemeanor and crimes by government ordinance was abrogated from the misdemeanor definition the comparison with the social danger of the crime and by Law no. 180/2002 was introduced the specification of the principle "the contraventional law defends social values which are not protected by the criminal law"

4. The Position Expressed by the Court

The court before which was filed the objection of unconstitutionality rejected the criticism arguing that the provisions are not applicable in this case brought before it.

Thereby, the court found that:

"In terms of the relevance of unconstitutionality from the point of view of connection with solving the merits of the case, the Court notes that, indeed, the defendants investigated in the present case were charged, among others, with a series of infringements of G.E.O. no. 60/2001 on the procedure for the award of public procurement contracts."

However, based on the content of the legal text criticized as well as their pleas, it is observed that solving the unconstitutionality exceptions could not have any effect in the present case.

As we can notice, the defendants from the present case were not prosecuted for committing offenses punishable under the ordinance in question, but for crimes covered by the Criminal Code, not covered by this call for referral to the Constitutional Court, respectively abuse of office with extremely serious consequences, given that the accusation consists, among others, on violation of certain provisions of Ordinance no. 60/2001 on the procedure for the award of public procurement contracts, articles expressly mentioned in the indictment and as well in the judgment of the court of first instance".

5. Cassation

Against the decision to reject the objection of unconstitutionality, the defendant through a lawyer filed an appeal to the High Court of Cassation and Justice.

Arguments were mainly related to the condition of admissibility regarding the incidence of the criticized text of the law in the case deferred for trial.

Thus, in regard of the incidence of art. 98 of G.E.O no. 60/2001 in the present case, we see that this text of law is the very foundation of this case being the normative act that was the basis of the prosecution acts and thus the basis for issuing the indictment.

The Court of Accounts decided the notification of the DNA for offenses of abuse of office on public procurement contracts signed by SC Nuclear Electrica SA.

In motivating of the referral, the Court of Accounts retained the infringement of incident legislation on public procurement, provided by art. 98 of G.E.O. no. 60/2001 which states that "constitutes a contravention and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions".

The indictment was based on the phrase "constitutes a contravention and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions"

from art. 98 of G.E.O. no. 60/2001, the prosecutor considering that the alleged facts incriminating the defendant constitutes an offense within the criminal law and not misdemeanors in the legal sense of the public procurement legal framework, as noted by the ANRMAP.

In other words, the only article that would attract jurisdiction of the criminal prosecution authorities is the article 98 of G.E.O. no. 60/2001, if not the deed would have been qualified as contraventions context in which the case file would not have reached the court.

In the indictment, the prosecutor motivates the solution for beginning the criminal action and referral to court on the provisions of G.E.O no. 60/2001 and G.D. no. 461/2001, allegedly infringed by the defendants in the present case, with reference to art. 98 of G.E.O no. 60/2001. Hence, in the indictment, the prosecutor made specific reference to provisions of art. 98 - point f of G.E.O. no. 60/2001.

Furthermore in the indictment, the public prosecutor quotes from the Control report drafted by ANRMAP where is withheld that the deeds "are considered misdemeanors under article. 98 lit. a and c of G.E.O. no. 60/2001".

Even the public prosecutor in the indictment, in justifying the legality of the notification of the prosecution notes that "according to art. 98 of G.E.O no. 60/2001 constitute contraventions and sanctioned the following deeds, if they are not committed under such conditions as to be considered in the sense of the criminal law, as offenses. Following an audit the Court of Auditors of Romania at SNN on the same contracts, the Court of Auditors of Romania notified DNA".

Moreover, the court of first instance, in the sentence makes express reference to the provisions of G.E.O. no. 60/2001, using phrases such as "the bidder thus breaching art. 40 para. 1 and par. 3 of G.E.O. no. 60/2001"; "contrary to art. 15 para. 1 of G.E.O. no. 60/2001"; "the court finds that the provisions of art. 12 letter a) G.E.O. no. 60/2001 were inapplicable"; "the selection of the procedure of negotiation with a single source was made in violation of art. 10 of G.E.O. no. 60/2001"; "by accepting the offer were not respected art. 2 letter a) and b) of G.E.O. no. 60/2001".

Thus, we have the following hypothesis:

- Control authorities respectively ANRMAP and the Court of Auditors in inspection reports, held that public procurements were made in violation of G.E.O. no. 60/2001.

- ANRMAP the only competent authority to establish the facts by which the legal provisions in public procurement are breached or infringed, holds that these alleged breaches are considered misdemeanors;

- DNA, in the indictment holds that the same breaches, considered by ANRMAP as misdemeanors, are crimes under Art. 98 para. 1 of G.E.O. no. 60/2001;

- According to the sentence, the court of first instance, in the conviction considerations withheld alleged violations of the provisions of G.E.O. no. 60/2001.

- according to art. 98 of G.E.O. no. 60/2001 "constitutes contraventions and are punished the following acts, unless committed in such conditions as to be considered, according to criminal law, infractions": a) performing a public procurement by evading or violating the provisions of the present Government Emergency Ordinance or of the norms issued in its application".

Therefore, the only logical and natural conclusion is that there is an inextricable link between art. 98 of G.E.O. no. 61/2001 and the present case.

In support of the argument set out above, we point out that the case prosecutor, refer to the report of ANRMAP and acknowledge that "the representatives of ANRMAP have determined facts that are considered contraventions but according to their legal duties, they are unable to determine what constitutes an offense".

Also, to give an appearance of legitimacy of the solution for trial, the prosecutor shows that:

"In the present case as was shown previously the deeds acquired criminal character trough the breach of duties by the public officials and by producing certain damages at the expense of the contracting authority".

The prosecutor used the phrase "acquired criminal character" in order to justify the criminal proceedings against the defendants for several misdemeanors which he interpreted as being offenses.

The essence of the objection of unconstitutionality is the very unpredictable nature of art. 98 of G.E.O no. 60/2001 which leaves to the discretion of the prosecutor whether certain deeds represent misdemeanors or offenses without the legislator to determine in the text of the legislation which are the objective criteria that must be considered and what is the limit, for the same actions, from which the deed goes beyond the contravention and becomes crime.

We consider that the courts judgment to reject the plea of unconstitutionality is erroneous since the defendants were not charged, "among others" but exclusively with alleged violations of G.E.O no. 60/2001 and of the norms implementing the legislation on public procurement.

6. Conclusions

We see therefore that the phrase *"are contraventions and are sanctioned the following acts, if not committed in such conditions as to be considered by the criminal law as offenses"* involves a number of criticisms from the perspective of constitutionality of the wording.

The unconstitutionality is not aimed solely at the wording but mainly, but targets the fact that subsequently of using this phrase, the Romanian legislator did not have in mind the objective criteria by which to define the contraventional sphere from the criminal one in the public procurement law, as it did in other cases encountered in the legislation.

Thereby, although generic, the previously invoked phrase might become constitutional to the extent that the legislator should intervene and regulate in criminal legislation either a criteria for determining the contraventional sphere from the criminal illicit or by express incrimination of certain deeds as offenses.

The lack of predictability and accessibility of the analyzed legal text could be complemented without the intervention of the legislator also by the Constitutional Court of Romania by issuing an interpretative decision.

Nevertheless, until the intervention of the state in the criminal policy on public procurement legislation, we believe the current legal framework contradicts the fundamental legal provisions of the Constitution and the principles of criminal law.

7. References

Convention for the Protection of Human Rights and Fundamental Freedoms.

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Normative Acts Adopted at European Level and their Effectiveness in the Field of International Police and Judicial Cooperation

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Abstract: This paper aims at making a brief analysis of the relevant EU legal acts in matters of international judicial and police cooperation and the effects on the national legislation of Romania. The objective is important as it concerns the European area of freedom, security and justice, protecting citizens being a fundamental objective of the Union. The paper will consider the terms and concepts mostly legal and will focus on the areas of international police and judicial cooperation. The approach used by the authors is, in essence, from a legal perspective, being used research methods like study and observation. The result of research leads to the conclusion that international judicial cooperation in criminal matters is complex, requiring the transposition into national law of a larger number of EU legal acts compared to international police cooperation. The paper may have implications in the activity of institutions which have attributions in the fields above-mentioned, but can be useful for people interested in the evolution of internal legal documents. Essentially, the work highlights the need for giving up legal national pride for the best possible cooperation of the member States authorities with responsibilities in both areas.

Keywords: security; assistance; law; legislation

Introduction

European area of freedom, security and justice cannot be achieved without a suitable internal and internationally framework. European sources of law are found in Union treaties which are the basis of the judicial foundation, and then, in the background, are the other acts of the EU institutions. The principles governing the activity of European level are the same as in our internal law. So, a basic principle is the hierarchy of normative acts which means that lower level normative acts issued by the European institutions can not contain other solutions that are regulated in Primary sources of Community law. Regarding the institutions with legislative powers, in the European Union, these are European Parliament, Council and Commission, which adopt regulations and directives, make decisions and formulate recommendations or opinions. It is worth mentioning that those acts does not have a differentiated power, so that there is not a priority order to apply, but they differ in their effects and extended application[3]. In the field of police cooperation and judicial cooperation in criminal matters, according to the treaties, Council may adopt framework-decisions, common-position, decisions and conventions.

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[3] L. Iamandi, International cooperation in the field of crime, Publisher AIT Laboratories LLC, Bucharest, p. 21.

Framework-decisions are instruments issued in order to harmonize laws and administrative acts of the Member States. This instruments require only targets to achieve, leaving to the opinion of the Member States legislative the ways for implementation. So, Council issued the Framework-Decision 2002/475/JAI[1] regarding combating terrorism and Amending-Decision 2008/919/JAI that define terrorist offenses and require Member States U.E., to harmonize their laws, to introduce minimum penalties for the criminal acts of terrorism. So, taking into account the international context, in the internal legislations of the Member States is imposed the necessity of regulating terrorist offense, in its legal content, being necessary to be found both sides, objective and subjective.

So, internal regulation must establish that this offense is produced by committing crimes, taking hostages, or committing threats etc. in order to strongly intimidate a nation, to destabilize political power or to constrain state bodies to act in a certain direction. Also, the Decision defines terrorist group as being a combination of at least two persons formed with the aim of committing acts of terrorism as we have previously defined. Not least, the Council requires Member States to punish any preparatory acts but also the participation of committing a terrorist offense as instigator or accomplice. Simultaneously, it is stipulated the situation of establish the jurisdiction if the offense is committed on the territory of a particular country or on a ship or aircraft belonging to a particular state, the Council impose Member States to cooperate to resolve issues related to jurisdiction. However, until the year 2014, not all U.E. states have implemented the Council measures found in stipulations of Council Framework-Decision 2008/919/JAI, in attention being Greece and Ireland, instead, other Member States have acted in order to prevent and combat terrorist offenses, punishing these crimes as U.E. required. Among the specific community acts in police and judicial matter are to be found common-positions, these normative acts being applied in particular Union matters. Understanding to remain within this controversial phenomenon, we mention that fight against terrorism is a key objective for the European Union, so that the Council's work in preventing and combating this scourge is extremely strong. Consequently, among the Council's acts is to be found the common-position 2001/931/PESC regarding the application of specific measures to combat terrorism[2]. Is important to underscore that this common-position regulates the composition of a list or groups and persons that committed act of terrorism with the purpose to freeze their financial resources, obviously, with the aim to stop financing their illegal activities. Being an extremely dangerous phenomenon, permanently, in attention of the competent EU institutions, the Council considered that the measures taken by UN Resolution no. 1373 from 2001 must be supplemented, adopting in this purpose the aforesaid common-position.

The mentioned list is composed from names obtained, significantly, from information communicated by Member States' judicial authorities. The measures contained in that common-position became applicable by adopting Regulation (CE) nr. 881/2002 which is an act with general application, mandatory and directly applicable in Member States. Also, in the matter of cooperation is required the obligation of targeted states to mutual assistance for preventing and combating this phenomenon implicit to provide information competent U.E. institutions for updating this list, which was to be performed by other regulations and future decisions. Moving on in our approach, we will stop at the decision, which is a legal act from the category of secondary sources, binding in its entirety for its recipients. The decision, as the regulation, applies in its entirety, not being allowed a selective application, which is why we can say that this could lead to a confusion of juridical nature between those two normative acts. But, to the necessary clarify, should be noted that the decision states who are recipients of its rules while the regulation is directly applicable in each U.E. Member State. The

[1] www.eur-lex.europa.eu, accessed on 12.03.2017.
[2] www.eur-lex.europa.eu, accessed on 13.03.2017.

Council may adopt decisions which are binding and can be applied directly as provided therein. It is possible that the recipients of those acts to be inclusive various European organizations sense that we exemplify the joint Decision of the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy regarding the participation of European Union in various organizations for cooperation in preventing and combating terrorism[1]. In order to strengthen European security space, the Council adopted numerous decisions from which we mention the Council's Decision 2009/902/JAI from 30 November 2009 regarding the establishment of a European network of crime prevention(EUCPN) and for repeal the Decision 2001/427/JAI or the Council's Decision 2010/88/PESC/JAI regarding the signing in the name of the European Union, the Agreement between the European Union and Japan on mutual legal assistance in criminal matters, acts which targeted states must transpose into their own legislation. Conventions are legal documents concluded in order to appropriate legislation in a particular area of cooperation, these showing a particular importance in legislative policy developed at Union level. From these acts, stands up in the field of judicial cooperation, Convention adopted by the Council in accordance with art. 34 from TUE regarding mutual legal assistance in criminal matters between Member States of the European Union from 29 may 2000 and additional Protocol from 26 October 2001, Convention on simplified extradition procedures between the Member States of the European Union adopted on 10 march 1995 or Convention on extradition between European Union and Member States adopted on 27 September 1996. In our internal legislation, the legislature adopted two normative acts about the field of international police and judicial cooperation, that transpose in our state legislation a few of framework-decisions and decisions, aspect that confirms the thesis that these two categories of documents are relevant and produce significant effects in the Member States relating to the foregoing. For Romania, are relevant Law no. 302/2004[2] on international judicial cooperation in criminal matters and Government Emergency Ordinance no. 103/2006[3] on certain measures for facilitating international police cooperation.

So, Law no. 24/2000 on legislative technique requires the legislature to mention expressly the community acts that are transposed into national legislation, with all their identification elements, this obligation subsisting even in the event of partial transposition, situation when it will be made only to those sections/articles/paragraphs taken into consideration by the legislator[4]. Also, it is imposed to the legislator the obligation to identify the most effective legal solutions in preparing the draft laws so that these enjoy the efficiency and stability. In the same manner, should be noted that the validity of a legislative act is based, together with social interest, of internal legislative policy and the requirement to correlate with the rest of internal rules and of the requirement to harmonize national legislation with community legislation[5]. Simultaneously, in order to integrate the new organic law into national law the legislature must consider the draft legislative act to comply fully with the requirements found in the community legislation that Romania manifested the intention to internalize them. Not least, the law establish, in the process of elaboration and drawing draft laws, the obligation to ensure their compatibility with EU rules and the task of formulating proposals for amending and supplementing them when their provisions are no longer consistent with community law.

At governmental level, legislative harmonization is achieved through specialized bodies of the central government respectively through the ministries concerned. In the field of police and judicial

[1] www.eur-lex.europa.eu, accessed 2/27/2017.
[2] Published in the Official Gazette no. 594 of July 1, 2004.
[3] Published in the Official Gazette no. 150 of February 28, 2014.
[4] Art. 45 of Law no. 24/2000, published in Official Gazette no. 139 of March 31, 2000.
[5] Art. 6 para. (1) of Law no. 24/2000.

international cooperation we believe that, in the main scope, have attributions the Ministry of Foreign Affairs, Ministry of Interior and Ministry of Justice, as specialized institutions of the central public administration. Regarding the first institution, according to Government Decision number 16/2017[1] regarding to organization and functioning the Ministry of Foreign Affairs, these one, by Department Legal Approximation, approves draft laws legislation that aim to provide the transposition or ensuring the framework to direct application into national law EU legislation or the ones that have European relevance and examines, in terms of compatibility with EU regulations, legislative proposals for formulating the government's viewpoint on them[2]. Therefore, the main activity of Department Legal Approximation from the Ministry of Internal Affairs falls within ensuring the compatibility national rules with European Union law, this being subordinate to the Government Agent for the European Union Court Justice, that is carrying out its duties in the coordination of the Minister Delegate for European Affairs[3]. Similar powers are also provided to the Ministry of Justice, which, according to art. 6 pts. I pt. 3 from Government Decision number 652/2009 regarding the organization and functioning of the Ministry of Justice, has the obligation to evaluate internal legislation, within its competence, in terms of compatibility with communitary acquis and other international legal documents, to which Romania has expressed its intention to assume them, formulating, simultaneously, proposals to improve the existing legal framework. As we are interested, internationally, Ministry of Justice exerts the most important prerogative, which consists of conducting skills of central authority in the area of international judicial cooperation[4]. Also, Ministry of Justice takes part in the Council of Justice and Home Affairs and all other international meetings involving one of its fields of competence[5]. As a specialized body of central public administration, Ministry of Interior, exercise, at its turn, responsibilities in harmonizing national legislation, this goal being a permanent one, assumed of Romania with its accession to the European Union. So, in its area, Interior Ministry ensure the fulfillment of the obligations assumed by Romania and participates actively in the processes of policy elaboration and drawing up community legislation[6]. Also, Interior Ministry participates, in the same manner as the Ministry of Justice, at the achievement of national strategies and programs developed in line with EU policies.

Within this function, for its area, Ministry of Internal Affairs shall represent Romania at the Council of Justice and Home Affairs and at the meetings of the EU Council and European Commission[7]. Not least, similarly, Ministry of Internal Affairs provides a higher degree of compatibility of national law with EU rules, submitting the same time every effort timeliness of transposition and implementation process for its fields of competence[8]. We have previously shown that the legislature transposed into national law a series of decisions and framework-decisions, legal acts of particular importance, governing forms and means of police and judicial cooperation. So, relevant in the field of international judicial cooperation in criminal matters is Law no. 302/20014.

[1] www.mae.ro, accessed on 03.13.2017.
[2]Art. 2 pt. 37 of H.G. no. 16/2017, published in Official Gazette no. 44 of January 16, 2017.
[3] Art. 2 para. (3) of O.U.G. no. 11/2017 on the organization and functioning of Government Agent for the Court of Justice of the European Union and the Court of Justice of the European Free Trade Association, published in Official Gazette no. 84 of January 30, 2017.
[4] Art. 6 pt. III, pt. 1 of H.G. no. 652/2009 on the organization and functioning of the Ministry of Justice, published in the Official Gazette no. 443 of June 29, 2009.
[5] Art. 6 pt. III, pt. 5 of H.G. no. 652/2009.
[6] Art. 1 para. (2) c)of O.U.G. no. 30/2007 on the organization and functioning of the Ministry of Internal Affairs, published in the Official Gazette no. 309 of May 9, 2007.
[7] Art. 3 par. (1) c) pt. 2 of O.U.G. no. 103/2007.
[8] Art. 3 alin. (1) lit. c) pct. 4 din O.U.G. nr. 103/2007.

This normative act, in its field of regulation, expressly stipulate to which forms of international judicial cooperation in criminal matters it applies. Also, it is worth mentioning that the legislature intended to regulate the situation when the law expressly applies to specific forms of police cooperation, namely when they are under the control of judicial authorities. Therefore, this law establishes the legal procedure for extradition, surrender under a European arrest warrant, transfer of proceedings in criminal matters, recognition and enforcement of judgments, transfer of sentenced persons, mutual legal assistance in criminal matters, in the end, leaving open the way for other forms of international judicial cooperation in criminal matters. Instead, by Government Emergency Ordinance no. 103/2006[1], Romanian legislator wanted the development of the internal legislation and to regulate the activities of an essential authority of police and judicial cooperation in criminal matters at international level, namely the International Police Cooperation Center. Although this authority has a significant role internally and internationally, it does not enjoy legal personality, being a structure within the General Inspectorate of Romanian Police. Similarly, by issuing this Emergency Ordinance, legislature expressly excluded any interference within the field of international judicial cooperation in criminal matters and in the sphere of international law and relevant community legislation in this matter.

This authority makes the connection with Interpol, Europol, SIS/Sirene, operational connection with SELEC, but also with the internal affairs attachés and liaison officers accredited both abroad Romanian and foreign accredited in Romania[2]. So, it is to be noted that this authority has major international powers, creating a bridge between the authorities in Romania and international channels responsible for preventing and combating cross-border crime. Turning to international legal acts on these two laws transpose into national legislation is is important to note that the report is disproportionate. So, Law no. 302/2004 transposes into national law the provisions of nine Framework-Decision while Government Emergency Ordinance no. 103/2006 transposes the provisions of a single decision and provides the legal framework necessary to implement two Council decisions. It is worth mentioning that, at the level of the Council of Europe, the reference document for regulating principle of mutual recognition is the Council Framework-Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States of the European Union. Relative to the competent authorities involved in the cooperation process, Law no. 302/2004 establishes these skills, depending on penal trial phases to the Ministry of Justice, the Public Ministry, and the Interior Ministry just for requests in criminal record. So, for all forms of cooperation, is under the jurisdiction of Ministry of Justice through its specialized department any request that is made during the trial phase or the execution of criminal judgments, while, for the stage of investigation and prosecution, all activities are under the jurisdiction of Prosecutor's Office attached to the High Court of Cassation and other prosecution units.

In general terms, cooperation, involves sending a request for judicial assistance by the Romanian central authority who receives, conduct regular control and, either executes or transmits the competent authority. We see that the central authority is carrying out this check regularly that involves verification of the requirements of form and substance governed by the law, by international documents ratified by Romania and, not least, the good practices established between states. However, the easiest way to cooperate is the direct transmission of requests for assistance, ensuring this way and the principle of celerity regulated by most proceedings in criminal matters, of course, if this method is stipulated in the incidental legal instrument. This method of transmission is provided in international

[1] Approved by Law no. 104/2007, published in the Official Gazette of Romania, Part I, no. 275 of April 25, 2007.
[2] Art. 6 of O.U.G. no. 103/2006.

legal instruments, a first shape imposing the transmission of the request only in an emergency, but with the obligation of communication of a copy to the central authority, while, for the second modality, transmission of the application being able to perform any situation. The law also provides for the transmission of the request electronic means, especially fax, if the requirements of authenticity, confidentiality and credibility are met. About this communication channel, in a court case[1], the High Court of Cassation and Justice rejected the criticism of the suspects who were the subjects of European arrest warrants. Thus, the Court said that faxes received by the Romanian authorities certify those copies as reflected in data transmission that are found in content mandates and making references to the fax number and e-mail. But, more than that, the Court noted that this solution is strengthened by the frequently use this rapid communication channel by Interpol. However, the Supreme Court ruled on the issue of pronouncing Romanian courts about certain aspects of criminal proceedings in the issuing of the European arrest warrant and on the accusations person subject to these mandates, stating that courts must be restricted to a check formal application attachment documents and determining the exact identity of the persons. This attitude is regulated in our legislation by applying the principle of mutual recognition and trust under the provisions of Council Framework-Decision no. 2002/584/JHA of 13 June 2002. In the field of judicial cooperation in criminal matters, particularly for the fulfilling measures taken by the judicial authorities, stands with an active role the International Police Cooperation Center.

According to Law no. 302/2004, this structure is informed, in most cases, on the measures taken by the judicial authorities either to meet them or to take action in another way. Turning to O.U.G. no. 103/2006, International Police Cooperation Center has, in police cooperation proceedings, an active role, exercising its jurisdiction, especially for exchange of information and intelligence. In essence, forms and means of police and judicial cooperation should converge towards the same goal, namely to prevent and combat crime in the EU, providing an area of security of EU citizens, facilitating the administration of justice and, not least, creating an homogeneous and effective institutional framework. Normative acts alleged follows that, the first and most common form of cooperation is the traditional one, based on mutual assistance requests information on arrests or other procedures. Next would be relatively formal cooperation, such as, for example, which used in Eurojust. Further, was found co-active cooperation, by combined teams joined as it is regulated in the art. 13 from Convention MACM EU for the 2000 or the Council's Framework-Decision of 06/03/2002 regarding the investigative teams merged.

Further, we have cross-border cooperation regulated as cross-border pursuit and surveillance. We also know another form of cooperation in the matter of international police established by shared institutions such as Europol, or through development of common databases such as the Schengen Information System and finally, cooperation based on the principle of mutual recognition. After transposition the international legal acts relevant for the police and judicial cooperation in internal legislation, meaning decisions and framework-decisions, we see that the Romanian legislator named the procedures of cooperation for the two segments, police and judiciary, distinct designations to avoid any confusion and to exclude any interference. Thus, Law no. 302/2004 uses the phrase "forms of international judicial cooperation" and O.U.G. no. 103/2006 uses the juxtaposition of words "specific cooperation activities and international police assistance", these activities being in the Law. 302/2004 as "specific modalities of international police cooperation". Next, the two laws regulates the principles

[1] Decision no. 2456 of June 21, 2010, delivered by the High Court of Cassation and Justice in case no. 800/46/2010 on www.legeaz.net, accessed on 03.18.2017.

governing the two forms of cooperation, which, analyzing them, we find that there are three common principles, respectively the principles of reciprocity, legality and confidentiality.

Further, O.U.G. no. 103/2006 regulates cooperation in home affairs attachés and liaison officers and pursuit. In the section on cooperation with the Member States of the European Union, are regulated, as forms of cooperation, exchange of data and information and other cooperation forms. In the last case, police assistance may be granted in special circumstances as, effective border control, major events of cross-border dimension in cases as major disasters and serious accidents, and for participating in joint operations.

Conclusions

Legal acts of European police and judicial cooperation international managed to become an effective tool in preventing and combating crime in the EU, which can be transposed into national law in a manner easy. Also, it seems that legislation allows the use of the most effective mean which is the request for judicial assistance, forwarded to the authorities of the Member States by any means of quick communication, of course, by respecting the conditions of authenticity. However, one should not overlook the role of Europol and Eurojust, which are strong pillars in strengthening the European security and justice.

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Leasing Agreement under the Provisions of Current Insolvency Code

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Abstract: The reason for promulgating the current insolvency law, Law 85/2014, was clearly to create an effective and appropriate legal framework for the collective enforcement of debtors in insolvency in order to ensure the recovery of claims they owed and implicitly to protect the current economic environment by saving viable businesses and eliminating those that have no chance of recovery. The reorientation of legislative policies in the field of insolvency, which also formed the basis of the elaboration of the current law of insolvency, imposed as a main purpose the maximization of the debtor's wealth, permanently aiming at giving the insolvent debtor the chance to recover, thus succeeding in harmonizing the international norms with the national legislation. Through the institutional steps aimed at consolidating the doctrinal and jurisprudential opinions in the field, the status of the leasing agreement under the insolvency procedures was codified, legalizing the fate of the current agreement in progress at the date of opening of the insolvency procedure, as well as the recording of the debts resulting from it following the termination, when the user/lessee enters the insolvency proceedings, the situation of this contract being specifically dealt with by the current Law 85/2014.

Keywords: leasing; insolvency; debtor; creditor

According to the doctrine, the insolvency procedure establishes the set of legal norms, which seeks to obtain the necessary funds to pay the debts of the debtor in insolvency to its creditors, under the conditions established differently by categories of debtors, by judicial reorganization or by bankruptcy (Carpenaru, 2014, p. 725).

Described in an original but perfectly relevant way by a comparison where, *if the business is an adventure, then insolvency is the consequence of the adventure that ended badly* (Piperea, 2009, p. 177), we can still retain the definition given to it by law, whereby "*insolvency is that state of the debtor's patrimony which is characterized by insufficient funds available for the payment of certain, liquid and due debts*"[2]. *Jurisprudence has characterized insolvency as the state of the debtor's patrimony which is characterized by insufficient funds available for the payment of outstanding debts.*[3].

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[2] Art. 5, pct. 29, Law no. 85/2014 on the procedures for preventing insolvency and insolvency was published in the Official Gazette, Part I, no. 466 of 25th June 2014.
[3] C.A. Constanta, Commercial, maritime and river department, tax and administrative due process, Decision no. 2037/COM/2007.

The notion of "insolvency" is the fundamental element around which the legal construction of the insolvency procedure was enacted. *The insolvency procedure is* therefore *the way the law and the courts organize the failure of the business* (Piperea, 2009, p. 177).

The state of insolvency differs as we have shown from bankruptcy, which is characterized by the superiority of debtors' liabilities to those of his assets. The notion of insolvency will therefore imply a difficult patrimonial situation of the professional, characterized by the imbalance through which the liability exceeds the asset, determining the impossibility of fulfilling the assumed payment obligations on time and in good conditions.

De *lege lata*, the state of difficulty differs from the state of insolvency by the fact that the holder of the undertaking in difficulty faces or is able to cope with the outstanding debts. The occurrence of this situation may lead to the opening of the insolvency procedure, which, as established by the current legal norm, aims at providing: "*the establishment of a collective procedure for covering the debtor's liabilities, with the granting, where possible, of a chance of redressing his activity*[1]".

The fundamental condition for the debtor to be declared in insolvency will be to cease the payment of certain, liquid and outstanding debts due to the insufficiency of cash funds, this cessation without being the result of the imbalance between the asset and the liability of its patrimony, which defines his state of insolvency.

In the previous form of the Insolvency Law (Law 85/2006, Article 86), a number of principles applied individually to certain categories of agreements which were in progress at the date of the opening of insolvency proceedings were also regulated.

Thus, the legislator has, both in the old and in the current regulation, perpetuated a special treatment for the credit, labor and lease agreement (in which the debtor is the lessee).[2] The current law on insolvency, however, proposes improved solutions in these matters, which are likely to contribute to the uniformity of interpretation and make it possible to apply uniformly and effectively the regulation of insolvency.

It is remarkable, as a novelty, that the importance granted by the legislator to the regime of registering the creditor's receivables resulting from the termination of the leasing agreements in the statement of affairs is stipulated in the present regulation in art. 123, **paragraph 11**, correlated with art. 105, the special regime of their termination being concomitantly introduced.

The new law on insolvency[3] brings among the main elements of novelty the individualization of regulations applicable to the leasing agreement, if the user/lessee is subject to insolvency proceedings.

[1] Art. 2 of Law no. 85/2014 on the procedures for preventing insolvency and insolvency was published in the Official Gazette, Part I, no. 466 of 25.06.2014.

[2] According to the text of the normative act in question, namely Law 85/2006 abrogated by the introduction of the new Insolvency Code, one can find particularities of the rental agreement in progress at art.91, nuances of the legal regime of the agreement for sale of a movable property, sold to the debtor, but not paid by him and still in transit at the date of the opening of the procedure, at art.87, the netting agreement at art. 88, commission at art. 89 and consignment at art. 9 0.

[3] Law 85/2014 – Procedures for preventing insolvency and insolvency, published in the Official Gazette no. 466 on 29th June 2014, abrogates: Law 85/2006 on the insolvency procedure, Law 381/2009 on the introduction of preventive legal settlement and ad-hoc mandate, OG 10/2004 on the bankruptcy of credit institutions, sections 1–3 of cap. III, cap. IV and art. 83 of Law 503/2004 on the financial recovery, bankruptcy, voluntary liquidation and dissolution in insurance activity, Law 637/2002 on the regulation of international private law relations in the field of insolvency, art. 175 of Law 187/2012 on the implementation of Law no. 286/2009 on criminal code, art. 81 of Law 255/2013 for the implementation of Law no. 135/2010 on the code of criminal procedure and for the amendment and addition of some pieces of legislation comprising criminal process provisions.

The specificity of such a complex agreement, under the old legislation, has generated many doctrinaire controversies, but has also raised real practical difficulties. The old insolvency law no. 85/2006 did not contain special rules on leasing agreements or receivables arising from these agreements, which generated a non-unitary judicial practice.

By the institutional approaches aimed at consolidating the doctrinaire and jurisprudential opinions, they succeeded in codifying the status of the leasing agreement under the insolvency procedures, legalizing the fate of this agreement in progress at the date of the opening of insolvency procedure, as well as the recording of the debts resulting from it after termination when the user/lessee enters the insolvency proceedings, the situation of this contract being specifically dealt with by the new Law 85/2014.

Under the old regulations (Law 85/2006), two hypothetical situations were distinguished, as follows:

-the hypothesis of maintaining the agreement in progress by the legal administrator, in which case the leasing company was the holder of a non-due claim, which was registered with this qualification in the final table of debts and was to be paid by the debtor as the installments became due (Moțiu, 2014, p. 124);

-when the agreement was denounced by the court administrator, several opinions stand out from the doctrine about the application and enrollment in the claim table of the criminal clause estimating the damage to the total lease installments owed by the debtor from the termination to the completion of the agreement[1].

Opinions according to which the termination of the leasing agreement in progress at the date of declaring the opening of insolvency proceedings on a legal basis cannot be assimilated to a default of the debtor for non-fulfillment of the obligations, have been supported in the doctrine. Thus, in this situation, the installments unpaid at the date of the termination of the agreement and the damages set by the syndic judge should have been written in the debts table, at the request of the financing lender, who in any case benefited from the ordinance for the regulation of leasing operations, as well as under the right of ownership of the funded property, the right to re-enter into its possession.

In another perspective, it is argued that, on the contrary, when establishing the claim to be included in the table, the value of the criminal clause should also be included, this being an anticipated assessment of the prejudice suffered by the creditor, on which the parties have expressed their consent of will.

From the jurisprudence in this matter, however, we note that, in most cases, the financier/lessor filed an application for enrollment at the statement of affairs, claiming the equivalent of unpaid installments up to the date of the termination of the agreement[2], based on a commissary pact (generally grade IV) expressly included in the leasing agreement; late-payment penalties until the date of the opening of the

[1] Although stated as abusive by some courts, on the basis of the provisions of Law no. 193/2000 on unfair terms in the agreements between professionals and consumers, it should be remembered that this rule does not, however, affect relations between professionals.

[2] Its legal ground is art.15 of OG 51/1997 which imperatively regulates that "Unless otherwise provided in the agreement, if the lessee/user does not execute the obligation to fully pay the leasing installment for two consecutive months, calculated from the due date of the leasing agreement, the lessor/financier has the right to terminate the leasing agreement and the lessee/user is obliged to return the property and pay all the amounts due until the date of restitution under the leasing agreement".

procedure for each outstanding and unpaid installment[1]; damages representing the totality of the installments after the termination[2].

The financier/lessor under the legal regulations thus reverts to possession of the property, whose legal owner was, but, under the terms of the agreement, could also claim the payment of the installments for the entire period of the canceled contract, under the title of criminal clause[3]. He therefore had a double repayment because the creditor claimed to enroll the conventional penalties covering the total amount of the leasing agreement in the receivables table but at the same time he remained in the possession of the financed asset, as its owner, and under the Ordinance for the regulation of leasing operations, the user/lessee is obliged to return the property in the event of termination of the agreement. By recovering the asset, the financier/lessor could capitalize it, thus collecting its value either by selling the asset to a third party or by concluding a new leasing agreement.

The lack of explicit regulations of these situations not only led to a non-unitary judicial practice[4] but obviously, this behavior of creditors who invoked claims from leasing agreements was meant to frustrate every effort of the debtor and even the other creditors of the debtor in the prospect of a possible recovery and return to the economic circuit, leading inevitably to bankruptcy.

Starting from the different views expressed in the doctrine and from the examples provided by the non-unitary judicial practice, the new regulation addresses this issue in a legislative way, succeeding in the harmonious and balanced combination of the following principles: the avoidance of harmful destruction of the active assets by losing an essential asset in the continuation and eventual recovery of the insolvent debtor's activity, as well as the creation of a safety situation in favor of the financing creditor, which will continue to enjoy the prerogatives of ownership of the asset (Bufan, Motiu, & Diaconescu, 2014, p. 575).

[1] These have conventional grounds, the value applicable as penalty being obviously inserted in agreements.

[2] These damages were claimed as a result of a criminal clause inserted in the general non-negotiable conditions of financial leasing agreement and which in many cases also contained the residual value.

[3] In the case in question, the parties have regulated that in this situation (of the culpable termination) the objector's indemnity should be calculated by debiting the user "with the sum of the outstanding payments and the net leasing installments that would have matured until the end of the contractual period, as well as a possible calculated residual value of the leased asset, including capitalization costs, instead, the company will credit the user with the net income resulting from the capitalization of the leased asset up to the amount of the overdue receivable as well as the related interests. "It is therefore considered that this arrangement agreed between the parties (according to Article 11) - to which it is applicable in relation to the date of the conclusion of the leasing agreement, the Civil Code of 1864, is a true criminal clause since the extent of the damage and the amount of the damages in case of culpable termination of the leasing agreements were determined in advance, so the parties established in advance the equivalent of the damage caused to the objector. (Decision no. 85/2014 pronounced by DÂMBOVIȚA High Court on the date of 31-01-2014 in the dossier no. 1906/120/2013/a30).

[4] Even if such a clause providing for the termination for the non-payment at least two installments is stipulated in the agreement and is in accordance with art. 15 from O.G. 51/1997, this clause may be invoked by the financier lessor solely until the opening of insolvency proceedings, irrespective of any notice of its opening, as the effects of the opening of proceedings are lawful. After the opening of the insolvency proceedings, the payment of the installments cannot be achieved because in most cases the administration right of the statutory administrators is suspended, the debtor's bank accounts are blocked, the liquidities must be handed over to the judicial administrator together with all the assets and accounting documents of the company. The Court of Appeal considers that the non-payment of the installments according to the agreement cannot be guilty in these circumstances, any termination is excluded and the fate of the agreement will be determined by the judicial administrator in the conditions of art. 86 par. 1 of Law 85/2006. For all these arguments, the solution of the syndic judge, which rejected the creditor's registration in the claim table with the amount of 9800 Ron + VAT with the title of damages, is fully legal and sound, based on art. 13 lit. C of the leasing agreement because this amount depends directly on the possibility of termination of the agreement. As stated above, after the opening of the insolvency proceedings, the intervention of the termination is excluded, and under these conditions the debtor does not owe any amount as damages. Based on the provisions of art. 312 par. 1 C.p.c., the lodged appeal will be rejected and the decision under appeal will be maintained as fully legal and sound. (Cluj Court of Appeal, Commercial and fiscal and administrative due process department, decision no. 2016 of 14th September 2010).

As a *ratio legis* under the Principles of the World Bank, the UNCITRAL Legislative Guide, as well as the provisions of the Civil Code, the new rules regarding the management and registration of debts resulting from a leasing agreement in progress at the opening of insolvency proceedings have been laid down.

Because leasing generally represents an opportunity to finance the technological progress of industrial enterprises, the law of insolvency limits the application of the rule strictly to the categories of professionals as defined by the Civil Code, as well as to the autonomous administrations, excepting the professionals who exercise Liberal professions, pre-university and university education units and the entities listed in art. 7 of GO 57/2002 from its application.

To the extent that, at the maturity date, the debtor does not execute the undertaken obligation, that is, the leasing installment established by the agreement, then the creditor has several legal options to make use of and achieve its claim right.

Of course, it is necessary to specify the exclusion from the scope of matured certain and liquid debts, the obligations of the debtor having a nature other than monetary debts, since the rules of the common law and not the insolvency procedure (Carpenaru S. , 2016, p. 632) shall apply to them.

Therefore, in the case of the leasing agreement under execution at the date of the opening of the insolvency proceedings, by way of exception to the rule established by art. 123, par. 1, thesis 1, in his case, if the financier does not express surely its consent for the maintenance of the agreement, within 3 months from the date of the opening of the procedure, it shall be considered terminated from the expiration date of the term (art.123, par. 12, L85/2014) (Carpenaru S. , 2014, p. 65).

The present regulations also provide for the situation in which the financier/lessor, however, will transmit a notice of his express intention to terminate the agreement[1] within the prescribed time limit of 3 months from the opening of the procedure. In this case, the agreement is deemed to be terminated after the expiration of a legal term of 30 days from the date of receipt of the financier's notification by the legal administrator.

The insolvent practitioner will also be able to request the denunciation of any financial leasing agreement in order to maximize the debtor's assets.

The date of denunciation of the agreement shall be deemed to be the date of notice of the denunciation from the judicial administrator/judicial liquidator. Therefore, we note that, in accordance with the provisions of par. 12 of art. 123, the leasing agreement may be denounced:

- by law, upon expiration of 3 months from the date of the opening of the procedure - unless an express agreement has been obtained from the financier;
- by law, at the request of the financier before the expiration of the 3-month period - the financier sends a notification to the judicial administrator requesting him to denounce the agreement, and it shall be deemed denounced upon expiration of 30 days from the date of receipt of the notification;
- by the judicial administrator/liquidator of the agreement, under the prerogative of denunciation of any ongoing agreement (Godîncă-Herlea, 2015, pp. 79-94).

[1] "The notice of denunciation referred by the co-contractor to the judicial administrator must be unambiguous in the sense of requesting the denunciation of the agreement, without being able to give the extinguishing effect provided for by the law for such notification only on the grounds that the content of the denunciation denotes the intention of the co-contractor to terminate the agreement" (Bucharest Court of Appeal, Civil Department VI, Civil decision no. 1657/11.09. 2012).

According to the doctrine, however, one must underline the difference between the situation of the denunciation of the leasing agreement and the termination of the leasing agreement.

Thus, in the case of denunciation, there will be no incidence of the rules for writing the claim in the statement of affairs, expressly stipulated for the case of the termination of the agreement (situation where there must be *de plano* or a fault of the debtor, arisen after the opening of the procedure). In the event of denunciation, the financier is entitled to lodge a judicial action, which will return to the jurisdiction of the syndic judge (art. 123, par. 4) (Bufan, Motiu, & Diaconescu, 2014, p. 576).

However, when the leasing agreement is terminated, under L85/2014, we note from legal regulations that the financier/lessor is given the option of choosing between:

The transfer of ownership of the asset subject to the leasing agreement. In this case, the financier/lessor will acquire a legal mortgage on that asset, having a rank equal to that of the leasing operation, being registered in the statement of affairs in accordance with the order established by art.159, par. 1, point 3 of the law. The amount of the receivable to be included in the receivables table is the equivalent of the outstanding installments and accessories invoiced and unpaid at the date of the opening of the proceedings plus the remaining amounts owed by the insolvent debtor on the basis of the leasing agreement, without exceeding the market value of the asset, which will be determined by an independent evaluator. In this situation, the debtor continues to make regular payments until the full value of the leasing agreement is paid.

The recovery of the assets subject to the leasing agreement, in this case the creditor was given the opportunity to register at the creditor's table according to art.161, item 8 of the insolvency code, with the equivalent of the installments and accessories invoiced and unpaid at the opening date of the procedure, to which the remaining amounts due by the debtor under the leasing agreement will be added, the cumulative amount decreasing with the market value of the recovered asset, determined by an independent evaluator.

We therefore bear in mind the overthrow of the roles in adopting the decision on the fate of the terminated leasing agreement, subject to the imperative condition of a debtor's fault, arisen after the opening of the procedure, the financier having the right to choose between the two options that the legislator has limitedly regulated in the legal norm.

If the agreement is maintained after the date of the opening of the insolvency proceedings and the insolvent debtor in the position of the user/lessee will pay the debts arisen from the ongoing leasing agreement on the maturity dates, then the completion of the agreement will be considered successful and will be subordinated to the provisions of GO 51/1997, respectively it will be completed by the user's option to transfer the ownership right, to return the asset or to continue the leasing agreement.

For receivables acquired prior to the date of declaring the institution of insolvency proceedings, and entered in the receivables table, they will follow the legal regime of the guaranteed receivables.

It is therefore worth considering the initiative of the legislator, which, through the reorientation of the legislative policies in the field of insolvency, which also stood at the basis of the elaboration of the current law of insolvency, succeeded in harmonizing the international norms with the national legislation and imposed the main purpose of maximizing the debtor's wealth, aiming permanently at giving the insolvent debtor the chance of redressing.

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REALITIES AND PERSPECTIVES

Offensive Crime in the Romanian Criminal Law

Ion Rusu[1]

Abstract: In the paper I examined the constitutive elements of the blackmail offense provided by the Romanian law, as well as the elements of resemblance and difference in relation to the previous law. The examination also includes references to the judicial practice adopted by the courts in Romania, as well as some opinions on the application of the more favorable criminal law, having of course some elements of differentiation between the previous and the current regulations. The novelty elements of this paper consist both in the examination carried out as well as in the considerations regarding the application of more favorable criminal law in transient situations. The work may be useful to students in faculty and practitioners in the field of law enforcement.

Keywords: Constitutive elements; more favorable criminal law; objective side; subjective side

1. Introduction

As it results from its legal content, the offense of blackmail is the deed of a person who, by compulsion, forces another person to give, do, do or do something, the perpetrator seeking non-patrimonial benefit for himself or for another.

In another way, the same offense will be retained in the situation where, by threatening to commit a real or imaginary act, compromising the threatened person or a member of his family, the perpetrator pursues the above-mentioned purpose.

As an aggravated way, the above-mentioned facts will be considered more serious and sanctioned accordingly, when the perpetrator seeks the unjust acquisition of a patrimonial benefit, even for another person.

According to the recent doctrine, "the offense of blackmail refers to acts that restrict the person's psychological liberty, which he causes by constraint to do acts that he would not have wanted to carry out, this constraint being made for the purpose of obtaining unjustly to use one who exercises the constraint. If the benefit pursued by the constraint has patrimonial character, the act of constraint will be more severely sanctioned" (Toader, 2013, p. 136).

In another, older, but up-to-date opinion, it was argued that "the social danger posed by the offense of blackmail results from the attention to the psychic liberty of the person, in order to make an unfair advantage" (Roşca, 1971, p. 323).

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Another author claims that "it is noted that the PCN, on the one hand, makes a distinction between the act of blackmail committed for non-patrimonial use and the one committed to obtain an unfair patrimonial benefit (the latter being the only aggravated form of the offense) And, on the other hand, places on the same level of gravity the basic form with the one consisting in committing the act by threatening to vitiage a real or imaginary fact, compromising the threatened person or for a family member" (Udroiu, 2014, p. 112).

2. Similarities and Differences between the Previous and the Current Regulations

The offense of blackmail was also provided in the Criminal Code of 1969 in Art. 194, with the same marginal name, but with some changes in both the legal content and the penalty limits.

Thus, in the new law the person's coercive action is criticized without expressly mentioning the ways in which the action is carried out, while in the previous law the incriminated action consists in coercion through violence and threats.

Also, in the new law a distinction is made between the purpose of acquiring a non-patrimonial or patrimonial benefit, the first being provided as a typical way, while in the second, the aggravated way of the offense, unlike the previous regulation in which both purposes are provided in The normative way type.

Another differentiation consists in the compromising act that is the object of the threatening with the vileag that must refer directly to the threatened person or to a member of his family, while in the old law, the compromising deed of deportation refers to the threatened person, Her husband or a close relative.

A last differentiation that we are referring to refers to the penalty limits that differ, in the new law for the two types of way being the one-to-five-year prison, while in the previous law the punishment provided was imprisonment from 6 months to 5 years.

In both laws, although the content of the aggravated ways differs, the punishments are identical, respectively, the prison from 2 to 7 years.

3. Examination of the Offense

3.1. Preexisting Elements

A) The legal object

The special legal object is represented by the social relations related to the person's psychic freedom.

In the doctrine it was appreciated that "adjacent are protected and the social relations that are injured or endangered by the injustice pursued by the perpetrator. These relationships may be related to the person's property (personal property) if the constraint is exercised in order to obtain material benefit that damages the victim; Or social relationships may be related to an

interest of another nature (service, family, professional, etc.), and the pursued benefit may also be moral. Thus, the sphere of social relations emerging adjacent is broader, these relationships varying according to the nature of illicit use ". (Rosca, 1971, vol. III, p. 324)

B) Material object

The offense of blackmail is, in principle, not material, since the psychological freedom of the person is a personal right.

If the perpetrator exerts physical violence on the victim, the material object will consist of the victim's body.

At the same time, "the material object of the offense must not be confused with the profit (benefit) achieved by the blackmailing; This is a consequence, not an aspect of the blackmail offense. " (V. Roşca, 1971, vol. III, p. 324).

C) Subjects of the offense

Active subject

The active subject of the offense may be any natural or legal person who has criminal capacity.

Criminal participation is possible in all its forms, namely co-authoring, instigation and complicity.

The passive subject

Passive matter may be any natural or legal person.

The plurality of passive subjects will lead to the containment of a plurality of offenses.

3.2. Constitutive Content

A) The objective side

The material element of the objective side is achieved by a coercive action in the case of par. (1) and threat, in the case of par. (2) of art. 207 C. pen.

In the doctrine it has been considered that the material element refers to "constraining a person by any means to give (delivering a good), to do (to adopt a certain behavior or to act in a certain sense), not to do (the omission to adopt a certain behavior Or to act in a certain way) or to suffer (bearing a patrimonial or non-patrimonial damage) "(Udroiu, 2014, p. 112).

Since the law does not expressly provide the means by which the victim's coercion is achieved, it follows from the interpretation of the text that this (constraint) does not only cover violence or threats but also other means.

In the older doctrine, it was argued that "constraining a person means a force (oblige) to a thing which he would not willingly do" (Rosca, 1971, vol. III, p. 325).

The same author claims that in the case of blackmail, the constraint must meet two conditions:

- the coercive action must be capable of causing a state of fear under whose control the person subjected to coercive action can no longer react morally in the sense of effective opposition to the perpetrator's claims;

- the coercive action must be taken in order to obtain a certain behavior on the part of the constrained person (to give, to do, not to do or to suffer) (Rosca, 1971, vol. III, p. 325).

Therefore, coercion "can be exercised, under para. (1) through a physical or psychological constraint. To constrain a person is to force them to do or not do anything against their will. Regarding the essence of the offense consisting of the violation of the moral freedom of the person, the coercion must be of the nature of producing the one against whom a state of fear is exerted, because only in this way the deed impairing the moral freedom of the person will constitute an offense against that freedom, Respectively the blackmail offense. Physical constraint can consist of any act through which a foreign force acts on the person to defeat his physical resistance. This foreign force can be the physical energy of the perpetrator or another energy put into action by him. He does not care about the means or form of violence. The blackmail absorbs in its contents only those acts of violence that cause physical suffering, which do not exceed the intensity of those referred to in art. 193 par. (1) C. pen. And punishable within the limits prescribed for offense or other violence. If the use of violence causes the victim to suffer traumatic injuries or the health of the victim is affected, the rules relating to the offense competition shall apply.

Psychological constraint implies that the perpetrator performs an act likely to inspire the victim to fear that in the future he or any person close to him will incur an evil consisting of committing a criminal offense or detrimental act having the art. 206 C. pen. Constraint must be effective. For example, it was considered that when the defendant asks the injured party to reimburse money and clothing for the return of lost documents to the injured party, there is no element of constraint, the main component of the objective side of the blackmail offense, and, consequently, This crime can not be detained, a solution that is also being applied under the new regulation "(Toader, 2013, vol. III, pp. 137-138).

In judicial practice it was decided that the act of the accused, acting as the chief police chief - a person exercising a public office within a public institution - to compel the person against whom a criminal complaint was filed for acts of violence, Threatening to change the legal framing in an attempt to commit a crime of murder, to pay a sum of money to the person who has filed the criminal complaint meets the constitutive elements of the blackmail offense provided in art. 194 par. (1) C. pen. Related to art. 131 of the Law no. 78/2000.

In another case, it was decided that according to art. 194 par. (1) C. pen, the blackmail offense is the compulsion of a person, through violence or threat, to give, do, do or do anything if the act is committed to unjustly gain a benefit for himself or herself for another.

Therefore, the defendant's act of constraining the injured party by threatening his death and his family members to give him a sum of money in order to acquire this amount of money unjustly meets the constitutive elements of the blackmail offense provided in Art. 194 par. (1) C. pen. For the existence of the blackmail offense, it is not necessary for the injured party to

indict the amount of money claimed, the constitutive elements of the offense being met even if the amount of money was not actually given because the blackmail is an offense directed mainly against The moral freedom of the person, the freedom infringed by the simple fact of her constraint to give, to do, not to do or to suffer anything against her will.

Essential requirements. The doctrine was noted that the offense will exist under the constraint of the active subject is to determine the victim to give, do not do or suffer something.

To give something "means to perform an act of remission, self-filing. In judicial practice, it was considered that the offense exists where the accused claimed money for not reporting people you surprised by stealing goods store. In this situation, the blackmail offense complies with the omission of the referral.

To do something means to act in a certain way at the request of the person who exercises the constraint, such as signing an act, evacuating a room or a building, etc.

Doing nothing is to refrain from an act, from an action, for example, not to make a complaint, not to start a trial, not to participate in a competition for posting a post, etc., omission alleged by the constraint.

To suffer something involves the imposition of material or moral damages, such as the loss of money, the acceptance of a humiliating situation, etc. The offense of blackmail exists regardless of whether the constrained person satisfies the perpetrator's claim or not" (Toader, 2013, vol. III, p. 138).

In judicial practice, it was decided that, from the point of view of the material aspect of the objective side of this crime, it is necessary to prove the existence of a coercive action - by violence or threat - by the perpetrator, a kind of fear, under the control of which the person forced to Can no longer react and opposes effective resistance to the claims of the perpetrator. However, the threats of the attorney that "will remove them from the building if they do not pay the amount of EUR 37,000 are not in the nature of an actual coercive act that meets the above requirements.

In the case of par. (2) of art. 207 C. Pen., The material element is accomplished by a action of threatening the victim by giving a real or imaginary fact, compromising the threatened person or for a family member.

We note that this time, besides the psychological freedom of the person, the social relations regarding the honor or dignity of the person are also affected. The threat action may be aimed at rendering real facts such as committing or participating in committing a crime, involving the victim in illicit activities of any kind (for example, committing tax evasion facts). Because the law does not distinguish, the threat may also concern other past or present activities of the victim, which are related to the current life, even in some intimate aspects.

The concrete action of deportation may be accomplished against other persons, by any means.

There will be no such offense when the facts that are the subject of the threat (real or imaginary) have been brought to the attention of public opinion, without any other novelty elements (Udroiu, 2014, p. 121).

Concerning the concrete actions by which the victim's threat is carried out, we refer to the examination of the material element of the threat offense, made in the previous section.

Essential requirements. The threat action must have as its object the rendering of a real or imaginary fact, compromising the threatened person or the person threatened or for a member of his / her family.

By the phrase of giving meaning is meant an action by which the active subject brings to the knowledge of other persons, by any means of that real or imaginary act.

This real or imaginary act must be such as to harm the honor, dignity, profession, and reputation of the person to whom it relates.

In judicial practice it was noted that the act of the defendant who, in his capacity as a journalist, threatened the injured party with the vitiation of compromising facts for his image and his family, requesting him a sum of money not to publish an article in this sense, meets the constitutive elements of the blackmail offense. It constitutes complicity to the offense of blackmail the act of repeatedly transmitting the requests and threats of the author, facilitating his activity, in order to determine the victim to remit the amount of money claimed. To make a compromising act known is to bring it to the attention of others. He does not care if the is done in a certain way. Also, it is irrelevant if that deed is real or imaginary. It must be compromising for the threatened person or for a close relative.

In another case, it was decided that in order to be able to withhold the offense of blackmail, the following conditions must be met cumulatively: existence of constraint in order for the injured party to give, do, do or do something if the act is committed Unjustly gained a benefit for himself or for another, and the constraint is made by threatening to condemn a real or imaginary act, compromising the threatened person, a spouse or a close relative. In the present case, the offense of blackmail is carried out by all its constitutive elements: the injured party R.M. was forced to conclude an alienation contract by threatening to start criminal investigations for the tax evasion offense.

The immediate consequence is a state of danger that is created on the victim's psychic freedom.

Between the action of constraint and the state of danger, the existence of a causal link must be established.

Both doctrine and judicial practice have highlighted the differences between blackmail and robbery.

One of the authors, insisting on the differences between blackmail and robbery, points out that "if the injured person surrenders the constraint exerted by the perpetrator, there must be a period of time between the exercise of the constraint and the victim's activity of giving Do, do not do or suffer anything; Unlike robbery (crime against the patrimony), in the case of an aggravated blackmail crime aimed at obtaining a patrimonial benefit (a crime against freedom), the danger is future and it is necessary to have a period of time between coercion and surrender of the requested asset" (Udroiu, 2014, p. 117).

In this respect, it has been decided in the judicial practice that the two offenses are distinguished by the fact that the principal legal object of the robbery is the patrimony of the person, while the main legal object of the blackmail is its moral freedom. Also, in the case of robbery, the practice of violence or threat is, as a rule, simultaneous with the taking of the good, whereas in the case of blackmail the violence or threat is exerted for the purpose of later acquiring an unfair advantage.

The same issues mentioned above also arise in relation to the link between rape and blackmail.

Thus, if, by constraint (of any kind) or threat the perpetrator requires a person to carry out a sexual act of any kind with him, and the victim succumbs immediately, it will be the responsibility of the author to commit the rape, not the offense Of blackmail. If the same actions concern the future maintenance of a sexual act, the deed will meet the constitutive elements of the blackmail offense.

As mentioned in the examination of the offense of deprivation of liberty illegally, if the release of a person deprived of liberty under the law requires a patrimonial or non-patrimonial benefit, the two offenses will be detained in a real contest (deprivation of Freedom illegally and blackmail).

B) Subjective side

The form of guilt with which the active subject of the offense acts is only the direct intention, qualified by the aim pursued by the perpetrator.

According to the doctrine, "the legislator understood to criminalize the injustice of seeking to profit, so that the blackmail offense exists even if the benefit is just" (G.) Would have been due to the perpetrator if he obtained it justly, that is to say, in a lawful way" (Toader, 2013, vol. III, p. 140).

The mobile has no legal relevance regarding the existence of the crime, being important in the process of individualization of the criminal law sanction made by the court.

4. Transitional Situations. Applying More Favorable Criminal Law

The comparative examination of the provisions contained in the two codes and the special law highlights the following more favorable assumptions of criminal law:

A) If the coercion of a person to give, to do, not to do or to suffer, committed for the purpose of gaining a non-patrimonial benefit, the deed meets the constitutive elements of the offense in the manner provided by art. 194 par. (1) of the old law and art. 207 par. (1) C. pen., The penalty limits between the two regulations being different (imprisonment from 6 months to 5 years in the old law and the prison from one to 5 years in the new law), the more favorable criminal law may be any of these.

Thus, if the court seeks to apply a punishment directed to the minimum prescribed by law, the more favorable criminal law will be the old law, which stipulates a lower minimum, and if it

is directed towards the application of a punishment oriented to the special maximum, the law in force.

If the court retains an attenuating circumstance, the more favorable criminal law will be the old law, and if it retains an aggravating circumstance, the more favorable criminal law will be the new law.

If the provisions of the special law apply, the limits of punishment also differ, in the old law being a prison sentence of 2 to 7 years, and in the new law one year and four months to 7 years and four months. The more favorable criminal law will be the old or new law, depending on the above.

B) When detaining the same act, but for the purpose of acquiring a patrimonial benefit, the deed meets the constitutive elements of the blackmail offense provided in art. 194 par. (1) C. pen. Of 1969 and art. 207 par. (3) C. pen. Because the penalty limits differ (imprisonment from 6 months to 5 years in the old law and the prison from 2 to 7 years in the new law), the more favorable criminal law may be any of the two.

Thus, if the court seeks to apply a punishment directed to the minimum or maximum prescribed by law, the more favorable criminal law will be the old law, as the penalty limits are lower.

If the court retains an attenuating or aggravating circumstance, the more favorable criminal law will be the old law.

If the provisions of the special law apply, the penalty limits also differ, in the old law, being between 2 and 7 years of imprisonment, and in the new law the imprisonment is 3 to 9 years and 4 months. Given the penalty limits, as a rule, the more favorable criminal law will be the old law.

C) If the act of threatening to deport a real or imaginary act of compromise for the threatened person, for her husband or for a close relative, for the purpose of acquiring a patrimonial benefit, the deed meets the constitutive elements of the blackmail offense provided for in art. . 192 par. (2) C. pen. Of 1969 and art. 207 par. (2) and (3) C. pen. In this situation, where the penalty limits are the same (imprisonment from 2 to 7 years), if no aggravating circumstances are taken, the law in force will apply.

If the pursued benefit is non-patrimonial, the limits of punishment differ, in the sense that the old law imprisonment is from 2 to 7 years, and in the new law the prison from one to five years. Given the limits of punishment, as a rule, the more favorable criminal law will be the new law.

If mitigating or aggravating circumstances are taken, the more favorable criminal law will be the old law.

If the provisions of the special law apply, the penalty limits also differ, in the old law being a prison sentence of 2 to 7 years, and in the new law the imprisonment from 3 years to 9 years and 4 months. More favorable criminal law will, as a rule, be the old law because the minimum and maximum limits are lower.

D) In the doctrine, it was appreciated that "if the act of threatening to deport a real or imaginary demeaning act for the persons who have established similar relations with those of the spouses or between the parents and the children, if they cohabit with The person threatened, for the purpose of acquiring a patrimonial benefit (for example, the concubine of the threatened person), according to C. pen., Will be classified under the provisions of art. 194 par. (1) C. pen. (Imprisonment from 6 months to 5 years) and according to the new law in the provisions of art. 207 par. (2) and (3) NPCs (2-7 years). Given the limitations of punishment, the provisions of C. pen. Are more favorable. If, in the above-mentioned hypothesis, the intended benefit is non-patrimonial, the more favorable law will be also C. pen., But only if the court is directed to the special minimum, because the deed will be framed in the provisions of art. 207 par. (2) (1-5 years) according to the NCP, which provides only the specially higher minimum" (Udroiu, 2014, p. 123).

In all circumstances, the more favorable criminal law will be applied only in relation to the court's decision to apply the criminal law sanction directed to the minimum or maximum provided for in the rule of incrimination, with some particularities aimed at restraining aggravating or attenuating circumstances or the incidence of the special law, Where the special quality of the active subject is considered.

5. Conclusions

Statistics show that the blackmail crime in Romania is a crime whose rate is quite high compared to other states.

The new regulation came with a number of modifications and additions, but also with the maintenance of provisions that have proven to be effective over time.

In addition to the actual examination of the constitutive content of the offense, I attempted to capture some interpretations on the application of the more favorable criminal law under the provisions of Art. 5 par. (1) C. pen.

The examination of several variants of more favorable criminal law enforcement proves to be useful both in didactic, but especially in judicial practice.

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REALITIES AND PERSPECTIVES

Passing Illegal Liberty in the Romanian Law

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Abstract: In the paper we have proceeded in examining the offense of deprivation of liberty illegally, in the light of the new legislative regulations brought by the new Criminal Code. We have paid particular attention to examining the constitutive content of the offense, focusing on the new changes and additions made with the entry into force of the new law. We have also insisted on identifying and reviewing the provisions that have been retained in the new regulation, which are of some importance with regard to the criminal liability of the natural or legal persons who have committed such offenses. The work may be useful to both the university and practitioners in the field.

Keywords: offense; constitutive content; more favorable criminal law

1. Introduction

Provided in the provisions of art. 205 C. Penalty, the offense of deprivation of liberty illegally consists in the deed of a natural or legal person who is illegally deprived of liberty by a natural person, and the hypothesis in which the victim is abducted and is in a state of impossibility, And expressing his will or defending himself.

In addition to the type of deed, the legislator also provided for more aggravating norms that would be retained if committed in the following circumstances: by an armed person, a minor, endangering the health or life of the victim, or the deed As a result of the victim's death.

The penalties provided for in committing the act in these ways are more severe, given the seriousness of the offense when committed under the conditions described by the legislator in the rule of incrimination.

It can be argued that the deprivation of liberty illegally is the act by which a natural or legal person, without acting on the basis of a legal ground lacking liberty a natural person.

With the exception of the limitations implicitly or explicitly revised by the legal norms which establish either forbidden activities or activities whose fulfillment is required by law, the individual must be guaranteed the possibility of moving and acting in accordance with his interests and no one It is allowed to abduct or restrict that freedom.

Illegal deprivation of liberty poses a serious social danger because it is a significant attribute of the individual who is defended by law, therefore, he despises a social value for the defense of which society is directly interested" (Roşca in Dongoroz and Col., Vol. III, 1971, p. 284).

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The particular social danger of the deed is determined by the situation of a physical person, namely, that he is lacking for a certain time the opportunity to take part in the social life, that is to say, according to his situation in the process of realization Material and spiritual values (Rusu & Rusu, 2010, p. 142).

The offense examined corresponds in the previous law to the offense incriminated in the provisions of art. 189 C. pen of 1969.

Between the two regulations there are some elements of resemblance, but also of difference, on which we will continue to insist.

Among the elements of identity we mention the marginal title, the legal content of the type, and the sanctioning of the attempt.

As a novelty, we notice the provision in the new law of another type of normative manner, which will be retained when the act is committed by the kidnapping of the victim who is unable to express his will or to defend himself.

Unlike the previous regulation, the new law gave up the criminalization of aggravated ways in the following circumstances: the simulation of official qualities by two or more persons together, or if, in exchange for the release, a material benefit or other advantage is required, committing the deed In order to oblige the victim to practice prostitution if the State, a legal person, an international intergovernmental organization or a group of persons are required to release the victim to perform or not to perform a particular act and to commit the act by a person belonging to -A group organized.

Also, the new law gave up the incrimination as a tentative of preparatory acts, which consist in producing or procuring means, instruments or taking measures to commit the deed of para. (4).

The last distinction between the two crimes concerns the sanctioning regime, the minimum and maximum limits of the punishments provided by the new law being lower.

Thus, in the type of way, one to seven years imprisonment is provided, compared to the previous law, where the punishment limits were between 3 and 10 years in prison.

Within the aggravated ways provided in paragraph (3) the penalty limits are between 3 and 10 years in prison, compared to the old law, where these limits are between 7 and 15 years in prison.

Also, in the aggravated way that resulted in the death of the victim, the punishment provided in the new law is imprisonment from 7 to 15 years and the prohibition of the exercise of rights, while in the old law the penalty limits are between 15 and 25 for years.

2. Examination of the Offense

2.1. Preexisting elements

2.1.1. The Legal Object

The special legal object is represented by social relations related to the protection of a person's physical liberty.

The secondary legal object is "social relations related to the person's health if the deed has endangered the victim's health or the social relations related to the right to life if the deed endangered the life of the victim or resulted in his death" (Toader, in G. Antoniu et al., 2013, vol. III, p. 127).

2.1.2. The Material Object

In the case of the type normative procedures provided in the provisions of para. (1), (2) and (3) let. A) and b), the offense is not material, since the action or inaction of the active subject affects a subjective right, namely, the freedom of the individual. In the case of the aggravated ways provided in paragraph (3) lit. C) and par. (4) when the act endangered the victim's health or life or resulted in the death of the victim, the material object of the offense is the victim's body.

2.1.3. The Subjects of the Offense

A) Active subject

An active subject may be any natural or legal person with criminal responsibility.

Criminal participation is possible in all forms, namely co-sponsorship, complicity and instigation.

In all cases, co-authoring and concomitant voting also attract the retention of the aggravating circumstance provided in art. 77 lit. A) if there are at least three participants, as well as other aggravating circumstances, depending on the concrete circumstances of committing each act.

B) Passive matter

A passive subject can be any natural person.

The plurality of passive subjects will lead to the retention of a plurality of offenses.

2.2. Constitutive Content

2.2.1.a. The objective side

The material element of the objective side is accomplished by an act or inaction by which the injured person is deprived of physical freedom, which in concrete terms implies his impossibility to move and act according to his own will.

Most often, the action by which the material element of the objective side is made involves physical or even psychic violence.

Also, "the material element of the deed is accomplished when the victim is immobilized or only kept against his will in any place, and when he is prevented from going where he would have wanted to arrive (for example, a person is Prevented systematically or at some point (by the perpetrator) from entering an institution in which he or she has access to make a complaint in time or make a claim, or the perpetrator knowing that the victim usually moves by bicycle , Produces a malfunction, cuts the tires or breaks a few spokes and that is because the victim can not reach a certain place at the time when her presence was necessary) "(V. Roşca in V. Dongoroz et al., 1971 , Vol. III, p. 287).

Regarding the material aspect of the offense, another author claims that "the law does not require an absolute impediment to the victim's movement, that is, a complete constraint regarding the freedom of movement of the victim, but may also appear as a partial constraint in the report An activity, a determined action the victim wants to accomplish (for example, the perpetrator prevents the victim from attending a meeting where he wants to take part). Deprivation of liberty must be objective, whether the victim was aware or not that the right to freedom of movement was paralyzed or restricted. The victim's error in the status of the victim is not equivalent to his or her consent. Deprivation of liberty can occur in any way and by any means likely to lead to this result.

Thus, the author can resort to direct actions, such as physical constraint (the author links the victim by being unable to move), or the administration of substances that paralyze the victim's will (for example,

gives him alcohol, drugs, etc.) or Hiding clothes to prevent the victim from moving or moral compulsion (threat), deception (misleading the victim through false information or exaggeration of the danger, or the obstacles he has in front of you, etc.). The offense may also be committed by indirect action (for example, the victim's internment in a hospice by misrepresentation of the state of fact before the authority).

If the fraudulent means by which the deprivation of liberty was made is a distinct offense, the perpetrator will answer for a real contest of crimes "(G. Antoniu, in T. Vasiliu et al., 1975, vol. III, p. 164).

In court practice, most of the time the offense under consideration is in real competition with other offenses.

Thus, one of the courts decided that the defendant, penetrating the victim's home to commit a theft and being surprised by it, slammed her to the ground and, after striking her several times, when she He stood up, pushed it first to the access door in the basement and then on the staircase, securing the door to the doorbell at the doorbell; After which he returned to his home, where he acquired more property, being caught by the police in the North Railway Station, these facts characterized by both the first instance and the appeal court - which rejected the defendant's appeal - as robbery (Article 211 of the Penal Code), deprivation of liberty illegally (Article 189 of the Penal Code). The appeal by which the defendant criticizes his conviction for the offense provided in Art. 189 C. pen., Is unfounded. The circumstance invoked by the defendant that the injured party has managed to leave the basement of the building by forcing the access door, which he has broken with a piece of wood, is irrelevant to the existence of the offense of deprivation of liberty illegally; Which is objectively important, is the fact that the defendant immobilized the victim in the basement against his will. Also, from the same point of view, it is not important that the period of time the victim was deprived of his freedom; It is certain that this interval was enough for the defendant to evade the goods and leave the scene.

In another relevant case concerning the detention of the real contest between the offense examined and the blackmail, the court ruled that the act of depriving a person of liberty and forcing him to pay a sum of money in exchange for his release, Constitutive elements of the offense of deprivation of liberty illegally in the aggravated form provided in art. 189 par. (2) C. pen, and not those of the offense of blackmail, as the blackmail is absorbed as a circumstantial element of aggravation in this aggravated form of the offense of deprivation of liberty illegally.

Undoubtedly, given the new changes made to the content of the offense of deprivation of liberty illegally in the new law, in which the defendant's act of forcing the victim, in exchange for his release, to pay a sum of money, is no longer criminalized, The application of the new law, the offense of deprivation of liberty illegally will be retained in real contest with the offense of blackmail.

Essential requirement. Because the deed committed to collecting the constitutive elements of the offense of deprivation of liberty illegally it is necessary to establish the existence of the essential requirement that the deprivation of liberty be illegal, contrary to the law.

The essential requirement will not be met when a citizen or more retains a person who has committed a crime and handles it to the police; In this case, it is necessary to carry out the detention only for the period necessary to hand it over to the bodies with attributions in the field; The essential requirement will not be met even in the case of parents who, within the exercise of parental authority, restrict the free movement of their child within certain reasonable but reasonable limits.

In court practice, it was decided that there was no offense of imprisonment if the defendants linked the aggressive victim to immobilize it until the police arrived.

If it is found that detention, preventive arrest, home arrest, or conviction were ordered if the person who knew it knew the person was innocent, the essential requirement would not be met, but the deed would meet The constitutive elements of the unjust criminal offense provided in art. 283 par. (2) C. pen.

In this respect, it has been decided in the judicial practice that the evidence administrated in question shows that the four persons were arrested and their investigation was made at the defendant's order. The order not to release the detainees, received by the defendant from the deputy of the former interior minister, was manifestly contrary to the law and, being unlawful, should not have been executed by him. Such an order, without the condition of legality, can not justify the exoneration of criminal responsibility of the person who executes it. This conclusion is also necessary because the law does not foresee legal consequences for failure to comply with such a provision. The defendant, receiving the illegal order and ordering his execution, became knowledgeable in lawful activity and had the impression that the illegal detention and investigation of the four minors were made in violation of legal provisions. To admit that criminally responsible persons are held accountable, motivating that a higher order would be to justify committing any offense in this way and to paralyze the performance of justice.

Also, "in the event of committing the offense in fulfillment of an obligation imposed by the law in compliance with the conditions and limits stipulated by it (the law order), respectively fulfilling an obligation imposed by the competent authority, in the form stipulated by law, if it Is not manifestly illegal (command of the legitimate authority), will operate the justifiable cause provided by art. 21 NCP" (Udroiu, 2013, p. 92).

In this respect, it has been decided in judicial practice that the existence of the offense is essentially conditioned by the requirement that the deprivation of liberty has been committed unlawfully. Individual freedom and people's safety are inviolable. There are categories of people whose personal situation imposes and justifies taking measures to restrict or deprive them of their freedom. It is the case of persons against whom the measure of preventive arrest or arrest, detained for the purpose of executing a custodial sentence, armed soldiers, hospitalized patients (psychologically dangerous, sufferers of some contagious diseases), athletes in training, Of certain categories of employees during the performance of certain tasks, actions. Only in situations such as those shown, the restriction or deprivation of liberty has no criminal significance, because either they are admitted being socially useful, or those who bear them fulfill an obligation, have consented to it with the acceptance of a certain status.

The offense under investigation may also be committed by inaction if the perpetrator, in the performance of his / her duties, refuses to release a person who has expired the period of preventive arrest (eg where the person in charge of a decision within a Detention center and pre-trial detention, refuses to release a person whose pre-trial detention order or detention order has expired).

The immediate consequence is the absence of the person injured by the freedom of movement and action in accordance with his will; In the aggravated ways provided in the provisions of art. 205 para. (3) (c) and (4) C. pen., The consequence is to endanger the health or life or death of the victim.

In judicial practice, it was decided that in case of an offense of deprivation of liberty illegally, the immediate consequence is highlighted by the impossibility of manifesting the victim at a time when his interests necessarily required a useful manifestation. The fact that the defendant drove the car

where they were and the injured parties for a relatively short distance is irrelevant in terms of the arrest of the offense foreseen and punished by art. 189 par. (2) C. pen., Since his criminal behavior has attempted the full freedom of the victims.

Regarding the period of time for which the victim was deprived of liberty, we specify that the law makes no clarification, which leads to the interpretation that it will be appreciated according to the concrete circumstances of committing each act. For the existence of the offense it is necessary that the period of time during which the victim was deprived of liberty should be sufficient for him to be unable to act according to his will.

The offense will subsist if the existence of the causal link between the incriminated action or inaction and the resultant result is established.

2.2.2. Subjective Side

The form of guilt with which the offense is committed is direct or indirect intent.

In the doctrine it was considered that "the judicial bodies should analyze the whole of the evidence material by reporting and the defendant to exclude the incidence of the error as a cause of non-immutability (for example, when the perpetrator had all the premises to consider that the freedom of movement to a person" (Udroiu, 2013, p. 95).

In the aggravated ways provided in the provisions of art. 205 para. (3) (c) and (4) C. pen., The offense is committed with praterintentia.

For the existence of the crime, the mobile and the purpose have no juridical relevance, these being of importance only in the process of individualization of the penal law sanction made by the court.

The offense will not survive if the interpretation of the evidence shows that the perpetrator did not act with direct or indirect intent.

Thus, in the judicial practice it was decided that the act of the defendant who, believing that he was abandoned, did not constitute an offense of illegally depriving a minor who was 6 months old with the intention to present him orphanage. By document executed juvenile defendant prevented to act and move according to the will of legal representatives, but to meet all the constituent elements of the crime of illegal deprivation of liberty, act of the defendant must have been committed intentionally.

In another case it was decided that correctly prosecutors who investigated the cause, and the trial court verified the legality of the solution, they decided not to prosecute holding that in terms of the offense of deprivation of liberty unlawfully are not met Since the applicant was released on 19 December 2005, when the Bucharest Tribunal requested his release, on the basis of the decision of 12 December 2005, which was final on 16 December 2005. The High Court, The solution not to initiate criminal prosecution against the workers of Rahova Penitentiary, a solution maintained by the court of law, finds its merits. In the absence of evidence showing that the release of the petitioner was done intentionally over legal deadline to deprive the liberty illegally PRP act complained of by the petitioner, legally and thorough trial court dismissed the complaint And maintained the solution not to initiate prosecution by prosecutors. For the existence of this crime, it is necessary for the perpetrators to act with intent, knowing that illegally a person is deprived of liberty. In the present case, although the petitioner was not released according to the conclusion of the Bucharest Tribunal, the communications sent by the court were not sufficiently clear, giving the possibility of erroneous interpretation of the date when the petitioner should be released (at the time of communication - 12 December 2005, on the date of the final closure of the agreement - 16 December 2005 or the date of

the second communication - 19 December 2005). The penitentiary workers had the impression that they had acted legally, not intending to impose illegitimate freedom on the petitioner. Obligation of the Ministry of Finance to pay the amount of 1800 lei with the title of moral damages to P.R.P., through civil sentence no. 350 of 6 March 2007 of the Bucharest Tribunal, the Civil Division 4, which is final (the case being suspended by the Bucharest Court of Appeal, the 9th Civil Division and for the Intellectual Property cases, by the closing of 15 June 2007); Makes evidence of the criminal intention of Rahova Penitentiary workers, but acknowledges the right to petitioner's moral damages for the period in which he stayed in the penitentiary over the legal term due to material errors. Even with the petitioner's decision, it is acknowledged that "the damage was due to a material error produced in the course of time of judicial activity, which implies an objective responsibility of the state."

3. Forms, Modalities, Sanctions

3.1. Forms

Although they are possible, preparatory papers are not sanctioned by law.

According to the provisions of art. 205 para. (5) C. pen., Attempted the offenses provided in para. (1) - (3) shall be punished.

The crime occurs when one of the consequences provided occurs in the text of the indictment or deprivation of freedom to move the injured person, bodily injury or health or death of the victim.

Since it is an offense continues, we will have a moment of exhaustion that identifies when the victim no longer is interfered with the right to freedom of movement or due to intervention in law enforcement or because Cancellation perpetrator be other causes that concern Other people's intervention, other factors, or the victim frees himself.

The offense can also be committed in a continuing form, in which case the exhaustion occurs after the last act of execution.

Given the circumstances of the offense, it may be absorbed into the content of other offenses, or may enter into real competition with other offenses.

Among the offenses in which the crime of imprisonment is absorbed illegally, we list simple murder, qualified murder, rape and robbery.

3.2. Modalities

The offense examined has two types of way, and four aggravated ways.

Types are provided in the provisions of paragraph (1) and (2) of art. 205 C. pen., And consist in the illegal deprivation of liberty of a person, as well as in the abduction of a person who is unable to express his will or to defend himself.

Also, the offense presents, as we mentioned four worsened normative modalities, which are stipulated in the provisions of art. 205 para. (3) and (4) C. pen.

As each of the four aggravated modes presents some particularities, we will proceed to examine them, in the order of the criminalization text, with examples of recent judicial practice.

A) The act of the act of an armed person (art. 205 para. (3) lit. A) C. pen.]

In order to keep this aggravated way, it is necessary for the perpetrator to have a weapon on him, which he must wear in such a way that the victim can observe it; The offense will subsist, even if the perpetrator does not threaten the victim with the weapon, it is sufficient for the victim to observe it, or for the offender to be intimidated by the offender in order to intimidate her (we mean the victim).

As the legislator does not make any further clarification in the text of the criminality, the notion of weapon is assimilated to all categories of weapons provided by Law no. 295/2004 on the regime of arms and ammunition, republished.

Thus, according to the normative act to which I refer, a weapon (as a general definition) means any object or device the operation of which causes the throwing of one or more projectiles, explosive substances, ignited or luminous, incendiary mixtures or the dispersal of gases harmful, irritating or neutralizing, as far as can be found in one of the categories listed in Annex (art. 2 pt. I.1. of law no. 295/2004, republished).

On the other hand, as regards the classification of weapons from a constructive point of view, the special law provides for the following classification:

- Compressed air or pressure guns;
- short firearms;
- long firearms;
- automatic firearms;
- semi-automatic firearms;
- Repeated firearms;
- one-shot firearms, and
- white weapons with blade (Article 2, points IV.1 to 8 of Law No 295/2004, republished).

On the other hand, according to the provisions of art. 179 C. Pen, weapons are the instruments, devices or parts so declared by law, and any other objects of a kind which may be used as weapons and which have been used for the attack are also assimilated to weapons.

Undoubtedly, it is clear from the interpretation of the provisions of the special law that the act of the defendant who has a weapon of the kind mentioned above, without actually using it, but which is visible to the victim, the aim being to intimidate it and to cause a fear, Meets the constitutive elements of the aggravated mode examined.

However, in the doctrine it was argued that from the interpretation of the provisions of art. 179 par. (2) C. pen., It appears that the perpetrator must have the assimilated weapon on him and actually use that weapon against the victim (Udroiu, 2013, p. 98).

We disagree with this interpretation, and we appreciate that if the perpetrator has an assimilated weapon on him, as stated in the text of Art. 179 par. (2) C. pen., For the existence of the offense, it is necessary for the perpetrator to carry that weapon (for example, a knife) in sight (to be visible to the victim) or to show its presence in a way Ostentatious (for example, by disconnecting the buttons from the jacket, as the knife is attached to the hip of the perpetrator).

This interpretation results from the provisions of Art. 179 par. (2) where the legislator establishes an obligation for that assimilated weapon to be effectively used for attack. Or, in the case of unlawful deprivation of liberty, the perpetrator does not attack the victim with intent to cause bodily injury or even death, but tries to intimidate her, to provoke a state of fear, which results in the attainment The aim pursued, namely the victim's unlawful deprivation of liberty.

B) The commission of the act against a minor (art. 205 para. (3) lit. B) C. pen.]

The essential conditions that also result from the text of incrimination are that the victim is minor at the time of committing the crime, and that the perpetrator knows his minority status.

If the evidence shows that the perpetrator was unaware that the victim is a minor, we will not be faced with this aggravated way.

This aggravated mode will be retained when the victim is a newborn child or a minor who is abducted from the maternity or other place.

C) The act of the act has the danger of endangering the health or life of the victim (art. 205 para. (3) lit. C) C. pen.]

In order to ensure that the offense is committed in this aggravated way, it is necessary that the act or inaction through which the deprivation of liberty is caused, the health or life of the victim be endangered; It is not necessary for these forms to exist throughout the period of deprivation of liberty, it being sufficient to have only a certain moment when the health or life of the victim is jeopardized.

If the victim's health or bodily integrity has been affected, the offense examined will be dealt with in a real contest with the offenses of harassment or other violence or bodily injury (Art. 193 par. (2) and art. 194 C. pen.].

This interpretation results from the very text of the law, where only the possibility of endangering is envisaged, not the following danger, which may consist in harming the health or injuring the victim's bodily integrity.

Unlike the other two ways examined above, this time the form of guilt is praterinintentia.

D) The deed resulted in the death of the victim (art. 205 para. (4) C. pen.]

The offense will be detained in this aggravated way, when the imprisonment of the unlawful is the death of the victim (with the form of guilty verity).

If the victim's death occurs as a result of acts of violence against him (with direct or indirect intent), the commission of the offense of deprivation of liberty illegally, in real contest with the simple murder crime, or qualified.

3.3. Penalties

For the two types of normative norms provided in the content of par. (1) and (2), the penalty provided for by the law is imprisonment from one to seven years.

In the case of the aggravated normative procedures provided in paragraph (3) the punishment provided is imprisonment from 3 to 10 years, and for the aggravated normative mode provided in paragraph (4) the punishment is imprisonment from 7 to 15 years and the prohibition of the exercise of certain rights.

In the case of committing the offense in the imperfect form of the attempt, the limits of the punishment shall be reduced by half, according to the provisions of art. 33 par. (2) C. pen.

Also, "in view of the provisions of Art. 36 par. (3) The PCN in the event of an attempt to commit an offense of imprisonment unlawfully followed by the victim's death shall be punishable by the law for the offense provided for in art. 205 para. (4) NPC: imprisonment from 7 to 15 years and the prohibition of certain rights" (Udroiu, 2014, p. 108).

4. Conclusions

The new regulation of the offense of imprisonment was unlawfully imposed on the background of some dysfunctions in the previous judicial practice and the many critical opinions formulated by some specialists in this field.

The evolution of the Romanian legislative system also envisaged the reformulation of the texts of criminalization of this deed, as well as the elimination of some who had no correspondence in everyday reality.

Examination of this crime was imposed on the background of a fairly high crime rate, which has led to numerous discussions.

In the paper we have made many references to the older judicial practice which corresponds to the current regulations, as well as to the recent judicial practice.

By the way in which the legal content was formulated, which required the maintenance of some provisions of the old regulation or the introduction of others, we appreciate that the current regulation corresponds to the needs of preventing and combating this crime with more efficiency.

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REALITIES AND PERSPECTIVES

Threatening Offense in the New Criminal Code

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Abstract: In the present paper we have proceeded in examining the offense of threat provided by the new Criminal Code. The examination also took into consideration the highlighting of the main elements of similarity and the difference between the existing regulation in the Criminal Code of 1969 and the new provisions. The novelty elements of the present paper consist in the comparative examination of the differences between the two regulations (the old law and the law in force), as well as in the examination of the constitutive elements of the offense stipulated in the new Romanian law. The work may be useful to law students and practitioners in terms of violation of the provisions under consideration.

Keywords: Constituent elements; objective side; subjective side

1. Introduction

Provided in the provisions of art. 206 of the new Criminal Code, the offense of threat consists in the act of a natural or legal person who makes known to another natural or legal person that he will commit against him or another person a crime or other degrading deed which is likely to Produces a state of fear.

So, in essence, the threat is a dangerous, intimidating action that affects a person's psychic freedom.

In the earlier doctrine, it was argued that "the dangerous character of the threat is emphasized by the circumstance that, by doing so, the threatened person no longer possesses the mental freedom necessary for a natural behavior, because under the fear or fear that the threat instilled, The person is no longer able to decide and act freely on what to do.

Secondly, the dangerous character of the threat is the result of the antisocial defeat for the collectivity that brings it to the freedom of the person (V. Roşca, 1971, p. 315).

In a new opinion, it is alleged that the offense consists in "direct or indirect intimidation of a person, either explicitly or implicitly, by threatening that in the near future a committed or indefinite crime or detriment will be committed against him or another, if it is likely to cause him a state of fear" (Udroiu, 2014, p. 108).

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2. Similarities and Differences between the Two Laws

The offense of threat to be examined, with some exceptions, presents identity elements with the same offense provided in art. 193 of the Criminal Code of 1969.

Among the elements of identity we mention the marginal name, the subjects of the offense and the limits of punishment.

The distinction between the two regulations relates to the evil that threatens the active subject, which in the old law could be directed against the person concerned or his spouse or close relative, while in the law in force the perpetrator's action is directed against the active subject or another person's without the legislator expressly nominating the relationships that must exist between the person threatened and the person who will bear the consequences of the perpetrator's action; No doubt, in this circumstance, between the person directly threatened and the person who would bear the evil with which the perpetrator is threatened, there must be a series of special relationships of affection (friendship, kinship, etc.).

It may be appreciated that the new law "extended the sphere of the persons concerned by the deed to which it threatens, including in this case both the spouse or close relative of the threatened person, and any other person (for example, a friend, the concubine) Of fear is determined by the deed directed against them" (Udroiu, 2014, p. 108).

3. Examination of the Offense

3.1. Preexisting Elements

3.1.1. The Legal Object

The legal object is the social relations that concern the person's psychic freedom.

In a more elaborate definition, another author considers that the legal object consists in "the social relations relating to the psychological, moral freedom of a person, to his or her decision-making power and manifestation without the fear that there may be any bad. As part of the category of fundamental rights and freedoms, the right to psychological integrity is guaranteed by the provisions of art. 22 par. (1) of the Constitution, according to which the right to life and the right to physical and mental integrity of the person are guaranteed " (Toader, 2014, p. 132).

3.1.2. The Material Object

The offense examined has no material object, since the perpetrator's action is directed against the freedom of the person.

3.2. The Subjects of the Offense

3.2.1. Active Subject

An active subject of this crime may be any natural or legal person who has criminal capacity.

In relation to the quality of the active subject (criminal investigative body, prosecutor or judge), in the circumstances described in Article 280 C. Pen, the threat is absorbed in the content of the abusive investigation crime.

Except when the action by which the material element of the objective side is realized is by direct address (live), the offense can be committed in criminal participation.

3.2.2. The Passive Subject

The passive subject of the offense can be any natural person in life.

In cases where the passive subject of the offense has a certain quality and the perpetrator's action occurs under certain circumstances expressly provided for by law, the offense of threat is absorbed into the constitutive content of other offenses. We have here the quality of judge, prosecutor, lawyer, civil servant, policeman or gendarme, situations in which the threat will meet the constitutive elements of the judicial jail or, as the case may be, the ultraj (Article 279 and Article 257 C. pen.).

In this respect, in the judicial practice it was decided that the defendant's act of threatening three police officers who were in regular working hours during their working hours was dressed with the specific uniforms and had the armament in their possession was the crime of outrage . The defendant had the idea that the police officers were representatives of the state authority, who were in the exercise of their prerogatives, pursued and accepted that by its deed it would affect the state authority (M. Udroiu, 2014, p. 109).

The doctrine expressed the view that, in principle, the plurality of passive subjects attracts the retention of a plurality of crimes (M. Udroiu, 2014, p. 109)

3.3. Constitutive Content

3.3.1. The Objective Side

The material element of the objective side is accomplished by a threat action of the active subject. This can be done in a variety of ways, such as direct addressing, letters, phone, sms, e-mail, social networking, etc. The action can also be accomplished by gestures, attitudes, behaviors or some symbolic signs (when they have a clear meaning and commonly used in collectivity, which in essence poses a threat).

Another author considers that the material element of the offense consists in "intimidating a person, directly or indirectly, explicitly or implicitly, through the threat by any means that a crime (no matter the nature or gravity Or an act by which a material (non-moral) injury can be determined or determined against her, his spouse, a close relative, or another person (for example, against a friend, fiancée, concubine etc.) .) (M. Udroiu, 2014, p. 109).

In order to establish the existence of the offense, it is of no legal relevance that the incriminated action was determined by a possible legitimate interest of the perpetrator (for example, the threat of a person who previously committed a crime against the active subject).

When the threat is carried out under the law, as in the case of the use of a weapon of use (act that can be committed by police officers or military personnel in the exercise of their duties), the deed does not meet the constitutive elements of the threat of crime, in these cases Incidents the provisions of art. 21 C. pen. (The exercise of a right or the fulfillment of a justifiable obligation).

Essential requirements. According to the recent doctrine, for the existence of the offense it is necessary to fulfill the following essential requirements: to have a crime or a detrimental act committed, to be directed against the person threatened or another person, Threatened a state of fear, have an unfair character, and be realizable in a not too distant future (T. Toader in G. Antoniu et al., 2013, pp. 133-134).

In another opinion, the existence of the following three essential requirements was supported: the framework of facts, which may be the subject of a threat of criminal relevance, the intimidating effectiveness of the threat action that must be susceptible to threaten the victim and the persons against whom the offense may be offended; The damaging act, which is the subject of the threat (V. Roşca in V. Dongoroz et al., Vol. III, 1971, pp. 317-319)

In my opinion, the examination of the two opinions, supplemented by the provisions in force, leads to the finding that there are the following essential requirements, which must be fulfilled cumulatively:

A) the action by which the material element of the objective side is made must relate directly to the commission of a criminal offense or detrimental act, for the passive subject or other person;

B) If this threat is directed against another person, there must be a certain state of affection between the person to whom the threat was sent and the person threatened (husband, child, close relative, friend, fiancée, fiancée, concubine , Former professor, head or colleague, etc.);

C) the action by which the threat is to be carried out must be such as to cause the person threatened, either for himself or for another person, a state of fear;

D) the action by which the threat is carried out can be carried out immediately or in the near future and have an unfair character,

E) the action by which the threat is made to be serious, achievable and not followed by another action by which the active subject passes to the materialization of the threatened threat.

If one of these requirements is not met, the constitutive elements of the offense will not be met objectively.

Thus, in the judicial practice it was decided that the action of the bailiff who chooses the debtor to pay a sum of money and at the same time informs him that in case of non-payment of this amount, he will proceed to the sale by public auction of the building, does not meet the constitutive elements of Threatening crime, because the threat of having a right against the threatened, using a legal path, even if it expose the one threatened to some damaging consequences, is not a crime.

In the other case, the court ruled that, in order to commit the offense of threat, it is necessary for the threat action to induce the victim to fear that the person would be exposed to actual danger. Consequently, the threat must be serious, likely to alarm the victim, that is to provoke a restriction of psychic freedom, protected by establishing the criminal norm.

In another case, the court ruled that spraying the victim with a flammable liquid in order to fire him meets the constitutive elements of the crime of attempted murder and not those of the offense of threat. In the present case, it is clear from the statements of the witnesses in question that the defendant threw

a flammable liquid on the injured party, then put his hand in his pocket to remove a lighter, telling him to fire and kill it.

Therefore, any such act will meet the constitutive elements of the threat of threat only if the essential requirements mentioned are cumulatively met, the supreme court establishing that as long as the activity of the defendant confined itself to the threat of the victim of death without having done acts of nature To indicate his intention to suppress his life (in this case, the defendant went into the kitchen with a knife, which he held up, telling his wife that he was killing her, but without making a knife movement to prove that intention) , In his / her task can only be detained the offense of threat, provided in art. 193 C. pen., Not attempted the crime of qualified murder, provided in art. 20 combined with art. 174, 175 lit. C C. pen.

3.3.2. Subjective Side

The form of guilt with which the active subject acts is intent in both forms.

For the existence of the offense, the mobile or purpose has no legal relevance, these being important in the process of individualizing the criminal law sanction to be applied by the court.

4. Forms, Modalities, Sanctions

4.1. Forms

Training and attempts are not sanctioned; If the act is committed by direct address (live), they are not possible.

The offense is consumed when the injured person learns of the offense of threat that is likely to cause him a state of fear.

This offense can also be committed in a continuing form, in which case there will be a moment of exhaustion that will identify itself with the last act prohibited by law.

If, immediately after the threat the active subject commits and the offense threatened by the victim, the offense of threat will be absorbed in the content of the offense (for example, the active subject threatens the victim to kill her with a knife and threatens to attack the victim and stab her A vital area of the body).

The doctrine expressed the view that the offense of threat can be detained in concurrence with the offense that was threatened if the offense is subsequently committed after a certain period of time from the threat (Udroiu, 2014, p. 111).

4.2. Ways

The offense of threat has only one type of way and several factual ways.

4.3. Penalties

As a less serious offense, the penalty provided by law is imprisonment from 3 months to one year or fine.

5. Complementary Explanations

5.1. Link to Other Offenses

The offense of a threat has some links with the offenses that are part of this group, namely illegal deprivation of liberty, blackmail and harassment, because all these incriminations protect the physical and mental freedom of the person.

5.2. Some Procedural Aspects

Jurisdiction in the first instance belongs, as a rule, to the district court in whose district the act was committed.

In relation to the quality of the active subject, jurisdiction may lie with the tribunal, the court of appeal or the supreme court.

In cases where the jurisdiction in the first instance belongs to the court, the criminal investigation is carried out by the criminal investigation bodies of the judicial police under the supervision of the prosecutor or the prosecutor, and in all other cases only by the competent prosecutor.

The offense of the threat is absorbed in the complex content of other offenses, namely, the ultrajudge (Article 257 of the Penal Code), the judicial offense (Article 279 of the Penal Code), the abusive investigation (Article 280 of the Penal Code) Abusive [art. 296 par. (2) C. pen.], Robbery (Article 233 C. pen.), Rape (article 218 C. pen.), Sexual assault (article 219 C. pen.), Blackmail (article 207 C Pen.).

6. Legislative Precedents and Transitional Situations

6.1. Legislative precedents

The offense of threat was also provided in previous criminal codes. Thus, in the Criminal Code of 1865 the threat was provided in art. 235-237, and in the Criminal Code Carol II in art. 494.

6.2. Transitional Situations. Applying More Favorable Criminal Law

In view of the limitations of punishment and the timing of this course, we consider that the transitional situations are no longer of practical significance, which is why we do not insist on their examination with reference to the more favorable criminal law.

However, in didactic terms, we only specify that the more favorable criminal law can be any of the two.

7. Conclusions

We examined the threat offense in the light of the new amendments and additions made by the new Criminal Code, trying to identify some elements of similarity but also a differentiation between the provisions of the two laws (Article 193 of the 1969 Criminal Code and Article 206 of the new Code criminal).

Even though there are many elements of similarity between the two incriminations, we considered it worthwhile also to emphasize some elements of differentiation, which are extremely important from the point of view of applying the provisions of art. 5 par. (1) of C. pen. (More favorable criminal law).

On the other hand, we stress that the examination is also of major importance to practitioners, as this crime continues to record a fairly high crime rate.

We appreciate that the examination carried out may constitute a reference point for persons studying crimes against the freedom of the person in view of the latest amendments and additions made with the entry into force of the new Criminal Code.

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THE 12TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

On the Admissibility of the Presidential Ordinance for Measures to Terminate Acts for the Infringement of Industrial Property Rights

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Abstract: Given that the special laws on industrial property (trademarks, geographical indications, patents, models and industrial designs) do not contain any special rules regarding the procedural particularities of the Presidential Ordinance for taking measures to stop acts of infringement of industrial property rights, we propose to present the special legal conditions of common law for the exercise of the presidential ordinance, provided for in art. 997, par. 1 Code of Civil Procedure, in the light of the particularities determined by the specificity of industrial property rights.

Keywords: Presidential Ordinance; industrial property rights; common law

In principle, the presidential ordinance may also be issued in the field of industrial property for the cessation of acts of infringement of industrial property rights, if the special legal requirements of common law are cumulatively fulfilled: the appearance of the law, the urgency of the measure to be taken, the temporal character of the measure and the failure to judge the fund.

The peculiarities are determined by the specificity of industrial property rights, which must be found in titles obtained in procedures governed by special laws, these being absolute real rights of industrial property, *erga omnes* opposable (Roș, 2003, pp. 633-634) (within the limits of the principles of specialty, territoriality and temporary character, established by Law for each of these rights), with the content expressly and legally regulated.

The special regulations in the matter insurance provisions in the industrial property domain expressly providing for the possibility for the plaintiff to make bail. The examination of this condition of admissibility is, however, a matter of further examination of the other conditions of admissibility of the presidential decree, which must be retained as previously agreed, given their mandatory and peremptory character (in relation to the optional initial and the dilatory nature of the bail).

The condition- premises from which the examination of the admissibility of the request made by way of the Presidential Ordinance is the appearance of the subjective right which would be prejudiced by delay and which must be retained accordingly or in connection with which an imminent loss would occur and which could not be repaired and, consequently, necessary to be prevented.

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In the doctrine[1] it was considered that the justification of the appearance of the law is a specific condition of admissibility, as any measure ordered in this way, although provisional, must be in conformity with the law" being "closely related to the condition that the fund of the law of not being put under discussion."

In the field of industrial property, the premise behind the opening of the admissibility of the presidential ordinance is the applicant's justification of the appearance of his industrial property right.

The request for a presidential order is inadmissible, if the preconditioned condition is not fulfilled, namely whether the applicant does not invoke or justify the appearance of an industrial property right in his favour as the holder of the right or the beneficiary of another form of exploitation (the license or the cession), with the consent of the holder, for the protection of which he can use the way of the Presidential Ordinance, either to preserve it or otherwise to delay it or to prevent imminent damage in connection with this right, and which could not be repaired.

Emergency

By listing the situations in which the measure may be taken by way of the Presidential Ordinance, art. 997 par. 1 the Code of Civil Procedure defines implicitly the specific condition of admissibility of emergency, in terms of its alternative content. Consequently, the condition of admissibility of the emergency will be deemed to be met whenever the temporary measure is required to be ordered to retain a right that would be prejudiced by delay, to prevent imminent and unrepairable damage, such as and to remove the obstacles that arise on the occasion of execution. The latter situation has no particularities in industrial property matters and will therefore not be the subject of the analysis.

The provisions of the special laws do not contain derogatory regulations on this matter.

The emergency condition is fulfilled in this matter, with regard to the delay of the right, due to the nature of acts of infringement of industrial property rights: acts of successive execution, usually of a commercial nature, which involve a reaction of the consumer of products or services which implies such a right.

Therefore, damages in this matter are not susceptible to full reparation by the equivalent (compensation) and are, as a rule, future but certain (imminent), which implies periodic actions in law, the extent of the damage being determined over time, and the effects of violations are susceptible to amplification over time. For example, dilution of the mark by abusive use of the identical or similar sign, loss of clientele, etc.

As regards the second alternative legal condition, imminent and irreparable damage is indissolubly linked to the industrial property right, the appearance of which must be justified.

In this matter, the reasoning of the urgency is implicit and equates to the finding of the defendant's committing abusive acts or acts of infringement of the industrial property rights, the appearances of which are justified by the applicant. The abusive nature of the acts or acts committed by the defendant needs the protection of the violated industrial property right, the appearance of which acts in favour of the plaintiff, by way of the presidential ordinance, a way to obtain effective protection against the

[1] (Crisu, 1997, p. 35) and note 1 dc to the footnote of the same page in the present case, the applicant requested a presidential ordinance, ordering the marketing of a pharmaceutical product, on the basis of a non-final judgment by which the transient protection certificate for a patent of invention in favor of the defendant, also concerning a pharmaceutical product (other than the one marketed by the applicant) which was annulled until its irrevocable stay. *Law no 93/1998 on the transitional protection of patents for inventions governed by art. 1, the protection in Romania for patent holders "with priority date".*

application of common law, as long as the damage is amplified by the passage of time, due to the successive execution of the acts of violation.[1]

Transitoriness

No measures may be taken by way of the Presidential Ordinance, the execution of which renders the impossibility of the subsequent restoration of the changed situation. (Tăbârcă, 2014, p. 196)

As stated in the doctrine[2], "the temporality depends on the essence and nature of the presidential ordinance, and the length over time depends on the causes that have generated the measures and the position of the parties", without the temporality of the provisional measures, the transitory measure having temporary nature from the very moment of its taking.

Since the measures are required to be taken by the holder of the industrial property right, by way of the presidential ordinance, against third parties, concern the obligation of not making or terminating the abusive acts of infringement of the industrial property rights, they appear as definitive measures precisely due to the fact that their duration seems unlimited.

The doctrine[3] (analysing a settled jurisprudence in this regard) is unanimous in assessing the fulfilment of the condition of admissibility of temporality when the measure consists in determining the defendant's obligation to make an end to abusive acts, the measure retains its temporal character, although its length over time may give the appearance of a definitive measure.

However, the probable duration of the measure is that which gives the appearance of its definitive character. The duration of the measure taken by way of the Presidential Ordinance depends on the attitude of the parties, respectively on their manifestation of will, on the litigation on the merits.

As regards the protection of industrial property rights in this way, the duration of the temporary measure depends on the attitude of the defendant.

The defendant is the one who is interested in bringing the case to the merits, a prejudice that calls into question the validity of the applicant's title in the presidential decree. Obviously, and under these circumstances, the measure will last indefinitely, if the court in the case of the liquidation of the fund irrevocably assesses the validity of the claimant's title (or confirms the right to exploit it).

When the complainant uses the way of the presidential ordinance, justifying the appearance of the industrial property right, after the publication of the application, temporary measures become definitive in terms of time duration if the title is ultimately issued to the plaintiff and the defendant does not contest it, or although he contested it, he did not get a favourable decision.

The measure is temporary in the mentioned cases, as it tends to end abusive acts, only the duration of which is of a definitive nature. Accordingly, it is not necessary to refer to a certain period of time in the operative part of the Presidential Order, since the duration of the measure prohibiting abusive acts determines the condition of admissibility of the term, but rather the content of the measure itself. [4]

[1] The court is obliged to state the urgency "and to show the reasons which led the judge to decide on the existence or non-existence of this condition" (Crisu, 1997, p. 45)."... self-indigence or violence creates for the injured party the right to use the procedure of the presidential decree, these acts being the proof of urgency" (Crisu, 1997, p. 46).

[2] (Crisu, 1997, p. 67).

[3] Exceptionally, by means of a presidential ordinance, for the abolition of some abusive acts, to the defendant it has been imposed an obligation to do" (Deleanu, 2010, p. 31) with notes 4 and 5 in the footer of the same page).

[4] "... the determination of the duration of these measures is a mistake. Such an explanation is unnecessary to the provisional nature of any presidential ordinance, as it cannot be ruled out that the next day it became illusory by the disappearance of the reasons which led to the ordering of the measures and therefore their abolition" (Crisu, 1997, p. 67).

Not Judging the Fund

In assessing the fulfilment of the condition of non-judgment of the merits, for the admissibility of the request for a presidential order, it must be taken into account what would be the judgment on the merits, which would be the claim brought to the court at the moment when the request for a presidential ordinance was made. The importance of establishing this issue lies in the need to determine the limits of the examination of the appearance of the law on the way of the Presidential Ordinance, both in the light of the claims put forward by the applicant and of the defendants, which the defendant may formulate and the acts to be proven.

The claim on the merits of the case, at the applicant's request, would have the effect of prohibiting any act likely to bring prejudice to the industrial property rights protected by the title on the basis of which the applicant justified the appearance of the right in his favour and the reparation of the damage caused by such acts. At the defendant's request, the claim brought by him under common law would have the purpose of challenging the validity of the title on the basis of which the applicant justified the appearance of industrial property rights by way of the presidential ordinance.

The assessment of the subject matter of the dispute on the merits is reported at the time of the introduction of the request for a presidential order irrespective of the subject of the petition for judicial proceedings pending before the courts and until the final settlement of the case by which the applicant requests the taking of the measure by way of the presidential ordinance.

The substance of the dispute will not be solved in the summary procedure of the presidential decree if the investigation is circumscribed to the relevant elements of the appearance of the law, without any assessment of the fund (Deleanu, 2010, p. 36), even if the defendant's defence concerns the validity of the title on the basis of which the applicant justifies the appearance of his industrial property right.

If the defendant invokes some aspects of the industrial property right, the appearance of which is invoked in the request for the Presidential Ordinance, the investigation of these issues is equivalent to the resolution of the funds. Therefore, the request for a presidential order will not be considered inadmissible as the investigation of the defence of the defendant's involves prejudicing the substance, but the defence will not be received, motivated by the limits of the investigation in the proceedings of the presidential ordinance.

As it has been shown above, the investigation into the appearance of industrial property rights excludes the investigation of the validity of the title challenged by the defendant in its defence, in terms of the substantive and formal circumstances assessed in relation to the moment of the issue of the title, the exclusive jurisdiction of the court in the matter. The court vested in the presidential decree examines only the opposability of the title (in the period of validity) to third parties.

The investigation of the fulfilment of the condition of admissibility of the Fund is not justified by the justification of the appearance of the industrial property right, the protection of which is claimed by the plaintiff in this way, and not the defence claimed by the defendant. To admit the opposite is to admit that the defendant may paralyze the request for a presidential ordinance by simply invoking certain defence whose investigations involve solving the fund.

In conclusion, these conditions being fulfilled cumulatively, the admissibility of the request for a presidential ordinance for the protection of industrial property rights by the prohibition of abusive acts is taken as a procedural means of taking rapid and effective provisional measures for the purpose of ensuring such protection, under art. 50 of the TRIPS Agreement. The investigation of each of these conditions starts from the concrete aspects of each case, retained on the basis of a minimal proof, and

it is not limited to their formal research in purely theoretical terms. The solution to the inadmissibility of the request for a presidential ordinance for the protection of industrial property rights must be based on a number of considerations, including a concrete examination of the conditions of admissibility, on the basis of the specific elements of the case, by showing and assessing the considerations contemplated in the retention of non-fulfilling each condition.

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On the Possibility of the Employer to Terminate Unilaterally the Labor Contract of a Pregnant Employee during the Probationary Period

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Abstract: We intend to analyze the way in which the provisions of art. 31, par. 3 of the Labor Code concerning the possibility for the employer to terminate the labor contract unilaterally only by written notice, without notice and without having to justify during the probation period the legal provisions establishing the prohibition of dismissal of a pregnant employee, who has previously notified her condition during the probation period, respectively with the provisions of art. 60 par. 1, letter d of the Labor Code, art. 21 from G.E.O. no. 96/2003 on the protection of maternity and art. 10, par. (6) of the Law no. 202/2002 on equal opportunities and treatment of women and men.

Keywords: Labor Code; pregnant employee; written notice

The probationary period is a common option in employment relationships between employees and employers, temporary working agents and temporary workers, and it is an extra chance for both parties to check whether the conclusion of a contract of employment is the most inspired choice. There is a chance to discover, as an employer, if it's worthwhile to invest in the following years in the employee you submit to a probationary period, and for the employee, it is a chance to find out if that job is what he is looking for.

Perhaps the best known aspect of the probationary period is that the employer and the employee can also terminate the employment relationship by simple notification, without motivation, without notice, according to the provisions of art. 31, par. 3 of the Labor Code.

Thus, in the context of a legislation which strictly and restrictively regulates the employer's right to terminate an employment contract, the Romanian legislator provided - by regulating the probationary period - the possibility for the employer to unilaterally terminate the employment contract by a simple written notification, without giving a notice and without motivating its decision to terminate.

However, this "exceptional" employer privilege has often opened the way to abuses, a fact that has made it necessary to establish clearly the legal nature of this mode of termination of employment.

The way in which this type of termination of the employment contract is technically interpreted during the probationary period is relevant in the practical application of the prerogative to terminate the employment relationship.

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In practice, termination of employment under the provisions of art. 31 par. 3 Labor Code was considered either a dismissal for reasons of professional misconduct or a unilateral denunciation of the employment contract.

In order to know exactly how to deal with certain situations in practice, the legal impediments to the termination of the contract, it has become important to establish this qualification for termination of the employment contract during the probationary period.

Therefore, the need to determine whether the employer has the legal opportunity to terminate unilaterally the employment contract of a pregnant employee who is in the probationary period resulted from the numerous litigation brought by the courts, which were asked to determine whether, for example, it is legal that the employer - as soon as he has learned of the pregnancy status of his employee, issued the notice of termination of the employment contract, relying on the fact that the employee was still in the probationary period.

Under these circumstances, it is the question whether the employer, as soon as the employee's pregnancy status was acknowledged, had the obligation of complying to respect the legal prohibition laid down by three distinct normative acts, namely not to terminate the employment relationship with the employee.

According to art. 60 par. 1, letter d of the Labor Code states: "*The dismissal of employees cannot be disposed (...) during the period in which the employed woman is pregnant, insofar as the employer became aware of this fact prior to the issue of the dismissal decision*."

At the same time, G.E.O. no. 96/2003 on the Protection of Maternity, updated in 2011, prohibits the dismissal during the period of pregnancy by the provisions of art. 21: "*It is forbidden for the employer to terminate the employment or service relationship in the case of the pregnant employee who informs the employer in writing of his physiological state of pregnancy and encloses a medical document issued by the family doctor or the specialist doctor who certifies her State, for reasons that are directly related to her condition."*

According to art. 10, par. (6) of the Law no. 202/2002 on equal opportunities and treatment between women and men, "the dismissal is forbidden during the period when "*the employee is pregnant or is on maternity leave".*

All three normative acts regulate the same prohibition, namely that of prohibiting the dismissal of a pregnant employee who previously notified her condition during the probationary period. (Țiclea, 2014)

The prohibition on dismissal during the period in which the employee is pregnant has as aim (even to the detriment of the employer's interests) the insurance of the protection of the employee, which is vulnerable during this period so that such a measure cannot seriously harm the health of the mother or the child.[1]

Given that the legal nature of the termination of the employment contract during the probation period was qualified in the case law of the Constitutional Court as "the possibility of unilaterally denouncing employment relationships without being bound by the obligations to be observed in the event of dismissal or resignation"[2], confusion may arise over the application of the G.E.O. no 96/2003 on the

[1] Court of Appeal Bucharest, VII Civil Division, for cases concerning labor conflicts and social insurances, decision no. 3846 / R / 2009, in (Uta, Rotaru, & Cristescu, 2010, p. 72)
[2] Decision no. 653 of 17 May 2011 on the objection of unconstitutionality of the provisions of art. 31 par. (3) of the Law no. 53/2003 - Labor Code.

Protection of Maternity at Work, which establishes the prohibition of employers to order the termination of employment relationships in the case of pregnant employees for reasons directly related to their condition.

Exceptional provisions of art. 60 par. (1) letter c) of the Labor Code governing the dismissal of the pregnant worker are strictly interpreted, the text referring only to the hypothesis in which the employer was aware, at the date of issuing the dismissal decision, of the pregnancy status of the dismissed employee, and not in the situation where, for example, the employee informed the employer of her state after the date of issue of the dismissal decision, even within the period of notice before the decision took effect.

Therefore, if the contestant had not been "pregnant" according to the law, the employer could easily follow the procedure regulated by art. 31, par. 3 of Labor Code, unilaterally terminating, by notification, the labor relations, even without motivation.

By interpreting this provision in the light of the jurisprudence referred to above, it is clear that the termination of the employment contract would be possible in so far as it is not determined by the state of pregnancy.

In a case[1] which may help to interpret this reasoning, the Court of Justice of the European Union has ruled that the provisions of Art. (10) of Directive 92/85 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding and which require for the pregnant workers to be protected against dismissal must be interpreted in the sense that they are opposed to some national rules which allow the revocation of an administrator who is pregnant within the meaning of the Directive, and the decision to revoke is essentially based on her pregnancy status.

By interpreting this solution, we can understand that it is not excluded for the termination to be also disposed to pregnant workers, insofar as it is not related to pregnancy status and, of course, also complies with the other applicable legal requirements.

The Ploieşti Court of Appeal also appears to apply this position, stating in its decision no. 1148 of October 23, 2014, referring to the termination of the employment contract of a pregnant employee that it is not about "a dismissal but another legal institution, namely the termination of the probationary contract, based on the notification issued by the employer. Therefore, the provisions of Article 60, paragraph 1, Labor Code regarding the protection of pregnant women refers strictly to the dismissal measure, and it cannot be extended to other situations, being special provisions of strict interpretation.

Therefore, we believe that as long as during the judicial investigation, the pregnant employee whose contract of employment has been terminated during the probationary period, by simple notice, without notice and without motivation, demonstrates - by unambiguous evidence - that it has in fact made a dismissal as a result of her pregnancy, the unilateral termination of the contract by the employer is unlawful and the notification must be annulled by the court.

In conclusion, we consider that although the reason for the termination of the employment contract needs not be one of the limiting ones listed in art. 61 and art. 65 of the Labor Code, in the event of a contestation by the former employee, the termination must be reasonably justified and not the result of discrimination or abuse.

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Employer Responsibilities in Moral Harassment Claims under the Romanian Legislation

Isabela Delia Popa[1]

Abstract: This paper addresses the grey legal area of moral harassment at work under the Romanian legislation, with a focus on employer responsibilities deriving from claims grounded on such discrimination deed. It puts under spot light an issue that Romanian employers confront with on a daily basis and which has not been analysed and conceptualized up to the present. The author has relied on previous research she conducted with respect to moral harassment at work, with the aim to build legislative propositions to be further considered during the legislative process. The research outlines the currently applicable legal framework in Romania, as well as the *status quo* of the files submitted with the courts of law addressing moral harassment at work. The paper synthetises the conclusions of the observations made throughout the last 4 years in practice (court procedure). This paper highlights that, despite the efforts undertaken by the Romanian legislator in order to ensure protection of employees at work, the concept of "moral harassment at work" does not benefit from any regulation under the Romanian legislation. As a paradox, there is an outstanding number of court files initiated by (former) employees against their employers, grounded on mobbing, that usually go through the two-stage trial procedure (first phase of judgement and appeal), thus determining the courts of law to frame the concept of moral harassment at work based on related legal concepts (discrimination, harassment, psychological harassment). The study has implications for researchers, employees and employers, students and academics. This paper stands out as a first legal and practice research on the topic of employer responsibilities in moral harassment claims under the Romanian legislation.

Keywords: mobbing; Romania; discrimination

JEL Classification: K31; K49

1 Introduction

The Romanian labour legislation has been conceived and projected to confer employees the highest degree of protection possible. Considering the juridical inequality that exists between the employee and the employer, in the context where the concept of subordination characterises the employment relationship, the employee is presumed to be the "weak" joint of the employment chain and, thus, the contractual party that must be safeguarded and harboured through the Romanian legislator's efforts. As a historical background, this approach was initiated in 2003, once with the adoption and enforcement of the Law no. 53/2003 – the Romanian Labour Code, that – although amended and completed for over 30 times – is currently in force. Up to that moment in time, employees' protection was illusory and non-effective, being regulated through a normative act adopted by the communist regime, *i.e.*, Law no. 10/1972 – the Labour Code of the Socialist Republic of Romania.

The extensive care of the Romanian legislator with respect to the protection that employees should benefit from in connection with their employment has generated and led to a "pendulum effect" in as

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much employers are concerned. Essentially, from employers' perspective, the Romanian labour legislation could be synthetized as a set of strict rules to be observed and obligations to be complied with, under a severe sanction regime. The risk of non-compliance or improper-compliance is generally high and is particularly increased in matters which are in a legal grey zone. This is also the case of moral harassment at work.

2 Moral Harassment at Work under the Romanian Legislation – Legal Grey Zone

Recent studies have shown that harassment in workplaces is not considered a major issue in Romania, low levels of reporting of harassment by workers being registered at country level mainly due to low level of awareness (Eurofound, 2015).

The conclusions of the aforementioned studies are partially confirmed by the current legislative status of the legislation addressing harassment at work. Specifically, the concept of "moral harassment at work" does not benefit from any regulation under the Romanian legislation. However, we must stress that the low levels of reporting of harassment by workers derives from the lack of reporting procedures implemented at company level. In the context where workers don't have a procedural support to address the harassment issue directly with the employer, at company level, they seek for resolution with the courts of law. In practice, there is an outstanding number of court files initiated by (former) employees against their employers, that usually go through the two-stage trial procedure (first phase of judgement and appeal). The economic crisis, the political unstable climate and the permanent shrinking of the Romanian economy have had a significant influence on this effect.

The concept of "moral harassment at work" is rather a grey zone under the Romanian legislation. Essentially, there are no legal provisions to specifically address this matter, but only general provisions aimed to prevent and sanction discrimination deeds. After a 15-years effort of the Romanian legislator, psychological harassment was first defined and expressly regulated by the Romanian legislation in 2015. Still, it does not address the employment relationship and it does not respond to the current needs of the workers facing such issues at their workplaces.

A brief analysis of the Romanian legislation reveals that concepts such as "discrimination", "direct discrimination", "indirect discrimination", "harassment" and "psychological harassment" benefit from a legal definition. Every time an employer, a worker and/or a court of law faces a "moral harassment at work" matter, it has to merge, corroborate and make interpretation of the above indicated definitions in order to determine the context and extent to which the subject employee is under legal protection.

To sum up, at present, the relevant Romanian legislative framework regarding moral harassment at work consists of the following 4 (four) normative acts:

[1] Labour Code of Romania[1]

As mentioned above, the Labour Code of Romania was adopted and enforced in 2003, transposing at that time the great majority of the relevant EU Directives applicable in the labour law field (as part of the EU pre-accession efforts). Although in August 2017 the Labour Code of Romania had undergone its 30th amendment and completion, no adjustments have been operated therewith in connection to (moral/psychological) harassment at work that workers may deal with during employment.

[1] Law no. 53/2003 on the Labour Code, published in the Official Gazette of Romania Part I, no. 345 dated 18.05.2011 (republished), as further amended and completed (hereinafter the "**Labour Code of Romania**").

Specifically, the Labour Code of Romania addresses the principle of equality of treatment of all employees as a fundamental guideline upon which employment relationships shall be construed, without tackling the specific forms of discrimination. As per the provisions of Labour Code of Romania (Article 5 para. (1) of the Labour Code of Romania), within the framework of work relations, the principle of the equality of treatment for all employees and employers shall apply and any direct or indirect discrimination against an employee, based on criteria such as sex, sexual orientation, genetic characteristics, age, national origin, race, colour of the skin, ethnic origin, religion, political options, social origin, disability, family conditions or responsibilities, union membership or activity, shall be prohibited.

Following the same line of reasoning, the Labour Code of Romania strictly defines direct and indirect discrimination, as follows:

a) "direct discrimination" is defined as any actions and facts of exclusion, differentiation, restriction, or preference, based on one or several of the criteria mentioned above, the purpose or effect of which is the failure to grant, the restriction or rejection of the recognition, use, or exercise of the rights stipulated in the labour legislation (Article 5 para. (3) of the Labour Code of Romania);
b) "indirect discrimination" is defined as any actions and facts apparently based on other criteria than those mentioned above, but which cause the effects of a direct discrimination to take place (Article 5 para. (4) of the Labour Code of Romania).

It is for the Romanian courts of law to decide which provision is applicable to moral harassment deeds occurred at the workplace, on a case-by-case analysis.

[2] Government Ordinance no. 137/2000 regarding the prevention and the sanctioning of all discrimination forms[1]

"Discrimination" and "harassment" were first regulated in Romania in 2000, through the Government Ordinance no. 137/2000. Article 2 para. (1) establishes the definition of discrimination as "any distinction, exclusion, restriction or preference based on race, nationality, ethnicity, language, religion, social status, belief, sex, sexual orientation, age, disability, non-contagious chronic disease, HIV infection, membership of a disadvantaged group and any other criteria which has the purpose or the effect of restriction, elimination of recognition, use or exercise of fundamental human rights and freedoms or of rights recognized by the law in the political, economic, social or cultural field or in any other field of public life." Furthermore, any behaviour on grounds of race, nationality, ethnicity, language, religion, social class, creed, gender, sexual orientation, membership in a disadvantaged group, age, disability, refugee or asylum status or any other criterion leading to the developing of an intimidating, hostile, degrading or offensive setting is deemed as harassment (Article 2 para. (5) of the Government Ordinance no. 137/2000).

Pursuant to the provisions of the Government Ordinance no. 137/2000, any harassment deed is deemed an administrative offence and shall be sanctioned with a fine ranging from approx. EUR 250 to approx. EUR 7,500, in case a natural person commits the harassment deed, respectively with a fine ranging from approx. EUR 500 to approx. EUR 25,000, in case the harassment deed is committed to a group of persons or to a certain community. In addition, the law entitled the Romanian National Council for Combating Discrimination or the relevant court of law, as the case may be, to oblige the

[1] Government Ordinance no. 137/2000 regarding the prevention and the sanctioning of all discrimination forms, republished with the Official Gazette of Romania Part I, no. 166 dated 07.03.2014 (hereinafter the "**Government Ordinance no. 137/2000**").

party who committed the harassment deed to disseminate, using mass media channels, a synopsis of the sanctioning decision issued by the Romanian National Council for Combating Discrimination or by the relevant court of law, as the case.

[3] Law no. 202/2002 on equal opportunities between women and men[1]

The aim of Law no. 202/2002 is to provide the relevant measures necessary to promote the principle of equal chances and treatment between women and men with the purpose to eliminate all the forms of discrimination based on sex from the public relationship and especially from employment relationship, as stated in its preamble.

In 2015, the Law no. 202/2002 was extensively amended and completed, the main novelty being the regulation of "psychological harassment" for the first time under the Romanian law. Essentially, "psychological harassment" is defined as any inappropriate behaviour that takes place in a certain period of time, repetitively and systematically, and which implies a physical, oral or written behaviour, gestures or other international acts and which may affect the personality, the dignity or the physical integrity of a person (Article 4 letter d^1 of Law no. 202/2002). The definition provided by the law is arguable and too vague, making no distinction between the types of behaviours that may be deemed as moral (psychological) harassment, and too confusing, in the sense that it does not cover the situation where a single act of psychological harassment is committed (and not a repetitive one) (Popescu & Popa, 2016).

[4] Criminal Code of Romania[2]

The Criminal Code of Romania defines "harassment" strictly from the perspective of a physically-focused deed (stalking), without setting any legal implications with respect to moral harassment (at work or in any other context). Otherwise saying, under the Romanian law, psychological harassment is not deemed as a criminal deed.

3 Employer Legal Responsibilities regarding Potential Acts of Moral Harassment at the Workplace – before Court Action

In practical terms, victims of moral harassment at work suffer from stress at work or due to work, resulting from bullying actions exerted either vertically (from superiors or from inferiors) or horizontally (from same-ranked colleagues). Otherwise saying, the aggressor is not the employer itself (*i.e.*, the company), but the superiors, inferiors or same-status colleagues of the victim.

There are three key questions to be answered in relation to the above: (1) Does the employer have any responsibility for the deeds committed at work by its employees towards other employees? (2) What are the steps to be followed and procedures to be implemented by employers in order to ensure compliance with the (vague) applicable legal framework, before workers initiate any court actions with respect to the moral harassment deeds they were subject to? and (3) Are there any other means available to employers that would allow them to mitigate the risks derived from moral harassment deeds occurred at the workplace?

[1] Law no. 202/2002 on equal opportunities between women and men, republished with the Official Gazette of Romania Part I, no. 326 dated 05.06.2013, as further amended and completed (hereinafter the "Law no. 202/2002").
[2] Law no. 286/2009 on the Criminal Code, published with the Official Gazette of Romania Part I, no. 510 dated 24.07.2009, as further amended and completed (hereinafter the "Criminal Code of Romania").

To answer question (1), note is to be made that – under the Labour Code of Romania – the employer is held responsible for any material damage incurred to any of its employees during the course of the job or in relation to the job (also called «liability for material damage»). Essentially, as a general rule, the employer shall, on the basis of the rules and principles of contractual civil liability, compensate the employee in case he/she suffered a material damage as a result of employer's fault, during the course of the job or other tasks related to the job (Article 253 para (1) of the Labour Code of Romania). Therefore, the lack of any support at company level for the employees that are victims of moral harassment at work deeds (*e.g.*, reporting moral harassment at work committed by another employee, followed by the inaction of the employer; no response provided by the employer to the employee who requested support in relation to moral harassment deeds occurred at the workplace; inexistence of any measures implemented by employers in order to solve the harassment situation occurred at work etc.) shall inevitably engage the liability of the employer with respect to the consequences incurred by the victim employees. In conclusion, the employer is held responsible, under the law, for the moral harassment deeds committed at work by its employees towards other employees.

With respect to question (2), in the context where – as shown above – the employer is held responsible for the moral harassment deeds committed at work by its management and/or by its executive and non-executive employees, one may conclude that the employer has its own stake in preventing and sanctioning moral harassment at work. Practice reveals that a small number of employers understand the significance of such approach, as well as the role of the internal sanctions that could diminish or even eliminate moral harassment at work.

In the Romanian legal system, sanctions are attributed with three main characteristics (functions/roles): (i) an educative role, aimed to ensure acknowledgement of the potential implications that an inappropriate behaviour may have, (ii) a preventive role, aiming to anticipate the negative consequences derived from committing deeds or acts that affect rights or values, and (iii) a remedy role, focused on the correction of the inequities that the victim was subject to.

From this perspective, the internal regulation - that any employer has the legal obligation to draw-up and implement at company level - entitles the employer to proceed with two sets of actions: firstly, to implement a reporting procedure, including a "whistle-blower procedure", that could ensure that all moral harassment incidents are revealed and placed under spot light, and secondly, to establish the sanctions that it may appreciate necessary in order to mitigate the risks of moral harassment at work. Thus, in order to ensure compliance with the (vague) applicable legal framework, before workers initiate any court actions with respect to the moral harassment deeds they were subject to, employers should project their internal regulations as an efficient and effective tool against potential discrimination actions, following the legal guidelines indicated here below:

- employers have the obligation to set, within their internal regulations, disciplinary sanctions, with the observance of the limits provided by the applicable law, for all employees that breach the right to dignity of other employees by creating degrading, intimidating, hostility or offensive environments, through discrimination deeds (Article 8 letter b) of Law no. 202/2002);
- employers have the right to establish rules for the observance of the non-discrimination principle applicable at the workplace, specific rules regarding work discipline, as well as disciplinary sanctions (Article 242 of the Labour Code of Romania);

- employers have the right to assess the existence of disciplinary misconducts and to apply the corresponding disciplinary sanctions, as per the law, the applicable collective labour agreement and the internal regulation (Article 40 of the Labour Code of Romania).

To conclude, the internal regulation proves to be a powerful and effective tool to be used at company level in order to diminish and/or eliminate the incidence of moral harassment deeds at work.

To answer question (3), we shall rely on the Draft National Strategy "Equality, inclusion, diversity" for the period 2018 – 2022, publicly released by the Romanian National Council for Combating Discrimination on 26 September 2017, to be further approved by means of Government Decision (Romanian National Council for Combating Discrimination, 2017)[1].

According to the aforementioned document, one of the strategic areas of intervention shall consist in "equality and non-discrimination on the labour market in terms of hiring and profession", the proposed measures consisting in:

- Elaboration of conduct codes by employers from both public and private sector, regarding the combating of discrimination, harassment and mobbing, which shall be mandatorily filed with the relevant territorial labour inspectorate;
- Elaboration by the Romanian National Council for Combating Discrimination of methodological norms reflecting a proper mechanism for reporting discriminatory behaviours and attitudes at workplaces, to be addressed to any public institution, irrespective of the size of its personnel, as well as to any private employer having at least 50 employees;
- Imposing the obligation of employers to train all personnel, upon the moment of employment, with respect to the prevention and combating of discrimination, harassment and mobbing at work;
- Including in the individual labour agreement the obligation of the employer with respect to the proper observance of the worker's right to equality and non-discrimination, as well as relevant provisions related to harassment and mobbing and reporting mechanisms that are available to employees.

In the light of the above, other means available to employers that would allow them to mitigate the risks derived from moral harassment deeds occurred at the workplace could consist in: (i) drawing-up and implementation of conduct codes (having the same force and applicability as internal regulations), (ii) training of personnel, (iii) awareness provisions included in the individual labour agreements with respect to the content and implications of mobbing at work, as well as (iv) the development and implementation of internal reporting mechanisms, that would enable the employer to gain knowledge of and solve the conflicting situations that derive from moral harassment deeds.

4 Employer Responsibilities Regarding Moral Harassment Claims Brought To Court

Having in mind that, under the Romanian laws, the employer is held responsible for the moral harassment deeds committed at work by its management and/or by its executive and non-executive employees, note is to be made that court actions are filed by workers against the employers (and not

[1] Draft Government Decision for the approval of the National Strategy "Equality, inclusion, diversity" for the period 2018 – 2022. Retrieved from http://cncd.org.ro/proiect-strategie-eid-2018-2022, date: 28.09.2017.

against the aggressor-workers). The employer stands in trial and, in case the court of law decides in favour of the claimant worker, then the employer has the legal right and possibility to regress against the aggressor worker.

Litigations deriving from moral harassment deeds committed at work have serious impact on employers: firstly, the company faces a reputational risk (which is deemed as more devastating than any pecuniary risk); secondly, court actions usually go through the two-stage trial procedure (first phase of judgement and appeal), process which has serious time and costs implications on the company; thirdly, a lost case shall always be regarded by the company as a "negative precedent" that could encourage other employees to seek resolution in court.

As per the provisions of the Romanian laws, litigations deriving from moral harassment deeds committed at work are qualified as "labour law litigations" and are subject to the competency of the Tribunals (first instance) and Courts of Appeal (appeal phase). Following the same focus of ensuring workers' protection, the Romanian legislator provides that workers' access to court has to be free of charge, no judiciary stamp fee or any other related fee being applicable. This facility partially explains the outstanding number of number of court files initiated by (former) employees against their employers on moral harassment grounds.

Furthermore, according to the Labour Code of Romania, labour law litigations need to be solved by the courts of law in emergency procedure and hearing terms have to be scheduled no later than 15 days one after another. Although these provisions are not observed in practice, as it is practically impossible for the courts of law to comply given the significant number of court files submitted for trial, labour law litigations benefit from a more urgent trial procedure than any other types of litigations (*e.g.*, civil litigations, public procurement litigations etc.).

In terms of specific responsibilities of employers regarding moral harassment claims brought to court, the burden of proof stands out as the most restrictive. By way of explanation, as per the provisions of the Labour Code of Romania, the burden of proof in labour law litigations lies with the employer, irrespective if the claimant party is the employer or an employee. Otherwise saying, in labour law litigations grounded on moral harassment at work, it is for the employer to prove that no such discrimination deed has been committed at the workplace by the superiors, inferiors or same-status colleagues of the claimant worker.

In many cases, employees address to the courts of law seeking to obtain damages for acts like: being ridiculed by co-worker/several co-workers, being professionally discredited by co-worker/several co-workers, being approached by a colleague in an un-professional and impolite manner, being subject to rumours initiated by co-worker/several co-workers, irrespective of such rumours related to professional and/or private life aspects. Under these circumstances, it is self-understood that the employers' degree of exposure in court is high and the risk of not being able to provide relevant pieces of evidence cannot be easily mitigated.

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Duality of Categories of Persons for whom Civil Liability of Parents is involved. Aspects of Civil Law and Family Law

Mirela P. Costache[1], Tiberiu N. Chiriluţă[2]

Abstract: Objectives: In this study, we have analyzed the continuity of an old concern, a brief aspect of the broad issue of parental liability for the deed of a juvenile or a minor under court interdiction. Prior Work: From the analysis of art. 1372 of the Civil Code the scope of this type of liability is easily noticed, and in this paper we only analyze the category of liable persons for the purpose of repairing the damage. Approach: In relation to the two categories of persons, that of the minor and that of the person under court interdiction, there will also be highlighted interpretations from the field of family law, points of view regarding situations arising from the interpretation of the text of the law. In addition, concepts such as age, the presence or absence of minor discernment, anticipated exercise capacity, tort capacity will be correlated.
Keywords: exercise capacity; discernment; minor under court interdiction; age

1. Introduction

The connotation that emerges from Descartes's statement "Before being parents, we were children", allows us to assert that the child is still at the center of the human universe. Beyond its social and philosophical content, this assertion develops a few consequences in the legal terms, as it expresses the child-parent-family relationship[3], under all principles, rights and obligations, by directing our attention to the content and the way of exercising the legal relations among parents and children. We will develop in this study a particular aspect of this report, namely the "legal algorithm" whereby the law obliges parents or guardians to be responsible and to repair the damage caused by their **minor children** or **the child without discernment**. We therefore place at the center of the discussion an analysis of the provisions of art. 1372 of the Civil Code, but also other texts of family law or special laws with direct reference to this issue.

The minor, within the meaning of Law no. 272/2004 on the protection and promotion of the rights of the child, republished and updated, the child, which we place in the center of the parental and institutional concerns, is subjected by the human factor to many vulnerabilities, anxiety, consumerism, challenges, morals, deprivation. These circumstances, along with belonging to a particular subculture or inappropriate models to which they are attracted, cause them to act in directions that draw the illicit, and implicitly, the sanction. If in criminal law the liability is a personal one and it cannot be

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[3] For a point of view that reflects the sociological and legal perspective of the family see (Lupşan, 2001, pp. 6-10).

transferred to another person, the civil law system extends the liability beyond the limits of its own deeds by establishing the two hypotheses of liability for the deed of another person, regulated in articles 1372 and 1373 of the Civil Code. On the one hand, the situation of parents and guardians' liability for the damage caused by juveniles or those under legal prohibition and, on the other hand, the liability of the consignee for the agents. The role of this commitment of indirect liability is directly related to the principle of the need to repair any prejudice caused to a person and it derives from the circumstances strictly prescribed by law. We will achieve a partial analysis of them, under the aspect of answering the question: who is the person for whom parents or guardians are liable?

The first paragraph of art. 1372 of the Civil Code, on the basis of which we will construct the entire argument, reveals the following provision: (1) "A person who under the law, of a contract or of a court order is obliged to supervise **a minor** or **a person placed under the court interdiction** is liable for the prejudice caused to another by the latter persons." Even from the marginal title of the article in question, there are nominated the categories of persons who, due to legal grounds, are not liable for their own deed, although they are the **active subjects** of the deed, but for which under the law, indirectly, other persons are liable. The indicated rule refers first to "minors" and then to "people under interdiction". Therefore, the new codification concerned a wider scope than that covered by art. 1000 (2) and (4) of the Civil Code of 1864, currently repealed, proceeding to a double extension, the first hypothesis being the liability for the prejudice of the minor and the second one for the deed of the one under court interdiction. The novelty of the legislative approach consist in regulating the liability of the person obliged to supervise a mentally ill person, since liability "*should also be committed in the case of injuries caused to third parties who have reached the age of majority, who lack discernment, whether or not they have been submitted to court interdiction"* (Pop, 2010, p. 107). This doctrinarian desiderate has become reality in the sense that it has been regulated. Therefore, the legal approach does not come into arid legal field, but is the answer of the situations encountered in practice and analyzed by the doctrine, as well as the guidelines from other legal systems.

The provisions of art. 1372 of the Civil Code should be corroborated with other laws, those referring to: minority status, the situation of the married minor, the minor who, for good reason, has acquired in advance the full exercise capacity (the emancipated minor), the provisions regarding putting under court prohibition, the presence of discernment in the minor or the person under interdiction, the parental authority and its duration, etc. Obviously, the minority, or, as the case may be, the status of a person under judicial interdiction is appreciated at the time of the commission of the prejudice by the direct author of the prejudice of the prejudicial illicit deed.

2. The Condition of Minor vs. Minor Child

Art. 38, par. (2) of Civil Code determines that "*the person becomes adult at the age of 18*". *Per a contrario*, minor means any person below the age of 18, therefore either without the exercise capacity, but also regardless of whether he has limited or anticipated exercise capacity as a result of a valid marriage or the emancipation of the minor under art. 40 of Civil Code.

According to art. 263, par. 5 of Civil Code and art. 4, with the same content, from the above mentioned Law no 272/2004, **child** means "*the person who has not reached the age of 18 and has not acquired the full exercise capacity, according to the law*". Given the possibility for the 16-year-old to marry, the unmarried and the non-emancipated minor will be still a child (Bodoaşcă, Drăghici & Puie, 2012, p. 10).

From these aspects, it follows that not in all cases the content of minor and child notions overlap. As a common rule, the quality of child and minor overlap when the person is under the age of 18. However, as a derogation, and what differentiates the two concepts, it refers to the second condition in the content of the legal concept of a child: not to have acquired the full exercise capacity (between 16-18 years) in one of the two hypotheses which we mention: the marriage of the 16-year-old, with all the conditions and the so-called emancipation of the minor. In the latter case, we refer to the provisions of art. 40 of the Civil Code, which allows a minor to invoke the trusteeship court certain sound reasons that would require the early grant of the entire civil legal mechanism available to a major person.

Liability established by art. 1372 of the Civil Code will not exist in the case where the perpetrator of the detrimental act is major, in which case the liability for the deed is enforced. A special situation is required by the case of the married minor[1], who, under the conditions of art. 39, par. (1) of Civil Code, as a result of marriage, will acquire full exercise capacity. In the same situation is also the 16-year-old, who acquires anticipated exercise capacity by the decision of the tutelage court passed on the basis of well-founded reasons. The problem that arises is: what is the relation between the acquisition of the full exercise capacity by a minor (as a result of marriage or proof of good reasons) and the legal regime applicable to civil liability, or rather, what interpretation should we give to this situation? In whose task do we engage tort civil liability in the event of the commission of a damaging act by such a minor?

The majority doctrinal opinion excludes the possibility of parental liability, invoking different reasons. A first opinion stating that in this case an accountability for the own deed will be established, it is argued by the fact that "*the minor has come of age by marriage*" (Eliescu, 1972, p. 263), an idea with which we cannot agree, due to express legal considerations, the acquisition of full exercise capacity does not have the implicit recognition of the majority. The 18-year-old is a "physical" period, explicitly prescribed by law, at which many more rights are born for the fresh major, including the constitutional right to elect and to be elected. If we agree that by marriage a 16-year-old minor will become major, we should also accept the potential of the right to vote. Minor and major legal criteria are relevant only to the flow of time, not to the exercise capacity. Going further with the analysis, in matters of tort liability, this criterion of exercise capacity is not at all relevant, only time, and implicitly the age.

In the same vein, we admit that parental liability will not be held in these situations, but on different grounds, invoking the provisions of art. 484 of the Civil Code, in the sense that, with the acquisition of full exercise capacity, the married minor will no longer be under parental authority. Becoming of age has the effect of acquiring the full exercise capacity, but not vice versa, having only one criterion of appreciation, the age of 18 (Vasilescu, 2012, pp. 640-641)[2]. The consequence: the married minor is liable for his deed. The same situation will also apply to the juvenile who has reached the age of 16 and has acquired full exercise capacity, decided on good grounds, as it results from art. 40 corroborated with art. 484 of the Civil Code, as a result of a putative marriage, he "recovers" the minor quality as a person under the age of 18 whose marriage is annulled, he was in bad faith at the conclusion of marriage (the liability belongs to the parent), while the minor who was in good faith at the conclusion of the marriage retains full exercise capacity, so he will be liable for any detrimental act.

[1] According to art. 272, par. (1) Civil Code, the matrimonial age is 18 years old. By exception and under the terms of the law (article 272, par. 2), the 16-year-old can also be married, gaining full effect of exercise. For details, see (Bodoaşca, Drăghici & Puie, 2012, pp. 44-48).

[2] The married minor will not become an adult, but will no longer be under parental authority, and the liability of his parents will be without ground".

Returning to the provisions of art. 1372, par. (1) Civil Code, there is no reference to the juvenile's tort capacity and it is not distinguished the discernment compared to the situation of liability for his deed, art. 1366 of the Civil Code. According to this article, the minor who has not reached the age of 14 old, nor the one who is under court interdiction is without discernment, while the minor who is 14 years old is relatively presumed to have the knowledge of his deeds, giving him a tortuous capacity. Therefore, to attract tort liability for the deed of another person, we retain both the fulfillment of the minority condition, but also the existence or the lack of discernment.

We appreciate that these provisions are irrelevant as in matters of liability for the deed of another person, it is not necessary to prove the guiltiness of the minor or the one under court interdiction, nor the presence of their discernment. In the same sense, art. 1372, par. (2) of the Civil Code, which emphasizes that the liability of the person responsible for supervision, control, guidance and authority is engaged regardless of the perpetrator's discernment at the time when the offense was committed.

We conclude that he will be liable to the juvenile's deed while he / she retains this status, i.e. under the age of 18, and not being in the situation of the married 16-year-old or the person who has acquired the full exercise capacity for good reasons. Children, in general, school children, preschool children, pupils, apprentices, etc. are part of this category. By virtue of the above and by analogy with the above-mentioned scope, we can also conclude that in the case of the juvenile the supervision obligation can be found in: law, through the broad institution of parental authority; in the contract (e.g. professional maternal assistant); based on a court decision - appointment of a guardian, etc.

3. Person under Court Interdiction[1]

The second analyzed category is the person under court interdiction, for which there is no requirement for the fulfillment of any age limit, but only for the special interdiction procedure.[2] "*A person who does not have the necessary discernment to take care of his interests, due to alienation or mental debility, will be placed under court interdiction"* - confirms art. 164, par. (1) of the Civil Code corroborated with art. 104 of the Civil Code.[3] The current legislative context had as starting point the provisions of the former Family Code, being regulated today in art. 164-177 of the Civil Code, "The Protection of the person under court interdiction".

As a measure of civil protection of the individual, it will only be ordered by the court and only if the interest of the protected person is justified, which will deprive the person under court interdiction from the exercise capacity. From the civil provisions, namely, art. 104 of the Civil Code, it results that the principle that will govern such a situation is that of protecting the superior interest of the protected person. With the ruling of court interdiction, the court will also order the establishment of a **guardian**. In special cases, until its appointment, the court may designate the appointment of a **special curator**, according to the provisions of art. 167 of the Civil Code.

[1] Gheorghe Beleiu (2001, pp. 368-369) defined the interdiction as the measure taken against "*the individual lacking the necessary discernment to take care of his interests due to alienation or mental debility, consisting of lack of exercise capacity and the establishment of guardianship."*

[2] The procedure for imposing a judicial interdiction is provided in art. 936-943 of the New Code of Civil Procedure. In Official Monitor no. 196 of March 21, 2017, Law no. 17/2017 on the approval of G.E.O. no. 1/2016 for the amendment of the Law no. 134/2010 on the Code of Civil Procedure, as well as related legislative acts.

[3] This welcome clarification of the situation comes after long doctrinal approaches that have supported such a point of view, of which we mention: *"If the author of the illicit deed is under an interdiction and the guardianship of the person under interdiction is established, we believe that liability for that deed would fall within the charge of the guardian, on the basis of art. 1000, par. (1) of Civil Code."* (From 1864 – s.n.) (Pop, 2010, p. 107).

There is no relevance to the matter of tort liability for the nature of the full designation, in the case of the tutor or the partial designation, in the case of the special curator. It is important that the liability will be made according to the moment of the harmful act and the person to whom the supervision obligation was at that moment.

From the interpretation of art. 164 of the Civil Code, we observed the following three substantive conditions of this procedure:

- lack of judgment of the person. And under the provisions of art. 1366, par. (1) of the Civil Code, the prohibition is presumed not to have the discernment of his deeds, as a consequence of being under court interdiction, regardless of his age;
- the cause of lack of discernment is the alienation or mental debility of the person;
- lack of discernment will not allow the person to take care of his interests.

The person responsible for establishing the state of alienation or mental debility is the specialist doctor. The legislator establishes the meaning of these phrases in the art. 211 of the Law no. 71/2011: *"Mental alienation or mental debilitation is a mental illness or a psychic disability that determines the psychic incompetence of the person to act critically and predictively on the social and legal consequences that may result from the exercise of civil rights and obligations."*[1]

As a matter of novelty to the former provisions of the Family Code, minors with restricted exercise capacity may also be under interdiction, if the conditions of art. 164, par. (1) of Civil Code are met. (Fodor, 2013, pp. 29-47)

Also as an element of novelty, art. 166 of the Civil Code provides the possibility for any person to designate, through a unilateral act or mandate contract, the guardian who is to take care of the person and goods of the person under court interdiction, subject to certain formal conditions. It is the so-called "assigned tutelage" (Fodor, 2013, p. 37) or the "protection mandate" (Boti, 2012, p. 393), according to the model of the Quebec legislation (art. 2166-2174 of the Q Civil Code) or French civil law (articles 477-494).

Article 111 of the Civil Code lists the sphere of persons who may request the establishment of guardianship in this case: a) persons close to the minor, as well as administrators and tenants of the house where the minor lives; b) civil status service on the occasion of the death of a person, as well as the public notary, on the occasion of the opening of a succession procedure; c) the courts, on the occasion of the conviction of the criminal sanction of the parental rights prohibition; d) local government bodies, protection institutions, and any other person. We also add to this list the possibility of the prosecutor's request for the measure under art. 92, par. (1) Code of Civil Procedure.

With the final ruling of the court decision of court interdiction, according to art. 169, par. (1) of the new Civil Code, it has its effects: the person under interdiction will have the right to be included in the sphere of the persons for whom a civil tort is answered, as it was ordered by art. 1372 of the Civil Code. As a matter of fact, the designated guardian will also fall within the sphere of liable persons under the same article.

Finally, reiterating what has been said above, the Civil Code does not set any minimum or maximum age limit for the person under court interdiction. As a result, they may be placed under a court interdiction, according to par. (2), art. 164 of the Civil Code *and minors with restricted exercise*

[1] On the difference between alienation and mental debility, see (Chirică, 2012, pp. 26-59).

capacity. *A fortiori*, it is only if they suffer from alienation or mental debility and if they meet all the other above-mentioned conditions can such a decision be made by both the adult and the minor.

Summing up, however, the interdiction of a minor will only take place from the age of 14, and until this age he is under the protection of parents. Establishing such a procedure before this age would be devoid of interest or effect, due to the cumulative fulfillment of two conditions, namely the lack of exercise capacity and the presumption of lack of discernment.

Directly related to our subject, it notes the possibility of the accumulation of two qualities by a single respondent, if the juvenile of the age of 14 and 18 is placed under a court interdiction, a minor who at the time of him being under court interdiction was under the protection of the parents. Under what civil capacity will the parents be liable for the damages caused by the illicit acts of such a minor placed under court interdiction? Will they be liable under the law, that is to say, as parents of the juvenile or on the basis of a court decision, as persons "required to supervise" a child under court interdiction? What does it prevail, the law or court judgment, by extension, the quality of parent or supervisor?

The legislator makes no reference to this state of affairs. The mere listing of the grounds ("the one under the law, of a contract or judgment" ...) does not empower us to consider that this is also the preferred and obligatory order to follow. Although the enumeration is limited, it is a random one, assuming that a particular form excludes the other two. This does not apply in the mentioned case.

The Doctrine has stated and was the one who shared the issue, arguing the controversial provisions of art. 1372, par. (3), the content of the supervising obligation, that of the parents and other responsible persons. The conclusion has been that the parental obligation is wider and it integrates that of the mere supervisor.[1] (Mangu & Motica, 2011, p. 18)

We believe that this situation could be avoided by endorsing *in terminis* a differentiated regulation according to the subject of civil law for which it is liable.

Although the law does not provide expressly, no liability will be imposed on other persons if the perpetrator of the deed is a major person without discernment, on whom it has not been ordered to place a court order for alienation or mental debility. He does not answer for his deed if, at the time when he committed the damaging deed, he was in a state, even temporal, of a mental disorder that prevented him from realizing the consequences of his deed (article 1367, par. 1 of the Civil Code), excepting the states of mental disorder caused by himself, by alcohol, narcotics or other substances (par. 2). Therefore this situation does not fall within the scope of art. 1372 of Civil Code. Until the appointment of a special curator by the court, no other person will be held liable for the damage caused by the person without discernment. The author of the damage, if he or she was without discernment, will be obliged to pay compensation to the victim in a fair amount, taking into account the patrimonial status of the parties (Pop, 2010, p. 168). Lack of discernment does not exempt the injured party from paying a compensation to the victim whenever the liability of the person cannot engage the duty to supervise him, according to law. The compensation will be set in a fair amount, taking into account the patrimonial status of the parties. We believe *de lege ferenda* is necessary, for a fair solution to the problem through the full compensation of the victim, a special insurance system, such as a guarantee fund established at national level, in order to ensure that those who have suffered prejudices that cannot be recovered for reasons such as those highlighted above or the insolvency of the responsible ones.

[1] Considering the fact that the content of parental protection includes, besides raising, the education and professional training of the juvenile also supervising the juvenile, the conclusion is that parenting will prevail, encompassing even the supervisor.

Concluding, as in the case of the juvenile, the obligation to supervise the one under court interdiction can find its grounds in the following: judicial decision - the most common situation; contract - the case of the trustee appointed by mandate contract; in the law - the case of state hospital units treating psychiatric patients under court interdiction. It is not liable under art. 1372 of Civil Code for the fool who is not under court interdiction, in which case the liability for his deed is established, unless it is proved that the conditions of art. 1367 of the Civil Code are met, placing the issue of a subsidiary obligation to compensate the victim.

4. Conclusions

In the light of the above, we conclude that parental liability for the deed of the juvenile or the minor under court interdiction is an indirect liability and we have argued in the present analysis that it can only be engaged when the damage is brought by the deed of a minor or a person on which the special measure of court interdiction was taken. Commitment to liability for the two categories (minor and the one under court interdiction) is justified by the nature of the relationship of the person responsible with the perpetrator of the deed, and is also motivated by the authority it exercises over it, materialized by controlling its way of life or conducting its activity.

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REALITIES AND PERSPECTIVES

Some Considerations on Criminal Policy and Crime Prevention

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Abstract: The paper deals with the issue of criminal policy as an integral part of the general policy of a state and its main component - the prevention of the crime phenomenon. Although the notion of criminal policy is used in the legal language, and not only, for more than two centuries, during which various definitions of this concept have been issued, there are enough indications that it is not correctly understood at this time. For this reason, we attempted to present a possible definition of what was considered to be the position of any government over criminality and a few landmarks of this particularly important activity. At the same time, given the unanimously accepted opinion that the prevention of criminality must precede the fight, I tried to present some opinions regarding this prophylactic enterprise, starting from its delimitation in relation to other notions and activities and continuing with the responsibilities that can be distributed in a rational and timely manner to state authorities.

Keywords: the criminal policy; policy of government; crime prevention

1. Introduction

The events at the beginning of 2017, which took place in Romania, having the stated reason the opposition to the initiatives of the power to decriminalize certain facts, revealed, more than the disputes on the realm of doctrine, the nebula surrounding the notion of criminal policy. This is all the more so since the specialized dictionaries, defining politics, explain notions such as: internal politics, foreign policy, economic policy, nonalignment policy, customs policy, etc. (Political Dictionary, 1975, pp. 461-464).

Beyond the slogans in the market, the attitudes of some institutions and individuals have been especially distinguished in this matter, invested with attributions and responsibilities that, instead of clarifying things, have made them even more disturbed. Those concerned about the problem had the opportunity to find out that the judge called to judge on law, wanted to be the law maker, and the prosecutor called to discover offenses and identify offenders, charged those charged with making the laws. Of course, the course of events (if any) could be interpreted in many ways, could identify faults and culprits, evil intentions, lucid and less lucid people, one thing, however, pierces among all these uncertainties: the notion of criminal policy is not clear to those called to conceive it, for those called to apply it, and even less for those who are obliged to respect it.

And, as a consequence of this blurring, the practice of an incoherent and ineffective criminal policy is in the natural order of things. Since an efficient management of the phenomenon of crime depends

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mainly on a systematic and orderly criminal policy, it is all the more necessary to define this notion, to identify its main characteristics and, consequently, their usefulness in developing strategies and tactics of prevention of the phenomenon in question.

Not to be understood that until the events mentioned, the Romanian state would not have and would not have promoted a criminal policy. Our intention is to point out that this policy has not been enough well-related to the realities and has not been developed coherently, the precariousness of the effects being visible, one of the causes being also the confusion on the definition and characteristics of the criminal policy. Apparently, this approach to clarify things can be theoretically cataloged, after all didactic, ultimately - useless in an increasingly pragmatic world.

Our opinion is that, on the contrary, the more precise and correct definition of the individualization of the notion of criminal policy is a guarantee of the elaboration of some rigorous laws, resistant to the pressures of reality, harmoniously framed in all the social relations whose ordination and regulation are called upon to accomplish, capable of constituting a strong barrier to abuse and arbitrariness. The examples of everyday life that support such an assertion are countless. We are confined only at highlighting the syncope encountered by the two codes (the Criminal Code and the Criminal Procedure Code) from their implementation to the present. The multitude of decisions taken by the Constitutional Court in resolving some exceptions of unconstitutionality or by the High Court of Cassation and Justice in appeals in the interest of the law forced the legislator to operate regularizations and agreements on numerous texts.

Here again, unfortunately, has imposed itself the insufficient attention given to the criminal policy, so that a number of modifications and additions have not been made by the legislator enshrined in the Constitution, respectively by the Parliament, but by the Government through emergency ordinances. Moreover, the adoption of the codes was done in an unnatural manner for this kind of normative acts (organic laws), that is, not through debates in Parliament, but through the procedure of engaging the liability of the Government. It is only for these reasons that a closer focus on criminal policy is needed. And closely related to this policy is the issue of crime prevention, because its purpose, translated by the drafting and enforcement of criminal law, is the prevention. No matter how risky such an assertion, which circulates more and more in judicial environments, and not only, prevention is the primary purpose of the criminal norm, and penalty - the second purpose, subsumed to prevention. In other words, prevention is the very essence of the modern criminal policy.

2. A Possible Definition of Criminal Policy

Criminal policy can be tackled in two ways: as a science and as part of a general policy promoted by a government. The notion of criminal policy was used for the first time by German criminal law specialist Feuerbach[1] at the beginning of the nineteenth century, and the first work on this concept was the Handbook of Criminal Law and Criminal Policy of German jurist E. Henke,[2] issued in Berlin in 1823. However, the concept of criminal policy was used with greater frequency in legal, political and sociological language only at the beginning of the twentieth century and towards the middle of it. The

[1] Paul Johan Anselm von Feuerbach (1775-1833), German jurist, has made an important contribution to reforming the Bavarian Criminal Code.
[2] Eduard Henke (1783-1869), German jurist and criminologist, author of the paper Handbuch des Criminaltrechts und der Criminal politic.

work of Franz von Liszt[1], *Traite de droit penal allemand,* vol. I issued in Paris in 1913 has laid the foundations for the concept of criminal doctrine and criminal policy. (Daneș, 1995, p. 42).

Over time, the opinions and attitudes towards this concept have been different, although some of the decisions in the reference field of criminal policy have been taken in some organizations such as the UN. In this context, of course the question of formulating a definition that individualizes the concept of criminal policy and identifies its main features has been raised.

It is noteworthy that it has been generally left from the etymological meaning of the expression which, in the opinion of many authors, the criminal policy designates only the activity of repression of the crime phenomenon (Cioclei, 1994, p. 3). In French literature, are used in parallel the notions of penal policy (*politique penale*) and criminal policy (*politique criminelle*). Naturally, criticism have been brought to the second wording, pointing out that it would suggest the opposite of what it is actually intended to express. This is why the term anti-criminal policy has been proposed (*politique anti-criminelle*), but this was not imposed in the specialized language. Some authors, like Marc Ance[2], consider criminal policy as a science and art at the same time, others propose its identification with a "management of the criminal phenomenon". Cristine Lazerges[3] considers that criminal policy is "the analysis and understanding of a particular business of the city - the criminal phenomenon (on the one hand) and the implementation of a strategy to respond to delinquency or deviance situations (on the other hand).

In the Romanian doctrine, the preoccupations in this sense have started also from the etymological meaning of the expression, considering that, in general, through politics is meant the activity of social groups, parties, bodies of power and the state leadership that reflect the social state and the economic structure of a country (Political Dictionary, 1975, p. 461). In this respect, some authors, appreciating the social importance of criminal policy, considered necessary to point out that it "has, or in any case should have nothing in common with politician...politics" (Cioclei, 1994, p. 2). Despite such attitudes (natural under certain circumstances determined by the general policy inconsistency promoted by the government), even they have admitted that "criminal policy circumscribes the wider scope of a state's general policy, but only to the extent that it is understood and practiced in its traditional sense of managing the city's affairs" (Cioclei, 1994, p. 2). It has also been admitted that criminal policy can only be a "criminal phenomenon management" (Cioclei, 2009, p. VII) and that it cannot be detached from the wider context of "criminal sciences", namely criminal law and criminology.

In view of this diversity of opinions, the definition has emerged that "criminal policy is the whole of the means and methods used at one time by governments, educational actors and state bodies to fight against and prevent crime" (Daneș, 1995, p. 42). In another sense, the criminal policy is "a part or an aspect of the general policy of the state, which includes all the measures and means of preventing and fighting against the criminal phenomenon, as well as all the principles of elaboration and application of these means and measures, adopted at some point in a particular country" (Bulai, 1992, p. 14). Finally, it was appreciated that "criminal policy elaborates and implements strategies to fight against the criminal phenomenon" (Cioclei, 1994, p. 12).

From the analysis of those presented, it results that in formulating the evoked definitions some elements were considered such as: the criminal policy - part of the general state policy, the criminal

[1] Franz von Liszt (1851-1919), German jurist, professor at the University of Berlin.
[2] Marc Ancel (1902-1990), magistrate and theorist of French law, the author of the paper La Defense sociale nouvelle, un mouvement de politique criminelle humaniste, 1954, 3-e edition, Cujas, Paris.
[3] Cristine Lazerges (n. 1943), professor of Law and Criminology at Pantheon Sorbone University, author of the paper La politique criminelle, Que sais – je?, 1987, Paris, Press Universitaires de France (PUF).

policy cumulates a set of measures, means and methods designed for a certain purpose, the criminal policy elaborates strategies to combat the criminal phenomenon.

It therefore appears beyond doubt that criminal policy is an integral part of the general state policy promoted by a government, whatever it may be. And this is a natural consequence of the democratic rules governing a society. Whoever holds power and governs imposes their policy, including criminal policy.

Criminal policy can only be a set of means, methods and measures to prevent and combat crime as a reaction of the social body to the disregard of the law and the rule of law, with negative effects on life, health, patrimony, order and public peace.

Criminal policy is materialized in the final analysis of a government program aiming at combating the phenomenon of crime, this involving legislative initiative measures to obtain the legal instruments and of implementation from the legislator.

In consideration of the above, we can define the criminal policy as that part of the general policy of a state, which aims at the measures necessary to combat and prevent the phenomenon of crime.

3. Benchmarks of Criminal Policy

Any criminal policy is guided by certain benchmarks or principles that guide the rule of law specific to a state.

a) A first benchmark is compliance with the law that is the promotion of the principle of legality and rule of law. Combating crime can only take place in accordance with legal provisions, whatever they may be. This presupposes that the acts that constitute offenses, as well as the penalties to be applied for such acts, must be provided by the criminal law. The judge and the prosecutor cannot decide instead of the law, that is, they cannot create the law. They can only decide according to the law. Criminal policy should target the fight against the phenomenon of crime exclusively through legal means.

b) A second benchmark of the criminal policy considers the fact that, in the legislative framework, it is being implemented by the legislator, meaning by the Parliament, the only organ of the state of law empowered to impose penalties for the acts incriminated as crimes. In concrete terms, the criminal policy is carried out by the judicial bodies on the basis of the legal norms enacted by the legislator. Concerning the implementation of the criminal policy it is worth noting that the solutions adopted by the judicial bodies must constitute inaccurate acts of justice in order to produce the inhibiting effect, narrowing the scope of the phenomenon of crime (Daneș, 1995, p. 43). From here it results that the means of reaction to crime are determined by the general evolution of society.

c) The third benchmark of criminal policy is its position towards crime prevention. It has been appreciated in the specialized literature that prevention has an alternative role in relation to combat activity when it has not necessarily been imposed. On the other hand, it was considered prevention to be a stand-alone measure, prior to the fight (Daneș, 1995, p. 44). We appreciate that crime prevention is an integral part of the criminal policy, which is the most important. Its importance is not derived from the immediate social impact, which can sometimes be eclipsed by the effects of the fight but by the medium and long-term effects, consisting in stopping the upward trend of the criminal phenomenon and reducing it to reasonable limits.

The Romanian criminal policy had a coherent course in a few periods from the existence of the modern Romanian state. In general, it has been affected by some issues, more or less acute, in relation to the government's vision in this area. The main shortcomings of the current criminal policy have been determined by several factors, including: legislative inflation, inconsistencies in the determination of penalties, inappropriateness of some incriminations, lack of clarity of some texts of law (Cioclei, 2009, p. VII).

Legislative inflation, in addition to the fact that it denotes the weakness of a state in managing its own problems, lacks the content of the principle of legality. Apart from the other two guarantees provided by the principle of legality, namely the prohibition of limitation of citizens' rights other than by the will of the legislator and the protection against the abuses of the executive power, the third one, that is the possibility of the citizen to know the law is impaired by the avalanche of normative acts which succeed in short periods of time. In such circumstances, the rule nemo censetur ignorare legem[1] seems meaningless and the courts have been forced in some situations to admit ignorance of the law.

The lack of clarity of some legal texts is also a consequence of legislative inflation, explained only by the rush of legalizing at any price, neglecting the clear, unequivocal expression, thus giving way to non-uniform interpretations and applications in similar cases up to identity. There have been stages or periods when the Romanian criminal policy has marched to the increase of exigency, translated into the increase of penalties in the case of some crimes such as theft of components of irrigation systems, electrical networks, components from safety installations and management of railway, road, naval and others traffic. Judicial practice has shown that this optic is not productive and that the increase in penalties has not produced any effect on the phenomenon of crime as a whole. At the same time, it was observed what Beccaria[2] had yet to find out in the eighteenth century that not the severity of the penalties impressed the offenders, but the promptness and certainty of their application. Or precisely this promptitude has been missing and still missing from the Romanian justice arsenal. When prosecution in cases of offenses of bodily injury, economic frauds, copyright offenses, etc. has been going on for 1-2 years, plus 1-2 years of trial and appeal, it is hard to believe that the law has been applied promptly and that its preventive effect has worked. It may be that a severe punishment, applied so late, would have adverse effects on the prevention of crime. The new Code of Criminal Procedure contains provisions on the speeding up and shortening of the length of the criminal trial by means of some procedures such as the recognition of guilt agreement and the simplified court procedure, but as practice shows and appreciated in doctrine, these tools have great deficiencies of regulation and, as a consequence, sometimes are applied in unusual ways. On the other hand, they are in fact aimed at alleviating the task of the judicial bodies and not the promptness of law enforcement.

4. Crime Prevention

Crime prevention has been and still is a challenge both for theoreticians, but especially for criminal policy practitioners everywhere. It is undoubtedly an essential component of the social reaction against crime, the fight against this phenomenon, which, regardless of costs, aims to eliminate the antisocial facts and their consequences, namely the reduction of the number of victims, the consequences suffered by them, as well as of the persons guilty and liable to criminal penalties. "Regardless of costs" means the preoccupation of the rule of law to protect the rights and freedoms of its citizens, but

[1] No one is allowed not to know the law, or no one can invoke the ignorance of the law.
[2] Cesare Bonesana – Beccaria (Marchiz de Gualdrasco și Villaregio) n. 1738, d. 1794 – Italian jurist, philosopher and politician, the author of the famous work *„On Crimes and Penalties",* promoter of the removal of corporal penalty.

also to avoid the failure of some in the criminal territory, with all that implies such a possibility (criminal prosecution, trial, reparation of damages, reinstatement in the previous situation, etc.).

There was a time when the criminal policy was essentially constituted by the repressive element (Daneș, 1995, p. 44). The reaction of society to the criminal phenomenon was limited to the means of criminal law, the investigation of criminality only serving to substantiate the repression measures in the idea that they be as effective as possible. This aspect of the criminal policy is what the practitioners and theorists of criminal law consider to be the fight against the criminal phenomenon, some of them considering it a complementary side of prevention (Dincu, 1993, p. 173). Other authors consider the prevention and the fight against crime different activities, with their own specific and purpose, carried out by institutions, bodies, specialized courts, having strictly defined competences. Finally, opinions were also expressed that prevention would include both pre-tort and post-tort measures, while combating always occurs post-tort.

We consider that from a terminological point of view, prevention is the species, and the fight - the genre, in other words, prevention is a form of combating crime, which does not contain any measures of criminal repression. Naturally, the mere fact of incriminating some facts produces or should produce a preventive effect translated into a warning or intimidation of those predisposed to commit crimes, as the finding of criminal offenses, the application of penalties and their execution also produce effects with preventive aspect. It is that prevention known in doctrine as prevention by law, based on the inhibitive nature of the criminal law. We cannot, however, ignore the fact that all these activities and measures mainly aim at repression, what produces as a result of the repression has an adjacent character.

The social reaction to crime cannot be limited only to repression and its preventive effects, or if such a situation is accepted, the results will be insignificant, as evidenced by a long practice. In order to give a firm and effective response, the social body felt the need for other remedies as well, rather than repression, which, of course, cannot be ignored. These remedies constitute what we consider to be crime prevention.

In general, prevention has been defined as a set of measures against the action of the generating and enhancers factors of the crime (Chipăilă, 2009, p. 344). Therefore, by acting on the causes and conditions of crime, prevention is outside the judicial environment, it is essentially extrajudicial (Dincu, 1993, p. 173). It addresses the annihilation of the generating causes of the crime and the conditions that favor its perpetration. It is a civil activity, which must involve the community more than the judicial institutions. In this configuration, crime prevention can only be a succession of coherent and permanent measures, organized and managed in relation to the evolution of the considered phenomenon.

If we admit that crime has a dual causality, which at the same time is related to the human being and society, it means that prevention also has to take into account the man and the social environment in which he lives. Thus we come to the idea that prevention must be done through social (relating to the person or persons prone to committing crimes, as well as their living environment) and economic (which addresses the economic causes of crime) means. From this perspective, it must be noted that the Romanian criminal policy of the last period has been shy in the sense that were insufficiently addressed social elements and almost neglected elements of economic nature. Thus, the lack of jobs and the lack of motivation to get a job have generated a whole range of alcohol-grafted, psychoactive substances offenses, lacking any ideological horizon, or any existential landmark. Also, excessive economic polarization, resulting in the emergence and widening of some social categories at the

extreme limit of poverty, has generated, as expected, a sharp rise of offenses with patrimonial impact. These findings are beyond doubt and cannot be challenged. The problem that arises is what counter-measures envisaged and envisages the Romanian criminal policy.

The measures are those mostly practiced in most European countries: measures implemented by law and police. In other words, legislation and clear competencies for police agencies. It is possible that in other communities, with other educational configurations and especially with other socio-economic conditions, the stated measures have the expected effects. Referring to the situation in Romania, we can appreciate that such a system of measures is, certainly, ineffective.

From an institutional point of view, Romania, pressed also by the requirements of European integration, has created a system that could be effective if it would be used in the parameters imposed by the evolution of the phenomenon whose management is called to do it.

There is a National Crime Prevention Council, as a governmental structure that has developed a National Crime Prevention Strategy for 2011-2016. Within the Ministry of Justice functions the Directorate for Crime Prevention, whose tasks are to study the phenomenon, to develop some programs and projects, to implement them, to ensure the collaboration between the institutions with attributions in the field, etc. Within the General Inspectorate of Police, the Crime Research and Prevention Institute has been operating since 1998 with corresponding structures in the territory. Finally, there is a National Institute of Criminology, having, among other functions, the prevention of crime. We also add the National Anti-drug Agency and NGOs such as the International Crime Prevention Agency and Security Policies.

All these entities have carried out analyzes and studies on the phenomenon, developed strategies, programs, projects, initiated and carried out campaigns and activities meant to stop, diminish, reduce the scale of crime. But there is no analysis or assessment of the effects of these measures. However, in order to realize their effectiveness, it is enough to consult the judicial statistics and compare them from one year to the next. Thus, we find that the crime has not been reduced in its entirety, but on the contrary it has registered significant increases and this relates only to the revealed (known) crime, regarding the actual crime, being impossible to make any appreciation. If there have been some decreases, they have been on some segments and insignificant in relation to the whole phenomenon.

What would be the explanation for such a situation? There is an institutional framework, strategies, projects, programs, campaigns and actions have been developed, with modest results. The explanation can be found in the fact that all these measures neglected the causes that are not related to the offender's person, namely the socio-economic ones, on the one hand, and on the other hand, the weight center of the whole preventive ensemble was placed in the police yard.

5. Conclusions

Crime prevention activity is a basic component of the criminal policy of a modern rule of law. Continuing cantoning on the repressive side and the so-called legal prevention is a kickback in the field of modern prevention. Prevention should be conceived and carried out based on some in-depth criminological studies on objective reality data. The weight center of all preventive activities should be placed under the responsibility of entities other than the police, reserving it the role of principal partner.

As long s preventive measures addressing the socio-economic causation of crime will be neglected, any preventive action will remain without effect.

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Criminal Liability and Sanctioning the Legal Entity in the Romanian Law - Realities and Perspectives

Monica Pocora[1]

Abstract: Over the past 25 years, Romania has entered into the market economy club, which means the constant growth of the economic actors that carry out their commercial activities. Over time, criminal activities conducted by legal entities have become more and more elaborate, so that there has been a need to identify the shortcomings, complemented by effective measures to coerce the illicit activity, and identifying prevention methods that appear to be effective. Moreover, the economic actors with transnational activities have begun to take advantage of the "favorable" jurisdictions of the illicit deeds, being more profitable. Thus, in the context in which Romania receives foreign investors and, more recently, gives rise to companies with international operations, the importance of modernizing and aligning the legislation on the liability of the legal person with most European and even global jurisdictions becomes evident.

Keywords: criminal liability; legal person; prevention; repression

1. Introduction

In the light of the modernization needs of the Romanian legislative framework perceived during the research, the de lege ferenda proposals are built on the ideas found in the paper, repeating certain proposals already mentioned in the context of the suggestions for a European directive in the matter, and also recommending to the legislator the adaptation of the Romanian legislation on the liability and sanctioning the legal person to the current requirements by:

(1) increasing the general maximum of the fine sanction for the legal person;

(2) supplementing legislation on safety measures, in the sense of introducing a specific measure for the legal person;

(3) the regulation of a legal attenuating circumstance specific to the legal person;

(4) completing the legal provisions on the complementary punishment of placement under judicial supervision.

(5) completing the legal provisions on complementary punishment of the interdiction to participate in public procurement procedures.

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2. Modification of the General Maximum Penalty by Fine applicable to the Legal Person

Currently, art. 137 par. (2) The new Criminal code sets the limits of the fine applicable to the legal person after the commission of a crime, setting the general maximum of 3,000,000 lei (the equivalent of approximately 670,000 Euros). Since the primary purpose of the regulation of a criminal penalty is general prevention and its scope tends to be a reflection of the importance given to the social values defended by the incrimination of that act and the importance or even the urgency of preventing and combating a certain type of behavior, we consider that the current maximum provided by the Romanian law is not such as to prevent the corrupt behavior of companies with the turnover of millions of euro, nor to ensure the coercion and re-education of the mega-companies to which the penalty was imposed.

In the face of the different economic power of legal persons, we consider it appropriate *to amend the general maximum of the punishment of the fine imposed on the legal person in the sense of not limiting it*, according to the Canadian legislation, so that *the individualization criteria will occupy a central place in determining a truly proportionate, effective and dissuasive punishment*, of the criminal behavior of the legal person. Thus, if the legal person sought to obtain a patrimonial benefit through the commission of the offense, e.g. obtaining a public procurement contract of around EUR 54 million (Microsoft case), the effective operation of the special circumstance provided by art. 137 par. (5) according to which the fines will take into account the value of the patrimonial benefit obtained or pursued, it will not find the maximum much too low of 670,000 Euros.

Adapting the maximum penalty to the needs of the reality characterized by legal entities with economic force is all the more appropriate as, according to a recent study by PriceWaterhouseCoopers, around 200 mega-companies will appear on the Romanian market in the next 15 years, in addition to the multinational companies already active.

3. Supplementing the Legislative Framework on Safety Measures, in the sense of establishing the Implementation Measure of the Compliance Programs as a Measure specific to the Legal Person

By definition, the safety measures have a preventative role, they are applied *in order to eliminate a state of danger* and *to prevent the commission of a new act provided by the criminal law*. In this context, we consider it appropriate to supplement the current legislative framework on safety measures, currently regulated around the nature of the individual by the New Criminal Code in Art. 112, with a specific safety measure for the legal person, namely the implementation of a compliance program with the law.

In the context of committing corruption acts, the legal person could apply the measure of the implementation of an anti-corruption compliance program, consisting of making it necessary for the legal person to take effective organizational measures for the prevention and detection of corruption, at its expense. *Stricto sensu*, the content of an anticorruption compliance program should consist of the elements otherwise provided by the French project law *Sapin II*, which has been inspired by the current practice of the companies and the North American norms in the field:

- adopting a code of conduct detailing prohibited behavior;
- a procedure to verify the integrity of customers, direct suppliers and intermediaries;

- a clear internal procedure that allows employees to report to management about the existence of situations contrary to the code of conduct;
- a map of the corruption risks per sector and region, updated periodically;
- an accounting control procedure to ensure that the records are accurate and do not attempt to mask corruption;
- training seminars for staff exposed to corruption risks; and
- a disciplinary sanction regime applicable to violations of Code of Conduct rules.

Therefore, we propose to the Romanian legislation *the supplementation of the legislative framework regarding the safety measures, in order to establish the implementation measure of the compliance programs to the law as the specific measure of the legal person*, either *by amending the provisions of art. 112 of the New Criminal Code, or through the elaboration of a separate article (e.g. Art.136[1]) under Title VI of the New Criminal Code*.

4. The Regulation of a Mitigated Judicial Circumstance specific to the Legal Person Consisting in the Existence of a Program of Compliance with the a Priori Law for the Commission of the Criminal Offense

While we consider it premature to introduce a legal obligation on the legal person to implement a specific program of compliance with the independent law of committing a crime, in our law, ***we consider it appropriate to introduce a legal provision regulating the circumstance of such a compliance program and also the attenuating judicial circumstance.*** We believe that the usefulness of such a legal plural provision: on the one hand, it will stimulate the voluntary implementation of law enforcement programs by companies, and on the other hand it will reward the good faith of companies that have done diligence and reasonable measures to prevent crimes, even if they have proven to be partially ineffective.

The reason behind the proposal to frame the circumstance of a compliance program in the category of *judiciary* mitigating circumstances and *not legal ones* is to avoid encouraging scenarios where companies adopt such compliance programs superficially, as a façade, just in anticipation of mitigating effects in the case of criminal proceedings. By regulating the court circumstances, the implementation of compliance programs will need to be real and robust to mitigate the applicable punishment, and the court may ask the company for evidence to that effect.

5. The Completion of Legal Provisions regarding the Complementary Punishment of Placement under Judicial Supervision

Placement under judicial supervision is a new institution for the Romanian law, introduced for the first time by the provisions of art. 136, par. (3) of the New Criminal Code, implying the conduct of the activity which caused the offense under the supervision of a judicial trustee. In the section devoted to the analysis of this punishment in this paper, we have brought to the current regulations to three main reproaches; the first refers to the poverty of legal provisions that leave too many variables in the operation of punishment, the second reproach consists in limiting the function of this punishment to the purpose of special prevention and rehabilitation, and the third refers to the restriction of the scope of punishment by art. 144, par. (3).

In order to remedy the perceived shortcomings of the current regulation, we consider that the legislator's intervention is necessary, in order to elucidate and detach the operation of the punishment of placement under judicial supervision, in order to specify (a) who can be called a judicial manager, namely what professional qualifications are required to take responsibility for surveillance; (b) what are the powers which may be attributed to the judicial trustee; (c) what are the obligations of the manager in relation to the court; (d) what are the criteria for determining the remuneration of the trustee and who determines the due amount of payment.

We also consider that the extension of the purpose of punishment to assuring a support function in executing other sanctions imposed by the court, for example implementing *a compliance program*, and granting broader powers to the guardian to intervene in the organization of the legal person, would contribute efficiently to the efforts to reorganize and re-socialize the legal person, and it would effectively supplement the sanctioning framework applicable to the legal person.

Regarding the scope of the punishment of placement under judicial supervision, contrary to the current regulations, we consider that art. 144, par. (3) by virtue of which the punishment is not applicable in the case of the legal persons stipulated in art. 141 of the New Criminal Code, namely political parties, public institutions, trade unions, employers' organizations, religious organizations or those belonging to national minorities, as well as the legal persons working in the media field, must be removed. The reason for which the legal persons mentioned in art. 140 are exempted from the application of the dissolution and suspension of activity, namely the necessity of continuity of their activity under the principles of the rule of law, cannot justify their exclusion and the punishment of the judicial supervision, because the punishment in question does not interrupt the activity of the mentioned legal entities. On the contrary, we appreciate that the placement under judicial supervision is appropriate for all legal entities mentioned in art. 141, due to the strong preventive feature, and maybe, in the near future, a support function.

6. Completion of Legal Provisions on the Complementary Punishment of the Prohibition to Participate in Public Procurement Procedures

According to the current regulation, the application of the prohibition to participate in public procurement procedures is left entirely to the discretion of the court, as the art. 138 of the New Criminal Code imparts an optional feature to the punishment, and moreover, the law keeps silent on the need for a link between the offense committed and a public procurement procedure.

As far as we are concerned, we propose ***to the legislator the obligatory investment of the application of the prohibition to participate in the public procurement procedures in all cases where the court finds that a deliberate offense is directly related to the organization of public procurement procedures or the execution of a public contract.***

The public services or products are in the interest of the entire society, putting at stake directly the resources of the state; at the time of conviction for an offense that alters the public's confidence in the ability of the legal person to serve with integrity and performance the public interest and resources, withdrawing the right to contract with the state or other public authorities or institutions is at least useful and welcome, if not absolutely necessary.

Regarding the maximum period of 3 years for which the punishment can be ordered according to the provisions of the New Criminal Code, we propose to increase it to 5 years in order to bring the criminal provisions into line with the Public Procurement Directive.

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