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Legal Sciences

Multiple Discriminations – between a Contravention *Per Se* and an Aggravating Circumstances

Cristian Jura

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Abstract: In spite of a lack of a legal definition of multiple discrimination UE is showing a high interest in dealing with multiple discrimination. Preparatory work of the European Commission for a new Directive prohibiting discrimination on different grounds – commonly referred to as the 'Horizontal Directive' – reference is made to 'the need to tackle multiple discrimination, for example by defining it as discrimination and by providing effective remedies' (which, however, is considered as going beyond the scope of the directive). In Romania the legal provisions on combating discrimination lies on a law from 2000. In that law multiple discrimination is seen as an aggravating circumstances as follows, art 2 (6), OG 137/2000: „Any difference, exclusion, restriction or preference based on more than one criteria will be an aggravating circumstances and it will be take into account when trigger contravention liability, unless it falls under the incidence of criminal law". That means that the Romanian National Council for Combating Discrimination, the specialized authority in the field of discrimination, when judges a case of multiple discrimination must prove not only one, but at least two acts of discrimination and then when fines takes into consideration the aggravating circumstances.

Keywords: discriminations; aggravating circumstances; Romanian National Council for Combating Discrimination,

1. EU Legal Provision on Multiple Discrimination

It is well known that the combating discrimination legislation lies at the level of European Union in three distinct Directives. The three Directives are:

- Directive 2000/43/EC – Racial Equality Directive: establishes a framework against discrimination based on racial or ethnic origin inside and outside the labour market;
- Directive 2000/78/EC – Employment Equality Directive: establishes a framework for equal treatment in employment and occupation, and in Article 1 lays down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation;
- Directive 2004/113/EC – Gender Directive (and Gender Recast Directive 2006/54/EC): establishes a framework for equal treatment between men and women in access to and supply of goods and services.

The approach of multiple discriminations in the three directives is quite the same: there are **no legal provisions** regarding combating multiple discriminations.

2. Comments of Multiple Discriminations from EU Perspectives

There are some references on multiple discrimination like in the Recital 14 of the Racial Equality Directive, **2000/43/EC**: „*In implementing the principle of equal treatment irrespective of racial or ethnic origin, the Community should, in accordance with Article 3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, especially since women are often the victims of* ***multiple discrimination***". Even in this case there is no legal definition of multiple discriminations.

In **2008**, so after 8 years, in the Explanatory Memorandum of the Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation there is a reference regarding multiple discrimination in the sense that „*Attention was also drawn to the need to tackle* ***multiple discrimination****, for example by defining it as discrimination and by providing effective remedies. These issues go beyond the scope of this Directive but nothing prevents Member States taking action in these areas*."

There are more references on multiple discriminations in Recital 13 of above mentioned Proposal.

(13) In implementing the principle of equal treatment irrespective of religion or belief, disability, age or sexual orientation, the Community should, in accordance with Article3(2) of the EC Treaty, aim to eliminate inequalities, and to promote equality between men and women, ***especially since women are often the victims of multiple discrimination****."*

But in the same time it is quite strange that multiple discrimination it is not mentioned in the Recital 12, where are underlined the forms of discrimination: "*(12) Discrimination is understood to include direct and indirect discrimination, harassment, instructions to discriminate and denial of reasonable accommodation."*

More than that there is no reference at multiple discriminations on the body of the **2008** Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation.

There are another two documents, both Communications From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions, in which multiple discrimination is not mentioned: **2008** Non-discrimination and equal opportunities: A renewed commitment and **2008** Renewed social agenda: Opportunities, access and solidarity in 21st century Europe.

There are some suggested definitions and anyway there is no difficulty to define multiple discriminations. One of the last definitions is suggested within the EU – MIDIS European Union Minorities and Discrimination Survey in **2011**. Defining 'multiple discrimination': *The term 'multiple discrimination' can be understood as meaning discrimination on more than one ground" or a sum of various discriminations*. In the same Survey it is admitted that *No specific definition of multiple discrimination was used in the survey.*

From the legal point of view there are two possible situations:

- on the one hand multiple discrimination could be taken into account as an fact *per se,* suggested in the new Horizontal Directive: defining it as discrimination and by providing effective remedies;
- on the other hand it could be considered as an aggravating circumstances.

Indifferent the way the multiple discriminations are considered, there are another related issues and this is how to prove any of the two situations and how to sanction.

In **2008** EU Justice, Freedom and Security Commissioner, Jacques Barrot, said that the proposal of Horizontal Directive, which would bar discrimination not only on the grounds of disability or age, but also of religion or sexual orientation, will be put forward as early as at the beginning of July 2008. Not much happened since then.

3. EU Concern on Multiple Discriminations

In spite of a lack of a legal definition of multiple discrimination UE is showing a high interest in dealing with multiple discrimination. Preparatory work of the European Commission for a new Directive prohibiting discrimination on different grounds – commonly referred to as the 'Horizontal Directive' – reference is made to 'the need to tackle multiple discrimination, for example by defining it as discrimination and by providing effective remedies' (which, however, is considered as going beyond the scope of the directive).

In addition, the European Commission has commissioned reports and has funded research on multiple discriminations – such as the 'Genderace' project under the 7th Framework Programme.

4. Multiple discriminations – a Romanian approach

In Romania the legal provisions on combating discrimination lies on a law from 2000. In that law multiple discrimination is seen as an aggravating circumstances as follows, art 2 (6), OG 137/2000: „Any difference, exclusion, restriction or preference based on more than one criteria will be an aggravating circumstances and it will be take into account when trigger contravention liability, unless it falls under the incidence of criminal law".

That means that the Romanian National Council for Combating Discrimination, the specialized authority in the field of discrimination, when judges a case of multiple discrimination must prove not only one, but at least two acts of discrimination and then when fines takes into consideration the aggravating circumstances

5. Conclusions

After analyzing various document, European and national we could draw some conclusions:

- there are no legal provisions defining multiple discrimination at the EU level, there are just mentions of it in various legally or politically binding documents. In spite of this lack of legal framework EU shows great concern into this issues, a prove in that sense is the last EU – MIDIS European Union Minorities and Discrimination Survey in **2011,** called Data in Focus

Report – Multiple Discrimination. Being no legal definition it is difficult to have a common and uniform approach of multiple discrimination at the EU level. After analyzing EU – MIDIS European Union Minorities and Discrimination Survey in **2011** it is also very difficult to discover what is EU approach on multiple discrimination.

- We may find various provisions regarding combating multiple discrimination at national level and those provisions may be more specific in terms of definition or national approach.

6. Recommendation

To conduct a research at the EU level to analyze the national provisions, if any and then to agree upon what is multiple discrimination: a contravention *per se* or aggravating circumstances and to check how many cases where submitted to the national specialized institutions.

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Organisational Structure: Essential in Making Mechanisms Process Management

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Abstract: Although public management is a new field of management science, there are already convinced that the extension of specific principles and approaches, there is only a relative matter, but becomes an imperative necessity, which determines the coordinates of the major public sector reform. Otherwise, there is increased risk of slipping into formalism, changing some general understandings and essential to the detriment of the fundamental, meeting new public management. As a consequence, it is absolutely necessary to waive the perception and treatment of the old administrative system, public institutions in general and in particular as bureaucratic administrative apparatus that develop rules, regulations and laws by which they are applied and the transition to new principles and regularities of public management, the administrative system as a whole and each public institution by public managers seek an given level of managerial performance, reflected in increasing general public interest and satisfaction of specific social needs. To this we highlight the organizational analysis and design of technology-specific organizational structure of public institutions, structures of communication within public institutions, participatory decision-making structures that are most efficient and effective types of organizations based on structures - pyramidal and hierarchical organizations network-type organizations.

Keywords: organizational structure; information-decision process; organization; coordination

The organization of public management is a set of processes that are under the legal framework defines the components of the administrative system as a whole and each part of public institutions, state powers, duties and powers assigned to its components and the relationships established between them within and outside the system to effectively meet the public interest.

At the current stage of transition the organization's work may be carried out efficiently only against a rational organization, based on the principles, methods and techniques scientifically. In this way the organizational rigor provides the only source of generating coherent action, the discipline and order and create functional organization can adapt to the changes that occur in continuous practice in its work.

Fundamental organizational element, organizational structure of public institutions plays a major role with broad implications. It defines the framework for action and outlines the factors of efficiency, specifies the job and determines the place and role of each section, outlines the powers, duties and responsibilities, influences the information - decision-making and effectiveness. Examining the basic elements of organizational structure, how to combine them, the correspondence between functions and

departments, their nature, mode of distribution of responsibilities, establishing connections between functional and operational elements, the literature identifies three types of organizational structures: a) hierarchical structure, b) the functional structure, c) hierarchical structure-functional.

In connection with the foregoing analysis, design, evaluation and restructuring of the organizational structure must meet several conditions, most important of which appear to us: a) conform to the institution's overall goals and objectives, b) be further and cover a number as low levels of management, c) to provide clarity and precision functions and connections between functions, giving powers, functions and responsibilities of civil servants, d) can be adapted easily to new goals of the institution; e) to be economic in the sense of reduced advertising expenses and personnel management.

Analysis and design of organizational structures appears as comprehensive, complex, multidisciplinary implications, with numerous difficulties, the influence of sense otherwise. The science of studying public management and relationship management processes between the components of the administrative system but also within them in order to discover general principles and laws, methods and techniques for improving forecasting, organization and coordination, resource management and control evaluation activities aimed at increasing to meet the public interest.

Organizational culture has attracted attention especially after the appearance of the paper renowned researchers T. Peters and R. Waterman, In Search of Excellence, which in many practical cases have shown a correlation between organizational culture dimensions and performances by renowned companies. Before the advent of this book, Herbert Simon introduced the organizational culture research organization, by defining a "limited rationality". He left the grounds that the theory of organization not found usefulness and justification than accepting that human rationality is subject to certain limits. They depended on the organizational environment in which the individual is more accurate values, beliefs, traditions and legacy that gives each organization an identity.

Rationality is "culturally limited" because the organization can have a well defined structure to the extent that there are boundaries of rationality. If these borders vary repeatedly and unpredictably, the organization may not be stable. While the results of these attempts have not been neglected, because we are witnessing today the development and affirmation of a new distinct discipline called organizational culture, such courses are very useful in management specialists.

The concept of "organizational culture" can be analyzed from the functional perspective, as an organization has a culture seen as a variable or in terms of integration where the firm fully defines a culture (I Dill Heinen, 1986).

Functional perspective is based on the premise that the organization has a culture that allows the integration, coordination and motivation of individuals within the organization. According to the perspective of cultural integration is in a continuous process of change, but can only be influenced by external factors difficult.

Culture can be defined as a model of values, representations, modes of behavior that govern life in the organization (Smircich, 1983). It is thus the sum of all the unwritten rules of business.

Organizational culture is a way of life, the result of internal practices, of rules of conduct, values, aspirations and beliefs of that particular organization. It is what gives an organization's personality and identity. However, organizational culture does not control all the perceptions, thoughts and feelings of staff organization. The more time staff in the organization, the organizational culture will influence deeper perceptions, thoughts, and feelings organization members, how they will react in certain situations acetic. The organization has its own culture a more powerful; it is much more mature and

better defined, having a greater impact on employees, including direct and immediate impact on innovation and economic performance. Their model of organizational culture and values fit a pattern of behavior from the organization that directs life. Strong companies do not rely solely on rational tools of scientific management to achieve certain productivity, a certain level of efficiency.

They use organizational culture - deep convictions, and shared values that they express heroes, rituals and ceremonies - to formulate strategies and policies I support the majority. Based on how employees dress, even if there is no official uniform, to the way in which conflicts are managed, all bearing the imprint of a unified strategy that aims to blend some positive results and conduct and to deter others .

From the psychological point of view, the culture was analyzed by Jacques in his The Changing Culture of a Factory published in 1951. He examines the culture of a factory in this book as a way of thinking and action of ordinary people in the organization.

Thus, culture describes the behavior of the organization, production methods, technical, discipline, leadership style, organizational goals, business practices and assess how different types of rewarding work, not least the conventions and things taboo. A book's success has made Peters and Waterman Auf der Suche nach Spitzenleistungen (1984), where the authors have highlighted the importance of factors "soft" (style and way of filling a job), which are very important for obtaining performance.

Etymologically speaking, lodges ceremonies, rituals, myths and taboos exist in the organization. Thus, organizational culture determines the employees to behave in a certain way, implicitly and naturally follow the standards of its own conviction and agreed to become the stronghold of a certain style of action.

An organization without culture, even if they are in a training stage, is vulnerable, like a state without a culture and history. From this perspective, organizational culture acts as a binder, as motivating and educational and formative valences. The most visible component is the symbol of a mature culture. Building architecture, interior design, representative colors, logo and logo are all symbols come to establish identity.

Although public management is a new field of management science, there are already convinced that the extension of specific principles and approaches, there is only a relative matter, but becomes an imperative necessity, which determines the coordinates of the major public sector reform. Otherwise, there is increased risk of slipping into formalism, changing some general understandings and essential to the detriment of the fundamental, meeting new public management.

As a consequence, it is absolutely necessary to waive the perception and treatment of the old administrative system in general and public institutions in particular, as bureaucratic administrative apparatus that develop rules, regulations and laws by which they are applied and the transition to new principles and regularities of public management, the administrative system as a whole and each public institution with public managers aim to produce a given level of managerial performance, reflected in increasing general public interest and satisfaction of specific social needs.

Public institutions represent all organized structures created in the society for public affairs. Public institutions within the meaning of bureaucracy that we have today, is the only way the state social-economic organization that can meet the challenges of modernity (the large number of population, diversity and complexity of human needs that need to be satisfied). The objective of a public institution is serving the public interest.

Communication is one of the tools of efficient management strategies to change the organization. It can help adjust attitudes, "way of looking at things" and changing behaviors. Mission and objectives of management communication are closely related to organizational changes and organization characteristics of the environment in which it operates.

Public relations are in essence communication activities. If public relations is communication between an organization and management of the public or the public interest, effective public relations manager must be in permanent contact with the public organization to be able to distinguish at all times their communication needs, to formulate and messages depending on the characteristics of each of them and watch their reaction to receiving each of the messages.

The organization, give the second phase of management process aims to group people, prioritizing tasks and activities and to establish organizational links conveyance of all efforts in one direction and that is to achieve the goals and the organization has set.

The organization of public management is a set of processes that are under the legal framework defines the components of the administrative system as a whole and each part of public institutions, state powers, duties and powers assigned to its components and the relationships established between them within and outside the system to effectively meet the public interest. At the current stage of transition activity of the organization is likely to take place efficiently only against a rational organization, based on the principles, methods and scientifically based techniques. In this way the organizational rigor provides the only source of generating coherent action, the discipline and order and create functional organization can adapt to the changes that occur in continuous practice in its work. Fundamental organizational element, organizational structure of public institution plays a major role with large implications. It defines the framework for action and outlines the factors of efficiency, specifies the job and set the place and role of each section, outlines the powers, duties and responsibilities, influences the information - decision-making and effectiveness. Examining the basic elements of organizational structure, how to combine them, the correspondence between functions and departments, their nature, mode of distribution of responsibilities, establishing connections between functional and operational elements, and the literature identifies three types of organizational structures:

a) hierarchical structure;
b) the functional structure;
c) functional hierarchical structure.

In connection with the foregoing analysis, design, evaluation and restructuring of the organizational structure must meet several conditions, most important of which appear to us:

a) conform to the general purpose and objectives of the institution;
b) to be supple and have a number as low levels of management;
c) define clear and precise links between the functions and features, specifying the powers, functions and responsibilities of civil servants;
d) can be adapted easily to new goals of the institution;
e) to be economic in the sense of reduced advertising expenses and personnel management.

Analysis and design of organizational structures appears as a comprehensive, complex, multidisciplinary implication, with numerous difficulties, the influence of sense otherwise. Scientists studying public management and relationship management processes between the components of the administrative system but also within them in order to discover general principles and laws, methods

and techniques for improving forecasting, organization and coordination, resource management and control evaluation activities aimed at increasing to meet the public interest.

Management organization, addressed systemically, is known more as a management system that set of elements of organizational, methodological, informational, decisional and relations between them, so shaped as to allow the achievement of objectives.

Organizational subsystem is the main component organizer formally represented by laws, regulations with national and informal organization that includes groups and informal links between them.

Methodological approaches the organization and management subsystem in terms of its management tools for use in management workflows and methodological elements of design, redesign and maintenance management and operation of its subsystems.

Information subsystem represents all information, information flows, procedures and means of handling information designed to help achieve the main objectives of the organization. Decision subsystem consists of all decisions taken and implemented within an organization is structured and determined its objectives and configuration management hierarchy.

Achieving Key management involves the public positions and public office holders and executive leadership in this area added responsibility in managing all types of resources available to the public sector, namely human resources, information, material and financial. All these are used in process management and execution of public institutions to meet social needs and thus achieve the fundamental objective of public management.

In any organization, managerial act is given by all the phases and work processes that establish the objectives of unity and organization of its subsystems, and proposed work processes necessary to achieve them, and those determined to enforce measures to meet their conditions as profitable. The scope and intensity of management is in a dependent relationship with the management echelon in the sense that, how it is done on the top step of the hierarchy of management system, the more comprehensive, more intense and rich meanings and results.

The essence of process management is to focus the efforts to coordinate human joint work. This effort is in place in time and space and form of combination is made necessary due to the division of labor and management cooperation.

Summing up many operations, grouped in phases, the act has a specific content management requires understanding how to influence the employees in solving organizational problems. The content depends on the managerial tasks that are key to the organization and may be methodological, functional, organizational, social and informational. Public management function addresses the public in a practical perspective, which also determines the coordinates necessary for the proper functioning of public institutions in which they operate government officials and leading public officials and representatives of political execution. It determines the status and structure of civil service and civil servants as employees of public institution. Performance of public institutions is directly determined by its employees, who are responsible, as public managers and performers, with the results.

Experience and reality of other countries shows that democracies improve the administrative capacity of public institutions depends most determination and professionalism in the managerial performance of public functions by public managers and civil servants to execute. This should be a theme for reflection and for representatives of our administrative system to understand the strong need for orientation of attention to public management, the professionalism in the exercise of public functions

by public officials and especially by representatives of the political class. For this, each item in the structure and function of public management or public management execution compels us to determine the subject, tasks, powers and responsibilities of owners, whereby they become an active part of the system they belong, care responsibilities clear regarding the objectives and, consequently, the administrative task of the authorities and the social mission of public institutions in which they operate.

The current stage of evolution of the Romanian legislation does not provide a conception unit on civil service issues, established itself with some necessary modifications for the correlation of the different categories of legal acts and to lay the foundation of their legal relationships viable. Should be a fundamental change in the orientation of public institutions in Romania, practically moving from strictly legal dimension that has a system in Romania generalized the managerial perspective to address public institution determined by the new public management values.

Managerial revolution and globalization must be built In a new model of management theory and practices that enable and encourage their mutual potentate. The effects of this new approach will spread and increase rapidly, which requires the assimilation of management institution "triplet's empathy - acceptance - congruency" in dealing with change management and change management for near new guidelines in management. Efficiency and effectiveness in the public sector needs to be improved public management in public institutions should be focused on objectives and results, and public managers must be assessed in terms of ability to solve social problems of general and specific.

Public Management has emerged as a necessity and is constantly developing as one of the most important areas of management science; its results can have a direct impact on improving the way of life of a country.

It is widely recognized that the paradigm shift in the public sector and creating new public management system of functional and effective administrative structure that represents a long process, but should be intensified in all countries who want a real orientation of the services offered by the administration market. The transition from the old public administration to new public management usually called public administration reform process requires management approach with regard to a set of basic values.

This reform must be achieved through institutional strengthening and capacity building of Romanian public administration, after the European model. The most important aspect in the process of institution building and strengthening the capacity of public administration is applying to all levels of the Romanian public management system to the acquis communitarian. The acquis is the set of rights and obligations of Member States of the European Union, the legal rules regulating the activities of member countries and institutions and rules that govern the Union's actions and policies. Harmonization of Romanian legislation with EU regulations was an essential condition of Romania's EU accession. Romania is making progress in this respect and its obligations not only refer to the adoption of necessary legislation, but also to secure the conditions necessary for their implementation in practice. European Union Member States have long recognized that the management standards and criteria for successful public managers are both the overall performance in public administration and for its reform. Improve performance of public administration means finding better standards of efficiency and effectiveness in law enforcement.

This involves delegation of responsibilities for public managers, accompanied by appropriate controls. In such situations, the quality of public managers is critical. Moreover, when state policies are becoming increasingly complex and increasingly exposed to international cooperation as it is for

Member States of the need for managers with broad perspectives and their ability to coordinate work with national institutions and international relationships becomes even more acute.

Basically, the implementation of the reform of public administration requires compententelor training needed to obtain the required performance of public servants at all levels. Institutional capacity building at the level of the European Union, rests the transfer of competencies to local authorities, which must respond to a growing number of job tasks, along with the provision of enhanced local or regional autonomy. Therefore, developing a functional administration, able to create conditions favorable framework for the development of market economy, is strongly conditioned training on identifying training needs, preparation and training of civil servants.

Decentralization is a highly complex phenomenon, which suffered a series of changes and social context in which the process unfolds. For this reason you cannot make a firm conclusion for the purposes of assessing whether the decentralization process in Romania is a success or a failure, the process itself is dynamic. Understanding the causes of failures exist could lead to development of social policy and institutional changes that lead to improved delivery of social services, and increase administrative capacity.

Romania has opted for decentralization of social services and greater autonomy to local authorities in providing social welfare. Decentralization is a process in itself good or bad, but depends on how the project was developed and its implementation. At present, the legislative changes are significant, is developing the necessary administrative decentralization.

Romanian public administration reform is one of the main challenges facing Romania today. In this respect, the European Commission, recognized the progress made so far by the Romanian authorities regarding the strengthening of the institutional framework and recommend clearly be substantial efforts in the reform of public administration. Because the priorities and objectives can help to improve the quality of the Romanian public administration is a need for better coordination and correlation of policies and strategies developed by the Romanian public institutions, and establish mechanisms for monitoring their implementation.

Regarding the reform process have been identified, particular, the following priorities: strengthening the coordination role of the prefect of the decentralization of public services and ensure an integrated management system for decentralized public services of ministries, the process of changing prefects and sub-prefects in high civil servants, strengthening the partnership between the ministry and local governments associations, drafting and adoption of the Charter of Public Service - which includes the main quality standards and principles of public service providers, a new salary system for civil servants, activities to promote best practices in the field of public administration.

Typology of public institutions in Romania is synthesized from the detailed presentation of important concepts and criteria for analysis and classification of institutions according to these criteria. The role of the public institution is to provide public goods and services to meet the highest quality general and specific social needs for individuals and companies, in terms of economic efficiency. Public institutions have an important place in the state because, through them, the state carries out its functions.

Public Administration is done through a variety of organizational forms that involve whole categories of staff affected this activity. Public administration system is a system of social organization which exists and operates in a macro-social organization of society as a whole, considered at the national or regional administrative units.

Organizational culture has attracted attention especially after the appearance of the paper renowned researchers T. Peters and R. Waterman, In Search of Excellence, which in many practical cases have shown a correlation between organizational culture dimensions and performances by renowned companies.

Before the advent of this book, Herbert Simon introduced the organizational culture research organization, by defining a "limited rationality". He left the grounds that the theory of organization not found usefulness and justification than accepting that human rationality is subject to certain limits. They depended on the organizational environment in which the individual is more accurate values, beliefs, traditions and legacy that gives each organization an identity.

Rationality is "culturally limited" because the organization can have a well defined structure to the extent that there are boundaries of rationality. If these borders vary repeatedly and unpredictably, the organization may not be stable. While the results of these attempts have not been neglected, because we are witnessing today the development and affirmation of a new distinct discipline called organizational culture, such courses are very useful in management specialists.

The concept of "organizational culture" can be analyzed from the functional perspective, as an organization has a culture seen as a variable or in terms of integration where the firm fully defines a culture (I Dill Heinen, 1986).

Functional perspective is based on the premise that the organization has a culture that allows the integration, coordination and motivation of individuals within the organization. According to the perspective of cultural integration is in a continuous process of change, but can only be influenced by external factors difficult.

Culture can be defined as a model of values, representations, modes of behavior that govern life in the organization (Smircich, 1983). It is thus the sum of all the unwritten rules of business.

Organizational culture is a way of life, the result of internal practices, of rules of conduct, values, aspirations and beliefs of that particular organization. It is what gives an organization's personality and identity.

However, organizational culture does not control all the perceptions, thoughts and feelings of staff organization. The more time staff in the organization, the organizational culture will influence deeper perceptions, thoughts, feelings organization members, how they will react in certain situations acetic.

The organization has its own culture a more powerful, it is much more mature and better defined, having a greater impact on employees, including direct and immediate impact on innovation and economic performance.

Their model of organizational culture and values fit a pattern of behavior from the organization that directs life. Strong companies do not rely solely on rational tools of scientific management to achieve a certain productivity, a certain level of efficiency.

They use organizational culture - deep convictions, and shared values that they express heroes, rituals and ceremonies - to formulate strategies and policies I support the majority. Based on how employees dress, even if there is no official uniform, to the way in which conflicts are managed, all bearing the imprint of a unified strategy that aims to blend some positive results and conduct and to deter others.

From the psychological point of view, the culture was analyzed by Jaques in his The Changing Culture of a Factory published in 1951. He examines the culture of a factory in this book as a way of thinking and action of ordinary people in the organization.

Thus, culture describes the behavior of the organization, production methods, technical, discipline, leadership style, organizational goals, business practices and assess how different types of rewarding work, not least the conventions and things taboo. A book's success has made Peters and Waterman Auf der Suche nach Spitzenleistungen (1984), where the authors have highlighted the importance of factors "soft" (eg style and way of filling a job), which are very important for obtaining performance.

Etymologically speaking, lodges ceremonies, rituals, myths and taboos exist in the organization. Thus, organizational culture determines the employees to behave in a certain way, implicitly and naturally follow the standards of its own conviction and agreed to become the stronghold of a certain style of action.

An organization without culture, even if they are in a training stage, is vulnerable, like a state without a culture and history. From this perspective, organizational culture acts as a binder, as motivating and educational and formative valences. The most visible component is the symbol of a mature culture. Building architecture, interior design, representative colors, logo and logo are all symbols come to establish identity.

Although public management is a new field of management science, there are already convinced that the extension of specific principles and approaches, there is only a relative matter, but becomes an imperative necessity, which determines the coordinates of the major public sector reform. Otherwise, there is increased risk of slipping into formalism, changing some general understandings and essential to the detriment of the fundamental, meeting new public management.

As a consequence, it is absolutely necessary to waive the perception and treatment of the old administrative system in general and public institutions in particular, as bureaucratic administrative apparatus that develop rules, regulations and laws by which they are applied and the transition to new principles and regularities of public management, the administrative system as a whole and each public institution with public managers aim to produce a given level of managerial performance, reflected in increasing general public interest and satisfaction of specific social needs.

Public institutions represent all organized structures created in the society for public affairs. Public institutions within the meaning of bureaucracy that we have today, is the only way the state social-economic organization that can meet the challenges of modernity (the large number of population, diversity and complexity of human needs that need to be satisfied). The objective of a public institution is serving the public interest.

Communication is one of the tools of efficient management strategies to change the organization. It can help adjust attitudes, "way of looking at things" and changing behaviors. Mission and objectives of management communication are closely related to organizational changes and organization characteristics of the environment in which it operates.

Public relations are in essence communication activities. If public relations is communication between an organization and management of the public or the public interest, effective public relations manager must be in permanent contact with the public organization to be able to distinguish at all times their communication needs, to formulate and messages depending on the characteristics of each of them and watch their reaction to receiving each of the messages.

The organization, give the second phase of management process aims to group people, prioritizing tasks and activities and to establish organizational links conveyance of all efforts in one direction and that is to achieve the goals and the organization has set. The organization of public management is a set of processes that are under the legal framework defines the components of the administrative

system as a whole and each part of public institutions, state powers, duties and powers assigned to its components and the relationships established between them within and outside the system to effectively meet the public interest.

At the current stage of transition activity of the organization is likely to take place efficiently only against a rational organization, based on the principles, methods and scientifically based techniques. In this way the organizational rigor provides the only source of generating coherent action, the discipline and order and create functional organization can adapt to the changes that occur in continuous practice in its work.

Fundamental organizational element, organizational structure of public institution plays a major role with large implications. It defines the framework for action and outlines the factors of efficiency, specify the job and set the place and role of each section, outlines the powers, duties and responsibilities, influences the information - decision-making and effectiveness.

Examining the basic elements of organizational structure, how to combine them, the correspondence between functions and departments, their nature, mode of distribution of responsibilities, establishing connections between functional and operational elements, the literature identifies three types of organizational structures:

a) hierarchical structure;
b) the functional structure;
c) functional hierarchical structure.

In connection with the foregoing analysis, design, evaluation and restructuring of the organizational structure must meet several conditions, most important of which appear to us:

a) conform to the general purpose and objectives of the institution;
b) to be supple and have a number as low levels of management;
c) define clear and precise links between the functions and features, specifying the powers, functions and responsibilities of civil servants;
d) can be adapted easily to new goals of the institution;
e) to be economic in the sense of reduced advertising expenses and personnel management.

Analysis and design of organizational structures appears as comprehensive, complex, multidisciplinary implications, with numerous difficulties, the influence of sense otherwise. Scientists studying public management and relationship management processes between the components of the administrative system but also within them in order to discover general principles and laws, methods and techniques for improving forecasting, organization and coordination, resource management and control evaluation activities aimed at increasing to meet the public interest. Management organization, addressed systemically, is known more as a management system that set of elements of organizational, methodological, informational, and decisional and relations between them, so shaped as to allow the achievement of objectives.

Organizational subsystem is the main component organizer formally represented by laws, regulations with national and informal organization that includes groups and informal links between them.

Methodological approaches the organization and management subsystem in terms of its management tools for use in management workflows and methodological elements of design, redesign and maintenance management and operation of its subsystems. Information subsystem represents all

information, information flows, procedures and means of handling information designed to help achieve the main objectives of the organization.

Decision subsystem consists of all decisions taken and implemented within an organization is structured and determined its objectives and configuration management hierarchy. Achieving Key management involves the public positions and public office holders and executive leadership in this area added responsibility in managing all types of resources available to the public sector, namely human resources, information, material and financial. All these are used in process management and execution of public institutions to meet social needs and thus achieve the fundamental objective of public management.

In any organization, managerial act is given by all the phases and work processes that establish the objectives of unity and organization of its subsystems, and proposed work processes necessary to achieve them, and those determined to enforce measures to meet their conditions as profitable. The scope and intensity of management is in a dependent relationship with the management echelon in the sense that, how it is done on the top step of the hierarchy of management system, the more comprehensive, more intense and rich meanings and results.

The essence of process management to focus efforts to coordinate human joint work. This effort is in place in time and space and form of combination is made necessary due to the division of labor and management cooperation.

Summing up many operations, grouped in phases, the act has a specific content management requires understanding how to influence the employees in solving organizational problems. The content depends on the managerial tasks that are key to the organization and may be methodological, functional, organizational, social and informational. Public management function addresses the public in a practical perspective, which also determines the coordinates necessary for the proper functioning of public institutions in which they operate government officials and leading public officials and representatives of political execution. It determines the status and structure of civil service and civil servants as employees of public institution. Performance of public institutions is directly determined by its employees, who are responsible, as public managers and performers, with the results.

Experience and reality of other countries shows that democracies improve the administrative capacity of public institutions depends most determination and professionalism in the managerial performance of public functions by public managers and civil servants to execute. This should be a theme for reflection and for representatives of our administrative system to understand the strong need for orientation of attention to public management, the professionalism in the exercise of public functions by public officials and especially by representatives of the political class. For this, each item in the structure and function of public management or public management execution compels us to determine the subject, tasks, powers and responsibilities of owners, whereby they become an active part of the system they belong, care responsibilities clear regarding the objectives and, consequently, the administrative task of the authorities and the social mission of public institutions in which they operate.

The current stage of evolution of the Romanian legislation does not provide a conception unit on civil service issues, established itself with some necessary modifications for the correlation of the different categories of legal acts and to lay the foundation of their legal relationships viable. Should be a fundamental change in the orientation of public institutions in Romania, practically moving from strictly legal dimension that has a system in Romania generalized the managerial perspective to address public institution determined by the new public management values.

Managerial revolution and globalization must be built In a new model of management theory and practices that enable and encourage their mutual potentate. The effects of this new approach will spread and increase rapidly, which requires the assimilation of management institution "triplets empathy - acceptance - congruency" in dealing with change management and change management for near new guidelines in management. Efficiency and effectiveness in the public sector needs to be improved public management in public institutions should be focused on objectives and results, and public managers must be assessed in terms of ability to solve social problems of general and specific.

Public Management has emerged as a necessity and is constantly developing as one of the most important areas of management science; its results can have a direct impact on improving the way of life of a country.

It is widely recognized that the paradigm shift in the public sector and creating new public management system of functional and effective administrative structure that represents a long process, but should be intensified in all countries who want a real orientation of the services offered by the administration market. The transition from the old public administration to new public management usually called public administration reform process requires management approach with regard to a set of basic values.

This reform must be achieved through institutional strengthening and capacity building of Romanian public administration, after the European model. The most important aspect in the process of institution building and strengthening the capacity of public administration is applying to all levels of the Romanian public management system to the acquis communitarian. The acquis is the set of rights and obligations of Member States of the European Union, the legal rules regulating the activities of member countries and institutions and rules that govern the Union's actions and policies. Harmonization of Romanian legislation with EU regulations was an essential condition of Romania's EU accession.

Romania is making progress in this respect and its obligations not only refer to the adoption of necessary legislation, but also to secure the conditions necessary for their implementation in practice. European Union Member States have long recognized that the management standards and criteria for successful public managers are both the overall performance in public administration and for its reform. Improve performance of public administration means finding better standards of efficiency and effectiveness in law enforcement.

This involves delegation of responsibilities for public managers, accompanied by appropriate controls. In such situations, the quality of public managers is critical. Moreover, when state policies are becoming increasingly complex and increasingly exposed to international cooperation as it is for Member States of the need for managers with broad perspectives and their ability to coordinate work with national institutions and international relationships becomes even more acute.

Basically, the implementation of the reform of public administration requires training needed to obtain the required performance of public servants at all levels. Institutional capacity building at the level of the European Union, rests the transfer of competencies to local authorities, which must respond to a growing number of job tasks, along with the provision of enhanced local or regional autonomy. Therefore, developing a functional administration, able to create conditions favorable framework for the development of market economy, is strongly conditioned training on identifying training needs, preparation and training of civil servants.

Decentralization is a highly complex phenomenon, which suffered a series of changes and social context in which the process unfolds. For this reason you can not make a firm conclusion for the purposes of assessing whether the decentralization process in Romania is a success or a failure, the process itself is dynamic. Understanding the causes of failures exist could lead to development of social policy and institutional changes that lead to improved delivery of social services, and increase administrative capacity. Romania has opted for decentralization of social services and greater autonomy to local authorities in providing social welfare. Decentralization is a process in itself good or bad, but depends on how the project was developed and its implementation. At present, the legislative changes are significant, is developing the necessary administrative decentralization.

Romanian public administration reform is one of the main challenges facing Romania today. In this respect, the European Commission recognized the progress made so far by the Romanian authorities regarding the strengthening of the institutional framework and recommend clearly be substantial efforts in the reform of public administration. Because the priorities and objectives can help to improve the quality of the Romanian public administration is a need for better coordination and correlation of policies and strategies developed by the Romanian public institutions, and establish mechanisms for monitoring their implementation.

Regarding the reform process have been identified, particular, the following priorities: strengthening the coordination role of the prefect of the decentralization of public services and ensure an integrated management system for decentralized public services of ministries, the process of changing prefects and sub-prefects in high civil servants, strengthening the partnership between the ministry and local governments associations, drafting and adoption of the Charter of Public Service - which includes the main quality standards and principles of public service providers, a new salary system for civil servants, activities to promote best practices in the field of public administration.

Typology of public institutions in Romania is synthesized from the detailed presentation of important concepts and criteria for analysis and classification of institutions according to these criteria. The role of the public institution is to provide public goods and services to meet the highest quality general and specific social needs for individuals and companies, in terms of economic efficiency. Public institutions have an important place in the state because, through them, the state carries out its functions.

Public Administration is done through a variety of organizational forms that involve whole categories of staff affected this activity. Public administration system is a system of social organization which exists and operates in a macro-social organization of society as a whole, considered at the national or regional administrative units.

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REALITIES AND PERSPECTIVES

Precautionay Seizure of Civil Ship

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Abstract: Noting that many pending cases in the maritime and river sections of the courts concern the seizure of commercial ships, we intend to study in detail this institution of maritime law. This approach is due to the fact that the few Romanian law-writers, and especially the practitioners, who have approached the subject, have referred in particular to comment and interpretation of existing rules in the Commercial Code and the Civil Procedure Code, not considering the relationship between other institutions of maritime law and seizing the ship. In our opinion the mentioned institution of law can not be examined thoroughly without prior investigation of what is the ship which is subject to seizure. Moreover, the ship is at the heart of all legal research on shipping. The concept of ship has been controversial since the seventeenth century, with the first regulations that led to the development and adoption of commercial codes, and it is still controversial today. We can say that the diversity of opinions, expressed both in the legal literature and legal practice, on the concept of ship, is largely due to the technical progress of shipping in modern times, this transport mean benefiting from exceptional facilities to ensure a safely water transport of goods and people.

Keywords: judicial seizure; commercial code; precautionary seizure

Ship's weapons are rapidly evolving, that being hard to imagine only a few decades ago, as a result of technology development in general, which has influenced the construction of ships. Given that, due to shipping specificity, capable of transporting large quantities of goods on all continents, oceans, seas, rivers, waterways, etc., but mostly because of the low cost of transport, in recent years most exports and imports are made using commercial ships. In light of these realities, it appears that the laws of many states, even of some naval powers, had not the same rate of change, remaining on outdated regulations about the notion of ship and its legal nature, which has created difficulties, in particular of practical nature, in application of regulations relating to the ship's seizure, with more emphasis on the precautionary seizure. In the latter part of last century, there have been made great efforts in the maritime conferences, prior to the adoption of conventions in the field, to give definitions of the ship as clear as possible, but some states, for various reasons (conservatism, commercial interests, etc.), either disregarded the regulations stated in conventions or added to these definitions various elements, which made difficult the theoretical interpretation of maritime law institutions, because all these have the ship as subject of their regulations. The situation is further complicated when the dispute is on ships under the flag of non-contracting states of maritime conventions.

As the theme of this paper is the seizure of civil ship, the analysis of institutions mentioned is to be made in detail, on another occasion.

Precautionary Seizure of Civil Ship

The concept of precautionary seizure is different in maritime law and in common law, as subject to seizure has a different legal nature than other goods subject to seizure.

Under procedural rules the precautionary seizure is a secondary or incidental measure established outside the trial, being however in connection with it.

In most European law, the precautionary seizure is regulated differently from judicial seizure, distinguishing between conditions that may be required as well as between the establishment procedure, but nevertheless there are some national laws in which the measure to seize the commercial ship subject to dispute is taken by judicial seizure. In Romanian law, art. 596 of the Civil Procedure Code[1] makes a clear distinction between the two forms of seizure. For example, the judicial seizure is the appointment by the court of a person who is entrusted with managing and maintaining the property seized for the duration of the trial, and therefore the reviewers of texts consider that this type of seizure is autonomous precautionary. The application of judicial seizure can be requested by litigants, but also by their creditors, in accordance with art. 974 of the Civil Procedure Code. With contentious nature, the request of judicial seizure is settled under procedural rules of common law and also by judge's order. This latter procedure may be used only in situations of emergency and it is temporary. It should also be noted that in the text referred is made a distinction between precautionary seizure and executory seizure.

The precautionary seizure is a measure to ensure the substance of the case and the executory seizure is a measure of enforcement the court decisions on the substance of the case.

Under the provisions of art. 1718 of Civil Code[2] the precautionary seizure may be applied in order to fulfill the obligations personally assumed by the person, with all its tangible and intangible, present and future assets.

This means that all creditors can call a penalty against debtors of bad faith which would have the intention to dispose of property, thus damaging them. More clearly, the seizure consists in making the assets unavailable to debtors to be sold after obtaining a writ of execution by creditors.

Substantive Place in Domestic Law

Commercial Code[3]

The Commercial Code still in force was adopted at a time when trade and shipping were in an early development phase, and this explains why this important institution of maritime law is briefly covered in a few texts. The precautionary seizure is regulated under the art. 910-911 which provide that a creditor is entitled to proceed to the seizure of a ship or to an individual part of it, owned by the debtor.

By examining these texts results that in their content there are regulations relating both to the procedural and substantive law, also referring to other provisions of the Civil Procedure Code.

[1] Civil Procedure Code of 09.09.1995, republished;
[2] Civil Code of 1864, Official Gazette No. 271 of 24.12.1864;
[3] Commercial Code of 10.05.1887, published in the Official Gazette no.126 of 10.09.1887, which has not yet entered into force;

It may be noted that these regulations do not contain a definition of precautionary seizure, as would be normal.

Nor in Romanian specialized legal literature the precautionary seizure has not been defined.

This default has been covered by the 1952 Brussels Convention[1] defining the precautionary seizure as "restraining a ship with the authorization of the competent authority for ensuring maritime claims, but by no means seizing a ship to enforce a title".

In the new Civil Procedure Code of 01 June 2010, under the provisions of art. 939 the precautionary seizure is generally defined as meaning "the unavailability of traceable tangible or intangible assets of the debtor, being in its possession or in possession of a third party, in order to assert them when the creditor of a sum of money will obtain an enforceable title". Art. 947 of the Code does not give a definition of the precautionary seizure of the ship, making instead a reference to the provisions of art. 939 and of international conventions relating to the seizure of ships, to which Romania is party.

Returning to the analysis of the Commercial Code regulations, we should note that the procedural rules are laid down in art. 908-911, completed with the provisions of art. 595 et seq. of the former Civil Procedure Code[2].

According to art. 908 completed with the provisions of Civil Procedure Code, the conditions of approval for precautionary seizure request are:

1. The request for setting the precautionary seizure must be taken concomitantly or after the introduction of the substance case based on civil delictual or contractual liability;
2. The submission of a security;
3. The precautionary seizure must be ordered of tangible assets of debtors.

The same text, in disagreement with the new Civil Procedure Code, provides that the court that has jurisdiction to resolve the request for the establishment of precautionary seizure is the Court, which decides in the Counsel Chamber, without summoning the parties. Ending of the measure will be ordered if the debtor "makes the consignment for the amount, capital, interest and expenses for which that seizure was established".

In art. 911 is just a reference to previous articles[3].

Civil Procedure Code[4]

Former Civil Procedure Code

The former Civil Procedure Code regulates the precautionary seizure in art. 591-596. Under the provisions of art. 591 only the creditor who has not an enforceable title, but whose claim is proven by written note and is payable may require this measure. Also, the creditor may require the precautionary seizure if it proves that has filed an action on the substance of case and submits with the request for

[1] International Convention for the Unification of Certain Rules Relating to the Arrest of Seagoing Ships - Brussels - 10.05.1952, to which Romania acceded by Law No. 91 of 01.11.1995, published in Official Gazette no. 255 of 08.11.1995;
[2] Article 908 – „Seizure or attachment will be requested only by giving a security, unless the seizure or attachment request is made under a bill of exchange or other promissory note or note payable to the bearer marked no protest";
[3] "The assets can be seized in cases and after the formalities laid down in art. 907 and 908".
[4] Civil Procedure Code of 09.09.1865, in Official Gazette no. 200 of 11.09.1865, republished and amended by Government Emergency Decision no.138/2000.

seizure a security of half of the amount claimed. There are situations in which the court may order the establishment of seizure even if the claim is not payable when the debtor has diminished by his acts the assurances given to the creditors, or has not given the assurances promised, and where is possible for the debtor to avoid the prosecution or to conceal or to dissipate its assets. In these cases, the creditor must prove that has a written note certifying the claim and that has filed an action.

For approving the request the creditor must submit a security whose amount is fixed by the court.

The request is to be addressed to the court that judges the case and that decides urgently, in the Counsel Chamber, without summoning the parties, by enforceable conclusion, setting a deadline date and the security, as well as the amount of that security[1].

The court conclusion may be under appeal within 5 days of notification. The appeal shall be urgently and in particular heard, summoning in short term the parties[2].

The precautionary seizure may be ended if the debtor gives sufficient security to cover the claim. Also, the measure may be ended if the main request under which the seizure was ordered was canceled, obsolete or rejected[3].

New Civil Procedure Code

Precautionary Seizure of Civil Ship in the New Civil Procedure Code

In Title IV Precautionary measures - Chapter I, the Romanian legislator regulates the precautionary seizure.

In Section 1, entitled General Provisions - article 939 gives the definition of precautionary seizure within the meaning of the above mentioned. By making a comparison between the texts of the former and the new code can be easily seen that the legislator took over, with very small completions, the previous regulations. It should be noted that all articles have a title, summary and clearly expressing the content of the text, which is especially beneficial for law practitioners.

Quite remarkable are the regulations of Section 2, entitled "Special provisions regarding the precautionary seizure of civil ships". The legislator, having not at disposal a new regulation of substantive maritime law, a new maritime code or at least a new maritime commercial code, taking account of controversial issues revealed by legal practice and specialized legal literature, understood to regulate by special provisions the precautionary seizure of civil ships. It is a first step made primarily in order to harmonize national legislation in this field with European legislation and international conventions to which Romania is party. However we have to note some omissions or formulations which in our opinion are not correct.

Firstly, we have to note that neither this time was given a clear definition of the precautionary seizure of civil ships. Such a clarification of the concept is the more needed as its default was revealed even by the few authors of maritime law in Romania. Considering that the first article in this section[4] states that "the provisions of this chapter shall apply by complying with international conventions on seizure to which Romania is party", we can not understand why the authors of the project of law and the legislative body have not taken over at least the definition in the 1952 Brussels Convention. Also, can

[1] Art. 592 of the Civil Procedure Code 1865 with subsequent completions;
[2] Art. 592 of the Civil Procedure Code 1865 with subsequent completions;
[3] Art. 593 of the Civil Procedure Code 1865 with subsequent completions;
[4] Art. 947 - Civil Procedure Code of 01.07.2010 - published in the Official Gazette no. 485 of 15.07.2010;

not be ignored the incorrect title formulation of art. 947 as “The right to seize a civil ship” provided that the content of the text states that only “a creditor may require the establishment of precautionary seizure”.

So the creditor can not seize a civil vessel, the right belonging only to the court to that the creditor requests the precautionary seizure. If the legislator intended to give this title to the text in order to specify that only the creditor may require the establishment of precautionary seizure, then the correct formulation, in our opinion, not only for accuracy but also to match the content, should be “The right to request the establishment of precautionary seizure”.

Article 948 is entitled “The establishing of seizure” "- but the conditions of establishing the seizure are not under this text but in art. 940.

As well, the title of art.952 - "Transfer of seizure" - can be confusing, because the text clearly states the possibility that court to order the seizure of another ship. Not only can the title cause confusion, but also the failure of the text to specify that the seizure may be ordered of another ship owned by the debtors and not of a ship in general. In the text under art. 953, the formulation that “the creditor of the legitimate owner of the bill of lading may proceed to seize goods represented in the bill of lading” on board a ship” is also misleading, because the creditor may not proceed with the seizure, having only the possibility to require the establishment of precautionary seizure. In art.955 we believe that the formulation of text skipped the word “navigation”, thus being not to understand what the legislator wanted to say by “ensuring civil safety”.

This article is entitled, "Urgent measures", without showing what they are. The more clarification was necessary as the competent court under the provisions of art. 949 can be a regular court which has no sea and river sections in which specialized judges are supposed to work. It is possible that when ships are in ports as, for example, Tulcea, Braila, Sulina, etc., a judge in that court to take by judge’s order measures which can affect trade and transport, traffic inside the port or even the safety of civil navigation in that port.

By a closer look at the provisions of art. 956 we can note that this text should not be included in Section III – “Special provisions regarding the precautionary seizure of civil ships”, because the measure to temporary stop the ship leave by the Harbour Master is an administrative measure governed by special law and not a civil procedural measure.

We appreciate that it was more important that in this section to be regulated the concept of maritime claim, a “sine qua non” condition of the establishment of precautionary seizure.

The conclusion can be no other from that: in Romania there are no law-writers specialized in maritime and river law. This reality is the consequence of the fact that in faculties of law the maritime and river law is not studied, and therefore judges and prosecutors are not really specialized.

Competent Court[1]

Unlike the former Commercial Code, which provides in art. 908 paragraph 2 that the Court has jurisdiction to decide on precautionary seizure, the new Civil Procedure Code, under the

[1] On these issues see the considerations in the works “Legal liability in maritime boarding”, Alecu Alexandrescu, Constanta 2002, and “Treaty of Maritime Law ", Alecu Alexandrescu, Ciprian Alexandrescu, Galati 2006;

provisions art. 949[1], establishes the jurisdiction to the court of the ship's place, regardless of the court to which has been filled or will be filled the action on substance. This provision is related to the provisions of the same Code - Title III, Chapter I, which regulates the substantive jurisdiction, that in the article 93 paragraph 1 letter b provides that the Court judges in first instance the requests concerning civil navigation and activity in the ports. To ensure rapidity of the establishment of precautionary seizure, the legislator has provided in art.948 a derogation from the provisions of art.119 which provides that the accessory requests are judged by the competent court for the main request even if the are subject to substantive or territorial jurisdiction of other courts or specialized section or of a specialized court.

Interdiction of Seizure[2]

The ship ready for departure may not be seized. The ship is considered ready for departure once the Master has on board the certificates, all documents of the ship and the permit for departure, submitted to the Master by the Harbour Master. Art. 912 of the Romanian Commercial Code states that "the ship ready for departure can not be seized nor prosecuted", and Article 3 (1) of the 1952 Brussels Convention states that: "a claimant may arrest either the particular ship in respect of which the maritime claim arose, or any other ship which is owned by the person who was, at the time when the maritime claim arose, the owner of the particular ship, even though the ship arrested be ready to sail".

Also in 1985, the Lisbon Conference was accepted seizing the ship ready for departure and the ship already left. Subsequently, the Geneva Convention, these provisions have been invalidated on the ground that seizure established under these conditions would affect the maritime trade and the security of that ship or other ships. Finally it was decided to let to the discretion of national law the establishment or not of precautionary seizure in these situation. Given the constant judicial practice we consider that the Romanian legislator has properly covered the interdiction mentioned.

Conditions of Establising the Precautionary Seizure

In art. 940, to which is made reference by art. 947, there are three situations covered for the competent court to order the establishment of the precautionary seizure of ship.

In paragraph 1 are provided the following conditions:

1. The creditor must not have an enforceable title;
2. The creditor must have a claim certified in writing and which is payable;
3. The creditor must prove that has filed a lawsuit request;
4. Payment of a security in the amount fixed by the court;

Paragraph 2 states that:

1. To establish a precautionary seizure, the creditor who has a claim not certified in writing must prove that has filled an action;
2. A security deposit in the same time with the request of seizure representing half of the amount claimed.

[1] Civil Procedure Code of 09.09.1865, in Official Gazette no. 200 of 11.09.1865, republished and amended by Government Emergency Decision no.138/2000;
[2] Article 950 - Civil Procedure Code of 01.07.2010 - published in the Official Gazette no. 485 of 15.07.2010;

Paragraph 3 states that:

1. The court may approve the precautionary seizure when a claim is not payable if:
    a. The debtor has diminished by his acts the assurances given to the creditors;
    b. The debtor has not given the assurances promised;
    c. There is a danger that the debtor to avoid the prosecution;
    d. There is a danger that the debtor to conceal or dissipate its wealth;

3. In all cases above, the creditor must prove that the conditions set in paragraph 1 are fulfilled.

4. The creditor must deposit a security in the amount fixed by the court.

According to paragraph 1 of art. 948 it is stated that, in urgent cases, the request to establish the precautionary seizure of a ship can be done even before the filing of the action on substance. In this case, the creditor who has obtained the precautionary seizure is obliged to file the action to the competent court or to initiate steps for setting up an Arbitrary Court no later than 20 days from the date of approval of precautionary measure. Paragraph 2 provides that the request for seizure is to be judged urgently, in the Counsel Chamber, summoning the parties, and the conclusion is enforceable.

Failure to file the action within 20 days has as a result the revocation by law of the precautionary seizure. Revocation of precautionary seizure is by final conclusion of the court given by summoning the parties.

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Enforcement of European Court of Justice Judicial Decision

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Abstract: The paper aims at highlighting the steps in enforcing European Courts of Justice judicial decisions. The enforcement of international courts judicial decisions is the most difficult and trapping stage for interstate jurisdiction. These courts do not have the opportunity to engage directly with their own bodies in the process of decisions enforcement, having to overcome the barrier of states sovereignty; neither the international community nor the public opinion have powers to lead to enforcement of international judgments. The case of European Court of Justice is different, as it has developed a role for the national judicial system in securing the enforcement of judicial decisions. According to article 244 187) of the Treaty, European Community judicial decisions are enforceable. Thus they acquire the status of enforceable; however European Procedural Law provisions require amendments from the national legal order of Member States. Enforcement shall be governed by the rules of civil procedure of the State in question. Decisions are appended as binding (without fulfilling other formalities but verifying the authenticity of the title, i.e. that they are issued by ECJ) by the national authority designated for that purpose by the government of each Member State.

Keywords: enforceable title; time-limits; judicial periods

1. The Decisions' Enforcement

Obtaining a favorable judicial decision does not imply necessarily the fulfillment pg the general purpose, because the adversary part may persist in its pretentions and behavior and may refuse to apply the judicial decision. When we speak about the internal law system, there is the execution procedure wherein the coercive force of the state is applied and the decision is enforced.

The international judicial decision enforcement poses different problems when coming to the inter-state jurisdiction. The international courts cannot be directly implied in the enforcement process because of the state sovereignty; neither the public opinion nor the states assembly can contribute to the enforcement of international decisions.

Different is the situation of the European Court of Justice, in its quality of supra-national court, it benefits of an efficient execution system. According to the provisions of the article 244 (187) of the EC Treaty, the decisions of ECJ are enforceable along of the order of enforcement which is appended to the decision, without any further formality. Enforcement is governed by the rules of civil procedure in force in the State in the territory of which it must be carried out. The order for its enforcement is appended to the decision (without other formality than verification of the authenticity of the decision, as it must be issued by the ECJ).

When these formalities have been completed on application by the party concerned, the latter may proceed to enforcement in accordance with the national law, by bringing the matter directly before the competent authority.

Enforcement may be suspended only by a decision of the Court of Justice. However, the national jurisdictions have the authority over the legal measures undertaken when decisions are enforced. (Fabian, *19*.., 329) Though the article 244 (187) of the EC Treaty lay down the instant order of enforcement by appending it to the decision, by this order are appended as well any pecuniary obligation on persons, which must be enforced.

The institution of enforcement within European Union, by general rule, is appended to any decision, but it is limited to the nature of the litigation, to obligations set by the decision, according to the person that is to be enforced. Thus are enforceable the decisions that lay down the pecuniary obligation or the obligation to give, if the person is an individual or a legal entity of private law (for example a commercial society).

In principle, though, the member state cannot be enforced. The enforcement process ran against a state is stopped by the sovereignty of the state, in areas where the state has not denounced it to the privilege of UE. Any measure of enforcement which is not expressed explicitly in the European Law represents a violation of sovereignty of the member state, therefore the enforcement against the member state is very rare and in exceptional cases.

An exception is the order of enforcement of the judicial ordinance of ECJ according to the article 74 of Code of Procedure of ECJ in the area of pecuniary obligations in regards with the judicial expenses.

Another exception is laid down in the article 239 (182) of the EC Treaty. According to its provisions, the Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject-matter of this Treaty if the dispute is submitted to it under a special agreement between the parties.

Institutions and organs of European Union, from the European law point of view are assimilated to states, when decisions of ECJ are involved in cases of litigation between one of these institutions and organs and a member state.

On the contrary, the judicial decision that obliges EU organs and institutions to pay a special amount of money, as prejudices or judicial expenses, are appended by an order of enforcement. Up to date, there is no record of such cases, because EU institutions fulfilled the obligations of all decisions. Along with those mentioned above, there are also decisions based on arbitrage procedure regarding contracts of private and public law. The enforcement procedure in those cases must follow the provisions of the internal law, of the state where the institutions in cause have establishment.

There are two types of institutions when the process of enforcement of ECJ decisions is involved. On one hand there are institutions that verify the authenticity of the enforcement order, and on the other hand there are institutions which carry the out the enforcement. The institutions that verify the issuing entity vary from state to state: in Austria, for instance, this is of competence of the Ministry of External Affairs, while in Germany this is the attribution of the Federal Justice Ministry. Afterwards, a clause of enforcement is applied. Along with this procedure the decision is addressed to be enforced to the judicial courts.

In regard with the contestation of the enforcement order, though the person against whom it is addressed has the benefit of all means of contestations assured by the internal law, the ECJ and the national institution of enforcement share jurisdiction.

According to the article 256 (192) of EC Treaty enforcement is governed by the rules of civil procedure in force in the State in the territory of which it is carried out. Though the control of legality of enforcement measures is of national jurisdiction competence, in regard to the suspension, ceasement or alteration of enforcement, this is carried out only on an ECJ decision grounds.

The contestations to the enforcement according to the national law, referring to the European law issues and are based on order of enforcement are inadmissible. The procedural provisions in this area are settled by the article 89 that states that its provisions are applicable to the suspension action of European judicial decisions. The second paragraph states that the order granting the application shall fix, where appropriate, a date on which the interim measure is to lapse, so that this suspension may be without date.

2. Procedural Periods and Time-Limits

To assure the celerity of the judicial process within the ECJ a large amount of actions may be introduced within period of time prescribed by the law. These dates are important to assure that cases brought to court in legal periods, according to the principle that the rapid right is the best.

The periods are divided in those prescribed by the president and those states in legal provisions. Legal periods and dates are stated in different acts of legislations and as a rule they may modified or prolonged by the president of the court.

Among these periods and dates, there are:

- two weeks after the delivery of a judgment, for rectifying clerical mistakes, errors in calculation and obvious slips in it – period mentioned in article 66 of Code of Procedure;
- six weeks to introduce an action of intervention in the procedure fast track;
- within one month of receiving the proposal made by the First Advocate General, the Court of Justice shall decide whether or not the decision should be reviewed;
- within one month after service on him of the application, the defendant shall lodge a defense, stating;
- the application to set aside the judgment must be made within one month from the date of service of the judgment and must be lodged.
- an application to intervene made to the Court in appeal proceedings shall be lodged before the expiry of a period of one month running from the publication. In preliminary ruling proceedings, the persons referred to in Article 23 of the Statute may, within a mandatory period of two months after notification of the order for reference, submit their written observations
- after receiving a copy from the Court Registry of the request for a preliminary ruling, the ”interested parties” - the litigants before the national court, the Member States, the Commission and, if appropriate, the Council, the Parliament and the European Central Bank and, in some cases, the other EEA States and the EFTA Supervisory Authority – may submit a document, referred to as written observations, within a period of two months (extended on account of distance by a period of 10 days in all cases). This time limit is mandatory and cannot therefore be extended.

- within two months after service on him of the application, the defendant shall lodge a defense;
- where the written procedure before the Court of First Instance has been completed when the judgment referring the case back to it is delivered, the course of the procedure shall be as follows: within two months from the service upon him of the judgment of the Court of Justice the applicant may lodge a statement of written observations and in the month following the communication to him of that statement, the defendant may lodge a statement of written observations. The time allowed to the defendant for lodging it may in no case be less than two months from the service upon him of the judgment of the Court of Justice;
- three months for action of intervention from the date of service of the judgment;
- three months for action of intervention for EU clerks against the employers, according article 179 from the EC Treaty and article 91, paragraph 3 from the rules of personnel;
- three months of the date on which the matter was brought before the Commission to deliver an opinion whether a member state has failed to fulfil an obligation under the EC Treaty regarding another member state;
- four months to observe the action of unjustified abstinence of the EU institutions according the article 175, paragraph 2 of the EC Treaty;
- five years from occurrence for actions arose from non-contractual liability, according to article 46 of the Court Statute;
- the period of ten years for an application for revision of a judgment, but no longer than three months of the date on which the facts on which the application is based came to the applicant's knowledge.

These periods and dates are prescribed in normative acts that cannot be altered but by amending the act itself, but there are exceptions (in the case of the date prescribed by law and may prolonged by the president at the parties' request.)

Dates that may be postpone, prolonged or modified are called judicial periods, because though these dates have their sources in legal concrete texts they may be modified by the court. These periods must not be confused with the procedural periods laid down by the courts or by the registrar.

Any period of time prescribed by the EC and EAEC Treaties, the Statute of the Court of Justice for the taking of any procedural step shall be reckoned as follows:

(a) Where a period expressed in days, weeks, months or years is to be calculated from the moment at which an event occurs or an action takes place, the day during which that event occurs or that action takes place shall not be counted as falling within the period in question;

(b) A period expressed in weeks, months or in years shall end with the expiry of whichever day in the last week, month or year is the same day of the week, or falls on the same date, as the day during which the event or action from which the period is to be calculated occurred or took place. If, in a period expressed in months or in years, the day on which it should expire does not occur in the last month, the period shall end with the expiry of the last day of that month;

(c) Where a period is expressed in months and days, it shall first be reckoned in whole months, then in days;

(d) Periods shall include official holidays, Sundays and Saturdays;

(e) Periods shall not be suspended during the judicial vacations.

The non-compliance with these time-limits invalidates the action. As it is stipulated in the internal law, there was a dispute in the European doctrine about the barring prescription in a material or procedural manner. In case of extra-contractual liability ruled by article 288, paragraph 2 of EC Treaty, and in the cases prescribed in article 130 (173) of the same treaty rules that any natural or legal person may institute proceedings within two months of the publication of the measure, while the article 43 of the statute shows that that the material right is barred within five years. Thus, any payment over two months, but earlier than five years is considered valid and cannot be revoked.

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The Application of the Hardship Theory

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Abstract: This paper presents an analytical view of the concept of hardship as described in Art.79 CISG, Art.8:108 PECL and Art. 7.1.7 UNIDROIT Principles, in contrast with certain legal systems. The purpose of the article is to analyze the possibility of applying the provisions on hardship from the UNIDROIT Principles in order to release a party from its contractual obligations although the CISG is the governing law of the contract. The paper begins with the demarcation of the principle of pacta sunt servanda, or sanctity of the contract, in connection with the concept of hardship, thus being avoided the burden bearing of such a change of circumstances only by the party on which it falls. The paper goes on to describe the requirements and the consequences of the application of hardship according to the above mentioned international instruments, pointing out certain differences between four important legal systems.

Keywords: changed circumstances; rebus sic stantibus; frustration; impracticability

1. Introduction

In the Roman Law, if contractual performance became impossible for both parties, the principle pacta sunt servanda could be eluded. In the same manner, if performance became impossible only for one party, he was no longer bound to fulfill his obligations as long as he proved the lack of negligence or fault in performing the contract.[1]

Despite these exemptions, the founding principles of Roman law, the sanctity of the contract and the formalism, converge towards the rejection of the hardship theory. Nevertheless, if the burdensome obligation could be fulfilled, thus not being impossible, one could invoke the clausula rebus sic stantibus. It was considered that the contract contained an implicit provision according to which the main elements of the contract had to remain unchanged. The Canonic Law was actually the one that accomplished the transition towards the modern perspective of contractual dynamics. The starting point in founding the paradigm of the hardship theory was the dichotomy just-legal. The just concept represented the application of the equity principle by the Church and the legal concept corresponded to the governmental power. Between these two concepts a concrete-abstract correspondence or individual-general one was established. The constant inconsistency of these legal concepts generated a paradox that could be solved only through a juridical artifice: a contractual mechanism that would

[1] Cicero: "si glaudium apud te sana mente deposuerit, repetat insamens, reddere peccatum sit, officium non reddere".

guarantee the application of the law both just and legal.[1] This mechanism was widely spread as rebus sic stantibus, linked to the principle of sanctity of the contract.

After the 19th century, having as background the Liberal doctrine, the principle of the parties autonomy of will is propelled as a main contract interpreting rule. That was a consequence of the influence of the political, economical and social area. Thus, the literal content of the contract regains the value held before the instill of the just or fair concept in interpreting the contractual provisions. The tendency was either to abandon the concept of rebus sic stantibus, or to severely narrow its application. The sanctity of the contract theory tale quale comes forth due to the decay of the just principle, owed to the constant intemperances in interpreting the contracts. Therefore, on the background of this general will of protecting the security of the economic circuit, the principle rebus sic stantibus was outlasted only in International Public Law.[2] The purpose of the hardship theory consists in reinstating the interest of performing the contract affected by a severe unbalance through its adaptation. In modern law the hardship theory is important especially in the financial and economic areas.

2. The Hardship Theory

The Hardship situation is generally defined as the situation in which, during the performance of a long term contract, certain events occur without the parties' fault and these events lead to the fundamental change of the contractual elements taken into consideration at the conclusion of the contract. The hardship situation generally occurs either due to an increase in the performance costs of one of the parties or due to a minimization of the value of the counter-performance. Hardship situations can be defined in three manners: from a synthetic point of view, an analytic one and a hybrid one: a mixture of the above. From the synthetic point of view, the hardship situation lato sensu can be any event that would jeopardize the performance of the contract in the initial terms. The analytic point of view takes into consideration, in an exhaustive manner, all the situations that may lead towards a contractual imbalance. But because both of these definitions lack either thoroughness or generality, a third one is therefore preferred: a combination of the general guidelines in defining hardship and of non-exhaustive, indicative examples. First of all, the hardship situation may be an application, a specific modality of clausula rebus sic stantibus from the theory of international contracts, according to which the substantial changes of the circumstances which lead towards the conclusion of the contract may generate the contracts‘ revision or suspension. Nonetheless, the hardship may be considered as being a custom or a usage of the international commerce. According to art. 9 CISG and art.1.8 Unidroit Principles, the usages are trade practices widely spread and known, which are respected in a certain branch of activity. We have to point out the fact that the general principles and the usages in international trade are actually the rules that define the lex mercatoria. An important development of the hardship notion determined by the dynamics of the international contractual practice and of lex mercatoria has been established. Also, the existence of a gap between the non-national solutions and the national ones has been admitted. The hardship notion expresses in fact the modernized concept of the omnis intellegitur rebus sic stantibus.

[1] St Augustin: ”semper subintellegitur haec conditio, si res in eodem statu manserit”(...)”quod propter novum casum novum datur auxilium”; St Thomas d'Aquino”si sint mutatae conditiones personarum et negotiarum” Summa Theologica. 2.2, q110,a,3, a, d, 5.
[2] In art. 62 of the Viena Convention, 1968/69.

Nevertheless, the revision of the contract will not necessarily reflect the loss suffered by the aggrieved party. During the process of contract revision, every single provision will be considered, including those regarding the value or to the amount to which the party is held to sustain the contractual risks of different nature or derived from different causes. Therefore, not the gravity of the occurred changes is the most important, but their impact on the contractual elements, this leading towards the substantial alteration of the contractual provisions. The hardship case is therefore described not in an absolute manner but in a relative one, by applying in concreto the hardship situation to the contract's provisions

3. Conditions for the Hardship Application

Before fulfilling the necessary conditions, certain pre-conditions or premises must be met: the lack of fault of the debtor, the absence of a contract adaptation clause and the licit character of the contract's non-performance. The debtor's lack of fault must be evaluated in an objective manner, corroborated with the absence of bad faith in the debtor's conduct. In the case of concurrent fault, in other words in the hypothesis in which, in addition to the debtor's fault in producing the contractual changed circumstances, an external act occurs, the situation will be solved by ascerting the causality link according to civil law rules or through partial indemnity, according to the criteria invoked for force majeure.

The absence of an adaptation clause or its inefficiency derived from the different nature of the covered risks or from the disproportionate effect of the occurred risks makes the hardship theory applicable. But the presence of such a clause leads towards the application of the principle of the parties' autonomy of will, thus excluding the hardship theory application similarly with a positive competence conflict. The rules of contractual hardship state that the aggrieved party will be held liable both for minor risks, which do not severely imbalance the contractual economy, but also for the major risks that lead towards the breach of the contract taken into account by the parties at the moment of the conclusion of the contract or for those that depend on the contract's nature.

More conditions must be fulfilled to apply the hardship theory. In this perspective, the disrupting event must either occur or become known to the aggrieved party only after the conclusion of the contract. Also, the aggrieved party must have been in an objective impossibility of acknowledging the possibility of the event's occurrence at the moment of the contract's conclusion and the event must have been beyond the aggrieved party's control. From this standpoint, the party must have not made any admission of liability in case of the event's occurrence, neither explicit nor implicit; moreover, it must not be incident neither an error nor a lesion. But if the aggrieved party knew about the event's possibility of occurrence when the contract was concluded and took no protection measures, it is considered that the party made an implied commitment of the risk generated by the occurrence of contractual imbalance. The unforeseeable character of the event is not actually a feature of the event itself, but it's referring to its result upon the contractual economy. It must be analyzed at the moment of the event's occurrence as it expresses a relative, stricto sensu unforeseeable event. The hardship situation may consist in the occurrence of an unforeseeable situation or unforeseeable effects having a particular feature: neither insurmountability nor irresistibility are sufficient conditions for the revision of the contract. The nature of the event leading towards contractual disproportion it is rather irrelevant at a first view. But the stricto sensu analysis of the hardship generating situations points out that these events have a financial or economical origin, thus being the case of the pecuniary obligations and not the case of every patrimonial obligation.

However, in the juridical literature the opinions are highly divided. It is therefore discussed whether the nature of the event must characterize the constitutive situations or the effect produced over the contractual economy. On one hand, the previous and independent existence of such situations constitutive or exclusive of hardship has been denied, grounding this point of view on the assertion that such a situation actually consists of an event derived from the addition of more hypostases. On the other hand, the conclusion was reached that some situations could be found, regardless of their nature, which could constitute the premises for hardship application.

Despite these discussions, it is considered that the nature of the unbalancing event is not as important compared to the economical or financial direct effect on the breach of the contractual equilibrium. (Zamsa, 2006, p. 98) However, the nature of the event can have a general character represented by different political, economical or technical circumstances, unforeseeable for the parties at the conclusion of contract. The event must be external to the parties' will. Therefore, the occurrence of the event must be beyond the control of the aggrieved party, which must not be in the situation of non performance at the moment of applying the hardship theory. Moreover, the breach of the contractual equilibrium must have certain intensity in comparison to the contractual economy, this being also relative criteria. Nevertheless, the bearing of the effects only by one contractual party is a subsidiary, subjective criteria, and the condition of contractual equity being interpretable. (Sitaru, 2008, p. 652) In order to enable us to discuss about the effects of the application of hardship theory we must begin from the doctrinal classification of the notion of "obligatory contractual content" and "obligational, compulsory or bonding content". (Zamsa, 2006, p. 33) The contract's effects consist in the creation, the modification or the annihilation of rights. From this point of view, we must restate that the contract may not generate only obligations, aspect which is exemplified through the translative or extinctive contracts that do not generate obligations stricto sensu.

However, through the "obligational or bonding content", one can designate the total amount of obligations derived from jurisprudence even though they are legally consecrated. As an example we indicate the application of the principle of good faith corroborated with the principle of negotiation, of parties' cooperation and security of the civil circuit. The contract revision during its implementation is the main effect of the application of hardship theory. Its amendment may be done in a contractual, legal or juridical manner, thus avoiding the contract's binding character. Nevertheless, it is stated that this amendment refers to the quantitative alteration of performance and not to the qualitative one. Firstly, the aggrieved party may ask for negotiations; the request must be immediately issued and must contain all the reasons on which it is grounded. The introduction of this request does not entitle the party to ask for the suspension of the performance of the contract. Nonetheless, the parties may insert different clauses that define a maximum term for negotiations. If an agreement is not reached after such an unequivocal term, the contract can be suspended. However, in case of delay or insufficient communication from the aggrieved party, even though this conduct is not sanctioned, it will be taken into account during the phase of checking the conditions for the application of the hardship theory, being capable of altering its retroactive effect. The notification must contain the description of the altering effect of the event and of the consequences over performance. By notification, the party expresses its intention towards the application of hardship in order to obtain the revision of the contract. Nonetheless, if the contract contains any clause regarding the suspension of the contract during negotiations, this will be applicable. The obligation for negotiations (Cedras, 1985, p. 265) is an obligation of diligence and its failure does not disregard the contractual provisions; even though it is strongly recommended the good faith negotiation in order to obtain the adaptation of the contract, the parties cannot be forced into reaching an agreement as a result of the negotiations.

The non performance of the obligation of negotiation may consist in an unjustified refusal of taking part in the negotiations or by attending them while displaying an attitude of bad faith. The party distressed by the nonperformance of the negotiating obligation could demand the temporary suspension of the contract on the grounds of exceptio non adimpleti contractus, or request the termination of the contract and the indemnity and interest payment by the liable party.[1]

Nevertheless, if the negotiating refusal is due to the fact that is a serious doubt regarding the application of hardship according to the case's circumstances, the judge or the arbitrator will establish if the conditions for the hardship application are fulfilled. The contract adaptation may be realized in different ways: by the modification of the main obligation's object, by the changing of the performance or of the performance term, by creating new obligations or by suppressing certain obligations and in the meantime by creating different ones. In this last case, if by interpreting the parties' intention the will of substitution by object changing does not result, the initial contract holds good, altered after the occurrence of the hardship situation. Still, the parties can insert in the contract some provisions regarding the necessity of reentering into force of the previous contractual provision in case the hardship situation ends. (Florescu & Parvu, 2009) Nevertheless, if the negotiations fail, despite the fact they were conducted in good faith, the performance of the contract either continues in view of the initial established terms or the contract is terminated. However, the parties have recourse to the court.[2] The court may either ascertain the termination of the contract at a specific date or adapt the contract with the purpose of reestablishing the contractual equilibrium. Following the negotiations, an additional act or a new contract can be concluded. According to the parties' attitude, the court has more options at its disposal. It can decide the termination of the contract or its adaptation in the cases establishing the hardship situation if the counter party does not recognize the hardship situation or in the case of unjustified refusal of negotiating, of breaching the cooperation obligation and good faith negotiation or if the parties can not reach an agreement about the established hardship situation. Moreover, the court can impose to the parties to begin and carry on negotiations or it can confirm the contractual terms and reject the request for the revision of the contract. Nevertheless, the parties can appeal to a third party in order to solve the matter. This third party can be an arbitrator, a mediator, an expert or a legal adviser. On one hand, the last three can suggest to the parties a solution for the adaptation of the contract, for its termination or for its maintenance in accordance with the initial contractual terms. It should be noticed that this suggestion is not binding for the parties and it is subsumed to the alternative dispute resolution methods. On the other hand, the arbitrator issues an arbitral award in solving the dispute; this award or decision has a jurisdictional character, binding for the parties. Also, if the parties have inserted in the contract a general arbitration clause, it is extended ex oficii over the hardship clause.

First of all, the arbitrator has to analyze the existence of a hardship situation. If this situation cannot be established, the contract stands. But if the hardship situation is identified, the arbitrator will invite the parties to negotiate in order to adapt the contract. Generally, the arbitrator does not have to give any resolution but he has to decide the applicable law.[3]

[1] ICC Hardship Clause 2003.
[2] Deleanu, S, "Hardship clause" RDC, 9/1996, p. 141.
[3] Maskow, Dietrich (1992). Hardship and Force Majeure, 40 Am.J.Comp.L., at 657 et seq.

4. Different Legal Systems

Because the parties have the possibility choosing as lex contractus a national law, the regulation of hardship or imprevision theory in different national law systems must be taken into consideration. In the German legal system, the hardship theory was regulated in the year 2000 in the German Civil Code, BGB, art.313, having its origins in the '20th monetary crisis.[1] According to the German law, the legal basis for hardship theory is in fact the principle of good faith and the interpretation of the contract in the "fill in the gaps" manner, in contrast with the possibility of invoking the abuse of rights.

Because the contract is the law of the parties, the judge is held with regard to the contract as a premise towards deliberation. Nevertheless, in case of contractual gaps, these must be filled according to the standards utilized by the reputed traders. On the other side, the risk allocation is regulated either by using objective criteria like the dimension or the equivalence of the contractual imbalance, or through an objective interpretation of the contract. Therefore, in case of a hardship situation, the court is entitled either to terminate the contract or to adapt it in order to equitably allocate the unforeseen excessive burden. In the American legal system one can observe the existence of twin theories: first of all, the impracticability of performance theory and the frustration of purpose theory.[2] These two theories have a certain resemblance due to the effects of their application: either the suspension of contractual performance or its termination. There are however differences more important than these similarities. In case of frustration, the events that occur make the counter performance worthless whereas in case of impracticability one may observe either an impossibility of performance or an increasing burden in fulfilling the contract. We outline the fact that in case of frustration one party may avoid the performing of the contract by paying indemnities. (Schwartz, 2010, p. 13) The frustration theory applies only in case of extraordinary and unexpected circumstances, in case of a radical decrease of the counter performance and it operates in the advantage of the parties that must give money in exchange, absolving the party for which the counter performance value became worthless during the performance of the contract, between its conclusion and termination. This theory was founded on the idea of gap filling, thus attempting to supplement on the basis of what is equitable and reasonable what the parties would have inserted in the contract if they would have foreseen the occurrence of the unbalancing event. (Horn, 1985, p. 15 and the next)

The frustration proof is obtained by pointing out the purpose sine qua non for the conclusion of the contract and by certifying its total or main frustration due to the occurrence of an extraordinary, relatively unforeseeable and external event. Nevertheless, the aggrieved party must not have produced the event and must not have been at fault. The impracticability theory applies in case of a radical increase of the performance costs, absolving the party for which the performance became excessively burdensome or impossible to perform unless the contractual provisions prescribe implicitly or explicitly something else. This theory gives odds to the party whose performance consists in delivering goods or services. The frustration clause can be limitedly detailed or exemplified similarly to the force majeure clause, by listing the events that lead towards frustration. The force majeure clause represents the similar standard clause to the impracticability clause because it has the same function and it applies to the same cases. We must underline that in general, both in the American and in English law the principle pacta sunt servanda is closely observed, even though contractual non performance is not a consequence of the culpa in contrahendo. Moreover, for breaching the contract there can be awarded indemnities. In the Italian legal system the hardship theory is expressly regulated

[1] Wegfall der Geschaftsgrundlage, literally means the disappearance of the fundament of the contract.
[2] Krell vs. Henry, 1902, regarding the frustration theory and not the impracticability one; likeways, Taylor vs. Caldwell

in art.1467-1469 Civil Code, dating back to the year 1942. The Italian law presents two applications for this theory: Eccessiva onerosita or sopravenienza, regulated by the Civil Code and presupposizione, having jurisprudential origins.

The first application must meet certain criteria: either the increase of performance costs or the immediate and direct effect on the contractual performance doubled by the fact that the new difficult circumstances would exceed the element of normal alea typical to the contractual risk. The effect of this first application consists in either the adaptation of the contract or its termination. It should be observed that if the court decides the termination of the contract the counterparty could offer an equitable indemnity for maintaining the contract. The second application must meet the following criteria: the circumstances' alteration must lead towards the fulfillment of an assumed situation, considered by the contractual parties as an essential contractual element at the moment of its conclusion, certain to happen. Moreover, the event that leads towards the altering of the contractual circumstances must be objective, beyond the parties'control or will and exterior to any obligations assumed by the parties. The effect of this application consists in the termination of the contract. (Geamănu, 2008, p. 169)

In the French legal system the dichotomy between the civil contracts, of private law and the administrative ones, of public law, is obvious. In general, the contract must be performed as long as the performance is possible, no matter how burdensome it becomes. The hardship theory applies to all the contracts that are confronted with events that generate contractual unbalance as long as they meet the conditions for the theory's applicability.[1] The theory is generally applied for long term contracts has been hastily drawn on the sole ground that they are essentially long term. But the hardship domain is in fact a lot wider. The theory's admissibility is found especially in contracts where the public administration is a contractual party and the contract's object is a lease, public works, trades and delivers, services, transportation, and others, with the purpose of ensuring the public service continuity.[2] Indeed, the vast majority of the resolutions regarding this theory can be found in the administrative law.[3]

Nevertheless, the works contract is a genuine example of the application of the hardship theory. Consequently, even if the law states that the contractual price cannot be changed if it was determined as a flat price[4] in practice three exceptions can be encountered. First of all, the parties have the possibility of inserting certain contractual clauses regarding price indexation. Another apparent exception is the acceptance of the modification of the price by the client. A third one is the applications of the hardship theory according to which the additional works that have generated an imbalance of the contractual economy which may lead towards the changing of the price. [5]

Therefore, the aggrieved party can receive a certain amount of compensation. Moreover, if the economical event leads towards a total misfit with the reality of the contractual clauses, the parties can revise the contract in order to modify the clauses that have become obsolete. Nevertheless, if the parties cannot reach an agreement the court can decide to terminate the contract.

[1] Therefore, the events must be unpredictable, exterior to the parties (if the event is irresistible for the parties the force majeure theory could be applied); the contractual economy must be radically unbalanced (resembling with the lesion) and it must be temporary ;

[2] The hardship theory originates in a decision called "Compagnie générale d'éclairage de Bordeaux" from 1916 Conseil d'Etat, n° 59928.

[3] Conseil d'Etat, 9 décembre 1932, n° 89655, Compagnie de tramways de Cherbourg.

[4] According to art. 1793 from the French Civil code, the flat price is subject to no alteration even though some additional works may be indispensable.

[5] Cass. 3ème civ. 20 janv. 1999.

5. Conclusion

The international dynamics exceed the control field of the contracting parties. In this horizon perpetuum mobile the institution of a fixed, stable contract, opaque towards the external influences became outdated. In the foreground the concept of adaptability, flexibility, suppleness appears. This consists in fact in the transposition into practice of the theory of double perspective upon the binding force of contracts. Thus, for a better understanding of the principle pacta sunt servanda one can imagine two visions: the first one is static, fixed and immovable. This is the traditional vision, the safe way towards ensuring the performance of the contract as it was concluded. This perspective is protected against the occurrence of different events that could alter the contractual equilibrum after the conclusion of the contract. It was stated that the static vision is the only one that makes a certitude out of the principle of the parties' autonomy of will. The second vision puts forward an innuendo: the pacta sunt servanda principle should have a flexible, dynamic, open character, able to reevaluate the idea of just, fair, righteous and equity indicated by the Canonic law, founded on the principle of good faith. According to this formula, one must not establish a causality link between the agreement of the contractual parties and the contract's binding force. Even though such an agreement represents an essential contractual element, the binding force has its causa princeps in the idea of equity, morality or utility. Therefore a certain transition from the individualistic vision imposed by the liberal doctrine of the 19th century, towards a general, wider perspective is observed. One may notice the cyclic character of any idea: what is confirmed by a century is refuted by another in a dialectics of history. The novelty of hardship regulation is therefore obsolete: the Roman law regulated this theory and the Canonic law did this as well. It is very likely that in the near future the theory will be regulated at a higher, supranational level in order to harmonize the national legal systems.

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Efficiency Modalities in Internal Plan of Decisions Isued by International Jurisdictions that Regulated the Situation of Private Law Persons in National Judicial Order

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Abstract: The objectives of the article are represented by the prove of the fact that the decisions of the court give birth to rights and obligations in natural persons and judicial persons' patrimonies, in internal law, so that the problem if these can prevail from the authority of the thing judged is posed? Besides this situation, the rules of international law are applied by national courts according to national constitutions and for domestic purposes. According to the theory of the act of state, even if it would seem that, at least internal acts of implementation of international rules are subjected to internal jurisdictions, the resolutions implemented often touch the problem of security and public order which escapes the judicial competency. In order to realize this study the systemic method, the comparative method and the logical method were used, but a tight collaboration, a combination of research methods are imposed, so that each has the vocation to seize the universe, thus it is proper to mention the contribution of epistemology as a reflection on sciences, bringing into discussion a normative discourse in systems of descriptive texts. In conclusion, the national judge is free to ignore the decisions of ICJ or to keep in mind these decisions in interpreting an internal law norm, an international law rule or to avoid the reexamining of problems already presented in these decisions. It is important to also realized an approach of the image of the law and of its meanings, beyond the clichés we got used to, observing that, due to its complexity, law can not be reduced to one and unique representation.

Keywords: jurisdictions; resolutions; international organizations

1. Introduction

Modalities of efficiency on an internal plan of decisions issued by international jurisdictions that regulated the situation of private law persons in national judicial order suppose, on one side, the intervention of an internal judge. This may be demanded either by the creditor state either by private persons that benefit from rights and the in task of which the decision of the international organism give birth to obligations. The compulsory effect of ICJ decisions is based on a rule of conventional law that binds only contracting states.

2. Monitoring the implementation of decisions issued by international jurisdictions

According to art. 94.1 from the Nations Charta, each member state engages in obeying the decision of the International Court of Justice (ICJ) in all the case in which it is a party. Regardless all this, the Charta doesn't provides any mechanism of monitoring the implementing of these decisions instead of informing the Security Council regarding the non-execution, a mainly political organism, which will

act, in consequence, on criteria that are more political than judicial, even if the execution represents the third phase of an essential judicial process. This is why, the creditor state has the following means at its disposal for the obtaining of the execution of an ICJ decision:

- the adoption of countermeasures;
- the use of services of an international or regional organization;
- the informing of the Security Council.

In particular, this enforcement may be guaranteed by an internal judge. To sustain the ideas mentioned, art. 94.1 must be corroborated to art. 59 from the ICJ Statute which provides that decisions are not compulsory but for the state involved in the litigation. Because private persons are not parties in the trial presented in front of international courts, these are not bind by this decision and neither the internal judge which runs a future procedure in which these private subjects are involved.

The national judge put in front of such a dilemma, may use the decision of the international court in the interpreting of an internal disposition, in the interpreting of international rules and in solving prejudicial problems.

As consequence, the decisions of international courts are not susceptible of enforcement on a national plan due to their inter-state nature and to the principle of relativity of the effects of judicial decisions (Pigui, 2008).

In the specialty literature it is considered that at the moment in which the state acts in front of an international court to realize the rights of internal subjects of private law, a procedural substitution is produced, which allows the latter to benefit from the effects of the international decision in a quality comparable to that of their state, which they will be able to value in internal procedures, as in the first case. Such a conclusion may b confirmed by the institution of diplomatic protection. This reasoning is contradicted by the case regarding the *Mavrommatis Concessions in Palestine* (Jennings, Lowe, & Fitzmaurice, 1996, p. 328), in which the Permanent International Court of Justice showed that the decision from 30 August 1924 that the state which acts for the diplomatic protection of its nationals "it does not replace its nationals, but it values its own law".

This problem was also put in the *Avena*[1] case where ICJ recognized that the right to diplomatic protection is a temporary right of the individual and that the native state may act in front of the Court in order to value this right. Regardless all this, the Court hasn't confirmed that the state mentioned has the right to an appeal by replacing in the private person's rights, but it has underlined the possibility of the state to defend in front of international courts individual rights of its nationals[2].

Accessing this interpretative reasoning we can ask ourselves if it is also valid for the European Court of Human Rights (ECHR). The problem isn't for the cases in which the state takes precaution measures and adopts internal norms that allow the review of a trial after a decision was issued by the European Court of Human Rights. In this case, the internal judge's is to open the case that results directly from the ECHR decision, but from an internal law disposition (Murphy, 2000, p. 181).

[1] International Court of Justice, *Case Concerning Avena And Other Mexican Nationals (Mexico V. United States of America),* United Nations Publications, 2005, p. 4-14.

[2] Thus, because Osbaldo Torres (*Avena Case*) was not a part of the case presented in front of the International Court of justice, he couldn't invoke the authority regarding the problem judged in this decision in front of American legal courts. The Oklahoma Appeal Penal Court has answered to its appeal that „The International Court of Justice has jurisdiction only over this Court".

In the case *Committee of nationals residing in the United States in Nicaragua v. Reagan*, the American courts rejected the demand of indemnifying a civic committee introduced as a result of prejudices provoked by the Nicaragua war. In the recurrent' opinion the US responsibility results from the support offered to the CONTRAS movements and which was established by the International Court of Justice as being illegal. The first American court rejected the claimants request on the grounds that it involves a "*political question*".

The Appeal Court rejected the appeal motivated by the fact that individual persons can not act in front of an internal court in order to obtain the execution of ICJ (O'Connel, 1990, p. 15). In the *Socobel* (Jasentuliyana, 1995, p. 287) case, The Permanent Court of Justice (PCJ) has issued a decision that confirmed the validity and the compulsory character of the arbitrary sentence from 1936, obtained by *Socobel* (Belgium Commercial Society) as in 1939, but to which the Belgian state did not offer efficiency for the guarantee of the execution of a flat sum deposited in Belgium banks and belonging to Greece in the virtue of the Marshall Plan. The court denied the execution efficiency of decisions showing that arbitrary sentences, nor the decision of the Permanent International Court of Justice were not the object of a procedure of executor in Belgium, and *Socobel* wasn't a part of the litigation presented in front of ICJ.

A part of the doctrines criticize the solution offered by the Belgian courts. Claude Albert Collard considers that the decisions of the Permanent International Court of Justice and, in consequence, of the International Court of Justice should be assimilated to those of a superior court instead of those of a foreign court and thus, should be exempted by the exequatur formality. Or, it has been considered that, allowing a national judge to put in application the power of the thing judged when an international decision was issued, would mean the breaking of the principle "*the impossibility of infirming an international judgment through national judgment"*, principle that was affirmed by PICJ on the 13th September 1928 in *the Problem regarding the Chorzow factory* (Amerasinghe, 2002, pg. 439-442).

The cases presented have given examples of interpretative theories that represent true obstacles in offering efficiency to the decisions of international courts in front of national courts. The models given as examples, through which national court have offered efficiency in national legal order; the international decisions have been sustained by a series of theories, contrary to the ones presented. A first difference was made regarding the decisions issued by international courts regarding the lining of frontiers which were called decisions *in rem* opposed to *erga ormnes*, unlike the decisions that establish obligations in the task of debtor party and which were subjected to the effect of relativity (decisions *in personam*). This doctrine was criticized on reason that the effect *erga omnes* of the so called decisions *in rem* would allow the invoking of international decisions by privates, even if these are not a part of the parties or recipients of these decisions. The decision issued by ICJ in the case *Norwegian Fisheries* was taken into consideration by the Norwegian Supreme Court in the cases *Rex c. Cooper* and *Rex c. Martin* (Lauterpacht & Greenwood, 1957, pg. 166-167). The Norwegian government was delimitated through decree on the 12th of July 1935 fishing areas reserved with exclusive title to its nationals. Great Britain started an action in front of the International Court of Justice regarding the noncompliance with the international law that established frontiers. ICJ rejected this demand on the considerate that the method followed isn't contrary to international law (Pigui, 2009). Later, in front of Norwegian courts were introduced two similar appeals: two privates, one English and one French were accused of having fished in Norwegian waters and sentenced to paying a fee and the partial confiscation of cargo and equipment. Both have made an appeal sustaining the impossibility of applying in internal law of an Norwegian ordinance of frontier delimitation because this decree is contrary to international law, on one side, invoking the principle of good faith. As

answer, the Norwegian Supreme Court has showed that the compliance of this decree with international law was established by ICJ in the Fisheries case in 1951. Identically, the decision issued in the case *Minquiers et des Ecrehous* the Cassation Court was involved in the *Buchanon* case (Lauterpacht & Greenwood, 1970, pg. 425-426). The French Society Hanappier-Peyrelongue has used for the labeling of the whisky it produced, labels that resembled to those used by the London society James Buchanan for its bottles of whisky, so that it a confusion could appear regarding the origin of the product. In consequence, the London society has started an action in France for the compensation a decision was issued in which, on one side, the imitation of labels by the French society was interdicted and, on the other side, the action of the French society was recognized as representing an act of disloyal competition. The London Society has deposed an appeal in cassation against this decision considering that it hasn't obtained a conviction to the compensation of the French society for the imitation of the label. The French society sustained that this conviction should have been applied in two months according to French law. The French society prevailed from the ICJ decision in the case *Minquiers et des Ecrehous* showing that the French and English theories have a common frontier and that in this case a longer term couldn't have been valued in favor of the private subjects that have their residence in a state next to France (possibility offered by French law). Through the ICJ decision it was stated that the territories of the Minquiers and Ecrehous islands, being situated at less than 6 marine miles from the French coast and subjected to British suzerainty, may be considered as being limits of the French territorial waters that extend on a distance of 3 miles from the coast. The French Cassation Court, in the case of the Minquiers et des Ecrehous decision, rejected the exception of the inadmissible appeal raised by the French society showing that the islands are situated outside British territorial waters and their contiguity with French territories could not have as result the institution of a common frontier between the two states. Thus, there is a possibility of examining a longer term than two months for the British society, the appeal being declared as admissible.

3. Conclusions

In the absence of similar internal norms, national courts have the possibility, either to interpret the case in a general manner and according to national law allowing at the same time the adoption of the ECHR point of view, either to consider that the decisions of the Court do not affect the power of the thing judged on an internal manner, the execution force of national decisions. In both cases, the ECHR decisions can not be invoked with the power of the thing in front of internal courts. The decisions of international courts force only the state party in the case but not the national legal courts, even if the state as an abstract entity is represented on the plan of international relations through its public organisms. Thus, it would result that the actions of state public organisms engage the responsibility of the state on an international plan and the obligations of the state does not bind its public organisms. As example we can mention the refuse of the internal judge to apply the decisions of the International Court of Justice we remember the refuse of American judicial authorities to efficiency the decision of the Court in the Avena case by invoking the lack of the thing authorities judged of this decision for American courts and the principles of power separations in a state.

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The Jurisdiction of Public Notary

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Abstract: The jurisdiction generally means the ability of a body or persons to solve a specific problem. Legal language is not too far from the general sense described. In notary matters, the jurisdiction determines the specific applications and procedures of a notary office. Notary Public offices have overall responsibility regarding the notary acts. This jurisdiction shall be defined by the powers of the jurisdictional bodies because of non-contentious character of the applications that are address to the notary office. But the Law is regulating also an exceptional territorial jurisdiction. The paperwork refers to an analysis of main forms of notary jurisdiction. There will be also presented the competence of the administrative bodies and diplomatic missions in notary matter.

Keywords: notary office; notary jurisdiction; notary acts

The jurisdiction generally means the ability of a body or persons to solve a specific problem. Legal language is not too far from the general sense described. In notary matters, the jurisdiction determines the specific applications and procedures of a notary office.

Notary Public offices have overall responsibility regarding the notary acts. This jurisdiction shall be defined by the powers of the jurisdictional bodies because of non-contentious character of the applications that are address to the notary office.

But the Law is regulating also an exceptional territorial jurisdiction. The paperwork refers to an analysis of main forms of notary jurisdiction. There will be also presented the competence of the administrative bodies and diplomatic missions in notary matter.

According to the provisions of Article 8 of Law no. 36/1995, the notary public shall meet the following notary acts:

a) drafting legal documents with legal containing, at the request of the parties;
b) authentication of documents drafted by the notary public, or personally by the party or by a lawyer;
c) notary probate proceedings;
d) certification of facts in the cases provided by law;
e) the legalization of signatures on documents, of specimens of the signatures and also of seals;
f) setting officially attested date to the documents presented by the parties;
g) deposit the inscriptions and the documents submitted by the parties;
h) acts of protest bills of exchange, the promissory notes and checks;
i) authentication of copies of documents;
j) performing translations and legalization;

k) issuance of duplicates of notary documents that they elaborated;
l) any other operations required by law.

As noted, this paragraph of legislation that has an open content, meaning that any legal provision which will appear later and give the notary public power is another function, it will enter into his obligations without the need of amending the Law no. 36/1995. Based on article 9 from the same law, notaries public have the right to give legal advice on notary matters, other than those relating to the content of the acts they carry out and participate, as experts nominated by the parties to the preparation and drafting of legal documents with notary character.

For carrying out his duties, the notary public has general jurisdiction, with exceptions in cases specified by law, namely:

a) The probate procedure is in the responsibility of the notary public notary public from the notary office located in the territorial jurisdiction of the court where the deceased had his last residence;
b) in case of successive inheritances, heirs can choose the power of any notary offices located in the territorial jurisdiction of the court in which he was last home one of the authors who died at least;
c) acts of bills of exchange, promissory notes and checks are territorial jurisdiction of the notary public of the court in which payment shall be done;
d) issuance of duplicate and renewal of notary documents are the responsibility of notary public in whose office is located their original.

Excepting the notary public, Law confers specific attributes to notary activities and to others. It is, for example, the case stipulated by art. 12 of Law no. 36/1995 which establishes that the secretaries of local councils of municipalities and cities where the offices of notary public does not work, shall fulfil, at the request of the parties, the following notarial acts: a) legalization of signatures on the documents submitted by the parties, b) legalizing copies of documents, excepting the documents by private signature. The listed documents, excepting if their deposit is required at some institutions or traders, shall be fulfilled by those. Notary activity carries out also diplomatic missions and consular offices of Romania, based on Romanian legislation and international agreements to which Romania is party, and also according to international practice.

At the request of natural persons having Romanian citizenship, as well as Romanian legal entities, diplomatic missions and consular offices meet the following notarial acts: a) drafting legal documents for signature authentication or legalization, b) authentication of documents, c) legalization of seals and signatures, d) setting officially attested date to the documents presented by the parties; e) certification of facts, f) certification of copies of documents; g) performing translations and legalization h) deposit the documents and the documents submitted by the parties, i) issuing of duplicates of notarial acts issued by diplomatic missions or consular offices.

Notarial acts are carried out at the head-offices of diplomatic missions or consular offices and on board of ships and aircraft under the Romanian flag, which are located in the area of activity of these bodies, as well as Romanian citizens residence or in another place, if so required by international conventions to which Romania is party and the state of residence are parts or local law does not object.

Another component of notarial activity is driven by the increasing mobility of people and goods currently registered. The media of communication and telecommunications have strongly evolved, borders are obstacles hard to overpass. They speak of the phenomenon of globalization. Whether it's

about travel for professional reasons dictated by an employer, or personal, for family reunification abroad or pure convenience, such as for example the withdrawal of the province area, with a better climate, individuals are extremely mobile. From this international travel are resulting various risks of conflict between laws. In this changing world, notaries must be able to inform customers of the consequences and legal consequences of acts which they handle and to anticipate conflicts that may arise.

Finally, the final contents that will be given to a document will depend on the consequences it will have. For this, information should cover all items that notary should know and about which the parties have insufficient knowledge, a common practice in international law. Thus, the notary must inform the parties clearly and intelligibly on points that are favourable as well as those that are unfavourable. When a problem involves an element about which there is a risk of conflict with a foreign legal system, the notary is obliged to notify its customers and, where appropriate, together with a specialist in that country, to clarify parties or at least invite them to make themselves such an approach. For this reason it is important for the notary to keep informed not only on national law issues but also major developments of the main foreign rights, whether civil law or fiscal law. In tax matters, the countries which may be affected often use different concepts and criteria to be examined by a notary. For these reasons, the notary has the responsibility of inform the customer when drawing up a notarial act in connection with fiscal consequences of this act. The problem that we will examine here to know where goes the obligation of the notary, and not simply the opportunity, to inform the client of the tax consequences of acts performed by him. The notary, first if all not a specialist in taxation should be confined largely to inform customers about the tax cost of an operation or on the contrary it should help to create a tax situation that would be as favourable possible? Following the quick development of tax law and jurisprudence, the issue of the notary requirement to inform the client in the tax area should be reassessed periodically. Taxation has increased in complexity over the past 20 years. There appeared new taxes such as value added tax (VAT). Major reforms have been undertaken in various fields of interest in the notary, for example in terms of winning estate. More than once, we can say that the legislature can ignore the tax consequences of an act of notary investigated, especially in cases of sale of property or companies. The level of knowledge that we can expect from notaries is not the same in all areas of taxation.

From his side it is asked, rightly, to know precisely to inform the customer on how to calculate the tax on the gain derived from property or right to move. Be a similar situation also for the tax consequences to the example to transform a company from a reason individual capital into a capital society? If the answer is affirmative then the notary is required to acquire fiscal knowledge, such as a tax specialist, which seems hard to accept. If the answer is no, then let the customer in a great uncertainty about the direct consequences of an act issued by a public officer, a situation which is also not very satisfactory.

It thus define, together with the obligation to inform, meaning de the debt of notary to send the client to a specialist for the most complex cases, respectively, to ensure that the customer has been informed on these issues (duty to indicate or to signal).

In this way, the assessment can not be uniform over all areas of taxation in the awareness that the notary is obliged to provide these matters to his client.

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Reflections on the Adoption Institution and its Regulation in the New Civil Code

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Abstract: The emergence of new Civil Code can only be the combined result of several factors, among them: the political will, legislative development and jurisprudence stability. The ideal would be that this legal monument would reflect the most viable legislative solution, the ideas of the most inspired doctrinaires and the most sustainable jurisprudential decisions, with comparative law elements. Not even the new Civil Code of Romania avoids these expectations. In our material law we have proposed under the current legislation, with historical inserts, jurisprudence solutions over the recent years, of the comparative law, submitting constructive criticism on the institution of adoption, with references to the legal language, used legislative technique and, where appropriate, making some suggestions of *lege ferenda*. At the same time we answer to the question of the harmonization of the Civil Code with those of the European and International Convention in adoption matters.

Keywords: minor; adoptability; consent; biological bonds; European law

1. General Considerations on Adoption and its Regulation in the New Civil Code

Having its origin in a common practice in Rome, which allowed the *pater familias* to ensure the survival of domestic cult and to create, without legitimate offspring, the offspring that would bear his name and rank, the adoption was found in regulation of the Civil Code of Napoleon, then in all modern codes, including Romania in 1864. During the twentieth century, the adoption was amended by the Romanian legislator with subsequent laws, in the sense of openness to the widest possible interests of the child who is left without parental care, in terms of the trusts that the adopters must fulfil, the procedure split into two or three phases, some of administrative, other of judicial nature, and finally changes of legal effects that the adoption legal decision creates.

From the legal point of view, the adoptive filiation primarily responds to emotional reality, considering that the law establishes artificially a biological link between a child and a parent, during the life of those involved and it can be a real adventure for both human parties - adopted and the adopter or adopters. Secondly, the creation of parenthood with full effects leads to full integration of child adopted in the new family, making disappear all traces of biological parenthood. Thirdly, the adoption has met very diverse sociological realties: most often, husbands after a period of marriage and relatively young, often in the absence of natural descent, less often unmarried persons or in situations often met in practice where the husband wants to establish a filiation relationship with one or all children of the other spouse coming from a previous marriage or outside marriage. All these

realities of adoption must find its legal reflection in the legal regulation of the New Civil Code[1] (article 451-482, Chapter III, Title III, Book II "About Family").

In terms of structure, the regulation of adoption in the New Civil Code was made by the same well known patterns, even if for some titles it had renounced at the legal expressions in favour of a common language: general provisions, substantial conditions of adoption (the persons that can be adopted, the persons that can adopt, consent to adoption), the effects of adoption, termination of adoption (cases and effects).

Since the onset of the regulation, according to the definition of adoption taken from the legislation and established by the doctrine, referring to the principles governing the adoption, it is noted that the new legislator maintained only the first three principles under the current law –Law no 273/2004 regarding the legal status of adoption,[2] giving up unduly to the principles of information confidentiality of the child.

Also, a simple reading of the concerned provisions we note that for important issues related to adoption, the legislator uses the elegant formula "... there are established by the special law." This is the case of international adoption (article 453), the adoption procedure (article 454), the issuing the person certificate or adoptive family (article 461, paragraph 2), the conditions of expressing the consent (article 468), although in our view they should have been found in the Code, its mission being to provide a more complete regulation of the institutions in civil law.

2. The Analysis of the Material Law Depositions

2.1. In Terms of Substantial Conditions to Adoption

In the future regulation of the New Civil Code, it remained the substantial condition on the *adopted*, namely, the general rule that only after acquiring full legal capacity, a person may be adopted,[3] except the adoption of an adult, who was raised during the minor life by the prospective adopter. The legislator governs the impediments of adoption resulting from the quality of brothers and from the quality of spouses or former spouses (articles 457-458), implying that the impediments are actually the substantial conditions to adoption, thereby forgoing the traditional classification of the doctrine on adoption in terms of substantive requirements, obstacles and form conditions.[4]

We must highlight a special mention on the "plurality of adopted children, brothers and sisters", in the sense that the legislation is permissive, it is accepted that the brothers are adopted by different individuals or families, under the condition that this decision is in the best interests of children. As for us, we consider that the legislator should have kept as a rule that the siblings go together to the same adopter or family, and only as an exception, the separation of brothers by adoption.

As for the *adopter*, the legislator first imposes the requirement of full exercise capacity and state of health in a negative formulation, which is construed as an impediment to adoption,[5] secondly provided

[1] Adopted by Law no. 287/2009, published in the Official Monitor of Romania, Part I, no. 511 of July 24, 2009.
[2] Republished in the Official Monitor of Romania, Part I, no. 788 of 19 November 2009.
[3] Since the adoption has an educational purpose, in France, the adoption in principle is possible only on children below 15 years (art. 345 par. 1 Civil Code). This requirement is removed in two cases under article 345 paragraph 2 Civil Code: the child was received into the family for adoption before the age of 15 years or if it was adopted with the restricted effects before the age of 15, he may be adopted until the age of 20 years. In any event, the adoptee who has attained the age of 13 should express its own consent to adoption. See (Combo, 2008, p. 423)
[4] In connection to the existence of impediments to adoption in the current regulation, see (Bodoaşcă, 2007, p. 131-133)
[5] The alienated or mentally unstable have no full legal capacity, and those with serious mental illness cannot adopt."

the age difference conditions (minimum limit of age difference being now of 16 years, not 15, as provided in article 9 paragraph 2 of Law no. 273/2004) and, finally, the moral and material conditions that is proven by obtaining a certificate. It is not forgotten the condition of number of adopters, the general rule the adoption is open to a single person, and exceptionally to two people who have the status of spouses.[1] For the avoidance of speculation and for further strengthen the article 6 paragraph 1 of the European Convention on the Adoption of Children in Strasbourg, specifically in article 462, paragraph 3 it is provided the prohibition of adoption by two persons of the same sex.

The Consent to adoption was not neglected by the New Civil Code, the conditions for it are taken from the current special law (the list of persons who express their consent, freedom of consent, time, revocation of consent, refusal of parents to give their consent) with some novelties that we present below:

- the biological parents no longer consent the adoption, if their child was initially adopted by a single or married person, and then the adoptive husband wants also to achieve adoption (article 464, paragraph 3);

- it is maintained the court right of guardianship to approve an adoption, in the situation of the parents' or guardian's refusal to express consent to adoption, if it is judged by complex rules of evidence that such an attitude is unfair and contrary to the interests of the child. Unlike the legislation that we find in article 13 of Law no. 273/2004, the article 467 of the New Civil Code narrows the scope of children to which it will be applied this deposition, in the category of "abandoned children", that expression was not defined by the legislator. Perhaps the future special law will do so.

2.2. The Aspects of Adoption Effects

The provisions of articles 50-53 of Law no. 274/2004 concerning the date of adoption, kinship, relations between the adopter and the adoptee, the adoptee name and surname, adoption record, the confidentiality of adoption, are almost completely taken over and almost the same wording by the New Civil Code (articles 469-474).

We find it interesting that the new legislator considered it necessary to insert the contents of the New Civil Code of article 10 paragraph 1 of the European Convention on the Adoption of Children, according to which the adoptee has the rights and obligations towards the adopted as any person towards his natural parents. In our opinion, this provision is unnecessary because it is known that parentage is bilateral and not a unilateral relation between parents and children, and considering that adoption imitates nature, it is natural that the adoptee should be granted all the rights and obligations as any child from its natural parent.

2.3. Termination of Adoption

The new legislator added to the rightful dissolution of the adoption following the death of the adopter or adopters (at the date of the approval of the new adoption of the child became orphan) and the possibility of the dissolution of adoption at the request of the adopter and adoptee, if certain conditions are met, namely: the adoptee or adopter has made an attempt on his life or other ascendants or descendants of the other, on one hand, or adopter or adoptee has been guilty of a criminal offense

[1] In the French Civil Code, for a adoption requested by the spouses, it is required that they have at least 2 years of marriage and should not be separated physically. This condition on the duration of marriage is removed if adopters have over 28 years.

punishable by deprivation of liberty of at least two years (as a criticism, the legislator should have mentioned intentional acts).

From our point of view it is a step forward towards the settlement of Law no. 273/2004 which did not give the opportunity of the adoption dissolution at the request of the adoptee or the adopter, and we consider that the reason for which the New Civil Code has provided the possibility of dissolution under these conditions it is found in everyday reality where there have been numerous criminal cases (murder offenses, attempted murder, grievous bodily harm, etc.), which had as its author, either the adoptee, and rarely the adopter.

The cancellation of adoption may only be required for vices of consent by the person whose consent has been undermined and within 6 months from the date of error discovery on adopted or deception from stopping violence, but no later than 2 years after the completion of adoption.

As to the consequences of termination of adoption, it comes back to the previous regulation of the Family Code that provided that for ground reasons the court may allow that the adoptee would keep the name acquired by adoption, if the adoption is dissolved.

3. Conclusions

We would have expected that the adoption institution meet a more generous rule in the New Civil Code, the legislator fructifies more the proposals of *lege ferenda* sustained in law doctrine. It is missing from this regulation the concept of "adopted child" and the legal procedures by which a child acquires this quality, and any reference to the post-adoptive pursuit of the child and adoptive family.

We consider it appropriate to reintroduce the category of child *declared abandoned by court order*, as it was governed by the provisions of Law no. 47/2003, repealed by Law no. 273/2004. In principle, the court may declare the child abandoned that was received by Public Service of social assistance towards whom parents have expressed disinterest in a certain period of time expressly provided for (six months or a year). The disinterest of the parents proved by any evidence of the plaintiff is characterized by the absence of any emotional ties to parents with children.

We also consider it appropriate to introduce into our law, according to the French model and not only, the possibility of *birth under X*, the anonymous birth, in order to limit the births outside health institutions, thereby protecting the health and life of the mother, and the abandonment of new infants in poor conditions, which endanger their health and life. The future mother declares that she wants to give birth anonymously, which means that her identification data are not passed in the identity certificate stating the birth, the child acquiring the status of a child born under unknown parentage. Of course, the data will appear in the mother's medical records, under the protection of privacy, with the possibility of their disclosure, but only upon approval of a judge and only if the health of the children requires it, and with the consent of the concerned person (e.g. a transplant, a blood transfusion, a registry, etc.).

The legislator should provide a solution also to the situation when, after the referral to the court with the application for adoption, one of the adopters dies. Or, the death of one member occurred after the acceptance of the adoption application, without the legal decision it would still be reversed. In these situations, does the adoption become effective or not?

In another train of thoughts, the political will exclude Romania from the ambit of “children markets”, which was reflected in the legislative background by accepting the international adoption only if the

adopter or one of the spouses in the adoptive family is related up until the third degree including the child (article 45 of Law no. 273/2004), it can be refined in a future regulation by multiplying the situations in which a Romanian citizen child can be adopted abroad, especially in the case of mixed marriages or Romanian citizens residing or staying abroad. From the date of suspension of international adoptions in Romania, the prohibit deposition could be defrauded by foreign citizens by resorting to a simple mechanism, namely: the foreigner citizen was making a fictional recognition of paternity of a child born outside marriage by a Romanian citizen woman, after the child was to be adopted abroad by the wife of the foreign citizen, who became the father by the acknowledgement inconsistent with reality.

Certainly, as announced in its content, the New Civil Code will be accompanied in its application by a special law in matters of adoption, which will cover the gaps, to fill in and provide solutions to the unregulated situations.

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The French Civil Code

THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
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Corporate Governance

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Abstract: The purpose of this study is to analyze and understand the recently introduced form of management of a company limited by shares. The Law no. 441/2006, which fundamentally amended Company Law, created this form of controlling the company, the corporate governance, but the legislation does not explicitly define what it wants to achieve through this instrument. This topic is recent in research as the theme of german-roman commercial law systems (in French corporate governance system was introduced in 1966 and in Romania in 2006) but in terms of Anglo-Saxon law, the topic has been addressed years since 1776 (Adam Smith: The Wealth of Nations) The concept of corporate governance would like, as a result, to establish some rules that companies must comply in order to achieve effective governance, transparent and beneficial for both shareholders and for the minority. Corporate governance is a key element with an aim at improving efficiency and economic growth in full accordance with the increase of investors' confidence. Corporate governance assumes a series of relationship between the company management, leadership, shareholders and the other people concerned. Also corporate governance provides for that structure by means of which the company's targets are set out and the means to achieve them and also the manner how to monitor such.

Keywords: company; management; investor

1. The Notion of Corporate Governance

From an etymological standpoint, the notion of „corporate governance" has its origins in ancient Greek and Latin. The word *corporate* is derived from the Latin *corpus,* which means body, which, in turn, transforms itself in the Latin verb *corporare* standing for „forming into a single body", while a corporation represents a body of persons that is a group of persons authorized to behave, act as a whole, on its own behalf. The word "governance" comes from the Latinized Greek – "*gubernatio"*, meaning leadership, management. This *gubernatio* comes, in turn, from ancient Greek - *kybernao* which means to direct, to lead, to guide, to behave like a pilot[1].

Recently introduced in the Romanian company legal system, the notion of corporate governance was defined in the O.E.C.D.[2] Principles by establishing rules that commercial societies must respect in order to obtain an efficient, transparent and beneficial administration, for both major and minor shareholders. According to O.E.C.D.[3] corporate governance is a key element in view of improving efficiency and economic growth as investors` confidence is growing. Corporate governance implies a

[1] See also F. Stârc-Meclejan, *Reflectarea principiilor guvernanţei corporative asupra reformei reglementării consiliului de administraţie al societăţii pe acţiuni (Reflecting the principles of corporate governance on the reform of regulating the joint stock company's board of directors)*, within „Pandectele române" – supplement to the Works of International Bi-annual Conference held by the Faculty of Law within West University of Timişoara 2006, 2007, page 624 and following.
[2] Organization for Economic Co-operation and Development
[3] O.E.C.D. Principles, 2004.

series of relationships between the company management, leadership, shareholders and whomever it may concern. Likewise, corporate governance provides the structure through which the company's objectives and the means of getting such and the modality of monitoring them[1] are established.

According to the O.E.C.D. Principles, good corporate governance has to ensure a proper for the company leadership and management so that to follow-up objectives being in the company's and shareholders' interest and actual monitoring has to be facilitated. The actual presence of a corporate governing system in each company and in the economy as a whole helps ensure the correct functioning of the market economy. The result is the low cost of capital and, in this context, the societies are encouraged to use the resources more efficiently thus achieving growth.

In the doctrine[2], corporate governance has received more definitions. According to the majority opinion corporate governance is a set of rules and principles which have as scope the regulation of relationships between companies and associates (shareholders), relationships between the company and its management structure and the company's control practical modalities. Therefore, the term corporate governance is a means of administration and control of the company. According to another opinion[3], corporate governance is the principle according to which the management shall efficiently and directly supervise the corporation's actions.

Concerning German commercial law, it defines corporate governance as being the legal mechanisms and the instruments directed towards foreign capital markets regulating the relationship between active management, its supervisors and the role of the shareholders` assembly of corporations[4].

The corporate governance system in Singapore adopts the directions of Great Britain and The United States of America by defining it as being the way in which companies are owned and controlled[5]. A significant reform of the regulation in the range of commercial societies of Singapore was the achievement of the Code of Corporate Governance in March 2001 issued by The Committee for Corporate Governance. Thus, corporate governance is the process and structure through which

[1] In the same respect see also Gh. Piperea, *Societăţi comerciale, piaţă de capital. Acquis comunitar (Commercial companies, capital market. Communitary „acquis")*, Ed. All Beck, Bucharest, 2005, page 534 and follow (further on quoted *Companies*); Gh. Piperea, *Drept commercial l(Commercial Law)*, tome I, Ed. C.H. Beck, Bucharest, 2008, page 246 and follow (further on quoted *Lecture*); C. Duţescu, *Drepturile acţionarilor (Shareholders' Rights)*, ed. 2, Ed. C.H. Beck, Bucharest, 2007, page 711-712; G. Ripert, R. Roblot, *Traité de droit commercial (Treaty of Commercial Law)*, tome 1, tome 2, 18th ed., Ed. L.G.D.J., Paris 2002, page 256-257; P. Cannu, *Droit des sociétés (Companies' Law)*, 2nd ed Ed. Montchrestien, Paris, 2003, page 384 and follow.; Ph. Merle, *Droit commercial. Sociétés comerciales (Commercial Law. Commercial companies)*, 11th, Ed. Dalloz, Paris, 2007, page 274 and follow.; M. Cozian, A. Viandier, F. Deboissy, *Droit des sociétés*, 20th ed Ed. Litec, Paris, 2007, page 245 and follow.; J. Bussy, *Droit des affaires(Business Law)*, 2nd ed, Ed. Dalloz, Paris, 2004, page 200 and follow.; R. Salomon, *Précis de droit commercial (Commercial Law Handbook)*, Ed. Presses Universitaires de France, Paris, 2005, page 256 and follow.; Mémento Pratique Francis Lefebvre, *Sociétés commerciales*, Ed. Francis Lefebvre, Levallois, 2007, page 640 and follow.

[2] Gh. Piperea, *Societăţi(Companies)*, page 534; C. Duţescu, q.wks., page 711; C. Gheorghe, *Societăţi comerciale. Voinţa asociaţilor şi voinţa socială (Companies. Associates Will and Social Will)*, Ed. All Beck, Bucharest, 2003, page 132 (further on quoted *Will*).

[3] S. Anand, *Essentials of Corporate Governance*, Ed. John Wiley & Sons, Inc., New Jersey, 2008, page 76-77. Only by efficiently implementing the principles of corporate governance can be assured representation of shareholders' interests and fulfillment by the company of the legal land ethical requirements.

[4] J. Plessis, B. Großfeld, C. Luttermann, I. Saenger, O. Sandrock, *German Corporate Governance in International and European Context*, Ed. Springer, Berlin, 2007, page 11. see also Cf. J. Semler, G. Spindler în B. Kropff, J. Semler, *Münchener Kommentar zum Aktienrecht*, 2nd ed., Ed. CH Beck, Verlag Munich 2004 - introduction of S 76 para 219; M. Peltzer, *Deutsche Corporate Governance*, 2nd ed., Ed. CH Beck, Verlag, Munich 2004, para 9; Vetter (n 4) 748. German theories concerning corporate governance also provide with guide referring to the modality how the company's bodies shall collaborate to get the company's activity efficient and profitable.

[5] M. Conyon, *Corporate governance in Singapore: a case study*, in *International Corporate Governance. A case study approach*, Ed. Edward Elgar Publishing Limited, Cheltenham, UK, 2006, page 188. The structure of commercial companies of Singapore is composed of a single executive unitary body but which is composed of people within the commercial company (executive positions)and of people from outside the company independent people (non-executive positions).

business and company interests are led and managed to increase, in the long term, the value of shares through the corporation increasing performance and liability if considering also people concerned.

Corporate governance in Japan[1] is a system created for controlling or monitoring the company's management by solving conflicts of interest between the people concerned with the company, including corporate managers, shareholders, creditors, employees, business partners, local communities etc.

The Cadbury Report, made in Great Britain, presents corporate governance as a system through which corporations are led and controlled. The structure of corporate governance specifies the distribution of rights and responsibilities to different participants in the company, such as the executives (the board of directors), the company management, shareholders and people concerned. Likewise, the corporate governance system provides the rules and procedures by which decisions are made concerning the company's interests. Thus, a structure is established through which the company's objectives, the means of attaining these and the monitoring of performance[2] are set out.

While the Anglo-American approach to corporate governance had as starting point the analysis of the impact of dysfunctions on separating the company holders from the leadership of these, the German and European concept considered not only the relationship between management and shareholders but also the relationship between management and other people concerned with the company's activity, and also the relationship between people concerned between each other.

2. The Purpose of Corporate Governance

Essential for corporate governance is to create a balance between the commercial society's bodies for increased protection of the shareholders, major but especially minor, in order to constantly obtain wealth, economic growth, efficiency, output and confidence in the competitive market economy[3].

Corporate governance aims to evaluate state economies and implement the best mechanisms of society operation extracted out of a large experience of society law? (Gheorghe, 2006, p. 173)

[1] M. Suto, M. Hashimoto, *Will the Japanese corporate governance system survive? Challenges of Toyota and Sony*, in *International Corporate Governance. A case study approach*, Ed. Edward Elgar Publishing Limited, Cheltenham, UK, 2006, page 247. While Japanese and Germen corporate governance systems are featured as being relationship based systems, corporate governance systems of U.K. and USA are named market based systems. Features of Japanese system based on relationship are: weak external control due to immature capital market, strong domestic discipline doubled by cooperation between managers and employees based on the employee's life employment and concerns referring carrier and co-interest of persons concerned with the company such as banks, business partners having as a basis cross holding of shares (mutual) and affiliation to corporation.

[2] See also (Clarke, 2007, p. 2)

[3] Act no. 441/2006 applied the O.E.C.D. Principles 2004 by implementing obligations in charge of joint-stock companies such as e.g.: two-headed management system (directorate and supervision board, independent administrator, interdiction for administrator to cumulate this position with labour contract, registered capital etc. See also St.D. Cărpenaru, loc. cit., page 10 and follow.; Gh. Piperea, *Modernizarea legislaţiei societăţilor comerciale (Revamping of Commercial Companies)* in *Ad honorem Stanciu D. Cărpenaru*, Ed. C.H. Beck, Bucharest, 2006, page 19 and follow.; V. Peligrad, *Reform of Law no.31/1990 and harmonizing with community „aquis" (legislation proposals)* in *Ad honorem Stanciu D. Cărpenaru*, Ed. C.H. Beck, Bucharest, 2006, page 28; I. Răduleţu, *Joint-stock company management – new principles of corporatye governance in Act no. 31/1990*, in *Ad honorem Stanciu D. Cărpenaru*, Ed. C.H. Beck, Bucharest, 2006, page 152 and follow.; C. Gheorghe, *Guvernanţa corporativă - motor al evoluţiei societăţilor comerciale în contextul globalizării (Corporate Governance - driver within the globalizing)* in *Ad honorem Stanciu D. Cărpenaru*, Ed. C.H. Beck, Bucharest, 2006, page 173 and follow.; M. Fercală, *Originea şi evoluţia conceptului corporate governance în sistemul de drept anglo-american (Origin and evolution of concepte of coporate governance within the Anglo-American law system)* in *Ad honorem Stanciu D. Cărpenaru*, Ed. C.H. Beck, Bucharest, 2006, page 192 and follow.

Although at its origins the purpose of corporate governance was that of protecting investors and the applicability of this system of leadership of commercial societies was restricted to only commercial societies listed at the stock exchange (traded, public), today we are witnessing an extension of the corporate governance system to other types of commercial societies which are not traded at the stock market. Yet, we cannot talk about an implementation of corporate governance in small commercial societies because the results would not be those expected, the system being designed for big businesses, for big companies running large scale activities, and which need to attract capital in a fast and efficient way. The low significance of corporate governance for small commercial societies is justified by the fact that, because there is no separation of power between associates and management, the administration is done by the company's holders themselves, these being of a small number. On the other hand, in this category of societies there are no minor shareholders, the associates usually hold an equal number of shares, hence an equal participation in the registered capital.

Corporate governance, as shown, is intended for controlling and limiting the managers` abuses or those of the major shareholders[1]. The commercial society management should be conducted for the purpose of its investors and taking into account the interests of people that would justify a legitimate interest concerning the company's activities.

It is also shown that another finality of corporate governance is the development of the private sector of economy by attraction of new investors and capitals that could assure financing of major projects.[2]

To encourage the development of the private sector O.E.C.D. developed The White Book of corporate management in South-East Europe[3] in which it is stated the fact that a key element for improving economic efficiency is good corporate management, which is known for the capacity of creating an active investment climate, characterized by the existence of competitive companies and efficient financial markets. It is also stated that good management of corporate companies should offer the motivation for the achievement of objectives which are in the companies` and shareholders` interests[4].

[1] Gh. Piperea, *Societăţi (Companies)*, page 536.

[2] C. Duţescu, q.wks., page 713. The author adds to such purpose of the corporate governance with necessity of developing a normative framework that shall stimulate and encourage investments on capital market and in economy, that framework that shall guarantee also protection of investments and stability of financial-tax kind of standards.

[3] Pact of stability – The agreement of South-East Europe for reform, investments, integrity and economic growth- White Charter of administering of corporations in South-East Europe – Organization for Economic Cooperation and Development. The stability pact for South-East Europe is a political statement and a master agreement adopted in June 1999 in order to encourage and enhance cooperation between countries in the South-East Europe (ESE) and to facilitate, coordi8nate and focus the efforts of providing stability and economic growth within the region. The agreement of South-East Europe for Reform, Investments, Economic Integrity and Growth („Investment Agreement") is a component of the Stability Pact within the Working Meeting II for economic reconstruction, development and cooperation. Private investments are essential to facilitate transition to the structures of market economy and to support social and economic development. Agreement for Investments promotes and supports political reforms that propose themselves to improve the climate concerning investments in South-East Europe thus encouraging investments and development of a strong private sector. The main objectives of the Investment Agreement are: improvement of business and investment climate, attraction and stimulation of private investments; assurance of an involvement of private sector within the reform process; initiation and monitoring of the process of implementing reform. Countries of South-East Europe participating in the Investment Agreement are: Albania, Bosnia Herzegovina, Bulgaria, Croatia, Macedonia – former Yugoslavia republic, Moldova, Romania, Serbia and Montenegro. Starting from the basic principle that reform "belongs" to the concerned region; the Investment Agreement tries to share of the long experience of the O.C.D.E countries. That makes available studies on the whole region and assures the growth in capacities by initiating the dialogue concerning the development of successful politics, thus assuring identification of materialized steps for transition and implementation of reform. The activity of Investment Agreement is supported and financed by 17 countries member of O.C.D.E.: Austria, Belgium, Czech Republic, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Japan, Norway, Suede, Helvetia, Turkey, U.K. and the USA.

[4] Further to financial crisis of Asia in 1997 the O.E.C.D. Council meeting to ministry level demanded O.E.C.D. to issue a set of standards and guiding lines concerning management of corporations. So, in 1999 the O.E.C.D. Principles were approved concerning management of corporations. They are nowadays the only set of principles in management accepted

There is, without a doubt, a vexation of interests between the shareholders and the company management and corporate governance tries to balance the power ratio, aiming to, inter alia, mitigate the society bodies` power and implement society democracy[1], in which there are those fundamental rights of associates irrespectively of their participation in forming the registered assets.

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[1] See also L. Bercea, *Deficitul democratic în societăţile comerciale. Implicaţiile reformei legislaţiei societare* (Democratic deficit in commercial companies. Implications of society legislation) in „Pandectele române" magazine – supplement to the Works of International Bi-annual conference held by the Faculty of Law within West University of Timişoara 2006, 2007, page 539 and following.

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THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

Criminal Responsibility of Minors in the New Criminal Code Offences (Law No. 286/2009)

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Abstract: The elaboration and adoption of a new penal code represents a decisive moment in the evolution of any state laws. The decision to proceed in developing a new Criminal Code was not a simple demonstration of the political will, but represented a corollary matched of economic and social development, also to the doctrine and jurisprudence and it had as base a series of gaps existing in current regulation. Legislative changes concerning the minority represents one of the focal points of the reform proposed by the new Criminal Code (Law no. 286/2009). One of the major changes contemplated in this regard is the complete surrender to the punishment applicable to juveniles who are criminally responsible, in favor of educational measures. The model that inspired the current legislation is the Organic Law no. 5 / 2000 regarding the criminal liability of minors in Spain (as amended by Organic Law no. 8 / 2006), but have considered the provisions of French law (Order of 2 February 1945 with subsequent changes), German (Law juvenile courts in 1953 with subsequent amendments) and the Austrian law (Juvenile Justice Act 1988).

Keywords: minority; criminal; educational measures

1. For certain categories of offenders as juveniles, classical social reaction , the punishment, proves to be insufficient because it does not allow for any offender reintegration, or society protection. In the field of justice for minors, systems of law follows two models: the traditional one, where by from a young age are applyed penalties, and most recently, giving priority to educational measures. In both models, minors under a certain age who have committed crimes only apply protective measures (Necula & Minzala). Regarding Romania, legislative changes concerning the infancy is one of the central points of the proposed reform of the Penal Code (Law no. 286/2009). One of the major changes stipulated in this regard is the complete surrender to the punishment applicable to juveniles who are criminally responsible, in favor of educational measures (Government Resolution approving the preliminary thesis project of the Criminal Code).

The model that inspired the current legislation is the Organic Law no. 5 / 2000 regulating the criminal liability of minors in Spain (as amended by Organic Law no. 8 / 2006), but have considered the provisions of French Law (Order of 2 February 1945, as amended), German Law (juvenile court law of 1953, as amended) and the Austrian Law (the Juvenile Justice Act 1988).

2. The legislation imposed criminal liability of minors to complete reform of the existing system. Although the general trend in the European plan is to reduce the age limit of criminal liability is possible the child until 13 or even 12 years, the proposal of the new draft Criminal Code was not retained by the Law no. 286/2009 on the Romanian Penal Code, the provisions of art. 113 are relevant in this respect, "minors under the age of 14 years is not criminally responsible (par. 1)." It should be noted, the limits of criminal liability of minors, the provisions contained in the legislation of other states. In French law, the seat material is contained in the Criminal Code, approved by Law no. 2002-1138 of 9 September 2002 and Ordinance. 45-174 of February 2, 1945 of juvenile offenders, as amended and supplemented through 2002 (Brutaru, 2009). Adulthood coincides with the age of criminal responsibility, that is 18, but in some cases can be lowered to 13 years. Article 122-8 of the French Criminal Code establishes the principle of absolute lack of criminal liability of minors under the age of 13

Relative lack of criminal responsibility of minors who have reached 13 years is provided by art. 2 of Ordinance no. 45-174 of 2 February 1945, which states that "juvenile courts may, however, when circumstances and require the offender's personality, to give a criminal conviction against the minor who has attained 13 years" - an express exemption, which may be used only the juvenile courts. In German law, minors are subject to the provisions of the Criminal Code, supplemented by the juvenile court Act of 1953, as amended and supplemented. Adulthood coincides with the age of criminal responsibility, 18 years, but can be lowered to 14 years in some cases. German Penal Code provides an absolute lack of criminal responsibility for minors who have not attained 14 years (art. 19). (Brutaru, 2009).

The legal framework applicable to juveniles in Belgian Law contains two special laws: the Law of 8 April 1965 on the protection of young people and the Law of 13 June 2006 amending legislation on youth protection and care of juveniles who have committed a crime. The age of criminal responsibility is fixed, in principle, to 18 years. In some cases, the age of criminal responsibility may be lowered to 16 years.

In Spain, the provisions relating to minors are found in the Criminal Code and the Organic Law on the age of criminal responsibility on 12 January 200 015 (*Ley Orgánica reguladora de la responsabilidad penal de los menores del 12 de Enero de 2000*). (Necula & foal)

Age of criminal responsibility coincides with the age of majority. Article 19 of the Criminal Code, published on 24 November 1995 and entered into force six months later, states that "minors until the age of 18 are not criminally liable. If a minor commits a criminal offense will respond in accordance with the law on criminal liability of minors. " The organic law on criminal liability of minors of 12 January 2000 provides an absolute lack of criminal responsibility for minors who have not attained 14 years and the relative lack of criminal responsibility for juveniles aged between 14 and 18.

The seat material is found in Italian law in the Penal Code and Decree no. 48 of 22 September 1988 on the provisions relative to criminal proceedings for juveniles. The age of criminal responsibility coincides with the majority, 18 years, but in certain situations can be lowered to 14 years. Liability and treatment of juvenile criminal law are based in the Swiss Penal Code and the Federal Law on criminal procedure applicable to minors of 20 June 2003 (*Loi fédérale régissant la condition pénale des mineurs*). Title 4 of the Criminal Code deals with criminal liability conditions of children and adolescents.

Criminal Code provisions are not applicable to children who have not attained the age of seven years and established the principle of the absolute lack of criminal liability of minors who have not attained

seven years (Article 82 of Chapter 1, Children). The provisions of this chapter are applicable to children between 7 and 15 years who has committed a crime.

Criminal Code provisions are applicable to minors aged between 15 and 18 who committed a crime (Article 89 of Chapter 11, Adolescents). Title 5 of the Penal Code governing the enforcement regime applicable to young adults, aged between 18 and 25 years.

In the United Kingdom of Great Britain, the seat material is contained in the Act to prevent crime and disturbance of public peace (Crime and Disorder Act), adopted on 31 July 1998 and entered into force on September 30, 1998 Police and Criminal Evidence in the 1984 Act31 .

Law to prevent crime and disorder public peace (Crime and Disorder Act) repealed the presumption of "unresponsability" minors aged 10 to 14 years. Before this law, a minor aged between 10 and 14 years benefit from the presumption of "unresponsability" because it was assumed that he had no ability to discern between good and evil. This presumption may be rebutted, when evidence that the minor was aware of the consequences of his acts. The age of criminal responsibility is 10 years, but the age of criminal majority is 18 years. Under Article 34 of the Crime and Disorder Act, which repealed the presumption of "unresponsability" minors criminally responsible from the age of 10 years. Police and Criminal Evidence Act 1984 determine the penalties applicable to young offenders. Young people who are applying these measures are children and adolescents between 10 and 18.

2. A significant change that brings new Romanian Penal Code (Law no. 286/2009) is the waiver of sanctions established the duality of the criminal code today - penalties and educational measures. It has been estimated that this system has created difficulties in legal practice, legal hierarchy established by Article 100 of Criminal Code was often ignored. Therefore, the legislature gave the Romanian criminal in this regard, the punishments for juvenile offenders and instituted a system of enforcement based solely on educational measures, educational measures are included deprivation of liberty. The new Criminal Code Title V regulations throughout the reservation minority (art. 113-134). Under art. 114 par. 1 of Law no. 286/2009, "Compared to the minor at the time of the offense, have between 14 and 18 years, take an educational non-custodial measure", which means that the rule will be the implementation of educational measures for minors deprivation of freedom, constituting a deprivation of liberty except and reserving assumptions serious crimes or juveniles who committed multiple offenses. Thus, under Art. 114 par. 2 of Law no. 286/2009

'Compared to the minor referred to in par.1 can take an educational measure involving deprivation of liberty in the following cases:

a) if he committed a crime for which he was an educational measure has been executed or the execution of which began before the offense for which trial;

b) when the penalty prescribed by law for the offense is imprisonment for 7 years or more or life imprisonment. "

Conditions for implementing these measures is designed and equipped as to provide wide opportunities for customization, allowing adaptation to each minor conduct during the execution.

3. Article 115 of Law no. 286/2009 governing the categories and types of educational measures.

According to art. 115 par.1 pt.1, educational non-custodial measures are: length of civic education, monitoring, recording at weekends and daily assistance, and section 2.1 provides that educational measures are custodial detention in a school and internment in a detention center.

Educational non-custodial measures of supervision, weekends consemnation and assist daily close to the known rules of art once. 7 letters. g) and h) of Spanish Law. 5 / 2000. In terms of content, the educational measure of supervision does not imply a direct involvement of probation service in carrying out the minor program, the role of this service is only to monitor how the minor meet their normal routine (attendance, sport, leisure, etc. .). According to art. 118 of Law no. 286/2009, "educational measure of supervision and guidance of the minor is under the control of its daily program for a period of between two and six months under the supervision of the probation service to ensure participation in educational or training courses and conducting prevention activities or entry in connection with certain people who could affect the process of correcting it".

Unlike surveillance, daily assisting requires active intervention by the probation service, making the child's daily schedule, this program is included in the common elements in relation to age and situation of the minor or professional school (eg: school attendance) and any activity necessary for attaining the educational measure (eg: participation in social and educational activities designed to facilitate the social integration of the minor).

The imminent entry into force of new Penal Code will call into question the application of criminal law more favorable (*mitior lex*), the situation is somewhat similar to the entry into force of Decree no. 218/1977. (Dascal, 2010).

Examining successive provisions of law, criminal law is more favorable as the new law, because, on the one hand, minors under the new law will not be able to impose penalties, and on the other hand, the possibility of sanctions through educational measures are much broader.

In connection with the educational measure of supervised freedom in the legal literature (Dascal, 2010) appreciated that under certain conditions, the measure will be applied is more favorable than the non-custodial measures provided for educational new law, even if the duration for which ordering measures is greater than the duration of the new law.

In all cases, though until the final settlement of the case, the minor has attained 18 years because, unless the educational measure of reprimand, to a minor will not be able to take any of the measures provided for educational old law, the court will required to take to become a minor defendant in a major educational measures under the new law, which will not use punishment for minors, criminal law is more favorable.

4. As mentioned above, the new Criminal Code provides for two custodial educational measures: hospitalization in a educational center for a period of one to three years and internment in a detention center for a period of 2 to 5 years or, in exceptional cases, from 5 to 15 years.

Educational measure of internment in a educational center is hospitalized in a specialized minor in child recovery, which will follow a training program and training school according to his abilities, and a program of social reintegration (art. 124 par. 1).

Internment in a detention (art. 125 par. 1) the child is hospitalized in an institution specializing in child recovery, security and surveillance regime, which will follow intensive programs of social reinegrare and school readiness programs and training according to his abilities.

Measure of internment in a detention center to have a period of 5 to 15 years only in the event of committing serious crimes for which the law provides for life imprisonment or imprisonment of at least 20 years. Duration measure is compatible with international regulations and practices (eg International Association of Congress resolution Criminal Law adopted in Beijing in 2004 States should not provide for minors custodial penalties which exceed 15 years).

5. Educational measures exist in other countries under different laws (protection measures, corrective measures, etc.). And I know many forms: the obligation to obey certain rules of conduct relating to residence, training, the prohibition of certain persons to attend and places, reprimand, put under the supervision of specialized bodies, placement in a family of receipt or in a specialized center, hospitalization, medical treatment, assistance in a day care center, permanent home on weekends, to carry out tasks social and educational, personal performance, the obligation to assist and support victims. (Necula & foal)

It is noted that, unlike current regulations, the Romanian legislature has opted for a system of sanctions for juvenile offenders more diversified, as there are in the legislation of other states, because the general feature is the existence of a specific juvenile criminal law, which places focus on the one hand, on education, not repression, and on the other hand, the broader possibilities of individualization of responsibility juvenile, focused not only on the gravity of the offense but also his personality.

Thus, the new regulation reflects the purpose of educational measures - to ensure the reintegration to society and the assimilation of social values and principles.

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THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
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The Current Situation in Romania and the Role of Asylum within the Institutional Mechanism for the Migration Phenomenon Management

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Abstract: The paper aims to analyze in an inter-disciplinary manner the tendencies and causes of the increase of the migration phenomenon, as well as the measures taken at the level of Romania regarding the immigration and asylum policies, which have lead to the decrease of the number of immigrants. Also, the analysis of the procedure for granting the statute of asylum represents an important objective of the paper. The methodology chosen and the selected legal documents enabled some form of understanding as to how European and national Institutions perceive the concept of asylum and its problematic.

Keywords: refugee; asylum; transit; procedures

1. Introduction

The amplification of the cooperation between the states and of international collaboration have determined the increase of the fluctuation of persons, citizens of different states thus settling for different periods of time on the territories of other states. According to article 13 of the Universal Declaration of Human Rights, proclaimed and adopted on December 10th, 1948, "Everyone has the right to freedom of movement and residence within the borders of each State". Also, in the second paragraph of the same article, it is mentioned that "Everyone has the right to leave any country, including his own, and to return to his country". According to the estimates of the International Organization for Migration[1], there are approximately 185 million migrants at the level of the entire world. However, the majority are in the situation of leaving their state of origin, in search for a better life or attempting to escape physical or political oppression in the country where they were living. The concept of migration is defined as "a person's mobility across the borders of states, mobility which has as finality the temporary or permanent settlement on the territory of a state, other than that of origin"[2].

However, immigration represents a complex and dynamic phenomenon, influenced by a multitude of factors, both from the countries of origin (push factors), and from the destination countries (pull factors). That is why it is necessary that the national policy in the field be permanently updated according to the new evolutions at the regional and international level.

[1] According to the World Migration Report 2005: Costs and Benefits of International Migration, International Organisation for Migration, www.iom.int;

[2] Marian Chiriac, Monica Robotin "*Necunoscuţii de lânga noi – Rezidenţi, refugiaţi, solicitanţi de azil, migranţi ilegal în România"/ "The strangers around us - residents, refugees, asylum seekers, illegal migrants in Romania"* – report executed in 2006, within the program „Minority Rights in Practice in South Eastern Europe";

Becoming involved in the immigration process, the states adopt policies that outline the borders of the community and its quality as member thereof. The policies regarding immigration target a person's transit on the territory of a state other than that of origin, targeting especially the persons intending to work or to settle on the respective territory; thus, it is targeted a redefining of the manner of organizing the community in what concerns the ability to include newcomers. If until 1992 the problem of migration and refugees was in the sole care of each state, with the entering into effect of the Maastricht Treaty and the Amsterdam Treaty, the policies regarding migration, asylum, freedom of movement of persons and visas became responsibilities of the Community.

At the Tampere Summit in October 1999, the European Council decided that asylum and migration, although separate fields, but connected as approach, require the development of common policies. In supporting this decision, in year 2005 was adopted the Hague Program for strengthening freedom, security and justice, which represents a programmatic document of the Member States, which establishes the guiding lines in the field of justice and internal affairs for the period 2005-2010, special importance being granted to immigration, asylum and the social integration of aliens legally living on the territory of the European Union, and in year 2006, was elaborated the Solidarity and Management Program for the migratory flows for the period 2007-2013.

On October 16th, 2008, the heads of state and government within the European Union adopted in Brussels the „European Pact for Immigration and Asylum", which comprises five great commitments of the European states:

1. Europe's protection by means of controlling its borders in a solidarity spirit;

2. Organizing the legal migration in harmony with each member state's capacity to receive immigrants and in a solidarity spirit;

3. Organizing of the selective repatriation of illegal aliens;

4. Construction of an Europe of asylum;

5. Promotion of the development of the countries of immigration.

Thus, we can say that migration is considered at present a multi-national process, which can no longer be managed (solely) unilaterally or bilaterally.

All these have presupposed another attitude of the countries involved with respect to the migratory flows[1]:

a. on the one hand, an open policy for migration, for the purpose of covering the low qualified workforce deficit (with certain quantitative barriers, set depending on the size of the deficit and materialized in the contingent flows on trades and professions) and of intensifying the temporary/definitive attraction of „brains" for sustaining progress by means of performing technologies, hence by top-training workforce (manifested through the development of competition between receiving states, for the attracting of personnel, which to cover the high-competence deficit).

b. and on the other hand, a common policy for the control of the migratory flows and for combating illegal migration and illegal employment of aliens (including by means of an intensified cooperation between the states)

[1] Study "Immigration and Asylum in Romania, year 2006", Bucharest, 2007, p. 5.

This approach is currently undertaken by the European Union Member States. After almost 30 years of restrictive immigration and asylum policies, the governments of the EU states have started talking again about the benefits of the migration workforce and to take new measures regarding the migration of this workforce.

An analytical approach of the migration phenomenon in its entirety leads to the conclusion that all measures and tendencies are based, in the widest majority, on popular hysteria and not on an objective evaluation of the situation of facts. They start from a pressure created by public opinion, as a consequence of the manner in which the immigration phenomenon in these countries is affecting the individual's interests. The arguments brought forth in supporting these measures consist of: increase of the number of aliens, of the presence in the press of events or facts committed by immigrants, the idea that foreigners are a danger to the domestic labour force and contributes to the creation of a climate of insecurity, black labor and other criminal aspects specific to migration, in general – persons trafficking, drug trafficking, prostitution and pimping and others, and newer, the threat of terrorism. Another element of a nature to contribute to the adoption of such a position towards the immigration phenomenon is that there is no clear distinction being made between illegal migration, towards which severe measures must be taken, and migration in general, as objective and implacable phenomenon.

It must be mentioned the fact that all measures taken at the level of the Western states on the line of visa policy, border control, asylum and immigration, have not lead to a decrease in the number of immigrants, but, at best, contributed to a slowing of the increase of this number. It is thus noticed that in order to decrease migration other methods must be considered, other measures taken by a coalition of states, in order to have effect. Paradoxically, the analyses made at the European level reveal the need for immigration starting from the decrease of the birth rates and the increase of life expectancy, concomitantly with the needs generated by the economy of these countries and the needs of the social security system, which deepens the dilemma of the responsible persons in these countries. Considering the data presented, the analysis at hand targets to underline the need of approaching the immigration issue on the basis of the analysis of the objective situation in our country, and not by the simple acceptance of the currents existing in other states. The fact that in Romania immigration does not constitute an element of concern and frustration for the public opinion, allows the performing of an approach that serves the national medium and long term interests, which uses to the maximum the advantages of immigration and which leads to the creation of advantages, in the conditions in which this phenomenon is happening anyhow. The aspects revealed above do not exclude the adoption of a firm line in what concerns the visa policy, the border control for combating illegal migration, asylum and immigration, and the criminal spectrum that characterizes this phenomenon.

2. The Historical Evolution and the Current Situation in Romania

As European Union Member State, Romania had to align to the European standards and to perform its activity in the field of immigration in full accordance with the position of the other states.

If in the past Romania had, mainly, a role of transit country for the migratory flows coming from the Eastern states in their way towards the Western states with high economic development level, at present, Romania is also becoming a destination country.

In the first years after adhering to the Geneva Convention of 1951 and to the New York Protocol of 1967, the asylum procedure in Romania was performed through the Technical Secretariat of the Romanian Committee for Migration Issues, within the Ministry of Labour and Social Solidarity, and

the decision on the petition for granting the statute of refugee belonged to a Decision Commission, composed of representatives of the Ministry of Foreign Affairs, Ministry of Interior and Ministry of Labour and Social Solidarity. The Commission members were performing their activity by addition of functions and they met only once a week. This made the procedure last very long, for some cases even 2 or 3 years. In the meantime, many files were left unsolved, simultaneously with the increase of the number of applications. The efforts made in the period 1998 -1999 lead both to the increase of the procedure quality, and to the recovery of the back-lag with great additional efforts, by increasing the number of the commission's weekly meetings.

A series of measures of practical order were taken for the shortening of the procedure during the administrative stage, and by achieving food cooperation with the courts of law competent to settle asylum application, the judicial procedure was shortened, as well. Special attention was given right from the beginning to the problematic related to the admissibility of the asylum applications, meaning to the weight of the number of applications settled favourably. The principle established was that the analysis is performed individually for each case and with respect to the definition of the protection form.

The very high admissibility rate in years 1998 and 1999 is due to the fact that during that period old files were analyzed, the admissibility rate being computed as ratio between the number of applications solved and the number of applications submitted during that year.[1] The fight against illegal migration constitutes a requirement for the preservation of national security and the public order of any state. At the same time, the commitment to this fight constituted an obligation towards the international community, inaction producing effects not only for the state in question, but also for the other states in the region (is known the position of certain member states within the Sevilla Summit, to apply sanctions against third states which do not take measures for combating illegal migration or even encourage this phenomenon). Still, the measures of the authorities can only be taken with the observance of the obligations undertaken through the treaties and conventions to which it is part, namely with the observance of the rights for these categories of persons.

That is why the new legislation in the field of asylum establishes the right of any alien to have access to a correct and efficient asylum procedure and to not be returned except in case of an executive decision to reject his/her application. These fundamental rights granted by the asylum procedure have constituted an attraction element for certain categories of migrants, who use this procedure in order to extent their legal stay on the territory of a country of for obtaining a form of protection and of making they stay permanent. In reply, at the European level, a set of measures was developed, through the adoption of community documents which to achieve a balance between the observance of the human rights and the authorities' possibility to combat, in an efficient manner, any form of abuse to this procedure. The documents of the EU acquis regarding the policies in the field of migration and the common positions adopted by the ministers with duties in the field of migration in the EU member states include also asylum, both under the aspect of observing human rights, and as an efficient means of control and combating of illegal migration.

The evolution of the asylum system in our country, the adoption of certain legislative, institutional and practical measures have lead to the obtaining of result and, in some aspects, have foreseen certain policy changes at the European level, in this field.

[1] Data offered by the Documentation Center within NOR.

Thus, after the adoption of the first legislation and the creation of an institutional mechanism with competences in the field, in year 1992, there followed an increase in the number if asylum applications of more than 50% in year 1993. An even higher increase of the number of applications occurred after the implementation of Law no. 15/1996 regarding the statute and regime of refugees in Romania, presently abrogated, while the highest increase was registered in year 2001, after the implementation of Government Ordinance no. 102/2000 regarding the statute and regime of refugees in Romania, with all subsequent modifications and completions (abrogated). Every time, these spectacular increases of the number of applications were followed by period of setback, during which the number of asylum-seekers decreased, as a consequence of the manner in which the new regulations adopted were put into practice. The fact that Government Ordinance no. 102/2000 and the implementation legislation contain a series of restrictive measure, for combating abuses, is also demonstrated by the fact that, last year, the number of asylum applications had a larger decrease, proportional to the other two moments of setback, existing the possibility that, for the first time, this decrease to record values lower than those prior to the top moment, namely values lower than those recoded during year 2000[1].

Through Government Ordinance no. 102/2000 and Government Decision no. 622/2001 for the approval of the Methodological application norms (abrogated) a series of measures were introduced, which to lead to the sanctioning and discouraging of abuse, maintained through Government Ordinance no. 41/2004. These measures consist of:

- Limiting the procedure duration both during the administrative stage, 30 days with the possibility of extending it by another 30 days, in order to perform additional verifications, and in the judicial stage, 30 days the petition and 30 days the recourse. Thus, the duration of the administrative procedure was, in over 96% of the cases, of 30 days and even less, and the average duration for the complete procedure for solving an asylum application was of 3 months;

- Defining the concept of obviously ungrounded application and the introduction of the accelerated procedure, which allows the solving of an obviously ungrounded application within 20 days;

- Solving in accelerated procedure or with maximum speed the applications submitted by persons who were found with illegal stay, persons for who final decisions were rendered in criminal cases, with the safety measure of expulsion or persons declared undesirable by order of the minister of administration and interior, as well as any other persons using the asylum procedure for the purpose of obviously preventing a measure of taking out of the country;

- Defining in a distinct manner the forms of protection – statute of refugee, humanitarian conditioned protection and temporary protection; this allows a strict evaluation of cases according to the provisions of the international documents; in practice, these definitions have been applied through the individual assessment of each case, without making general interpretations – prima facia – according to which, if a certain geographical region or a certain category of persons is considered of risk, then, automatically, all persons in that region or group are refugees;

- Eliminating the possibility of granting the right to reunite the family for those who were married after entering on the territory of the main applicant; through this measures, it was targeted the elimination of the possibility of marriages of convenience, especially between persons with different countries of origin;

[1] Data obtained from the analyses and situations of the Documentation Center within NOR.

- Introducing a special procedure for the analysis of a new petition for granting the statute of refugee after the rejection, through a decision remained in execution, of a prior application. The inexistence of such a procedure gives the possibility for abuse of procedure, by submitting consecutive applications, which would block the possibility of returning a person, who would thus remain perpetually in the procedure of granting the statute of refugee;

- Adopting lists with countries where, in general, there is no serious risk of persecution and with safe third countries, which allow that, in case of an applicant coming from a country included on the first list, the accelerated procedure could be triggered, in the conditions of the law;

- Provisions regarding the detention of asylum-seekers in the transmit area of the border control points and the establishment of a special procedure for such situations;

- Maintaining a low value of the material aids granted to asylum-seekers. Through the legislation adopted, the National Office for Refugees targeted the ensuring of decent accommodation facilities for persons in the procedure of granting the statute of refugee and the assurance of minimum amounts of money, for food. Also, legislaţia mai prevede posibilitatea de a acorda o sumă de bani pentru cazarea persoanelor în alte locuri decât centrele aflate în subordinea Oficiului. This low level of assistance did not transform the asylum procedure in an attractive modality for providing for oneself and, corroborated with the short duration of the procedure, it has contributed to the maintaining of a low number of asylum applications, even though this was not targeted by the authorities, but was due to the economic situation in Romania. The amounts established by law for the material aid granted to asylum-seekers without means of support is of 25 lei/day/person for food and 15 lei/person/day for accommodation, as well as 5 lei/persons/day for other expenses[1]. For exemplification, the costs related to the support of an asylum-seeker in the Netherlands are the equivalent of 20,000 Euros/month.

The above measures were also introduced in view of harmonizing the legislation with the documents of the EU acquis in this field, by means of a strict interpretation, with the observance of the minimum guarantees, and not by taking these provisions as they were established in the legislations of the member states. This interpretation proved to be of a nature to preface the changes occurred in the legislation and practice of the European states, and even to constitute a course of inspiration for these changes. Thus:

- at present, the reduction of the duration of the asylum procedure constitutes one of the main objectives for the authorities of the Western states, within new anti-immigration orientations. In many member states, the procedure takes between 1 and 2 years, in the conditions of a net superior infrastructures and personnel assignment. If in the majority of member states the number of cases/decisional officer is of maximum 100, in our country, in 2001, the average was over 300 cases/decisional officer, in the conditions of a procedure performed within maximum 30 days for more than 96% of the cases (the data refer only to the procedure of solving the asylum applications, not to procedures of pre-admissibility, withdrawal, annulment, cease, extension etc.);

- the majority of the European states took measures for the elimination of the statute of refuge de facto, unlike the Romanian authorities, which have always avoided its application;

- in several member states, through the recent change of the policy in the field of migration, was introduced the interdiction to reunite the family for marriages concluded after entering on the territory

[1] Government Ordinance no. 44/2004.

of the main applicant and the possibility of revoking this right for the persons married on the territory of these states;

- Denmark, through the recent change of the policy in the field of migration, analyzed the possibility to eliminate the right to seek asylum in one of its embassies in a third country. This measure was taken by the Romanian authorities through Government Ordinance no. 102/2000;

- Reduction of material aids for asylum-seekers, the stop in giving money as allowances, aspect which has proven to be of a nature to attract economic migrants in the asylum procedure. The best example is that of Great Britain, which, prior to the modification of the legislation, confronted with a high number of asylum applicants attracted merely by the value of the money support. For this purpose, the Netherlands, through its new policy in the field of migration, intends to reduce the value of the aids for asylum applicants by 90%.

This comparison demonstrates that the manner in which the National Office for Refugees has contributed to the creation of a policy of Romania in the field of asylum and refugees, as composing part of the policy in the field of immigration, in which are observed the obligations undertaken at the international level by means of the legal instruments to which our country adhered and the national interest by achieving a balance between the rights and obligations of these categories of persons. As derived from the above, this policy preceded the attitude changes of the western states and, to a certain extent, contributed as an inspiration source for the measures adopted by them.

3. Asylum's Procedure

Romania's negotiation process in view of its accession to the European Union presupposed a sustained and continuous effort made by the governmental institutions in view of reaching a compatibility level with the member states, at the legislative and institutional level. In this context, the Government of Romania granted special attention to the problematic of immigration, as important part of the field of justice and internal affairs, since our country became a member state at the Eastern border of the European Union. The legislative reform in what concerns the regime of aliens and asylum in our country presupposed the adoption of a set of normative acts, in view of ensuring conformity with the communitarian legislation and with other judicial instruments with international character to which the Romanian state is part. The application of a modern legislative frame imposed the reforming of the institutions with duties in the field, thus obtaining the instruments necessary for putting into practice an efficient management of the immigration phenomenon on the territory of Romania. The progresses are evident and recognized at the level of the European institutions, which, throughout this period, supported the Romanian authorities, through projects that ensured high level expertise coming from the similar institutions of the member states, completed by a consistent financial support for investments in the field. Projects such as the Visa on-line System, the Informatics System for Aliens Management, the EURODAC System, border security, the construction or rehabilitation of accommodation centers for illegal aliens or refugees would have been realized much more difficult without the major contribution of the European Union. In the Romanian legislation, the asylum procedure is established by Law no. 122/2006 regarding asylum in Romania and Government Decision no. 1251/2006 for the approval of the Methodological norms for the application of Law no. 122/2006 regarding asylum in Romania, with its subsequent modifications and completions;

In Law no. 122/2006 regarding asylum in Romania, with its subsequent modifications and completions, is ensured, by defining certain terms frequently used in the matter of asylum and which

pertain to the terminology specific to this field, the concordance with the names used at the European level, to avoid both confusions and different interpretations. Expressly defined are terms such as: form of protection, asylum applicant, application for granting a form of protection / asylum application, alien, country of origin, asylum procedure, statute of refuge, subsidiary protection – which replaced the term of humanitarian conditioned protection, temporary protection, family members, unaccompanied minor, moved persons, massive flow a.s.o.

The law also comprises, expressly, the principles and procedural guarantees applicable in the field of asylum, such as: ensuring access to the asylum procedure for any foreign citizen of stateless person who requests the protection of the Romanian state, non-discrimination on the grounds of race, nationality, ethnicity, language, religion, social category, convictions, sex, sexual orientation, age, handicap, chronic disease, belonging to a less fortunate category, material situation, statute at birth or gained, a.s.o.; non-return – which establishes the fact that against the asylum-seeker there cannot be taken the measure of expulsion, extradition or forced return from the border or from the territory of Romania, the observance of the principle of the family unity, the confidentiality of data and information regarding the asylum application, the observance of the child's superior interest, guarantees regarding unaccompanied minors, the presumption of good-faith.

The principles that are at the basis of asylum granting are: access to the asylum procedure; non-return; non-discrimination; family unity; child's superior interest; confidentiality; presumption of good-faith; removal of criminal liability for illegally entering and/or staying of the asylum applicants.

A person is considered asylum applicant from the moment of his/her manifestation of will, expressed, in writing or verbally, before the competent authorities, from which to derive the fact that he/she is requesting the protection of the Romanian state.

The authorities competent for receiving an asylum application are the following:

a) Romanian Office for Immigration and its territorial structures;
b) structures of the Romanian Border Police;
c) structures of the Romanian Police;
d) structures of the National Administration of Penitentiaries within the Ministry of Justice.

The asylum application is submitted as soon as:

a) the applicant presented himself/herself at a state border control point;
b) the applicant entered the territory of Romania;
c) events occurred in the applicant's country of origin, which determine him/her to request protection for the alien with the right of stay in Romania.

The asylum applications submitted outside the territory of Romania are not admitted.

The competent authorities cannot refuse to receive the asylum application on the grounds of its late submission.

Many times, asylum was considered a barrier in the fight against illegal migration, a reason of frustration for the authorities with competences in border control or in the control of the legality of the aliens' stay on the territory, because through the asylum applications formulated by those caught in such situations, they were preventing the measures for return or removal from the territory. Such appreciations are not real, and asylum must not be seen as an instrument for favouring illegal migrants, but as a part of the national and international legislation which must be observed in the entirety of

measures taken for combating illegal migration, measures to which the National Office for Refugees contributes substantially.

Thus, the NOR is the only authority to which those who managed to enter illegally or who are illegally staying on the territory come before willingly, are registered, photographed, fingerprinted and released until the procedure completion. Here, it must also be mentioned the integration of the AFIS 2000 system, which allows the identification of those declaring a false identity or who have committed crimes on the territory of Romania or of another INTERPOL member state.

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The Bensberg Mediation Model

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Abstract: The basis of the conflict through the mediation represents the objectives and procedures of mediation, mediation of a conflict. The conflict will not be disclosed to others, but the parties will be credited the authority to resolve the conflict, the conflict among themselves with the help of a mediator. The dispute should be resolved by the parties with help of a third party. The parties in conflict (it may be several persons) are jointly responsible for the solution. They seek together a way that leads to long-term settlement of the conflict. The assumption of responsibility in this process strengthens the confidence and the importance of their decision. Important is that losers usually have no peace, because they are out for revenge. Winners don't need peace. If both parties lose, remains disappointing, with the understanding of which the conflict is resolved, will understand each other better developed. Reconciliation is therefore a longer-term goal. Conflicts also help to clarify roles. The paper presents Bensberg Model of Mediation, because this is developed as a win win solution and his possible implementation in Romanian schools.

Keywords: mediation; conflict; reconciliation; settlement

1. Introduction

Mediation (mediation in the conflict), originally from USA, is recognized as a great alternative form of resolving all conflicts. That mediation has a millennial tradition intercultural, has for many no more value.

In ancient times there were many specialists whose responsibility was to restore peaceful coexistence among citizens. Solon was elected as a mediator and leader of Athens. Aristotle and Plato have written about intermediation problems in cases of conflict. The word "mediation" has its origins in both Greek and Latin and means: intercession, to be neutral, impartial. In Asia, the methods of intervening in court have had special social recognition. In China mediation largely replaces justice in the social conflicts, family or work. Confucianism requires harmony. Important is to find a compromise. In Japan, arbitration has taken place outside the courtroom and has kept the role from ancient times until today. The reason for that was the inefficiency in the judiciary. Mediation requires and gives parties in dispute responsibility. A Japanese proverb says: "to maintain a friendship is more important than having a victory". Archival activities on mediation are recorded in Europe since the Middle Ages. Peace of Westphalia in 1648 had as mediator Alvice Contarini (Knight, envoy of Venice). To find a compromise he needed five years. Conciliation in the conflict between husband and wife were already known in France during the French Revolution and in the nineteenth century England had even conciliation councils for economic conflicts.

Nowadays, mediation plays an extremely important role both nationally and internationally. The EU has decided upon a directive on mediation. In Germany, the mediation has soared in the late 70s of last century, first in the field of family conflicts and divorce. Today methods of mediation in resolving conflicts find their use in many fields, economic conflicts, social, political and civil society.

2. Conflict Mediation and Violence Prevention in Pre-School and High School

Children learn to walk, talk and cry, discover the environment and learn quickly the means to impose. Later learn to play, learn the alphabet and numerals, arithmetic, geography and more. It is therefore fair to learn (if needed) how to argue. How can this be realized in a school is shown by teaching mediation. With the help of a mediator, the parties in conflict (arguing children) can reach agreement on a common view, remove differences and this before using his fist to impose their views.

Bensberg Mediation Model (Bensberger Mediations Modell BMM) also provides a teaching model. Mediation is a procedure of cooperation in which the mediator has no decision power but is responsible only for conducting the mediation process. Mediation is based on the free decision of the parties in dispute, and the principle of solving is the win-win situation..

Conflicts exist since humanity. Not conflict is the problem that puts even peace in the world and social peace in danger, but violent forms of expression, forms that perpetuate the conflict, which favors only one of the warring parties. The most powerful has "right" and "truth" in his hands.

Many studies have led to clarification of the forms of expression in conflict situations and their effects:

- fight or run (away), are the basic forms of conflict expression;
- personal advantage should be a priority (through the use of increasingly intensive force);
- initial position is supported when a record defeat (losses);
- is shaping a loss of differentiation capacity at all levels;
- conflicts are winning games, because otherwise appear like a loser;
- conflicts are seen as a threat to ones own security.

When a conflict is no longer seen as a threat but as a chance, the other part in confllict is accepted as a person and his interests are recognized in some way. This is the starting point in seeking a common solution for settling the conflict. Renouncing on violence is natural, respect for identity and dignity of all (not just those directly involved in conflict) is the basic requirement of living together in freedom and safety. Constructive processing of conflicts in kindergarten/ primary school is an educational method of absolutely necessary for the future of a country and even for mankind.

In fact, the problem of conflicts lies in permanent danger of conflict escalation, in conditions of increasingly value in asserting belief, will and power. From this moment on, the thinking prefer the appropriate strategies. Conflict will become increasingly difficult to master if you can not control it.

It is necessary to promote a culture of resolving a conflict and use it as a chance of development because it:

- Draw attention to existing and usolved problems;
- Promotes communication skills;
- Helps to clarify our position and point of view;
- Drives the search for cooperative solutions;
- Becomes an expression of their interest in school;
- Strengthens the feeling of belonging in the community.

3. The Bensberg Mediation Model

Bensberg model was developed at the Academy "Thomas More" in Bensberg (German state of Nordrhein-Westfalen). Since 1996, this institution has been offered to teachers and other professors a permanent self-taught conflict resolution in kindergartens and schools. The focus is put on the professional mediation training and coaching.

The basic idea is that conflicts cannot be (and should not) eliminated from children's lives. They belong to community life. The program "conflict resolution by students" is an approach to verify this method of resolving conflicts between children. The aim is a new culture of conflict resolution in schools. "The science of madiation" is in many schools part of the curriculum.

Bensberg concept was developed from the acquisition of American experiences of the "Cool Schools" Project and the school's conflict resolution by Johan Galtung.

The purpose of the concept is:

- introduction of mediation in all forms of university education and kindergartens;
- ensuring the sustainability of the system implementation;
- integration of the mediation concept in laws and education plans.

This means that:

- mediation is not a method, but implement a behaviour of responsibility;
- people involved in mediation tend to have a new way of thinking;

Their implementation is realized through an intensive professional education of teachers and training of students that have to become at a certain age student-mediators.

4. Stages of the Mediation Model using Bensberger Model

Introduction: After a simple greeting the parties in conflict are setting goals and conditions. Particularly important here is the appearance of confidentiality and neutrality of the mediator. Mediator conducting the mediation process clarified the rules and made the early discussion.

Clarifying the facts and find a solution: the parties in conflict expose their point of view. The main task is to ask questions, conduct helpful discussion, to summarize, to find points of emotional conflict. The purpose of this phase is to clarify the points of view of the parties in conflict. The mediator is not intended to discover the culprit. Then they switch sides to find out the position of the other, to understand the way how he thinks and reacts

Resolution: The Parties inconflict seek ways of resolving the conflict. Each writes down solutions. This should be a point of an intern view and an exterior one: "what am I ready to do and what I expect from the other". After this it noted they start to sort and analyze the proposals. Realistic proposals are discussed in detail. The purpose of this stage is to find a practicable solution to solve the conflict and assure a sustainable peace together.

Consilience: practicable solutions are found by both parties and noted. After giving their consent, the parties sign the consilience paper together with the mediator. Each party receives a copy of the paper and the third remains in the mediation file.

5. Conclusions

In the view of those who developed the Bensberg model, in kindergartens and schools are created structures of mediation and exercises are performed in order learn how to mediate a conflict. This ensures the participation of all students but also teachers in the mediation process. A regular training guarantees knowledge and application of tools in determining the specific conflict situations.

Unlike other methods of learning the social responsibility, Bensberger Model training has practical strategies for action. Exchange of experience and opinions, and the enrichment and improvement of the model is always a priority for the further development of this model within the Academy. This is ensured in particular through active participation in working groups of the German Association of Mediators and the learning process is made under the rules of this professional associations.

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Analphabetism in the 21st Century and its Legal Consequences

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Abstract: Every day we must note the main differences between well educated people and less ones. In fact, we can describe the human life like a continuous struggle between the pretensions: few people are to well informed, and the others cannot fulfill the same level. But these words are less important as conversation; the difference is created by the modernization of the technology. In this case, population is forced to learn new skills, but there is, somehow, a real disproportion between the result: not everyone is able to learn well all the new vocabulary, the new ideas of work and the new instruments of working, as computer or many others. In the same time, we must note that large categories of population, despite of free access to the education are not trying to adapt to the modern provocations: more than that, they are not able to understand new ideas or new technologies. However, they live as normal persons, make juridical act and represent subject for juridical reports. They are subjects of any branch of law, as the constitutions allowed. But this difference creates a question: can be a real gap between the ability to understand public or private law and its consequences? And, in this case, it might be possible to imagine some distinction between these kinds of persons? In our opinion, next years might be able to introduce this subject on public debate agenda, and we must find – from now – an answer: the humanity of today is quite strange, and from this part of life surprises are always ready. The specialists of law cannot stay in former reality; they must imagine new provocations and new answers. In our opinion, this direction is important for next years, and our text will try to find an answer for that.

Keywords: analphabetism; functional analphabetism; juridical re-dimension of society; new legal order

1. The Consequences of Technological Modernization - General Issues

Every day we face a situation: you have to endure, to analyze and consider actions, ideas and actions opposing it in a way different people: different primarily through their intellectual capacities, for although all people have were born - in theory (in terms of rights conferred by the organic legislature and constitutional one) with equal opportunity, the differences between them are difficult to overcome, and the consequences of these differences are not always positive.

What we want to mention here are not the words themselves, but rather the consequences of the legal aspect of the ideas we are trying to express here, in coherent, understandable and easily to analyze form.

Thus, the main idea is related to the technological modernization of the last 150 years that has brought mankind: inventing the first car; airplane, rocket and finally the computer. Over time, human society was obliged to receive any technological invention and to find a meaning in terms of the use daily, but

began to see after entering binary forms technology developed inside own homes (computers) that a good part of reality better known and well controlled change with dizzying speed.

Basically, it was born a new world where differences manifest themselves very quickly: the lack of technological knowledge creates gaps in terms of social position: both in terms of perception (image problem becoming increasingly important in this century) and especially the legal aspect. This second aspect is complicate because the requirements of various employers in the labor market is often difficult to fulfill many of the potential candidates for the vacancies: they can be filled, but the job description restricts access only to those who skills have not only formalized (by obtaining a qualification) for a domain, but also practical experience that, as global competition in the market for goods and services at the time of 2011.

2. Analphabetism. General Aspects

All these issues, noticed above, there is, in fact, than the consequences of a reverse phenomenon of modernization, that is – on one side – historically natural, organic, and on the other hand, an anomaly that should to be corrected, but it can not be transformed from something bad into something good in any country in the world, much less in poor countries.

Specifically, modernization is, in everyday language the word "progress, easy access (financial and technological) to as many products and techniques to improve the situation of persons".

The opposite is portrayed phrases that emphasizes the return of (the failure) to persons or companies, which can also be divided into:

a) Deficiency of historical nature, which means the situation of few human societies who didn't reached a historical consciousness in the form of their organization able to create states (here we include the tribes still remaining in different states of aggregation, but not as a state);

b) Economic failure by some states (as noted, is necessary the formation of states): they can not succeed, for reasons of cost strictly, to ensure certain standards of life which are known, desired, but very difficult to met for a large majority of citizens, regardless of corrupt or dictatorial as the political elite. The situation of many countries in Central Asia but also in the Middle East is particularly difficult by the water problem, it is almost a casus belli; any attempts to resolve them by administrative methods (communist type - such as trying to assigned new channel for the great Siberian rivers to the south of Turkistan sun-burnt), military (as of the Jordan River, with numerous conflicts that will reignited) or commercial (buying water from Turkey to Israel) did not lead to results positive long-term, predictable;

c) Psychological deficiency, where some technical or intellectual skills fail to be fixed, although the state has created or provided a framework for creating conditions for their acquisition, usually by setting up schools and specialized institutes.

In this third area will be situated states have reached a particular maturity, which acknowledges the role of education in training, allocation of resources in this direction, but faces a big problem: having access to many technologies, they are not yet easy to use by potential beneficiaries.

Specifically, their citizens are not sufficiently prepared to use every opportunity that the company uses a very simple, but unusual for civilized society: analphabetism.

The analphabetism is defined by the United Nations in 1958 as a situation of a man who can not read and write and can not therefore understand a text. The mere fact of not knowing how to read represents analphabetism, even though, by imitation, you could be a good calligrapher. However, it is obvious that this definition does not appear to be a misunderstanding of the text result of various shortcomings such as intellectual, but it is a direct result of the lack of two basic information: can be people who understand any situation, according with this definition, because there was someone to explain it, but still be analphabet, because they needed to have someone using a "mist elimination" from their minds.

3. The Analphabetism Rate to 0, the Global Level

The definition of 1958 corresponded to a particular period in history: the years 1950 to 1960 is when most states appear on the world political scene, the independence movements – especially on the African continent – taking at geopolitical scale hurricane proportions.

Many of the new states were hit from the start of this big problem: the new rulers were in no position to be in general upper secondary education, since the colonial powers – with few exceptions – very many natives did not allow access to high level of education. (Johnson, 2000, p. 436)

Thus, legally, we consider that Africa was the exception of high-school education, and analphabetism – the rule. We must note that in some states is not any native with higher education.

It should be noted that the Asian societies, more powerful as economy, enjoyed a higher access to education compared to the African continent, but on this continent is the only state where having more than four years of schooling means the offense against state security, who was followed by the mass executions, disappearing as 20% of Cambodian population.

For these reasons, the first concern of the new state – or those who have barely regained its independence – had to be the creation of schools for training in fundamental areas of existence of the state: legal sciences, medical sciences and military science, followed those other shortcomings to be removed as soon as possible within available funds established new political power.

Since then the African continent began to fall entirely within the first two categories mentioned above: the failure of historical nature (because tribes didn't disappeared, only few aspects becoming a little mild) and economic failure, (which states can not totally eradicate).

Just after 1960 we could really bring in any analysis of social phenomenon fully aware of the problem of analphabetism worldwide, as well as some steps that are in fighting this phenomenon: that the main measures to be provided will not only be taken by states, because the main obstacle to classical analphabetism (classical analphabetism we agree to call this like the definition stated by the United Nations) is the first language used for elementary education.

Intellectual development is accompanied usually by the acquisition of higher language skills, other than their own (or possibly first learned, because there are few languages spoken by so small number of people that can not be held fully education institutions in the school system), but this does not mean that the student reach his full intellectual capacity just by learning more languages.

4. Functional Analphabetism

Two press information caught our attention: one in 2008, the other in 2011.

First, in National Journal February 5, 2008 show the following news: "While the world is evolving successfully, Arab countries kept the slow pace of development and the analphabetism is the main problem. Even if funds are allocated for educational development record, the Arab countries "refuse" to cultivate their children, even if this method would be the easiest way to a better life. Following a report by World Bank experts, Arab countries kept at a high level of analphabetism, while in Asia and Latin America more schools are attended by many children. Worldwide, the leading Arab countries contributed to the unemployment level and 60% of the population is under 30 years. In 10-15 years, Arab countries will need to create 100 million jobs and to fulfill this target, whole educational process must be modernized, said one World Bank experts.

The second story has a more brutal in expression, belonging to a local newspaper[1]: "... From school violence, who become common in schools of the county to schoolgirls porn, everything became possible thanks to the leadership blinders School Inspectorate of Ialomita. ... Many of the pupils (and what is worse is that they are high school pupils) falls to the concept of functional analphabetism, but nobody does not talk about them. Ignore them, hide them, we just praise the performance of learners". And more recently, contends professor Otilia Dumitru, "the school created by indulgence, another category of pupils, drug addicts. Children drugged by the hour. I discovered Monday morning, all the fog. And they recognize! They smoke! I wonder how it is possible, why come to this? It has nothing to do with school! But they do at school because nobody refers!" says the teacher. ... Functional analphabetism is a concept that refers to people who can read but not understand what they read. For Ialomita, in the first semester of the 2010-2011 school year there were approximately 700 thousand absences. A study on education in member states published by the European Commission shows that in Romania, in 2006 compared to 2000, the percentage of pupils aged 15 who are functionally analphabet increased from 41.3% to 53.5%. According to statistics belonging to Ialomita School Inspectorate, in the same period 156 pupils were expelled because of absenteeism. 5257 other pupils have chosen to wear low notes for their behavior, 726 notes with less than 7. The percentage of functionally analphabets places Romania on the last European countries to literacy. Bulgaria is ahead of Romania, with a rate of 51.1% of young people who do not understand what they read. A total of 764 pupils were registered in the first half of the current school year with "serious disciplinary violations" of the school rules. Under this term it hides the violence against teachers, violence among pupils, public disturbance or theft".

As it can be seen, and persons with functional analphabetism are those who either went to school and obtained an appropriate degree level education or have left school before obtaining a degree, but in both cases have not sufficient basic skills.

A study on education in member states as published by the European Commission[2], shows that in Romania, in 2006 compared to 2000, the percentage of pupils aged 15 who are functionally illiterate increased from 41.3% to 53.5%. By comparison, in Finland only 4.8% of students aged 15 years have difficulty understanding what they read. After Finland is Ireland with 12.1% and Estonia 13.6%. Percentage places Romania on the last European countries to literacy. Bulgaria is ahead of Romania, with a rate of 51.1% of young people who do not understand what they read.

[1] http://www.independentonline.ro/2011/04/27/Elevii-ialomiteni-penduleaza-intre-droguri-si-analfabetism-functional_4308/

[2] http://www.consultanta-psihologica.com/infirmitatea-secolului-xxi-%E2%80%93noul-analfabetism-noua-sclavie/

5. Legal Consequences of Functional Analphabetism

All these data pointed out that soon a majority of the active population will be un-necessary, from social point of view, less productive and easily subject to manipulation of any kind.

However, legally, all these people (huge number) have civil rights and economic ones. Our question is: can be exercised within the limits and according to the purposes to which they were edicts?

Thus, in terms of substantive law, such a person will not be able to identify when they are subjective rights violations, therefore, can not bring suit in court when they need: to be somehow modified the general prescription period? Moreover, in this case it must be considered that functional analphabetism is a proven case that may lead to suspension prescription rate extinction because this assumption is a case to necessary impose similar person under interdiction?

Scientific analphabetism legal situation can, in our opinion, be one case for which any interested person may request, including the prosecutor, putting a person under interdiction. Although not required, such a move could lead to increased interest in education, including helping the national education system to eliminate the attitude of "diploma factory" that grow over 20 years.

If the first case sets a common situation to all branches of law, the second refers only to the legal capacity of individuals. We believe, moreover, the establishment of two additional prohibitions: to marry, because this institution is not an act "jocandi causa", on the one hand, and therefore to have one job: make certain prohibitions more good by their very existence, rather than failing them, under the false argument that it would violate a basic human right. The author advocates the idea that it is less important to write anything, but is compulsory to write well.

From the perspective of public law, retain the idea of real control, psychological, for anyone who wants to run for a dignitary. Obviously, it will consider that this is a measure that will violate human rights, only that it must abandon the idea that people really are equal among themselves all the time: the idea of specialization is, in fact, very strong affirmation of this idea. Otherwise, we might consider able to perform the task of foreign minister, for example, including a fireman on a steam train or a shepherd in the most isolated mountain peak.

6. Conclusions

The biggest mistake of scientific and political dialogue of the XXI century is to believe that all rights that provide access to a superior position are intangible, because this is a principle and not because of the need to protect society from various dictatorial tendencies.

And yet, we must understand that whatever is created by man is not eternal, and that the main purpose of the people is to grow and develop. Thus, to accomplish these goals, individual law subject, looked ut singuli, adopt various stratagems, which sometimes renounce to certain rights to acquire them later with more power. That idea can not remain at the individual level, with any risk; it should be extended to the whole society.

Therefore, we think that we need a new upgrading and repositioning of the politico-legal system: although one can not believe that it might be possible, the ultimate goal of law – to achieve augmentation of all opportunities which belongs to a society – often involving cleaning the land before building a strong construction, with no cracks.

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The Review of Decisions Issued by the Administrative Court, as per Art. 21 Paragraph (2) in Law no. 554/2004. Admissibility Conditions

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Abstract: By this paper, using the observation method, we proposed an identification of the admissibility conditions for the review claim based on the provisions of art. 21 paragraph (1) in Law no. 554/2004. On one side, we considered as necessary to elaborate this study as a consequence of the Romanian Constitutional Court decisions for solving the unconstitutionality pleas regarding this law provision, and on the other side we approached this subject considering the interpretable nature of the respective provision. From another point of view, we appreciated that a clarifying of "EU law preference principle breaching" formula content is required, the same being included in the provision mentioned above. Specifically, we tried to find out whether the respective formula can be taken as basis for a review claim based on the provisions of art. 21 paragraph (1) in Law no. 554/2004 in case a fundamental human rights breach is invoked, referring to Lisbon Treaty provisions. By this paper we showed the deficiencies of the enactment as it is in force (also signaling the deficiencies to be found in the modification proposal).

Keywords: decision; EU law; preference; fundamental rights

1. Introduction

The circumstance that many of the European states are members of the European Council or the European Union, and the last two are signatories of international commitments stipulating strictly established obligations, leads to the objective necessity of European integration.

This complex process develops on both norm and jurisdictional levels.

In this context, it is uncontestable that member states of the European Union (EU) must use their administrative and jurisdictional capacities to comply with the norms issued and commitments undertaken.

Responding to the above exigency which implies the Romanian state responsibility in case of eluding obligations undertaken by the EU accession Treaty, the domestic legislator assumed the introduction of a national remedy in case of breaching the EU law preference principle when solving a case in the administrative matters.

2. Relevant Provisions. Present and Future

Art. 21 paragraph (2) in the Law of administrative claims[1] stipulates the possibility of addressing a review claim in case of breaching the EU law preference principle.

According to this article, "a ground for review, in addition to those provided in the Civil Procedure Code, can be a final and irrevocable decision sentenced by breaching the principle of community law preference, as ruled by art. 148 paragraph (2), substantiated with art. 20 paragraph (2) in the Constitution of Romania, as republished".

We mention that the second tenet of this article, stipulating the period such a review claim can be done within, based on the said ground, was declared as unconstitutional by the Decision no. 1609/2010 of the Constitutional Court[2]. Although the term up to which the law provisions should have been harmonized passed, the legislative proposal for modifying this enactment is still in debate of the Senate, being adopted by the Lower House, as the first house approached, on 19 April 2011.

Regarding this legislative route, we consider as necessary some preliminary remarks.

The first observes that first tenet, still in force, is also concerned in the modification law draft for art. 21 in Law no. 554/2004, although this article was stated as unconstitutional only partially, in what concern its second tenet respectively.

Thus, according to the Draft of Law adopted by the House of Representatives[3], paragraph (2) of art. 21 in Law no. 554/2004 shall have the following content: „the breaching of the community law preference principle, as ruled by art. 148 paragraph (2), substantiated with art. 20 paragraph (2) in the Constitution of Romania, republished, by a decision remained final and irrevocable, can be a ground for review. The decision is to be notified to the interested party within 30 days since sentencing. The review claim shall be put within 15 days since notification and solved urgently and preferably within a period of maximum 60 days since registration".

The legislator's initiative to intervene in the whole text is a praiseworthy[4], but we can still find that the form of the text, extensively criticized in the Romanian literature (Râciu, 2009), is yet far from the rigor a norm should have.

Thus, the replacing of European Community name with that of European Union, once the Lisbon Treaty[5] was adopted, is ignored. Consequently, the community law collocation shall be used only when the jurisprudence of the European Union Court of Justice before this modification is referred.

At the same time, we may notice that the use of formula "the breach, by a decision remained final and irrevocable, of the community law preference principle..." would be more correct, the collocation proposed as earlier being questionable from the grammar point of view.

Thirdly, it is to be noticed that the second tenet of the text is not clear enough.

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[1] Published in the Official Gazette of Romania, Part I, no. 1154 from 7 December 2004. This law was modified and completed repeatedly. By Law no. 262/2007, published in the Official Gazette of Romania, Part I, no. 510 from 30 July 2007, the stated article was introduced.

[2] Published in the Official Gazette of Romania, Part I, no. 70/27 January 2011.

[3] To be referred http://www.cdep.ro/pls/proiecte/upl_pck.proiect?cam=2&idp=11737 .

[4] However, we may notice that it is a consequence to fact that by Decision no. 1609/2010 the Constitutional Court observed specific deficiencies in the drawing up of the first tenet in the same paragraph.

[5] The Lisbon Treaty for modifying the Treaty Regarding the European Union and the Treaty Establishing the European Community, signed in Lisbon, on 13 December 2007, published in the Official Journal of the European Union no. C 306 from 17 December 2007, came into force on 1 December 2009, upon its approval by all member states.

As irrevocable decisions are not to be notified, it comes out that the interested party must put a request for notification. The enactment shows that the decision is to be notified to the interested party within 30 days since sentencing, but it is not clear whether the party should demonstrate his interest for being notified about the decision within the 30 days, under the penalty of rejection of his claim for review as delayed, or such a request for being notified the decision can be made later without exposure to the risk of passing over the period when a claim for review can be addressed.

3. Admissibility Conditions for the Review Claim

Coming back to the admissibility conditions of such a claim, we considered two aspects.

On one side, there must be done an identification of the decisions that can be subjected to a review based on such a ground, and on the other side the content of the collocation "breach of the EU law preference principle" must be determined.

Regarding the first issue, we start from the context that art. 21 paragraph (2) first tenet in Law no. 554/2004, as it is in force presently (but also as proposed for modification) indicates that "final and irrevocable decisions" can be subjected to a review.

Regarding this collocation, there must be recalled that, being previously addressed with an unconstitutionality plea for the art. 21 paragraph (2) in the Law of administrative claims - grounded also on the lack of enactment formula precision in what regards the correlation with the norms in the Civil Procedure Code[1] - rejecting the plea[2], the Court noted that „no consonance can be required between the norms of Law no. 554/2004 for administrative claims and those of the Civil Procedure Code, as the author of the plea wishes, as far as, for the matter of review, the common law consists of the Civil Procedure Code, and **Law no. 554/2004 of administrative claims is an enactment with special features which, as per *specialia generalibus derogant* rule, derogates from the common law norms**".

From such reasoning, we understand that final and irrevocable decisions, regardless their type, are considered as able to be subjected to a review.

The same point of view was adopted by the constitutional control court in 2009[3], when it considered that no reasons exist for reconsidering its jurisprudence, noting that the mentioned decisions and **their reasoning** remain as valid.

One year later, although the rejection decision was maintained for the unconstitutionality plea regarding the first tenet of art. 21 paragraph (2) in Law no. 554/2004, when grounding Decision no. 1609/2010, the Court notices that „apart from the Civil Procedure Code provisions, the drawing up of this enactment is also not explicit enough in what concerns the decisions which can be appealed by the extraordinary way of the review based on the new review ground shown above. Thus, while art. 322 in the Civil Procedure Code specifies that decisions can be reviewed when they are final in the appeal court or not appealed or are given by a remedy court when recalling the subject matter, the first tenet

[1] As per article 322 paragraph (1) in the Civil Procedure Code, final decisions sentenced by the appeal court or non-appealed ones can be subjected to a review, together with the decisions sentenced by the remedy courts when recalling the subject matter.
[2] By the Decision no. 675 from 12 June 2008 of the Constitutional Court, published in the Official Gazette of Romania, Part I, no. 474 from 27 June 2008.
[3] Constitutional Court Decision no. 679 from 5 May 2009, published in the Official Gazette of Romania, Part I, no. 411 from 16 June 2009, to be referred.

of paragraph (2) of art. 21 in Law 554/2004 for administrative claims generically refers to "final and irrevocable" decisions without giving any details."

This time, the Constitutional Court considers that, **"considering the provisions of art. 28 in Law no. 554/2004, specifying that dispositions contained in the same are to be completed with the Civil Procedure Code provisions**, as far as the same are incompatible with the specificity of power relationships specific to administrative law, the judge and interested parties can use, however, the benchmarks necessary for classifying a court decision in the category of decisions susceptible to be reviewed according to the criticized enactment, so that it cannot be observed a breach of the right for free access to justice and exercising the remedy easy provided by the law".

We may notice that, although the enactment was found as accordant to the constitutional provisions, this time the constitutional control court **reconsidered its grounding**. Thus, abandoning *specialia generalibus derogant* principle, the Court implicitly[1] considered that provisions of art. 322 in the Civil Procedure Code are applicable.

We appreciate that first considerations of the Court are closer to the text content subjected to the analysis.

Paragraph (2) of art. 21 in Law no. 554/2004 comprises a new ground for review, expressly indicates what decisions can be subjected to review (final and irrevocable decisions, without any discrimination), provides a special term for promulgating this remedy procedure, a specific term for solving such a claim, so that, **in the presence of *the special derogates from the general* principle,** at least for *lege lata***,** provisions of art. 28 paragraph (1) in Law no. 554/2004[2], stipulating that "compatibility of applying the civil procedure norms with the specific of power relationships among the public authorities on one side and the persons prejudiced in their legitimate rights or interests on the other side shall be determined by the legal court" cannot be invoked.

The second issue circumscribing to aspects related to the review claim admissibility concerns the content of "EU law preference principle" collocation.

We mention that a thorough analysis of the content of this principle was not our goal, the only **question** we tried to answer was whether, in such a matter, in such an extraordinary remedy procedure, based on the provisions of art. 21 paragraph (2) in Law no. 554/2004, **breaches of the fundamental human rights can be claimed in front of the review court.**

At first view, the temptation is to answer unyieldingly negatively. This because, according to provisions of art. 322 item 9 in the Civil Procedure Code, „the review of a decision can be claimed when the European Court for Human Rights has found out a breach of the fundamental rights and freedoms caused by a court decision, and the negative consequences of such a decision continue to occur and no remedy can be achieved but only by reviewing the decision awarded".

[1] We cannot take no notice of how the Constitutional Court overstepped its competences suggesting the above interpretation. The same competences were, in fact, invoked by the Court within the content of Decision no. 675/2008 where there is noted that: „by solving the unconstitutional pleas, the Court strives for an accordance of an enactment against the norms and the fundamental rights contained in the Constitution and the international judicial deeds Romania signed as a party and not against other legal provisions in other domestic enactments with lower juridical power". We may notice that, although the Court finds out about its powerlessness in verifying some aspects concerning the law interpretation and enforcement ("regarding the unconstitutionality criticism on aspects concerning the law interpretation and enforcement and the lack of correlation in the domestic law regarding review matters, the Court notes that the unconstitutionality plea has an inadmissible feature as such matters do not fall within its competence, as they are assigned exclusively to the competent legal court and the legislator, respectively"– the same decision content to be referred), however the Court accomplishes an interpretation.

[2] Regarding the analysis of this enactment and the judicial practice revealing its enforcement see (Iorgovan, Vişan, Ciobanu, Pasăre, 2008, p. 368-386).

This review case is incident in the administrative claim matter too, as per the provisions of art. 28 paragraph (1) in Law no. 554/2004. Therefore, in the context of a fundamental human right breach, the interested party can use art. 322 item 9 in the Civil Procedure Code, provided this breach is found out by ECHR, also complying with the other conditions requested by the stated provisions.

A second argument justifying the negative answer to such a question could reside would be that protection of human rights has not been an original concern for the European Union. This context results from the main economic nature of the entire community construction[1], the recognized rights being closer to the general objectives and the community competences than to a concern for protecting the individual rights and freedoms (Renucci, 2009).

We may notice that, in the silence of the texts, the community jurisprudence progressively ensured an efficient protection of rights, the community judge making a preferential inspiration source out of the European Convention of Human Rights (Renucci, 2009).

For the studied issue, the provisions of the European Union Treaty, as amended by the Treaty of Lisbon, are of major importance.

According to article 6 in the European Union Treaty, „**The Union recognizes the rights, freedoms and principles stipulated in the Charter of Fundamental Rights of the European Union**[2] of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, **which shall have the same legal value as the Treaties**. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms[3]. Such accession shall not affect the Union's competences as defined in the Treaties.

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law"[4].

Moreover, as per article 2 in TEU „*The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities."* These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

In doctrine, there were advisably revealed the difficulties residing in the dual nature of human rights protection in the European area[5], such duality being sometimes baffling as the domestic norms must

[1] The constitutional treaties of the EU – The Treaty of the ECSC of 18 April 1951, The EC Treaty of 25 March 1957, The ECA Treaty (EURATOM) of 25 March 1957 – only recognize economic freedoms as the freedom of circulation of goods, capitals and persons and the free supply of services.
[2] Published in the Official Journal of the European Union C 83 of 30 March 2010.
[3] We mention that accession of EU to the European Convention of the Human Rights has not yet occurred.
[4] It is undisputable that the general principles of the Union law are a source of law for the EU.
[5] For an extended study on this matter, O. Bulzan, *The European Court of Human Rights and the Court of Justice of the European Communities – between Conflict and Compromise*, article available on the website http://studia.law.ubbcluj.ro/articol.php?articolId=240, The author of the same notes that „duality Strasbourg-Luxembourg has generated in time an uncertainty on the competences of the two Courts whose coexistence did not led to convergence in

cohabitate with standards established in two different directions, that is national actions must comply with both EU and conventional law.

4. Conclusions

Without getting into the details concerning this juridical context, we appreciate that in view of art. 21 paragraph (2) in Law no. 554/2004 provisions, **breaches of the fundamental rights can be invoked in a claim for review.**

EU law provisions to be invoked for preferential enforcement are quite the ones displayed above, art. 2 and 6, respectively, in the Treaty Regarding the European Union and those contained in the Charter of Fundamental Rights.

The conclusion results by itself, on one side, as the text discussed itself refers to the provisions of art. 20 paragraph (2) in the Constitution of Romania.

By the other side, as far as there are invoked breaches of the fundamental rights established by the Charter which has the same legal value as the treaties and also envisaging the new orientation of EU to an extended protection of the fundamental rights, we consider that the national judge will not be able to establish that a text contained in the Charter and guaranteeing a fundamental right is not a legal norm of the EU law and consequently refuse to make the preference principle effective.

The EU law offers an equivalent protection to the rights established in the Convention, only that their observance is ensured, apart from the general standards established by the Convention of Rome, taking also into account EU law principles and specificities which the national judge must consider too.

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jurisprudence, but to a kind of juridical insecurity generated by the cleavage on the national level in what regards the protection modalities for the fundamental rights and freedoms. Thus, the state has its protection ensured on two levels: by the European Convention of the Human Rights, signed in Rome on 4 November 1950, and, recently, by the Charter of Fundamental Rights of the European Union".

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The European Citizens' Initiative – Participatory Democracy in the European Union

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Abstract: A new democratic tool, the European Citizens' Initiative (ECI), starting with April 2012, will allow one million European Union (EU) citizens to ask the European Commission to propose EU legislation. The ECI could thus create a new space inside the EU policy-making machine for ordinary EU citizens. The purpose of the paper is to analyse the early implementation of the Treaty of Lisbon provisions concerning citizens' initiative. At the level of the European Union, member states in their fundamental laws set up the democratic initiative of the people. The following Member States have citizens' initiatives at national level: Austria, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and The Netherlands. These initiatives differ considerably in scope and generally operate according to different procedures. Because at EU level, there is no experience to build upon this, we will analyze the national citizens' initiative and the problems which occurred in practice. So, the citizens' initiative must accomplish few conditions which we intend to discover and unveil in a comparative study with the national initiative.

Keywords: common interests; active citizenship; European democracy on-line; European Union values

1. Background

The first step in European integration was taken when six countries (Belgium, the Federal Republic of Germany, France, Italy, Luxembourg and the Netherlands) set up a common market in coal and steel, with the signing of the European Coal and Steel Community Treaty (ECSC) in Paris in 1951. The aim, in the aftermath of the Second World War, was to secure peace between Europe's nations. It brought them together as equals, cooperating within shared institutions. This treaty expired on 23 July 2002, exactly 50 years after it came into effect. Economic areas became the focus for supranational cooperation, when, in 1957, the six ECSC members agreed to establish the European Economic Community (EEC) and the European Atomic Energy Community (Euratom) — the Treaties of Rome. (Cărăuşan, 2011)

The main goals of the future EU have been identified in the Treaty of Rome establishing the EEC and among them we can find the will to eliminate the barriers which divide Europe by creating a closer union, a union of the people of Europe. After almost 60 years of existence, the European Union re-evaluates its main purposes of existence and establishes as objectives[1] the well-being of its peoples and to uphold and promote its values and interests and contribute to the protection of its citizens. The European Union is a community of states based on shared values, values established in the Treaties.

[1] In article 3 of the Treaty of European Union as it was modified after Lisbon (ex article 2 of TEU).

The Treaty on European Union introduces a whole new dimension of participatory democracy alongside that of representative democracy on which the Union is founded. Reinforcing the citizenship of the Union and recognizing every citizen's right to participate in the democratic life of the Union, the Lisbon Treaty enshrined the key standards of civil dialogue – the European Citizens' Initiative. It provides that *'not less than one million citizens who are nationals of a significant number of Member States may take the initiative of inviting the Commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties' (Article11, paragraph 4 of the Treaty on European Union)*.

The guiding principles for this proposal are therefore as follows:

- The conditions should ensure that citizens' initiatives are representative of a Union interest, while ensuring that the instrument remains easy to use;
- The procedures should be simple and user-friendly, while preventing fraud or abuse of the system and they should not impose unnecessary administrative burdens on the Member States.

ECI will add a new dimension to European democracy, complement the set of rights related to the citizenship of the Union and increase the public debate around European politics, helping to build a genuine European public space. Its implementation will reinforce citizens' and organized civil society's involvement in the shaping of EU policies. But the Commission cannot accept the proposed citizens' initiative which could be manifestly against the values of the Union. The methodological approach of our study will use documentation, comparison, observation and identification of national and European issues and syntheses of data collected to get the real dimension of the problems discussed.

2. The Citizen's Initiative in the Fundamental Laws of the Member States

All member states of the European Union are democratic and are based on the rule of law. They promote, almost, the same values and the citizens' role in the society development is recognised in their fundamental laws. The citizens' initiative is seen as the way in which people can participate in the life of the state by establishing new rules. The way in which these rules can be the result of the citizens' initiative was established differently and in the following lines we will pay attention to the national procedures. The following Member States have citizens' initiatives at national level: Austria, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and The Netherlands. Regional citizens' initiatives exist in Austria, Germany, Spain, Sweden and The Netherlands. Local citizens' initiatives can be found in Belgium, Germany, Hungary, Italy, Luxembourg, Slovenia, Spain and Sweden. These initiatives differ considerably in scope and generally operate according to different procedures. According to the Constitutional Act of the Czech Republic[1] and the Republic of Bulgaria[2] a bill can be introduced by any member of the Chamber of Deputies or Senate or by the Government/Council of Ministers. Moreover, under the Czech fundamental law a superior governing territorial unit has the right to introduce a bill. In the case of Belgium[3], taking into

[1] Art. 41 of the Constitutional Act No. 1/1993 Coll. of the Czech National Council of 16th December 1992, as amended by Acts No. 347/1997 Coll., 300/2000 Coll., 448/2001 Coll., 395/2001 Coll. and 515/2002 Coll.
[2] Art. 87 of the Constitution of the Republic of Bulgaria, Prom. SG 56/13 July 1991, amended by SG 85/26 September 2003, SG 18/25 February 2005, SG 27/31 March 2006, SG 78/26 September 2006 - Constitutional Court Judgment No. 7/2006, SG 12/6 February 2007.
[3] Art. 75 and 132 of the Constitution of Belgium, amended (http://www.senate.be/doc/const_fr.html)

consideration that it is a federal state made up of communities of regions (French community, Flemish community and German community), the Constitution stated that each branch of the federal legislative power (art. 75) and also the Community Government and the members of the Community Parliament have the right to initiate bills. As we can observe, in some cases, the initiative of the citizens was not regulated by the Constitution.

If in some European countries the citizens' initiative was not regulated by the Fundamental Law in other states such as Italy[1] the people may introduce public initiatives consisting of a bill drafted in articles and supported by at least 50,000 voters. In Italy we can distinguish between *ex-parte populi* (citizens' initiative - CI) and *ex-parte principi* (government initiative/proposal). For having a CI the procedure requires, besides the minimum number of signatures, that these should be obtained by a public authority within a limit of time of 6 months. The signature has to be authetificated in front of a notary, court or competent local authority. Currently there are 13 popular initiatives and none of them turned into an Act of Parliament, since the Parliament is not bound to provide a result for the CI.

In Austria, the experiences with the 'Volksbegehren'[2] are mixed. There are some indirect effects like agenda setting, mobilisation and influence on public debates. The direct effects - enactment of laws and definitive policy changes - are only limited. In 6 of 29 cases (as of 2002) citizens' initiatives were enacted by parliament in total or in significant parts. On the other hand, even citizens' initiatives with a very high number of signatures were completely ignored by the parliament. Initiatives were addressed with considerable delay (Rehmet, 2003). Out of the 213 popular initiatives submitted for legislative approval only 29 have been enacted (Vanzetta, 2006, p. 20). Also, in former soviet countries like Hungary[3] and Poland[4] the citizens' right to participate in the life of the states was regulated by their Constitutional Act. In Hungary, for example, the popular initiative may fall under the jurisdiction of the Parliament and at least 50,000 citizens' votes are required. In order to pass the law on popular initiative, the majority required is of two-thirds of the votes of the Members of Parliament present. A national popular initiative may be for the purpose of forcing the Parliament to place a subject under its jurisdiction on the agenda. The Parliament shall debate the subject defined by the national popular initiative. In order to call a national popular initiative, signatures may be collected for a period of two months and it is forbidden to collect them at the work places, in public transportation vehicles or in local authorities' headquarters. Similar outcomes are experienced in Poland. The Polish Constitution allows popular initiatives since 1997. The initiator has to gather 100,000 signatures in support of the proposal: approximately 0,3 % of the total registered electorate. As of 2005, the procedure was used 55 times - however, legislation enacted by the parliament followed in only 6 of those instances (Rytel, 2006).

In Spain[5], where the barrier is much higher (500,000 citizens have to sign) a similar situation exists - 50 of 62 submitted initiatives have garnered sufficient support to even be subject to parliamentary debate – 12 renewed, 15 inadmissible, 9 without the number of signatures and 1 passed by contestation. The signatures are collected face to face in front of a notary. In 2010, 40% of Spain population manifested their interests in collecting the signature electronically. The limited range of

[1] Art. 71 and 87 of the Constitution of Italy, adopted on 22 of December 1947 and entered into force on 1st of January 1948.
[2] The name of the citizens´ initiative in Austria. 100.000 signatures (1,7% of the electorate) must be gathered.
[3] Art. 28/B – E, The Constitution of the Republic of Hungary, Act XX of 1949.
[4] Art. 118 and 221 of the Constitution of Poland, adopted by the National Assembly on 2 of April 1997 an confirmed by referendum in October 1997.
[5] Section 87 Spanish Constitution passed by the Cortes Generales in Plenary sittings of the Congress and the Senate held on October 31, 1978; ratified by referendum of the Spanish people on December 7, 1978 and sanctioned by His Majesty the King before the Cortes Generales on December 27, 1978.

issues that could be addressed by an initiative and the power of the legislature (Parliament) in determining the outcomes are the most important factors that have hindered the success of citizen initiatives.

3. 'A Voice for All' – Strengthening Participatory Democracy in the European Union

The EU has long been criticized for its democratic deficit. Several proposals for overcoming or reducing this deficit have been made. Some of them mention the role of more citizen participation and direct democracy – active citizenship. The EU citizens cannot directly influence the EU policy agenda, other than through the undemocratic form of interest representation (lobbying). It was not until 2005, when French and Dutch voters surprisingly rejected the EU Constitution in referenda, that EU leaders began to realize that EU citizens have changed. However, most defined the problem primarily as a failure of communications, not democracy: if EU citizens only understood what the EU does for them, they would support it. (Thomson, 2011, p. 2) The Treaty on European Union reinforces citizenship of the Union and enhances further the democratic functioning of the Union by providing, inter alia, that every citizen has the right to participate in the democratic life of the Union by way of a European citizens' initiative.

Claims that the EU has a 'democratic deficit' and that it is crucial for the EU's future to strengthen its democratic legitimacy have continued to arise for the last 20 years[1]. For the greater part of its history, citizens have not been at the centre of the European political system. One response to this was the establishment of the Citizenship of the Union, in addition to national citizenships. The Maastricht Treaty (1992) – Treaty Establishing the European Community (TEC)[2] – has integrated the Citizenship of the Union into the Treaty of Rome. The rights granted to the EU citizens include the right of free movement, the right to vote in communal elections in all Member States, the right of diplomatic protection and the right to petition to the European Parliament. These rights were regarded as a first step towards full-fledged citizens' rights. The concept of the Union citizenship is dynamic (Kluth, 2002, RN 1). Art. 22 TEC provided for three annual reports by the Commission that could form a basis to complement the Citizenship of the Union by the Council and subsequent approval of the Member States. Thus far, the Commission has presented four reports.[3] However, none of them referred to new instruments of participatory or direct democracy until the Lisbon treaty recognized every citizen's right to participate in the democratic life of the Union. (Efler, 2006, p.5)

The decision-making arenas can be seen to have a number of essential characteristics: inclusiveness; judgmental and dialogical (Pettit, 2001). So, ECI is trying to bring the inclusiveness of the citizens in the European decision-making process through the direct dialogue with EU citizens. In order to do that it has to accomplish some criteria. Hajer (2005, p. 450) in his performative analysis of decision-making noted that good deliberative / participative decision-making needs to meet the following criteria:

- reciprocity: 'discussion must be conducted through an argumentative exchange';
- inclusivity: all stakeholders are free to participate in the argumentative exchange;
- openness: the argumentative exchange must not be staged and 'must avoid unnecessary barriers, including that of (professional) language';

[1] See in this sense the Eurobarometer values in the last 20 years.
[2] Consolidated Version of the Treaty Establishing the European Community: Official Journal of the European Communities, C 325/33.184, 24.12.2002.
[3] COM (93) 702; COM (97) 230; COM (2001) 506; COM (2004) 695.

- integrity: the argumentative exchange 'requires honesty and no double play';
- accountable: stakeholders 'are accountable to political bodies and to the public at large';
- dialogical: the argumentative exchange mobilises knowledge and induces "learning through an iterative process".

Specifically, massive EU – wide public outreach and communications campaigns will be needed to convince over a million people in at least seven different countries to support a given ECI. This could in turn lead to the development of temporary 'European public spaces' where the ECI topic is discussed - e.g., in national media, in community meetings, between friends, etc. (Thomson, 2011, p.6)

Given the importance of this new provision of the Treaty for citizens, civil society and stakeholders across the EU and considering the complexity of some of the issues to be addressed, the Commission launched a broad public consultation with the adoption of a Green Paper on 11 November 2009. The consultation elicited over 323 replies from a broad range of stakeholders, including individual citizens (159 replies), organisations (133 replies) and public authorities (31). Most of the replies were from France, Spain, Italy, Germany, Greece, Portugal etc., as we can see some of these countries have regulations in the area and the good practices were used to improve the EU regulation. A public hearing was also held for all respondents to the Green Paper on 22 February 2010 in Brussels. The responses to the Green Paper underlined the need for the procedures and conditions for the citizens' initiative to be simple, user-friendly and accessible to all EU citizens and that they should be proportionate to the nature of the citizens' initiative. The responses also confirmed that a number of requirements are necessary in order to ensure that the instrument remains credible and is not abused and that these requirements should ensure uniform conditions for supporting a citizens' initiative across the EU. The procedure and practical arrangements required for this new institutional instrument raised legal, administrative and practical issues that were established in the Regulation no 211/2011 of the European Parliament and of the Council[1] as provided for in Article 11 of the Treaty on European Union and Article 24 of the Treaty on the Functioning of the European Union. To ensure that this instrument is credible and is not abused some verification requirements were established at national and EU level.

Requirements ex-ante (before the registration of the initiative by the Commission):

- the citizens' committee has to be made up of at least 7 members – EU citizens who are resident in at least 7 different EU countries;
- the proposed citizens' initiative does not manifestly fall outside the framework of the Commission's powers to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties;
- the proposed citizens' initiative is not manifestly abusive, frivolous or vexatious; and
- the proposed citizens' initiative is not manifestly contrary to the values of the Union as set out in TEU.

Requirements post-ante, after the registration and before submitting the initiative to the Commission:

- to reach the minimum number of statements to support (on paper or on-line) the initiative;

The initiative must be backed by at least 1 million EU citizens from 7 or more EU member countries and among collected countries a minimum number of statements has to be reached – equal to the

[1] Regulation (EU) No 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative published in the Official Journal of the European Union L 65, 11.03.2011.

number of MEPs elected in that country, multiplied by 750. For example, in Romania the minimum number of statements is 24.750 (33MEPs * 750 = 24.750).

- to verify the minimum age required to organise and support an initiative which is the voting age for European Parliament elections – currently 18 except Austria, where it is 16;
- to ensure that the statements comply with the models set out by the Regulation (Annex III);
- to collect the statements after the date of registration of the proposed citizens' initiative and within a period not exceeding 12 months;
- to send regularly updated information on the sources of support and funding for the initiative to the Commission;
- to have the certificate, if the collection is made on-line, the certificate enacted by the responsible national authority (each member state will establish the authority no later than 1st of March 2012) is free of charge;
- to submit the statements of support, in paper or electronic form, to the relevant national competent authorities for verification and certification;
- to comply with Directive 95/46/EC[1] in processing personal data needed to the citizen initiative.

After obtaining the certificates from the national authorities, the organisers submit their initiative to the Commission. The Commission in the procedure of the examination of a citizens' initiative will:

- publish the citizens' initiative without delay in the register;
- receive the organisers at an appropriate level to allow them to explain in detail the matters raised by the citizens' initiative;
- within three months, set out in a communication its legal and political conclusions on the citizens' initiative, the action it intends to take, if any, and its reasons for taking or not taking that action.

This procedure affords citizens the possibility of directly approaching the Commission with a request inviting it to submit a proposal for a legal act of the Union for the purpose of implementing the Treaties similar to the right conferred on the European Parliament under Article 225 of the Treaty on the Functioning of the European Union (TFEU) and on the Council under Article 241 TFEU. The ECI is binding on the Commission, which has to take legislative action once an ECI is admissible. However, it is not obliged to simply pass the unchanged ECI text on to the other institutions. Specifically, massive EU-wide public outreach and communications campaigns will be needed to convince over a million people in at least seven different countries to support a given ECI. This could in turn lead to the development of temporary 'European public spaces' where the ECI topic is discussed - e.g., in national media, in community meetings, between friends, etc. (Thomson, 2011, p.6)

But, the new technologies brought to fore a new issue for the ECI, the on-line sign-up and with it a new form of democracy the on-line one. This system is not used in the EU member states but it is required (Spain, 2010). For this the Commission has to provide by 1st of January 2012 the software for the collection of signatures, free of charge. However, the Commission does not intend to propose an on-line collection system on its own website. It would be the responsibility of the organiser to set up an on-line collection system complying with the requirements set out in the Regulation in terms of security and authentication.

[1] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data published in Official Journal L 281, 23.11.1995, p. 31.

4. Conclusions

The Treaty of Lisbon added a whole new dimension of participatory democracy to the European Union in addition to that of representative democracy, on which the Union is founded. For the first time, a treaty gives to every EU citizen an innovative way to be able to exercise the right to participate directly in the democratic life of the EU: The European Citizens' Initiative, which will be the first formal European 'bottom-up' processor in the history of the EU. This means that the European Citizens' Initiative will give citizens a right, which mirrors that of the European Parliament and of the Council in asking the Commission to make proposals. It will oblige the Commission, as a college, to give serious consideration to the demands made by one million citizens.

In order to accomplish its task this new tool has to be user friendly, simple, straightforward, understandable and most of all accessible. So, it has to respect all the Hajer (2005) criteria of participative decision-making process, because this instrument needs to be used in order to foster a European public space. Nevertheless, barriers remain in the way of ECI, such as:

- the petition will not go directly to the Commission but to the national authorities which may determine whether or not all the signatures are valid. The commission will be looking for any excuse to bin the ECI.
- to win support across the required seven countries, the text should be translated into the languages of those countries and should be accurate with the original one.

Even so, the internet will play a key role in the success of future ECIs and Social Media is the best way to achieve the one million signatures. The ECI represents an exceptional opportunity to shape up the EU policy agenda (potentially initiating legislative proposals). Therefore, organizations should reflect on the possibility of integrating grassroots campaigns into their public affairs strategies.

Through the ECI, EU has made 'a big step' for member states' citizens and also for the organization of the institution of the Union. To pass from the representative democracy, to the participative one and in the end to rejuvenate it through a new form, 'the on-line democracy', represents for the EU a new way of seeing the future.

To become a stronger community in a globalized era, *the EU needs the human touch* and this is exactly the spirit of the Lisbon treaty and in particular the ECI strength.

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THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
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The European Legislation and Protection of Trademarks in Romania

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Abstract: *Objective:* The present paper aims at producing a brief account and analysis of the changes that have been made to the Romanian Trademark Law during the last few years in order to achieve harmonization with the European Trademark Law. *Prior Work:* The subject is being researched especially by the authors from abroad and only the last years brought new investigations from the Romanians. *Approach:* The present paper was put together using a synthesis and analytical approach, taking in account different sources from legislation, court cases to papers that have been written about the subject. *Results:* The result of this study indicates a way of harmonizing the internal legislation of Romania with that of the E.U on the subject and future directions of Trademark Law. *Implications:* The present study does its part in the intellectual property studies research area, offering a better view on the problems regarding the trademark law and its naturalization in the legal systems of the member states. *Value:* The study at hand is of great value in understanding the problems and challenges in the harmonization of legal concepts using the example of Intellectual Property Rights in the U.E.

Keywords: trademark; European Union; internal law; legal harmonization

1. Romania – A State Integrated in the E.U., Internal Juridical Efforts

We could begin this presentation by not citing a jurist but a Romanian writer, I. L. Caragiale, who in the III-rd Act, Scene 3 of „A Lost Letter" (1884) relayed the following message through one of his characters, Caţavencu: "I do not want, dear sir, to know of your Europe, I want to know only of my Romania and only of Romania...". We should now ask ourselves if this line that has been written more than 100 years ago can still be interpreted the same way today, from the perspective of Romania's evolution and continuous legislative modifications on its legal stage. Fortunately, Romania is faced with a situation in which, willing or not, it must „know of" Europe and of the European Union, our countries' commitments making certain legislative modifications and initiatives for changing juridical norms mandatory, even if at the moment there is some uncertainty regarding the measure of their actuality or dynamics without the present European legal frame. This is the case for all the juridical domains or branches of law that are now forced to permanently relate to both the different European legal background (depending on the case) and the permanent changes that the European society goes through, in the European legal environment (Evans, 2008).

Of course, as we all know the most effective, practical and by far the most frequently utilized instrument to fulfill such purposes is the European Directive which shows its effects in different domains, one of which being intellectual property.

However, all those changes are integrated into the global environment that characterizes this domain. Major steps had been taken towards a great process of homogenization, coming as a result of the

globalization phenomenon, which has very powerful effects over intellectual property law (Dutfield, 2008). Either the end or the beginning of this, depending on the point of view of the beholder, is represented by the signing of the so called TRIPs – The Agreement on Trade-Related Intellectual Property Rights, as a part of the creation and consolidation of the World Trade Organization – WTO. Through this agreement, the states assumed national legislative changes concerning the patents, trademarks and copyright, establishing the minimal standards for each part (Narlikar, 2005). Presently, the pillars of this treaty are considered to be USA, Canada and the EU. Romania as a part of the EU and follows the guidance of the general directory lines of this international treaty.

Going beyond the entire general Romanian juridical frame, as we already had pointed out, the fine delicate adjustment becomes a priority which must be in tune with the juridical frame of the European Union. Therefore, this is one of the most active domains regarding the tentative of modifying the legislation in the purpose of aligning the national justice system to the European general justice mainframe (Kur, 2008). Such modifications and recent adjustment have been operated within all the essential branches of the main domain of intellectual property rights and attempt to complete the national legal mainframe, in order to properly optimize it with that of the European Union.

Without going into specifics, we would like to mention the already well-known directives which regulate the legislation regarding invention patents, as well as those regarding sub-domains with punctual application – types of plants, drawings, integrated circuits, etc. In addition to this, there is a similarity with the regulation of copyright, some of its elements being connected to these rights. One of the most important components of these rights are the royalties, which have been regulated after some changes made to Law 8/1996 regarding the copyright and the related rights in 2006, as a consequence of the Directive 2001/84/CE emitted by the European Parliament and the Council, regarding the royalties benefiting the author of an original art masterpiece (JOUE, series L, 272/23, 13 Oct. 2001). In this legal domain, as in many other instances, the Romanian Law has transcribed the text of the directive into law, without much discernment or solutions, the efficiency of this legal protection suffering from the total lack of a control mechanism, the entire process being left at the whims and goodwill of the persons implicated in the market transactions of works of art (Jucan, 2010).

Last but certainly not least there is the last modification that regulates the intellectual property rights regarding trademarks and geographical indication, a subject which we will further expand in the following paragraphs. Before we continue, there is one important remark to be made. Even if regarding this domain, the Romanian legislator has remained somewhat passive, even after preparing the legal framework meant to regulate these affairs, it continued to remain a more than blurry legislation, not even comparable with the European legal mainframe. In this regard, the Legal Courts of Romania have taken the task of integrating and turning into account these new European legislative guidelines on themselves, through their rulings. A good example of this would be the ruling of the High Court of Cassation and Justice, the Civil Section of Intellectual Property, Civil Ruling no. 4439, 30th of June 2008. The object of the case was the conflict between a trademark that had been previously registered and a commercial name. Although at the time of the ruling there wasn't an updated version of Law no. 84/1998 regarding trademarks and geographical indications, the Court took into account and underlined the fact that „in applying the dispositions of art. 35 of Law no. 84/1998, referring to the unauthorized use of a sign, the Courts must take the European Court of Justice's jurisprudence into account, respectively the ruling pronounced on September 11th 2007 in the case file of C-17/06 (Celine), which was based on interpreting art. 5(1) of The Council of Europe Directive no. 89/104/EEC" (The High Court of Cassation and Justice). We have to mention that presently, the aforementioned directive is abolished by Directive 2008/95/CE of the European

Parliament and the Council, on the 22nd of October 2008 (JOUE, series L 299/25, 8th of November 2008), which will be the object of the present paper.

In conclusion, it is obvious that, taking into account the deficiencies of the national legislation and the low internal level of protection for trademarks, the Courts have taken advantage of the constitutional stipulations which allowed them such attitudes and have proceeded to applying the European juridical norms, including the jurisprudence of the European Court of Justice. This is of course, a notable gain to the national jurisprudence but also for the doctrine and the legislator itself, which was somewhat forced to make the necessary modifications on the internal legal frame. The abolishment of Directive 89/104/EEC (which dated from the 21st of December 1988) by the new Directive 2008/95/CE came as an attempt to harmonize the legislations of the member states, to which Romania has finally connected itself regarding this aspect in the domain of trademarks and geographical indications.

2. The Relevant National and European Legislation

The internal legislation regarding trademarks and geographical indications is based on Law no. 84/1998, as it was modified by Law no. 66/2010 which entered effect on the 9th of May 2010, which is probably not a random occurrence. This last one was meant to synchronize the internal legislation to the European one, especially to the two European juridical norms regarding trademarks: Directive 2008/95/CE already mentioned and The Regulations (CE) No. 207/2009 of the Council from the 26th of February 2009 (JOUE, series L, no. 78, 24th of March 2004). We will not be referring to the aforementioned Regulations because it exclusively regards the notion of EU trademark, notion that was also introduced within the internal norms (taking the form of a new distinct chapter, Ch. XI, index 1) through the previously mentioned law, which is an element that only superficially affects the intellectual property domain. Given the fact that the main effort of introducing and naturalizing these juridical norms takes place through EU Directives, we will not be referring to the Regulations part of the legislation.

3. The Purpose of the Modifications

The new variant of Law no. 84/1998, after the modifications made in 2010 through the application of the aforementioned Directive and Regulations is one that is greatly updated and adapted to the EU requirements.

The internal law does not expressly stipulate but it was ascertained at the EU level that the legislative inconsistencies between various member states must be effectively thrown aside so that there can be a free circulation of goods and services to the end of brushing aside “denaturized concurrence” (as the directive names it). In this case, the goal would be to assure a good functioning of the EU internal market. Moreover, even if at the present time, the system of the Community Trade Mark is not compulsory, it is considered to be the best solution for the future. Point no. 3 of the preamble of the directive refers to the solutions and advantages which the EU community trademark offers and that must not be ignored.

From a national perspective, the adhesion of Romania to the European Union demanded the intervention of the legislative power. If during 2007, the adhesion year, the juridical norms that protect intellectual rights were not immediately and directly targeted by major adjustments, after the adhesion moment and after the emergence of several significant modifications at the EU level, Romania was

forced to make these changes too. Romania's obligation was on one hand a political one, because of the adhesion treaty while on the other hand it had important economical and commercial valences because of the major impact of the adhesion to the EU on these two dimensions of the Romanian society. Beyond all of this, it was very important for Romania to improve its legal system of trademarks taking in account the fact that trademark protection was very low in the past.

4. The Elements targeted by Law no. 66/2010

We would not start an exhaustive enumeration of all the changes that had been brought by the previously invoked juridical norm. We shall refer only to the most important changes, without indicating some of the articles which had suffered because of their subsequent statute, depending to the previous articles. Some of the novelties brought on by the new law are essential and we will mostly be referring to them.

In this way, the domain of the law's applicability was effectively adjusted through completing art. 1 of Law no. 84/1998 but moreover, the notion of „trademark" has been properly upgraded at a European level through the abolishment of the old art. 2 and the introduction of a new article 2, index 1, subsequently reassigning numbers to all its articles. In this regard, we must underline that the internal law does nothing more than practically to take the definition from the European directive and translate it word by word. This modification did however bring on new upgrades in the general terminology of the domain. The redefinition of the „trademark" is an extremely important step in achieving a more real and effective protection of these types of goods because the previous text was extremely vague and superficial (and which defined the „trademark" as a „sign susceptible of graphic representation employed in the differentiation of products and services of one physical or juridical person from those belonging to others) and could not, under any circumstances, offer an effective protection of these kind of rights (Macovei, 2006). Given the fact that it was difficult to determine which of those signs that can become distinctive are and what is the measure of their distinction, the effectiveness of these legal norms was quite doubtful. Furthermore, the law did not protect other types of signs besides those susceptible to graphic representation so the new legislation made the protection of other kind of signs possible, like holograms and audio signals (Dominte, 2009). Obviously, this enumeration of art. 3 letter a) was just an illustrative one but the brief definition of the notion of „trademark" opened the door to many abuses and violation of the rights of some persons (Macovei, 2006). The present regulation system is much more adequate and takes in account the technological advance and at the same time the fearsome market competition that has spawned a myriad of marketing strategies that revolve around the „trademark" concept, making it an essential one that holds a very important advertising and commercial value. Moreover, we must underline the fact that the protection of the sound trade marks consecrated by the American legal system existed in our legislation before 1998, the present rollback being a natural and logical one.

The redefinition of the notion of „trademark" was desperately needed and assuming the European Union's provisions on the matter, several other consequences have emerged in the modalities of protection of trademarks. Because the new legislation brings clarity to the question of what can be a trademark and what cannot, the degree of protection and the safety of the right's proprietor have grown.

Equally as important are the modifications of the successive articles from the aforementioned law that refer to the motives on which the registering of a „trademark" can be rejected or what are the

conditions of declaring a „trademark" to be void (art. 5 and the following ones). There are now new regulated categories of trademarks, for instance the trademarks that contain signs with a high symbolic signification, especially a religious one, the trade marks that contain heraldic signs, tags, etc. without any permission. In this regard, one of the most developed articles is art. 6, which in its turn draws on article 3 and 4 of the directive that establishes very clearly which are the situations when the registration of a trademark can be refused, drawing the limits for a subjective attitude, enveloping elements of the Community Trade Mark or CTM. All these modifications are linked to the primary change regarding trademarks and the meaning of such a notion.

One of the major changes is the addition of a new chapter in the law – Chapter XII – Community Trade Mark, which regulates a whole new category of a new kind of mark (Dutfield, 2008). In fact, this is the main reason for the legislative changes that have been implemented, in the sense of naturalizing this type of trademark within the Romanian legal system. Even from the directive it results that one of the European Union's wishes is that the CTM to become preferential, encouraging the registration of trade marks under it`s protection, contributing to the European integration. The Community Trade Mark already existed in the European Union, the advantages of this type of trademark being important (Cocoş, 2008). The CE Provision no. 207/26.02.2009 that establishes the registration procedure appeared later, and after that moment Romania immediately took all the legislative measures for its implementation.

For all these Community Trade Marks, the protection is established according the above-mentioned provision (art. 4 paragraph 2), so Law no. 84/1998 should be completed with all these provisions that became internal compulsory law. At the same time, the part that is connected with the trade mark registration procedure was completed, for instance articles 9, 10, etc., as well as the entire IVth Chapter. We will not insist on every change, but we will make a general remark to underline the fact that the new provision almost excludes the arbitrary, concretely stressing the elements that are necessary in registering a trademark.

This approach enjoys both the advantages and disadvantage of the European vision. Thusly, the bureaucracy was not, in any case, reduced but on the other hand, a clear order is induced and the steps and central documents that constitute the registration dossier are this time explicitly referred to throughout the legal text, even if unpredicted situations could still occur regarding the separate request of certain documents by OSIM. Equally important is the fact that, adapting to today's society technological realities, there has been at last an implementation of electronic publishing modalities.

By abolishing article 23-25 of the previously mentioned law, the third person's right to formulate an opposition to registering a trademark was retired aside.

The publicity of the Trademark Register is underlined and the electronic publication to which we referred earlier raises the transparency level of the whole system and becomes, in certain situation a central point in the opposability towards third persons (for instance, in the case of licenses that, until the modification of the law, would become opposable since the registration date) and facilitates free access for any person interested in certain information.

We are not insisting, as we have already shown, on all the modifications that have been applied to this law (for example, the possibility of renewal for trademarks has been somewhat limited), some being just simple grammar adjustments, generally language related (art. 36 paragraph 1 and 2 or others) but sometimes there are some clarifications of ambiguous situations up until this moment (for example, art. 46 regulates the dates from which the ruin dates are calculated) or modification of certain terms

(30 days instead of 3 months for contesting an OSIM decision, art. 86, 15 days instead of 30 for the decisions of reexamination art. 88)

Significant modifications have been also made in that which regards the sanctions, the fine for counterfeiting and circulating infractions being established between a minimum of 50.000 Ron to a maximum of 150.000 Ron.

Finally, OSIM's competences were completed with an obligation to inform the European Commission regarding the national dispositions adopted in the purpose of transposal of the directive, art. 97, paragraph. L.

We will not relay these two texts in the present paper - the internal one and the European directive - so as to be able to follow these identities, not just resemblances. The reality is that at the level of internal legislation, the effort was minimal, without precisely referring to certain aspects but directly assuming (sometimes using the *copy-paste* procedure) the provisions of the directive. For example, the legal provisions regarding licenses or in the case of the reasons of refusal and nullity, the whole text of the directive was taken over. In the second situation, the taking over was realized in a succession that sometimes loses every trace of logical coherence, culminating in a mixture of old internal provisions and new optional ones that were integrally adopted from the directive. All these provisions become more coherent only in reference to the rights safeguarded by a trademark.

The same directive, assumed by the national law, refers to and regulates aspects regarding the rights conferred by a trademark, modalities of limiting or even putting out of the trademark related rights (the emaciation, ruin, sanction for not using the trademark) and also aspects regarding the license contracts that have trademarks as objects. All of these norms have been assumed by the Romanian legislator in their naked form, without modifying them or optimizing them to the necessities of the Romanian environment.

5. The Efficiency of the Provisions and Proposals

One of the first consequences is a somewhat lack in adapting the internal legislation relating not necessarily with European norms but especially with the domains of the contemporary economy. As we have showed, the inner workings of this law show a lack of consistency, an imbalance between these European norms, extremely detailed through the taking over of the mentioned directive and the rest of the legal dispositions that existed beforehand and were kept as such, which sometimes are extremely short-sighted and which, under certain aspects concerning the whole legal text, seems broken off from the rest of the norm or insufficiently regulated. The European Directive has left an almost full liberty in that which relates to the formal modalities of registering a trademark, the due taxes, the sanctioning modalities of breaking the legal provisions, the procedure involved in different litigations, etc. Thusly, the Romanian State has only taken over the modifications recommended by the directive, without proceeding to modify the essence of the rest of the juridical norm. The problem facing the trademark domain is not only one of provisioning but especially one related to applying the law and providing an efficient protection to trademarks.

An example of lack of efficiency is the one regarding the sanction modalities of the breach of the trademark right. Art. 83 and the next one from Law 84/1998 which regulates these aspects related to penal law were also modified.

The European directive however does not have expressly stipulated provisions that can be taken as they are, the modifications command themselves only through the general modifying of the law. Thusly, once a new juridical frame has been established regarding the trademark itself, the modifying of the sanctioning of trademark related breaches was in its turn imposed not only regarding the quantitative aspect but especially regarding deeds relating to the breach of these rights under penal law. As a brief addendum, we must point out that in the Penal Code there are no detailed provisions that could complete these norms but only adopt their current form. As a consequence, as penal law is concerned, the vision has remained the same, although the real market situation imposes an urgent intervention. There is no need in arguing that the market is invaded with counterfeit products, especially by counterfeiting trademarks. At the same time, it is obvious that the circulation and existence of these products represent a breach of not only the rights of the proprietor of the respective trademark but a grave breach of the consumer's rights, which is more or less naively misled by forgeries that are more or less obvious.

The proprietor of the rights benefits from the "action in adulteration", a civil action that can be filed by any interested person who's rights are breached in any way and to whom lesion has been caused but the possibility of identifying every existent counterfeiting on the marker is at present extremely reduced. As a reaction to this, we are beginning to see more and more complaints made by big companies that wish to protect their property in this domain, and so companies like Siemens – civil injunction no. 244/R, 23rd June 2005 Bucharest Court of Appeal, Nokia - civil injunction no. 192/A 31st May 2005 Bucharest Court of Appeal, Adidas – civil injunction no. 1996 8th Dec. 2004 Bucharest Court of Appeal, Tommy Hilfiger - civil injunction no. 341/A 6th Oct. 2005 a Bucharest Court of Appeal, Gucci - civil injunction no. 370/A 27th Oct. 2005 a Bucharest Court of Appeal (Spineanu-Matei, 2006). Adding to these, it seems that complaints filed by internal trademarks of limited circulation become ever-more present, a sign that the reactions against this phenomenon of breaching the law are becoming more and more powerful.

As it was expected, most of the material within this domain, both from a doctrinary and a jurisprudence point of view comes from the western environment, especially the Anglo-Saxon legal area. In this respect, we are facing a great number of studies on this subject and an extensive jurisprudence. In these legal domains, the trademark as a form of property is viewed as an idea that is that is deeply rooted and which in our legal system is not sufficiently outlined and more importantly, not sufficiently respected. Of course, the discussions can vary and mainly take in account the monopolistic tendencies of some big companies that have taken control over a market segment through intellectual property rights, a classical example being the Disney Company. This company massively invests in copyright and trademark – over 5 million USD in 2009 – maintaining monopoly on the chosen segment for a period of 120 years at the present day, this being the interval at which the protection over the companies' products has been extended (Kenny, 2011). In a Business Week study, the most valuable trademarks were considered to be Coca-Cola, Microsoft, IBM and GE (Poltorak, 2002).

In the end, the big companies take in account the essential function of the trademark, function which is somewhat disregarded at the moment in which the legal norm is adopted and the trademark legislation implemented and that function is the regulation of the market and that of competition (Griffits, 2008).

In the future, the legislation would as well have to start taking in account one of the most powerful and problematic threats of the trademarks: the Internet and all the possibilities offered through it (Schwabach, 2007), (Committee on IPR, 2000). Taking in account that the conditions according to

which the European legislation that needs to be adopted is in a less advanced phase that the one in the U.S, U.K or Canada, the need for harmonization and of discovering ways in which this harmonization would be possible, the Romanian legal environment aims at aligning itself to these general efforts, the present juridical norms constituting the base of a process that needs to be continued. This vast and actual trademark domain is, as we have shown, in a continuous expansion and development stage given the conditions of a globalized world economy that is in a permanent state of transformation and in a situation in which there will always be persons that will try to break or elude the legal provisions protecting intellectual property. As a consequence, this legal domain is one that requires a continuous vigilance because the juridical norms would have to keep up with the socio-economical reality and to support a viable and permanent interrelation between intellectual property norms, penal law norms, the general legislation that protects against unfair competition and the regulation of the Romanian customs system.

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THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
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The Role of Romania in Building the New Security Architecture

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Abstract: The approach towards a multipolar world will be long lasting, and the international community will probably pass through a deep restructuring, where the global and regional integration will coexist with the contradictory trend of fragmentation and ranking of the world. While due to globalism there is almost unlikely to have a war between the great powers, the amplification of the asymmetric risks, including terrorism, organized crime and proliferation of weapons of mass destruction, is generating more and more reasons for conflict. Against the background of the rapid decrease of natural resources, along with the accentuated population growth, the battle for strategic resources remained the most stable source of conflict. The fight for them will increase, and the grouping of countries, according to their interests, around the new centers of power, will increasingly shape more clearly. We will probably assist to the affirmation and increase of their pressure in order to attract, in the sphere of influence, a larger number of countries, so as to occupy a place as advantageous as possible, within the new world order. This configuration will be determined by the interests, knowledge capacity, the volume and quality of information, technological strength and access to resources.

Keywords: integration; globalism; international community

1 Introduction

The operation of Romania's accession to European and Euro-Atlantic political, economic and security bodies printed a new vision to the reform and modernization strategy of the entire Romanian society, in its intention of returning to the big European family and of connecting to the universal values, to democracy and to the market economy principles and human rights.

Convinced that its national interests can be promoted, asserted and preserved only within the framework of Euro-Atlantic security structures, Romania considered that its membership to NATO represents the optimal solution to the security guarantees offered by the North Atlantic Treaty. The development and growth of international relations, especially after 1990, the enhancement of the political dialogue and the increase of trust between States have fostered a real close between East and West, virtually meaning the end of the Cold War.

By initiating cooperation projects and programs, NATO and EU countries have facilitated to Central and Southeastern European countries the conduct of the accession process to the two integrating institutions.

In this context, NATO, as an institution with a primary role in the Euro-Atlantic security, provided to the candidate countries for accession to its structures and to its partners the possibility to understand the philosophy of the Alliance, the substance and essence of interoperability, the knowledge of the control system, of its organization, information, logistics and details regarding its budgeting, analysis and decision processes specific to NATO.

2. The Matter Seat

Late political developments, especially after the historical events of November and December 2002 in Prague and Copenhagen, where the two integration institutions, NATO and EU, have made critical steps towards a new configuration of their size, by inviting new members, have marked, according to the views expressed by most political leaders, the end of the division of Europe.

The essential positive transformations in the public, economic, military, financial, social domain, which took place at the level of NATO and EU, as well as at the level of the countries invited to join the great Euro-Atlantic and European families, the development of democracy and market economy principles, the respect for human rights and universal values have positively influenced the period of the international loosening and cooperation initiated after the '90, while ensuring favorable conditions to the materialization for the new security architecture.

As a corollary of these conditions, the specter of large-scale armed confrontations on the European continent was clearly removed, appearing, in exchange, new and exciting challenges and threats generating stress and crisis, which, unidentified, unmonitored and timely unresolved can cause serious damage to the climate of peace and stability at local, regional or even global levels.

Identifying terrorism, organized crime and the proliferation of mass destruction weapons as the main threats to the security of States, required not only the joint efforts of the international community in order to prevent and control them, but also finding and applying new forms and methods of action. (Clava, 2001, p. 147)

The re-entrance to the forefront of global security of the issue of Iraq, while after the 1991 Gulf War the Baghdad regime headed by Saddam Hussein has not complied with the UN Security Council Resolutions on the production, stockpiling and use of weapons of mass destruction and its involvement in supporting terrorist groups, particularly those belonging to Al-Qaeda, which act in the Afghanistan, Pakistan and Iraq represents the reference event of this period, whose consequences can lead to the establishment of important new groupings and guidelines in contemporary international politics. (Clava, 2001, p. 196)

Barack Obama gave his first speech as President of the United States, on 21.09.2009, where he spoke about economy, defense, the withdrawal from Iraq or the Muslim world.

Thus, in terms of defense, he said that he rejects as false the choice between security and ideals. Their founding fathers were faced with dangers that they can hardly imagine, they have drafted a charter to ensure the role of law and human rights, a charter extended with the blood of all generations. These ideals still shine the world and they will abandon them for the sake of selfishness. He, therefore, sent to all other peoples and governments the message that America is the friend of every nation, man, woman and child and that it wants a peaceful and dignified future[3].

[3] Barak Obama' Speech, Washintong, 02:15, 21.01.2009.

Also, the U.S. president noted that the previous generations have dealt with fascism and communism, not only with missiles and tanks, but also with fierce alliances and sustainable beliefs. They understood that not only their power can protect them or that it entitles them to do what they want. Instead, they knew that their power grows through caution, that their safety comes from the justice of their cause, from the force of their example and the temperate qualities of their modesty and ability[4].

However, Barak Obama said that they will begin leaving the Iraq to its people in a responsible manner and by achieving peace in Afghanistan. With old friends and former enemies, they will work tirelessly in order to eliminate the nuclear threat and to remove the specter of global warming. They will not apologize for their lifestyle and they will not plead in their defense; they will say to those trying to reach their goals through terror and killing innocent people that their spirit is strong and that it can not be defeated. He said that they are a nation of Christians and Muslims, Hebrew, Hindu and atheists. They are modeled after each language and culture, coming from every corner of the world, and they knew the bitter taste of the Civil War and segregation and they have exceeded that dark chapter, becoming stronger and more united; thus, they can only to believe that old hatred will disappear someday, that the borders that divide them will be deleted; as the world becomes smaller, their common humanity will emerge. And America must play its role as the path breaker of a new era of pace[5].

The dimensions emerged in the U.S., Great-Britain and their allies on the one hand and France, Germany, Russia and China on the other hand, on how to resolve the Iraqi crisis, have challenged not only the role and place of the main security-oriented international organizations - UN, NATO and the EU - in solving the major problems of mankind, but also the need to redefine the world order resulted after the Cold War.

Far from affecting only the countries in the Persian Gulf, the Iraqi crisis directly addresses the geopolitical future of the planet.

Long before the onset of the military campaign in Iraq, there have been shaped ideas and options regarding the configuration of the new world order. Among the best known and publicized, three of them have made a career:

1. The unipolar option - with the U.S. as a single global superpower; this option has been called by some European analysts the Rumsfeld option;

2. The multipolar option, which relies on a possible alliance between France, Germany and Russia; it was called by some American and European analysts as the Gaelic option.

3. The Transatlantic West option, which is based on the U.S. and the United Europe, which is regarded as a more developed version of what existed during the Cold War.

For now, the idea was not explicitly treated, the option regarding the place and role that China and Russia will be able to play in the geo-strategic plan towards the middle of this century.

Under the impact of Iraqi and Afghan crisis, the two structures of the Euro-Atlantic stability of the past 50 years, NATO and the EU, have been in a position to question the soundness and quality of the relationships of its members. This event is, by its effects, the conjuncture created at the global level which accelerated the shaping, consolidation and expression process of individual positions of certain geopolitical actors against unipolarism in its concrete contemporary form, the one of the U.S.

[4] www.mediafax.ro
[5] www.mediafax.ro

unilateralism. The attitudes were, with few exceptions, the result of decisions taken at national level, and, only accidentally, they have been adopted at the level of decision making forums of UNO, NATO and the EU collective security structures.

Rather than having the means necessary to give consistency and credibility to national options, the main regional actors have made only statements, petitions and joint arrangements with regard to the Iraqi crisis, which, in time, could develop into multinational structures, sufficiently strong to set up a multipolar world.

In these circumstances, the war in Iraq emphasized that, in order to combat new threats such as "terrorism - Weapons of Mass Destruction", the relations between nation-States tend to become defining elements and not multinational arrangements. It is also clear that the reconfiguration of the new world order is ignored, with or without intent, existing collective security structures - the UN, NATO, OSCE, EU.

3. Conclusions

Romania, as part of these international developments, faces the challenges generated by the transformation process and aims to adapt the demands of today's world. Our country has adhered to democratic principles and values thus strengthening its position in the international community, becoming a major player on the international scene. Romania and its army opted unequivocally for the submission to a collective defense and security environment that ensures best the promotion and defense of our national interests.

In these conditions, the Romanian Army, as a fundamental institution of our country, can be adjusted flexibly to the demands and requirements imposed by the dynamics of events, in order to face new challenges. The NATO membership means advantages, benefits, but equally duties, responsibilities. In order to reach them, the transformation is a priority condition. In this respect, we appreciate that we have already a chance, namely that the transformations undertaken by the military institution in order to become an ally army are held simultaneously with the transforming measures set by the Alliance Summit in Prague[1].

[1] *Gandirea militara romaneasca* – Revista de teorie si stiinta militara editata de Statul Major al Armatei Romane, nr. 5, septembrie – octombrie, 2008.

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Aspects of Comparative Law regarding the Interceptions and Audio or Video Recordings

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Abstract: The area of law-breakings for which can be disposed the interception and registration of the phone calls can be pretty wide. Therefore, in the case in which solid clues exist that one person would have committed, as an Originator or Participant, law-breakings against the safety of the State, of high treason, or directed towards one land that jeopardize the international safety or the defense capacity of the country, these measures can be authorized. The present piece of work suggests a comparative analysis between national regulations and the international ones, in the material submitted to study, in the conditions in which we can notice, at the European Union level, a consolidation of the cooperation in the penal jurisdiction.

Keywords: interception; audio-video recordings; human rights

The interceptions and audio/video recordings are means of prove both in national regulations and in the legislation of other states, obeying special procedures.

In article 8 of the European Convention of the Human Rights[1], having the title "The right to respect private and family life" it is specified that: "any person has the right to respect their private and family life, their home and correspondence." That is why it is not admitted the interference of a public authority in exerting this right but as long as this interference is specified by the law and if it represents a measure that is necessary for the public safety, national security, economic welfare of the country, the defence of order and the prevention of penal acts, as well as the protection of health or others' rights and liberties.

As for the phone interceptions, the Court states that, even though paragraph 1 of article 8 does not mention the phone conversations, they are implied, being comprised in the notions of "private life" and "correspondence" taken into account by the text. (Barsan, 2005, pp. 591 and following)

A compared analysis between the specifications regarding the problem discussed presents special importance, in the conditions where it is noticed, at the level of the European Union, a consolidation in the penal field, significant contributions in this respect being the principle of mutual recognition of the law decisions, the European mandate of arrest and the frame regarding the intensification of the

[1] Ratified by our country by Law no. 30/1994 regarding the ratification of the Convention for the defence of human rights and fundamental liberties and the additional protocols to this convention, published in the Official Monitor, Part I no. 135 from 31.05.1994

cooperation in the field of combating terrorism and trans-border organized criminality[1].

Thus, from the perspective of these considerations, we will present in detail below, as an exemplification, the legal specifications in the legislation of some countries, regarding the interception of communication.

In the German system, listening to the conversations is allowed as long as there are enough clues to suppose that a person committed personally or as an accomplice, a serious crime (murder, genocide, rape, drug smuggling, organized crime, etc.). Also, in order to dispose of this measure, it is necessary that the supposition should be founded, a simple presumption being insufficient, and thus the investigations cannot be realized, aspect that supports the subsidiary character of the interceptions.

According to the German legislation, it can be dispose to intercept and record the phone conversations if the suspected person committed a crime against peace, crimes of high betrayal, or crimes endangering the safety of the democratic state, or against a land and endangering the international security, or if it was committed a crime against the capacity of defence of the state. At the same time, in the German law it is disposed this measure also if some person committed a crimes against the public order or has committed some deed to instigate or be an accomplice to escape, or instigation to rebel, done by a person without military quality, according to the article 16, article 19 reported to article 1, paragraph 3 from the Penal Law of the military staff.

At the same time, the Code of German penal procedure also specifies the fact that ordering the interceptions must be done by the instruction judge or, in case of emergency, the prosecutor, whose decision must be confirmed by the judge within 3 days. The mandate to authorize the phone listening confers, at the same time, the right to record the communications on magnetic tape. During the audition, the court can opt for playing the tape or reading the transcription of the conversations. (Delmas-Marty, 1995, p. 98)

At the same time, the Code of German penal procedure also specifies the fact that ordering the interceptions must be done by the judge of instruction or, in case of emergency, the prosecutor, whose decision must be confirmed by the judge within 3 days, otherwise the order will be null. The order must be written and must contain the name and address of the person who will be intercepted. Actually, it must mention the type, volume and duration of the measure, which can be of maximum 3 months. This duration can be extended though, until three months at the most, if there are accomplished consequently the specifications of article 100a of the Penal Code. The mandate of authorisation of the phone interception confers at the same time, the right to record the communications on magnetic tape. During the audition, the Court can opt for playing the tape or reading the transcriptions of the conversations. The interceptions and recordings on magnetic tape or any other type of support are done if there are founded clues regarding the preparation or committing a crime, for which the penal tracking is done ex officio, and the interceptions and recording are imposed in order to find out the truth. The interception and the recording are done with the grounded authorisation of the court, in the cases and conditions mentioned by the law, upon the prosecutor's request.

In the English system, the interceptions and phone recording are regulated by *Communication Act*, 1985. They cannot be done without a mandate given by the Home Secretary (*Home Secretary*), valid for 6 months, with possibility of renewal.

[1] Prof. PhD K. Himberg, The Crime Laboratory of the National Bureau of Investigations, Finland, "Presentation of the main scientific progress made in proof in criminal cases," 2008.

The investigations are done by the police organs that, by means of authorisation issued by the Home Secretary, can proceed to listening to the phone conversation in some cases especially mentioned: if the national security or the economic one of the country is in danger, or to prevent committing a crime sanctioned with prison for more than 3 years, or involving the use of violence, endangering an important financial interest, or is done by a large number of persons following the same purpose.

The judge does not have any power of control over the interceptions, they not being under their motivated authorization. The person who discovers that they are listened to can exert the attack of appeal in front of a special court, formed by lawyers appointed by the government. The court thus informed has the obligation to verify if it was respected the legal conditions of being intercepted. (Delmas-Marty, 1995, p. 152)

In the cause Malone vs. Great Britain[1], the Court noticed that the phone interceptions are not subordinated to a mandate of the Ministry of Home Affairs and underlines the contradictions contained in the jurisprudence and government interpretation. In this case, the court noticed the lack of foreseeable character and, thus, the violation of article 8, since the "English right regarding the interception of the communication is quite obscure and the subject of divergent analyses [...] and does not indicate clear enough the extension and modalities of exercise of the discretionary power of the authorities in this field."

In the Belgian system, before 1994, there was no special law to regulate the interception of phone conversations, so that the judge of instruction was not authorized to order the interception.

Beginning with the Law from 30 June 1994, the judge of instruction is allowed, for certain serious crimes, already consumed and limitedly mentioned, to authorize the listening to and recording of private conversations, and be informed about it. Also, regarding the period of time for this measure, the Code of Belgian procedure specifies the fact that the authorization can be given for a period of maximum one month, and it can be extended for one more month at a time, for six months maximum[2].

In France, on 10 July 1991 was adopted Law no. 91-646 related to the secret of the correspondence, regulating the interception of the phone conversations, conferring a legal existence to the Inter-ministry Group of Control (I.G.C.) and interceptions. (Cristescu, 2002, p. 14)

The law mentioned above authorizes two categories of interceptions, judiciary and administrative interceptions, respectively. Thus, the *judiciary interceptions* are, after the apparition of the mentioned law, specified and regulated beginning with article 100 and until article 107 in the Code of penal procedure. This category of interceptions is ordered by the judge of instruction in the frame of a criminal or correctional business, when the necessity of gathering information is urgent and the punishment of prison specified by the law for that deed is equal to or more than 2 years. The activity is done under the authority and control of the instruction judge who ordered it.

The decision of the instruction judge, settled for an initial duration of maximum 4 months, can be extended by repeating the whole procedure, with the same conditions of form and duration in time and must comprise all the elements to identify the relations to intercept, the crime motivating the decision to intercept and the duration of the activity.

The judge of instruction or the officer of judiciary police can ask the agents qualified in the field, to proceed to the installation of the device to intercept the phone conversations. They must write down a report for each operation to listen to and record, where it is mentioned the date and hour of beginning

[1] CEDO, 2 August 1984, no. 8691/1979, Malone vs. Great Britain.
[2] Ibidem, p. 200.

and end of the operation.

The information obtained, but only the "documents of information useful in finding out the truth" are transcribed in a report, and the communication in foreign languages are transcribed in French with the assistance of an authorized interpreter.

The supports to store the recordings are kept sealed. They are destroyed upon the Prosecutor Office's request, at the expiry of the duration of the public action started by the judiciary organs, an occasion to write a report of destruction.

As for the interception of the phone conversations of the persons having the profession of a lawyer, judiciary assistant or parliamentary, it cannot be done unless the instruction judge informs the Council of the Bar association where the lawyer belongs, the president of the National Assembly or the Senate, respectively.

The administrative interceptions are the phone security interceptions, authorized with extraordinary title by the Prime Minister, having as an object the research of some information of special nature, namely that regarding: "the national safety, the security of the scientific and economic potential of the country, the prevention of terrorism, criminality or organized crime, the prevention of restoration or maintenance of extremist groups." (Delmas-Marty, 1995)

At the same time, in the French legislation it is specified, in article 100-6 of the Code of penal procedure, that the recordings are destroyed, by the prosecutor's diligence, at the expiry term of prescription of the public action. In this case, the instruction judge has the monopoly in the procedure of the interceptions. No legal disposition authorizes the judiciary police to proceed to intercept in the frame of a preliminary investigation. It is noted the fact that the specification mentioned is judicious, since the solutions not to start the penal tracking are not temporary, but also not final.[1]

In the Italian system, in order to impose an interception and recording of somebody's conversations, a representative of the Public Ministry must formulate a request to a judge for preliminary investigations, when it is considered that the interceptions are compulsory for the investigation. They will be authorized in case of crimes that are punished with prison for more than 5 years, crimes related to smuggling or drug smuggling or gun smuggling, or when the phone is used to commit a crime (such as a threat on the phone).

The permit – to intercept conversations – can be obtained only for 15 days, yet it can be renewed.

The results of the interceptions are transcribed in special regime, they can be made available for the accused' council for the defence. In case of emergency, the Public Ministry can give up the judge's authorisation for maximum 24 hours. In this situation, after the expiry of the term indicated, it is required to validate the operation by the instruction judge within 24 hours, otherwise the interceptions cannot be continued, and their results cannot be used.[2]

The persons responsible for the fight against mafia or anti-terrorism, benefits from special power to organize interceptions, avoiding this process. (Diaconescu, 2000, p. 28).

In the Spanish system, the intercepting of conversations is done according to the Law of penal procedure, having the name of "Ley de enjuiciamento criminal." According to this law, the judge is the one who can authorize to retain the private, postal and telegraphic correspondence of the investigated person, as well as to open and check it, if there are clues that by these measures could be

[1] Means of prove obtained illegally, Magazine of commercial penal law, www.mateut-budusan.ro
[2] Ibidem, p.

proved some deed or important circumstances for that investigation.

Consequently, in the case Venezuela Contreras vs. Spain[1], regarding the interception of a phone line in the frame of some penal investigation, the Court considered that the Spanish constitutional dispositions in the sense that "the secret of the communication and, particularly, the post, telegraphic and phone communication, is guaranteed, except for when there is a judiciary disposition," do not accomplish the condition of foreseeable character. Even though it accepted partially the support of the Government that the judge followed to observe the legal conditions (indicating in the Ordinance of that person, the crimes they were guilty of, the controlled phone line, the duration of interception, etc.), the Court drew the conclusion that the constitutional dispositions and those in the code of penal procedure were not clear enough in the moment of producing the events, and did not specify the extent and the modalities to exert the power to appreciate of the authorities in the field of interceptions.

The measure to intercept can be disposed also by the Ministry of Home Affairs or, in its absence, by the Director for State Safety, but this disposition must be communicated compulsory to a competent judge. The latter, within at most 72 hours, can confirm or revoke this resolution. (Alvarez, 1996)

In the Danish legislation, the secret of the correspondence and communication can be violated only if there are grounded reasons to suspect that the correspondence comes or is for a person suspected for some deeds of penal nature. Breaking this fundamental right is presumed to be of essential importance for the development of the investigation and for it to have as an object a crime committed with intention and that is punished with prison for at least six years.

The interception of the conversations can be authorized thus, if there are fulfilled the conditions mentioned above. The code of Danish penal procedure, in article 782 paragraph 1, stipulates the necessity that the measure of interception should be proportional with the importance of the case.

The measures to intercept and register, according to the Danish legislation, are disposed only by judge order. This must contain, according to the Danish Code, the phone number, addresses and circumstances specific to the case, and the duration of applying the measure must not be more than 4 weeks.

In form of judge order, this duration of interception can be extended with 4 more weeks, every time when it is necessary. As in the case of the other legislations, in case of emergency, the measure can be taken by another judiciary organ. In this case, the measure can be disposed by the police, with the obligation that within 24 hours to inform the competent instance, and the latter will decide to maintain or cancel the measure, and in case it considers it necessary, it will inform the Ministry of Justice.

Actually, in the Anglo-Saxon legislation, due to the common law, the penal procedure has a form a lot different from the one in the law on the continent. Thus, ***in the United States of America***, the means of proof are regulated by the law called *Rules of evidence.* By issuing this law, it results the fact that for the first time in the history of the United States there are laws of uniform rules regarding the proof admissibility in the procedure of the federal courts. The legislation of the USA has a series of specifications to limit the sphere of obtaining proofs, such as the rule called *exclusionary rule* with application in the incipient stage of the penal investigations, and specifying that a proof, even though it could be useful to solve some case, will not be used in court unless it was obtained observing the legal procedure. (Sava, 2002, p. 55) Another rule is that called the *fruit of the poisonous tree* specifying that, if a proof legally obtained is related to another proof that was illegally obtained, then the proof legally obtained will not be used in the trial. (Sava, 2002, p. 56)

[1] Court EDO, 30 July 1998, no. 27671/1995, Venezuela Contreras vs. Spain RJD 1998-V no. 83.

The federal rules regarding the proofs (Federal Rules of Evidence) that are incidents in the American penal trial settle that there are admitted the relevant proofs. This type of proofs means the "*proof that has any tendency to make the existence of any fact that determined the penal cause more or less probable than it would be without that proof*". (Mueller & Kirk, 1994, p. 7; Lilly, 1987, p. 5)

Even though the proof is relevant, it is possible not to be taken into consideration, if its proof value leads to causing an unfair prejudice, if confusion appears among the objects of the proof or if it is confusing for the jury.

In the Swiss legislation, it is mentioned expressly the destruction of the information that is not necessary in a cause, as indicated also CEDO.[1] Thus, it was noticed that the Swiss law is not clear enough, if it supposes the possibility to preserve information. It was appreciated that there is a violation of article 9 in the Convention, both settling a file of information by the Public Ministry, and the preservation of files represent an interference in the private life, not specified by the Swiss law.[2]

Some authors appreciated, in virtue of rallying at the dispositions of the legislations of the European states, the fact that it is imposed to modify the article 91[1] in the current Code of penal procedure, in the sense of eliminating any doubt regarding the violation of the persons' fundamental rights and liberties. In conclusion, any interception must be done only with the motivated authorization of some judge, the court informing all the persons whose conversations have been intercepted.

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****Magazine of commercial penal law*, www.mateut-budusan.ro.

[1] CEDO, cause Hermann Amann vs. Switzerland, 2000.
[2]Means of proof obtained illegally, Magazine of commercial penal right, www.mateut-budusan.ro.

THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

General Considerations Regarding the Interceptions and Audio-video Registrations Related to the Judicial Practice and Present Legislation

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Abstract: The present paper tries to analyze the controversy of the admissibility of the interceptions and audio-video registrations in the phase of the precursory documents cannot be admitted. The fact that interceptions and registrations can be disposed even before starting the criminal prosecution, respectively before starting the criminal process or even before committing an offence is to bring severe prejudices to the right of a fair process and the right to a private life in the way in which these are stipulated in the Constitution and in the European Convention of the Human rights.

Keywords: precursory actions; evidences; admissibility; prosecuting charges

Because of the too general name of the precursory documents and lack of specification regarding the content and their limits, in the doctrine and judicial practice contrary opinions were expressed related to the interceptions admissibility and audio-video registrations in the phase of the precursory documents. Our opinion is in the sense in which the interceptions and audio-video recordings are admissible as evidence procedures, respectively evidences, only in the circumstances of starting the prosecuting charges in question, point of view expressed by the Constitutional Court in the summary of the Decision No. 962/2009 and by the New Code of Criminal Procedure.

Thus, it is shown in the decision above mentioned that, undoubtedly, administering these evidences is placed within the first phase of the criminal process, the prosecuting charges could be started, in conformity with the Article 221 & 228 from the Code of Criminal Procedure not only in *personal but also in rem.* At the same tine it was shown that the possible inobservance of these stipulations does not constitute a problem of constitutional debate but one of applying the law.

However the opinion of the Court was expressed within a decision of rejecting of one constitutional challenge of art, so that the point of view exposed does not have effects *erga omnes,* context in which the organs of criminal prosecution and the Law Courts are not kept to respect it, and the fact that the law does not condition deliberately this procedure of starting the criminal prosecution (or the fact that the law does not forbid explicitly in front of the precursory documents), does not determine supporting according to which this procedure is allowed.

The stipulations of the Code of Criminal Procedure, stipulate at the Article 91^1, the coercitiveness that the interceptions or audio-video registering to be realized only when the establishment of the situation in fact or the identification of the causers cannot be realized on the bases of other evidences. This

express provision of the law is of strict interpretation, the legislator establishing that the interceptions and audio-video registering be allowed in the append ant and only if the use of the classical evidence cannot lead to establishing the situation in fact or to identifying the causers. From another perspective, retaining as commissioners in order to do the precursory documents that lay on the basis of initiating the criminal procedure are the Organs of prosecuting charges and other state organs expressly stipulated by the law in the article 224 line 2, article 224^1 C.pr.en, in the conditions in which we could estimate that the interceptions and audio-video registering could be made in this phase, we must observe that the authorization of the judge by which the interception is disposed represents a precursory action and involving the judge in this phase is difficult to sustain.

Therefore, it is tackled if the public prosecutors or the judges are competent in suggesting and reducing the scope of some fundamental rights outside the criminal instruction, in the way in which CEDO defines the prosecuting charges. Although we admit the idea of the rights protection and the fundamental liberties in front of some abusive actions by instituting the fulfillment of the condition of the existence of the authorization given by the judge, we believe that, as far as the initiating of the prosecuting charges was not disposed in one cause, the judge shouldn't get involved, because this intervention can be interpreted as a substitution of this to the official examinations, by developing other activities than those judicial, that take place within a criminal process.

Another argument is that in the case of emergency, when the delay of obtaining the authorization would bring severe prejudices to the activity of prosecuting charges, the public prosecutor that does or watches the prosecuting charges can dispose, by motivated order, the interception of the conversations for a period of no more than 48h. Else the public prosecutor's order is a procedural document of argumentation, of justification by which it is carried out an act or a procedural measure that cannot be disposed with the exception of the criminal process. Even more, the judge is forced to motivate the authorization closing of the interceptions and of the audio-video registrations that, in conformity with 91^1 line C.pr.en, must contain the concise indications and facts that justify the measure, and also the reasons for which the establishment of the situation in fact or the identification or localizing the participants cannot be made by other ways, or the research would be very delayed.

In these conditions, we consider that this cannot motivate the authorization finality but in the hypothesis in which the legislator has foreseen the possibility of the court to ask to the criminal prosecution organs all the data that are on the basis of the authorization solicitation of the interceptions and audio-video registering, not only in favor but also against the person viewed. *Per a contrario,* in the way in which these elements are defining for the active role of the court, that cannot be exerted but within the criminal process, results undoubtedly that in this situation the criminal prosecution must be legally initiated. Another argument in sustaining the inadmissibility of making the interceptions and audio-video registrations in the phase of the precursory acts is that, when the legislator refers to certifying the registrations, in line 2 of the article 91^3 C.PR.EN, specifying the fact that ' the assessment record' is certified for its authenticity by the public prosecutor that makes or supervises the criminal prosecution in discussion', that leaves without certification the situation of the precursor documents. Besides, the situation of the interceptions and of the audio-video registrations as part of extra procedural litigation comes in contradiction with the article 98 C.pr.pen, where we will observe that the legislator, expressly, establishes a similar material that is keeping the correspondence only concerning the accused and the defendant. In these conditions we believe that a possible interpretative severance of the law is not justified, because the essence of the measures is identical.

We notice that the legislator had in view, and in the case of the domicile search (article 100 C pr.pen), the condition that this should be disposed after the initiation of the criminal prosecutions a guarantee

against possible abuses regarding the rights and fundamental liberties. Also, if we could interpret the law text in the way it is interpreted in the probation of the Superior Court, we appreciate that the stipulations of the art. 26 and 28 are not respected from the Constitution and the stipulations of the art. 6 and 8 from the European Convention, and as for the Constitutional provisions that weren't respected, it is necessary to be made a distinction between the moment of getting and the moment of using of these probation ways. In this way, the interceptions disposed and realized before starting the criminal process, so in the moment of acquirement, contravene to the right of private life, and in the moment of using these, the stipulations referring to the right to a reasonable process are defeated.

As a matter of fact, lacking of the legal text delimitations regarding the forms of the law-breaking, it comes to the conclusion that making the interceptions can be authorized even though it is discovered that the existence of preparatory acts or of a not inculpative attempt, aspect that brings into discussion not only respecting the principle of adequacy and also the equity of the criminal process. Thus, related to these aspects, in order to appreciate the adequacy of the intromission with the aim pursued, it is necessary to be quantified the gravity of the law-breaking. In the circumstances in which this was not actually committed, it cannot be evaluated the respecting of this principle. Related to the aspects presented, we estimate that, in the circumstances in which all the modifications regarding the dispositions relative to interceptions and audio-video registrations, were meant to let the legal texts without an ambiguous meaning, these are, anyway, in probation, applied and used, many times, to the detriment of the person executed and whose communications are wished to be intercepted and registered.

Even DNA public prosecutors expressed in the doctrine a series of considerations according to which the interception and audio-video registering cannot be realized but after starting the criminal prosecution. We reunite to this opinion and appreciate that, in as far as only the assessment records of acknowledging making the precursory documents can constitute probation means, and the audio-video registering are brought under regulation as means of probation, freestanding and also in the consideration of the fact that gathering the probations is realized only in the course of the criminal prosecution. In this way we mention that making interceptions in the phase of the precursory acts must be reported at the stipulations of the article 64 last line C pr. Pen, the means of probation obtained illegally couldn't be used in the criminal process.

Starting from the formal character, of strict application, of the norms of criminal procedure, we appreciate that through the expression 'cannot be used in the criminal process', the legislator understood to introduce a procedural sanction exactly for removing, by the operation of estimating the probations those means of probation obtained with breaking the law. The procedure of the invalidation of the interceptions and registrations obtained with breaking the legal instructions was presented in the specialty literature by realizing also in front of the prosecutor, by a simple solicitation or memoir through which it is invoked the illegal character of the probations or through a complaint. Formulated on the bases of the article 278 C pr.en, but also in the judicial phase, either on plea modality that is put under the discussion of the parties, or by exerting a way of charging. It was appreciated that these probations will follow the common regime of the invalidities, stipulated by the article 197 C.pr.en, the solution of returning to the prosecutor not having application in this situation, because form the legal text it is drawn the conclusion that the probations in this way obtained cannot be done again, no matter of the nullity type.

Anyway, it is considered that, in the consideration of the article 64 line 2 and of the arguments for which it was adopted, representing a new guarantee of the right to defend, it should be admitted that the defendant could use, in his defense, by a probation obtained illegally. (Mateut, 2004, pp. 133-144)

Our point of view, in the sense of inadmissibility of the interceptions in the phase of the precursory documents, is sustained by a part of specialized literature, by the stipulations of the new Code of criminal procedure, by the Constitutional Court of Romania, and also of several decisions from the judicial probation[1] that mentions solutions according to which the probation means were removed that were constituted of audio-video registering. Done previously to the initiation of the criminal prosecution by considering being contrary to the stipulations of the article 91¹ C.pr.pen.

As for the specialized literature, an opinion that comes in supporting the point of view above mentioned shows that the interceptions and audio-video registrations cannot make part of the category of the precursory documents, conditions in which, under no circumstances, cannot be done within the precursory documents. Specific documents to the criminal prosecution phase as a distinct procedural phase of the criminal process, but neither documents that are not necessary for the criminal prosecution. (Mateuţ, 1997, p. 47) According to the author of this opinion, the audio or video registering represent ways of investigation used by the organs of criminal prosecution, for discovering the malpractices and of the identity of the law breakers, and their result can constitute a means of probation that leads to establishing the truth objectively. (Mateuţ, 1997, p. 70) The previous point of view is strengthened by the argumentations of another author[2] that give the opinion in the way that this measure can be disposed only after the start of the criminal prosecution, procedural moment that delineates the legal frame in which the organs of criminal prosecution can develop all the associated activities of the object of criminal prosecution. It was also shown in the doctrine the fact that, because the precursory acts are done before starting the criminal prosecution, about which the causer does not know yet, for realizing this activity cannot be done acts that trench the interests and rights of a person. (Pintea, 2000, p. 94)

At last, one last opinion in this way, (Jidovu, 2000, pp. 202-203) sustains the fact that for authorizing the interceptions and registering of the conversations and communications it is necessary the start of the criminal prosecution, at least *in rem,* taking into consideration some arguments of normative text. Thereby, it is mentioned that the authorization request for interception and recording is raised by the district attorney that executes or supervises the criminal prosecution and in this regard, the legislator leaves no possibility of interpretation. Likewise, the authorization can be given only by the court that would have the necessary competency to judge the case in first degree jurisdiction or that has in its constituency the Public Prosecutor from which the District Attorney executing or supervising the criminal prosecution is part of. Also considered relevant in this respect is the interdiction of using the recordings between the lawyer and the represented or assisted party. This disposition refers to a well-established procedural framework, being known that the common procedural act triggering the criminal process is, usually, the starting resolution of criminal proceedings and only by exception the minutes of the audience offense or flagrant crime, or even the district attorney's order resolves a conflict of jurisdiction. Another argument is the text of the article 91^2, second paragraph of the Criminal Procedure Code, which expressly refers to the situation of serious prejudice to the criminal investigation activity, if the district attorney that executes or supervises it wouldn't dispose, temporarily, by order, authorization of interception. Moreover, the order is entered in the special register stipulated in the article 228, paragraph 1^1 of the Criminal Procedure Code, where only the starting resolutions of the criminal proceedings are mentioned. Additionally, in the line of reasoning is

[1] The Court of Justice Braşov, criminal section, Criminal sentence no. 51/S/03.02.2010, www.jurisprudenta.com; the Court of Justice Neamţ, Criminal section, Criminal sentence no. 116/P/09.06.2010, not published

[2] Anastasiu Crişu, Procedural problems regarding the law application for preventing, discoveruing and punishing the corruption actions, in the magazine Fight against corrpution and organized criminality, edited by the Public Ministry – the Centru of Continuos training of the prosecutors, p.152.

invoked that according to the article 91^3, paragraph 2 of the Criminal Procedure Code, the interceptation rendering minutes is certified for authenticity by the district attorney that executes or supervises the criminal prosecution, whether they bear or do not bear interest by contents. Moreover, the non-court solutions referred in the article 91^3, paragraph 3 are release from prosecution, termination of criminal prosecution or closure. The legislator refers in the article 91^3, paragraph 6 to the investigation resuming, in which case the records that couldn't be exploited can be consulted or copied. However, all situations of resuming the criminal investigations, as they are regulated in the article 270 of the Criminal Procedure Code, necessarily involve criminal investigation. In the purpose of these observations, it was tried modifying the Criminal Procedure Code regarding the interception and recording, in order to expressly incorporate the need of beginning the criminal investigation prior authorization to conduct intercepts. Thus, the draft law for approval of the Government Emergency Ordinance 60/2006, in its initial form was submitted for promulgation, has introduced three new paragraphs in the article 91^1 of the Criminal Procedure Code, according to which "The request of the district attorney that executes or supervises the criminal investigation, referred in the first paragraph must be together with a copy of the starting resolution of the criminal prosecution ordered according to the article 228 of the Criminal Procedure Code. The interception authorization given by infringing the provisions of this article is null. Interceptions and recordings made under an invalid authorization cannot be considered during the criminal proceedings. Romania's President has raised a request for review in this matter, requiring the removal of the three paragraphs, motivated by the fact that these are obviously blocking the activity of the criminal prosecution bodies and the new provisions would result in depriving effectiveness of the provisions relating to interceptions and audio or video recordings. The Public Ministry's point of view was expressed in terms that this alternative text is not justified. The mandatory beginning of criminal prosecution would be contrary to reason of the institution of interception and recording calls or communications. According to view formulated this way, the request for interception authorization for a person in criminal proceedings, together with the obligation of the prosecution body to inform the person concerned about this circumstance is equivalent with preventing the author of a crime.

In this view, this applies into practice by disclosing the investigation before the initiation of the operational moment, and by transforming it in something written, in the Code of Criminal Procedure, of evidence[1], consequently, the mentioned texts remaining in their original form, as they were stipulated. Following the request for review of the President of Romania, the provision that stipulated that the application for authorization be accompanied by a copy of the prosecutor's resolution for initiation of criminal prosecution has been removed. Regarding this law for approval, as amended after the application for review, the Constitutional Court, through Decision no. 54 of 14.01.2009, found that the provisions of the only article pt. 1-23 of the Law on the approval of Government Emergency Ordinance no. 60/2006 are unconstitutional[2].

Our opinion is supported by some of the solutions given in practice, so in the first case, the Brasov Court[3] noted that "though the Decision dated 27.11.2006, of M. Court, the interceptions were found unlawful, and through the decision of removal the documents in the case were maintained, the court can not take into account these evidence, that are to be taken out." The same resolution to remove the

[1] The views of the Public Ministry on the amendments to the Code of Criminal Procedure and Criminal Code regarding the Government Emergency Ordinance no. 60/2006 amending and supplementing the Criminal Procedure Code and other laws, www.mpublic.ro.

[2] The Constitutional Court, Decision no. 54 of 14 January 2009, regarding the unconstitutionality of the unique Article pt. 1-23 of the Law on the approval of Government Emergency Ordinance no. 60/2006 amending and supplementing the Criminal Procedure Code and other laws, published in Monitorul Oficial (Official Journal) no. 42 of 23 January 2009.

[3] Brasov Court, criminal section, judgment no. 51 / S / 03.02.2010, www.jurisprudenta.com.

evidence obtained by intercepting and recording telephone conversations of defendants, being considered illegal, was also adopted by the Court in Neamt[1]. Also, by Ordinance dated 28.06.2004 issued by the Prosecutor's Office of the Court in Iasi, the case prosecutor assesed that audio and video recordings acquire probative value only in the context of the initiation of the criminal procedeengs, otherwise requiring their removal as being illegal. Moreover, it considers that "such an interpretation <<add to law>> (criminal procedure law is interpreted strictly, and on behalf of a single text-art. 91 Criminal Procedure Code) denies the principle of corroborated interpretation of all paranthetical texts.

Thus, it is to be recorded that this procedure is governed by Title III of the Code of Criminal Procedure (Evidence) evidence being administered during the trial (after the initiation of criminal proceedings) and not outside it (extrajudicial). The view according to which the audio and video interception and recording can not be approved during the submission of documents stage is also supported by the Court of Appeal Constanta, Criminal Section and the juvenile and family cases, according to criminal judgment 59/P/30.04.20092. Thus, in the above mentioned decision, the court has analyzed the legality of the administration of evidence, namely audio-video recordings from the ambient environment, which are regarded as illegal. The reason adduced noted that under Art. 64 parargaph 2 Criminal Procedure Code, the evidence must be legally obtained to the contrary they can not be used to assert guilt. For this reason, the court established that "regarding the minutes of the playback of the telephone call in the ambient environment between the defendant and the informer, and well as the carrier with the copy of the discussions in the ambient environment of the two, are not taken into account, the objection of the defence being well-grounded because the recording had been done before the initiation of the criminal proceedings, contrary to the provisions of art. 911 Criminal Procedure Code.[3]" Against that Judgment, the National Anticorruption Directorate appealed, on the grounds that this evidence was improperly removed since it was satisfied the only condition that is required by the law that is to have solid data and clues related to the existence of a crime, considering that the interception of ambient talks before the initiation of the criminal proceedings is allowed. The High Court of Cassation and Justice' Decision no. 2521 from July 1, 2009[4] considered the criticism from DNA, regarding Judgment 59/30.04.2009, as being just, taking into account the constant practice that the Supreme Court which assessed that interception and audio or video recordings may be allowed during the preliminary stage.

Moreover, the High Court of Cassation and Justice, noted that „compliance with the provisions of the article 91[1], paragraph 1 and 2 of the Criminal Procedure Code is the only validity condition as evidence in the criminal case of communication interception and recording, regardless of the circumstance as being made during the preceeding acts were or were not recorded in the contents of a report, accorrding to the article 224, paragraph 3 of the Criminal Procedure Code. Consequently, the minutes for playback of the incercepted telephone conversation and recorded on magnetic tape available on the criminal prosecution file, conducted during the preliminary acts, with compliance to the conditions and where indicated by law, are considered relevant evidence".[5]

There is an uniform practice of the High Court of Cassation and Justice in this regard.

[1] Neamt Court, criminal section, judgment no 116/P/9.06.2010, unpublished.
[2] Prosecutor's Office attached to Iasi Courtl, file no. 297/P/2003, Ordinance dated 28.06.2004.
[3] Judgment No 59P/30.04.2009 Constanta Court of Appeal, Criminal Section for cases involving minors and family www.mateut-budusan.ro/revista/
[4] High Court of Cassation and Justice, Criminal Section, Decision no. 2521 July 1, 2009, www.mateut-budusan.ro.
[5] High Court of Cassation and Justice, Criminal Section, Decision no. 4481 of 12 July 2006, www.juris.ro.

Thus, by 10/07.01.2008 Decision, it is reiterated, by analyzing stipulations of the article. 91[1], paragraph 1 and 2 of the Criminal Procedure Code, which strictly establishes the legal requirements of realizing interceptions and audio or video recordings, that their legality is not subject to criminal proceedings[1]. However we note that even in theory have been expressed view diametrically opposed to the one expressed by us. In supporting this view is taken into account also the fact that in order for a procedural measure to be ordered, the person concerned has a certain quality (accused or indicted), the legislator always mentioning this. However, the provisions governing the interception and recording material are aimed to the "people" or "offender" who bears the calls and not to the "accused" whose conversations are recorded with authorization from the District Attorney. Also, it is argued that in order for this to be an effective measure, it is required that records be made without the concerned people to be aware of this, which would be possible, in principle, just in the pre-prosecution stage. (Ciobanu, 2003)

This view is supported by another expert opinion, (Slăvoiu, 2010, pp. 177-186) according to which, compliance with those guarantees instituted by disposition article 172, paragraph 1 of the Criminal Procedure Code, where audio or video interceptions seriously diminishes the effectiveness of the evidential process, whereas disclosing the accused of the beginning of criminal investigation determines the self-defense reaction, as well as avoidance to use technical means of communication. Also, it is considers that by disclosing the accused about beginning the criminal investigation one of the specific features of special techniques of investigation is compromised, as defined in Recommendation (2005) 10 of the Committee of Ministers of the Council of Europe. According to the enactment invoked, the techniques used in the context of criminal investigation, whose purpose is gathering information in order to detect and investigate crimes, will be conducted so that the concerned people are not alerted. Also in the doctrine was expressed the view that, as audio or video recordings may be authorized for criminal identification and localization, which involves informing work, it is considered that, without a prohibitive text, these recordings may be realized also as preceding acts, if authorized by law[2]. It is considered that authorizing this evidential process is not subject to the initiation of criminal proceedings, this measure can be ordered also in the pre-prosecution provisions, in order to improve the fight against corruption, organized crime or human or drug trafficking, regardless of whether a crime was committed or its perpetration is prepared[3].

At the same time, it is noted that the legislator has specified in regulating the necessary conditions that in order to authorize an interference with the privacy only the crimes for which an interference is permitted, without concerning the person that must bear the intrusion. (Udroiu & Predescu, 2008, p. 826)

In the reference literature also the principles that must be taken into account are highlighted in order to intercept and record conversations, respectively the principles of pro-active investigation (data or grounds about training), as well as reactive investigation (data or solid grounds about committing a crime), principle of measure proportionality of privacy right restriction due to interception, recording, tracking or tracing, by referencing to the particular circumstances, the importance of the information of evidence to be obtained or the seriousness of the crime and the subsidiarity principle, emphasizing the exceptional nature of the interference with the private life, in order to ensure the fairness of the procedure by avoiding that a significant part of the probation that is taken in a cause to consist in communication, conversation or image interceptions or recording. (Udroiu & Predescu, 2008, pp. 129-

[1] High Court of Justice, penal section, Decision no. 10 of 07 January 2008, www.scj.ro.
[2] Grigore Theodoru, Criminal Procedure, p. 399.
[3] Mihail Udroiu, Criminal Procedure, p. 130.

131) Contrary to these views though, the Constitutional Court recently ruled that legal provisions regarding audio or video interceptions or recordings are within the mean that they cannot be performed under any circumstance before the initiation of criminal proceedings, these not allowing managing the evidence outside the criminal trial, namely the preparatory act phase.[1] But, because these aspects are mentioned in a rejection decision of an exception of non-constitutionality regarding the stipulations of the article 91[1] Criminal Processual Code its effects are produced only *inter partes*, anf *not erga omnes*. More than that, in the context in which the Court of Justice does not have attributions in the sense of institutionalization, the prosecutors and the courts are not kept by this point of view. Taking into account the irregular probation of the courts of justice, we think in the way in which it was imposed the working out of an appeal in the law interest recurs for ensuring and uniform interpreting of the legal stipulations cases in the matter. A possible appeal in the interest of the law is needed to be solved in the meaning of the impossibility of making the interceptions and audio-video registrations in the phase of precursory acts. Thus, starting form the presented perspectives, we appreciate that making within the precursory acts of the registrations and interceptions audio or video, opens practically the possibility of the abuse regarding some rights and fundamental liberties of the persona. Consequently we emphasize the necessity of removing the discrepancies generated by the considerations of certain decisions of the Court of Justice, related to the possibility of the authorization of the communications interception and in the phase of the preliminary deeds, not only through an express regulation and free of ambiguity and also through a compulsory decision in view of interpretation and unitary application of these texts.

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[1] Constitutional Court, *Decision number 962 of the 25th June 2009, regarding the dismiss of the plea of unconstitutional provisions of article 91[1] of the Criminal Procedure Code,* publishd in the Official Monitor number 563 of the 13th of august 2009.

THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

The Analysis of the Pre-Emption Right under the Contract of Sale in the Regulation of New Civil Code

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Abstract: In this paper we will keep under review the specificity of the reported preemption right to the sale contract, according to the article 1730-1740 of the New Civil Code. With the entry into force of the new future regulation, the preemption right will acquire a separate status, being currently known that the legal status of the right under the review is diverse; there are many legal provisions which provide this right in various areas, being excedentary to the sale contract, such as culture, privatization, franchising, intellectual property. According to the analysis of the future legal deposition, it shows that preemption right may have as a source both the law and the contract; in this case it is referred to the legal and conventional right of preemption. We note also that, in light of the new regulations, the mechanism for exercising the right of preemption is similar to the one applicable to the right of preference. **Objectives**: The purpose of this paper is to focus on the usefulness of this new legislative measure designed to establish a proper legal support specific to the holder of this right in the conclusion of a contract in relation to third parties. **Approach**: This topic emphasizes the use of the following methods: observation, comparison and interpretation of laws.

Keywords: preemption; right to preference; consent; New Civil Code

1. Introduction

The application of the new Civil Code will have a great influence in all civil and commercial law, especially in monistic terms that this code requires: the regulation of private law relation incorporates all provisions relating to individuals, family and commercial relations, taking into consideration even the private international law provisions. So the effects of this new regulation[1] will be felt on various levels.

The principle of will autonomy of the parties will allow their ability to choose, within the limits set by law,[2] the manner in which it will conclude or give up the closure of a legal civil act, to establish the content, the way to terminate, modify it within the law and morality (Popa, 2008, p. 14-18). Such legal limits have as juridical reason the protection of some economic and social rights. In this regard, in the case of the contract for purchase and sale, the legislator understood that the interests that should be protected belong particularly to the buyer, recalling here the guarantee against eviction, against hidden

[1] The new Civil Code adopted by Law 287/2009 was published in Official Monitor no. 511 of July 24, 2009, and republished in the Official Monitor, Part I no. 505 of July 15, 2011.

[2] Article 5 of the Civil code states: "It is not permissible by convention or special provisions, the laws that are interested in public order and morals".

defects, questionable clauses that are interpreted in favor of the buyer etc. To these it is also added the right of preemption which we will analyze in terms of the stipulations that are established by the new Code within the article 1730-1740.

2. The Notion of Pre-Emption Rights and the Legal Status in the Light of the New Civil Code

The new rule in matters of the contract for purchase and sale has expanded in scope, presenting aspects of the promise of sale and the promise of purchase, for the sale of another's property, sale with the pact of redemption, selling with the installment payment, the sale at a public auction, sale of rights, but also the right of preemption.[1]

Thus it was expressly dedicated the notion of preemption, the legislator proposed an analysis of the legal nature, of the mechanism of operation, conditions and effects of the exertion of this right, paying also attention to certain conflict issues such as: violations of this right, the contest between the preemptors, the multiplicity of sold goods, the exertion of the right of preemption within a repossession. But it was not given a conclusive legal definition, which would have eliminated the doctrinal controversies, especially in connection with its legal nature. Article 1730 New Civil Code provides: "(1) *As provided by **law or contract**, the owner of the preemption right, called preemptor[2], may purchase prevalently goods. (2) The provisions of this current code concerning the right of preemption are applicable, unless by law or contract it is established otherwise.*"

The legislator mentioned the source of this right, either of **legal nature**,[3] as established by a peremptory norm (Deak, 2006, p. 40) or of **contractual nature**, which brings back the pact of preference, in which case the priority right to purchase is relied on the consent of the parties.

In connection with this double form of manifestation, we appreciate that the legislator was inspired by the French law, specifically from the definition of preemption right, "*aptitude recognized to a person or an administrative entity, under a contract or a legal deposition, to acquire the property of goods, in case of its alienation, with preference to another buyer."* (Jean, 1991, p. 398) We must mention that Professor Eugen Chelaru (1997, p. 15), starting from the same definition, showed that *"the right to preemption is contractual or legal. The preemption right is contractual when it arises from the will of the parties concluding a pact to that purpose, a pact of preference... the preemption right is may arise from the law*" in anticipation of the future orientation established in article 1730.

Depending on the source of this right, it was associated with a new name, either the right of preemption,[4] when the source is the law, or the conventional right of preemption [art. 1734 (1), a. and b.]. As for the doctrinal approach, according to which the preemption right may only be of legal

[1] Right of preemption is a limitation of the legal provision attribute of ownership, which usually follows a public interest. The existence of this right would not transform the sale into a forced one, it does not oblige the seller to undertake or to dispose of the property, or forcibly impose a price limit, but it is limited the freedom of the seller to choose the buyer (Chirică, 2008, p. 100).

[2] The legislator paid attention also to the legal terminology, establishing for the owner of the preemption right the term of preemptor.

[3] The Legal nature of the right of preemption which is based on a peremptory norm is the rule in this matter. The Doctrine considers that this right is a legal mechanism that is based on a legal will, which cannot be overridden by the agreement between the parties.

[4] We find even the name of legal right of preemption [article 1734 (1), letter a) and b)].

origin, the doctrine intervenes in a critical manner, abandoning this assumption, as that on that purchase priority established by contract giving the holder a right to preference. [1]

For the section reserved to the right in question, subsequent to purchaser's obligations, we may say that the New Civil Code limited the preemption only for the contract for purchase and sale, without making a distinction between the goods that may be the subject to this contract. Only when there are presented the terms of exercising this right, then we may reference to sell of real or mobile estate. It was considered that the right of preemption may be exercised not only as a priority to the sell, this right can generate priority to the holder to other categories of contracts: lease, franchise, etc. (Negru & Corneanu, 2004, p. 30) The notion of priority right would includes all the rights that grant the holder the priority to close a contract in relation to third parties, whether the priority is conferred by law or contract and regardless of the nature of the contract on which this priority is given.[2] A similar view can be deduced and analyzed following the definition of the right "subjective civil right conferred by law to certain categories of persons to purchase with priority an asset, when its owner decided to dispose it or exploit it by other contracts established by law, at a price and on equal terms with the third parties". (Neagu, 2010)

We note that when the priority is granted when concluding a contract, other than the one for purchase and sale, the New Civil Code uses the terminology of preference. According to article 1828 of the New Civil Code: "*(1) At the conclusion of a new lease of the dwelling, the tenant has, on equal conditions, the preference right. But he has this right, when he has executed the obligations arising under the previous lease. (2) The provisions concerning the exertion of the right of preemption in sale matters are applied properly."*

The article 1730 (3) provides the mechanism of operation and of acceptance of the offer when purchasing an asset. Thus, in order to exercise the right of preemption by the preemptor, the owner of the asset, he must give notice of its intention to dispose of the asset and also the price.

In light of the new regulations, the term allowed by the preemptor to decide is different, depending on the nature of the asset: 10 days from the notification of the offer in the case of sale of goods or of maximum 30 days, in case of sale of immovable property. According to the final paragraph of article 1730, the term flows in both cases, since the communication of the offer by the preemptor. We note that compared to other provisions of special law governing the right of preemption, the proposed terms of the future code are more limited. For example, according to Law no. 10/2001, the deadline for exercising the right of preemption is of 90 days for movable heritage and historical monuments according to article 36 paragraph 3 of Law no. 182/2000 and article 4, line 7 of Law no. 422/2001, the deadline is of 30 days, a similar deadline for alienation of forest covered by Law no. 46/2008.

Furthermore, the legislator intervenes expressly, stating that only after the end of that period, the asset may be alienated to a third party, otherwise, applying the sanction of relative nullity of the contract, whether there is a preemptive legal or conventional right (article NCC 1731). We must mention that in addition to this civil penalty, in the case of another piece of legislation governing the right of preemption, namely GEO no. 40/1999 on the protection and establishment of the rent for the spaces leased for housing purposes, the holder of that right may choose the subrogation in the rights of the

[1] For further details about the distinction between legal and conventional rights of preemption see the doctoral thesis of Adina Iulia Foltiş entitled *Regimul juridic al dreptului de preempţiune /The legal regime of the right of preemption*, presented in 2010 but not yet published. The author proposes a repositioning of this right in the sense that it should be included in the category of the priority rights, defined as preemptive right as being that right which gives the holder priority preference / priority in order to conclude a contract of sale in relation to third parties.

[2] *Idem.*

buyer, compensating the latter by paying the price. Other laws expressly provide absolute nullity sanction of the contract concluded by disregarding the right of preemption.

But what does the future regulation propose in this situation in matters of contract for purchase and sale? If however the sale was made by a third party, article 1732 provides that the options of the preemptor and the conditions for exercising its right of preemption: the seller (or the third party) will be required to notify at once the preemptor the content of the contract concluded with the third party. This notification will include the full name of the seller, description of the asset, the tasks that burden him, the terms and conditions of sale and the place where the asset is situated. Following this notification, the preemptor may exercise his right by communicating to the seller his consent to buy. In this case also, according to the nature of the property, the terms remain the same, 10 days and 30 days from the notification. But in the present instance, the new regulation is firm: the seller will be liable to the third party in good faith for the eviction which results from the exercise of the preemptive right. Also, any clause by which the seller and the third party sought to eliminate the application of law becomes null and void (article 1733).

A special situation, which finds its explanation in the duality of concepts, the *preemption right* and *preference right*, concerns the preemptors competition. Here the legislator distinguishes between **holders of the legal right of preemption** and **holders of the conventional preemption right**. Thus, under the rule of law, the proposed solution by the future code may be straightforward, all depending on the fundamental difference between the right of preemption of a legal nature and of conventional nature: in case of the contest between the two, the valid concluded contract will be the one with the holder the legal right of preemption. Other situations determined by the competition between the preemptors prevailed ether the holder of the legal right of preemption **chosen by the seller** (if there were more than one) or the holder of the conventional preemption right that was first registered in the real estate register[1] or the holder of the conventional preemption right that presents as a certain date the oldest sale (in the case of a movable asset).

Article 1739 NCC presents concise and summative the legal character of this right, recalling only the indivisible and the intransferable one. However, the list is not exhaustive, it can add the character of public order of this right, in the sense that it cannot be waived in advance, and the parties cannot derogate by agreement or unilateral legal acts of the provisions governing the right of preemption. (Chirică, 2008, p. 104). The doctrine added also the temporary character, under double aspect: the quality of the person holding this right and in terms of its exhaustion, after the right has been exercised (Popa, 2008, p. 260). It persists and argues the *erga certa personam*, not being mentioned in the future rule, according to which the holders may not require to any person to grant the right of preemption.

3. Conclusions

According to the analysis, we notice that the intention of the legislator is to protect and provide an additional guarantee to the holders of this right, giving them the opportunity to exercise it on a more stable legal ground, concrete and marked by the 10 articles. In addition, Law no. 71/2011 for implementing Law no. 287/2009 on the civil code solves the problem of possible overlapping of some rules on the same issue.

[1] Situation applies when the contract of sale is an immovable.

Thus, the provisions concerning the right of preemption contained in the special laws in force will be filled with the depositions of article 1730 -1740 of the Civil Code. In case of the right of preemption is of contractual nature, the provisions of article 1730-1740 of the Civil Code become applicable only to the agreements concluded after 1 October, the date of entry into force of the New Civil Code.

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***Law no 71/2011 for implementing Law no. 287/2009 on the Civil Code, published in the Official Monitor, Part I no. 409 of June 10, 2011.

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REALITIES AND PERSPECTIVES

The Proof of the Heir Quality in the New Civil Code

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Abstract: Similar to the Civil Code in force, Law no. 287/2009 regarding the Civil Code, published in the Official Gazette, but whose date of entry in force has not been established yet, regulates, as a main proof of the heir quality, the heir certificate. Like *de lege lata* the proof of the heir quality may be realised, integrated in the petition of heredity, and by other means of evidence. In the present paper we aim to analyze the problem of the heir quality's proof, under all its aspects in the light of the Law no. 287/2009 and to reveal the novelties brought by this governmental decree in the matter subjected to our analysis and to appreciate upon its correctness. We consider our scientific approach, through which we intend to contribute to the knowledge of the new Civil Code dispositions on successional matter, until its entry in force, is current and useful.

Keywords: heir certificate; heir quality certificate; petition of heredity; civil status papers

1. General Considerations regarding the Proof of Heir Quality

The problem of the heir quality proof is asked, mainly, in the petition of inheritance content. The current Civil Code, unfortunately, does not regulate the petition of heredity, although it is widely recognized by the doctrine and by the jurisprudence. As a consequence of the legislature's lack of interest to regulate the principal legal mean of protection of the successional rights, the term "petition of heredity" does not have a legal basis *in terminis*, although this name is regularly used.

Currently, in the absence of a legal regulations, the petition of heredity - *petitio hereditatis* - is defined by the doctrine as being the real action through which the claimant (legal heir, legatee general or with general title) asks the court to recognize his title of heir and the refund of the successional assets by the defendant, who also claims to be general heir or with general title of the deceased. (Deak, 2002; Bacaci & Comăniţă, 2006; Chirică, 1996; Stănciulescu, 2008; Popa, 2008; Dogaru, Stănescu & Soreaţă, 2009; Genoiu, 2008).

Law no. 287/2009 regarding the Civil Code[2] regulates the petition of heredity, in Title IV – The transmission and the partition of the inheritance, Chapter I – The transmission of the inheritance, affecting its Fifth Section (articles 1130-1131).

According to the dispositions of the article 1130 N.C.C., the heir with universal vocation or with general title can obtain at anytime the recognition of his heir's quality against of a person who,

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[2] It was published in the Official Gazette of Romania no 511 from 24th of July 2009. In article 2664 paragraph (1) of this governmental decree it is foreseen that "The present Civil Code comes in force on date that will be established by the law for its appliance". According to the dispositions of the paragraph (2) of the same law text, "In a 12 months' term from the publishing date of the present Civil Code, the Government will submit for adoption to the Parliament the draft law for the implementation of the Civil Code".

claiming to rely on the heir title, has all the assets from the successional patrimony or only a part of them.

Although these legal dispositions have, primarily the purpose to identify the persons who can obtain the recognition of the heir's quality, they allow us, equally, to define the heredity petition. As a consequence, in the light of the mentioned dispositions of the new Civil Code, the heredity petition may be defined as the real action through which the heir with universal vocation or with general title asks the court to recognize his quality of heir and for the restoration of the successional assets by the defendant who, claiming to rely on the heir title, has all the assets from the successional patrimony or only a part of them. (Genoiu & Mastacan, 2009)

It follows therefore clearly that the new Civil Code fully exploits the doctrinal definition of the heredity petition. We can identify no difference element between the definition given in the present to the heredity petition and the definition stated by the new Civil Code. The merit of this governmental decree undoubtedly lies in providing to the action through which the successional rights a name and a definition are protected. Moreover, we consider that the new Civil Code defines in a satisfactory and complete manner the proceedings in question.

In the heredity petition, the quality of heir can be proven, mainly, through the heir certificate or through the heir quality certificate. Equally, however, the quality of heir can be proved with other means of evidence, such as the will, the deeds of civil status, the recognition from the defendants.

2. The Proof the Heir Quality through the Heir Certificate

2.1. General Considerations Regarding the Heir Certificate

In the heredity petition, the disputed issue is represented by the quality of heir (legal heir, general legatee or legatee general title) of the parts[1]. The proof of this quality is realised, mainly, through the heir certificate (regulated both by Law no. 287/2009 in articles 1132-1134, and by Law no. 36/1995) or through the heir quality certificate (regulated only by Law no. 36/1995).

The heir certificate, according to the dispositions of the article 1132 N.C.C., "is given only by the public notary and it contains findings regarding the successional patrimony, the number and the quality of the heirs and their respective quotas from this patrimony, and also other mentions foreseen by law".

In the light of these legal dispositions, the present definition for the heir certificate completely keeps its validity. Thus, the heir certificate can be defined as the document given by the public notary, from the place of the inheritance opening, within the successional non-legal procedure, which allows the proven of the heir quality and which, in the same time, represents the right to take into possession immediately the legal inheritance without a prior authorization of the justice from the heirs who don't have this right.

The heir certificate is released by the public notary, unless there are no disagreements between the heirs (art. 1144 N.C.C.), in connection with the division of the successional mass. In the absence of the consensus between the heirs their successional rights will be determined by the court, in a contentious proceeding.

The heir certificate is released, according to the dispositions of Law no. 36/1995 regarding the public notaries and the notarial activity[2], after the prescription term's expiration of the successional option

[1] The legatee with private title can not use the petition of inheritance since, under the dispositions of the article 1130 N.C.C., he enters in the possession of the legacy's object in the specific day when it was given voluntarily, or in his absence, the day when the request for surrender has been applied to the court.

[2] Published in the Official Gazette no. 92/16th May 1995. So far, this governmental decree has suffered some changes and additions. From the dispositions of the new Civil Code and of the implementing the new Civil Code Law Draft it results that Law no. 36/1995 will be applied in parallel with these governmental decrees. As a consequence, in the light of the new Civil

right (of one year[1]), which starts, as a rule, at the opening date of the inheritance or even before the starting of this term, if all the heirs are not known (Mihuţă, 1969).

The heir certificate, released by the qualified public notary under the final conclusion, in term of 20 days since it was emitted, includes, mainly, according to the dispositions of the article 1132 N.C.C., in principal, specifications regarding:

- the deceased;
- the successional patrimony (the assets and the liabilities of the inheritance);
- the number and the quality of the heirs;
- the quota of each general heir or with general title, and also the assets assigned for the legatees with private title;
- the payment of the stamp taxes and of the honorariums;
- the date of its release and the institution that releases it.

A copy of the heir certificate is released for each heir. Exceptionally, however, in the omission case of some assets from the successional mass, the public notary has the possibility to fix this problem, with all heirs agreement, by realising a new heir certificate [article 88 paragraph (2) from Law no. 36/1995] or a supplementary certificate [article 86 paragraph (2) from Law no. 36/1995]. (Petrescu, 1975; Pop, 1968; Genoiu & Turza, 2011) Further more, in the omission case of some successional assets from the successional mass, the heirs may address the court, requesting it to declare the omission and to include the omitted assets into the successional mass. Through such an action the annulment of the heir certificate is not required, but only its completion with the omitted assets. (Bacaci & Comăniţă, 2006) A new heir certificate will also be released by the public notary in the hypothesis in which the court annuls the one released previously.

The public notary is also qualified to release (Genoiu & Turza, 2011):

- the finding certificate of the executor quality, if the testator stated in this regard [article 83 paragraph (3) from Law no. 36/1995];
- the heir quality certificate, through which it is certified only the quality of heir, without any references to the successional assets (article 84 final paragraph from Law no. 36/1995);

The heir quality certificate can be released in the hypothesis in which there are no successional assets, and also in the hypothesis in which in the deceased's patrimony are assets, but their acknowledgment requires time. The heir quality certificate preludes the release of the heir certificate, not having therefore the value of the latter one.

- successional vacation certificate, in the hypothesis in which the succession is vacant (Genoiu & Mastacan, 2010).

In conclusion, we notice the fact that the new Civil Code, unlike the Civil Code in force, is concerned with the heir certificate problem - the main mean of evidence of the heir quality in the petition of heredity - defining it, establishing its effects and regulating the possibility of finding, respectively the possibility of declaring its nullity. Still, by comparing the current definition of the heir certificate (based on the dispositions of Law no. 36/1995) with the one stated by the new Civil Code, we do not identify any difference element.

We consider the legislator's option to take over the existing definition of the heir certificate to be just, having, therefore, no innovations to bring in this regard.

Code's dispositions, we will refer to the stipulations of the public notaries and the notarial activities' Law. Between the two acts we find some overlaps, but no contradictions.

[1] Through the dispositions of the article 1103, the new Civil Code, as a novelty title, states that the length of the successional option term is one year.

2.2. The Functions of the Heir Certificate

Like *de lege lata*, and in the light of the new Civil Code dispositions, the heir certificate accomplishes the following two functions:

a) the modality to take into possession immediately the legal inheritance without a prior authorization of the justice from the heirs who don't have this right;

According to the dispositions of the article 1127 paragraph (1) N.C.C., "The legal heirs who don't have the right to take into possession immediately the legal inheritance without a prior authorization of the justice, take actually into possession of the inheritance only through the release of the heir certificate, but with a retroactive effect of the inheritance opening day".

b) mean of evidence.

The heir certificate is without a doubt the most important proof of this quality. Actually, the heir certificate does not confer to the successors the quality of heirs, but only acknowledges this quality (Genoiu & Sturza, 2011).

As a conclusion, we appreciate that the new Civil Code does not innovate, otherwise justly, under the functions' aspect of the heir certificate either.

2.3. The Proving Power of the Heir Certificate

According to the article 1133 N.C.C. dispositions, "the heir certificate makes the proof of the heir quality, and also of the quota or of the assets assigned to each heir". Thus, like *de lege lata*, the heir certificate does not proof the heirs' right of property (Popescu, 1970; Cristodulo & Vlachide, 1959; Popa, 1997; Leş, 1998), but only their quality and quota or the assets assigned to each of them.

We notice therefore that the new Civil Code takes over the dispositions of the article 88 paragraph (1) the second thesis from Law no. 36/1995 according to which: "Until the court's decision to annul it, the heir certificate is the full proof of the heir quality and of the share or of the assets that are due in part to each heir".

As a consequence, all the specifications outlined in the literature in the light of the legal dispositions in force regarding the probative value of the heir certificate shall remain valid also in the light of the new Civil Code.

As a novelty, through the dispositions of the article 1133 paragraph (2), the new Civil Code imposes the obligation of the public notary to proceed, in order to establish the composition of the successional patrimony, first at the liquidation of the matrimonial regime. We believe that the usefulness of those mentioned dispositions can not be denied and they meant to ensure a fair determination of the successional patrimony. Thus, the new Civil Code provisions incident in the matter of the matrimonial regime (articles 329-372) are correlated with those incident in the matter of the heir certificate. Therefore, in the process for determining the successional mass, the public notary must take, as a first step, the liquidation of the matrimonial regime.

We notice, therefore, the concern of the new Civil Code to regulate the probative value of the heir certificate and to ensure a full correlation between its provisions.

Heirs who consider themselves injured in their rights through the release of the heir certificate have the option, under the dispositions of 1134 NCC, to require to the court the ascertainment or, where appropriate, the declaration of its nullity and the establishment of their rights, according to the law.

According to the dispositions of the article 2502 paragraph (2) point 1 N.C.C., the action in ascertainment the absolute nullity of the heir certificate, if its object is represented either by the establishment of the successional mass, or by the successional partition, under the acceptance condition of the inheritance in the foreseen by law term, is not prescriptible from the extinctive point of view.

On the contrary, the action in declaring the nullity of the heir certificate is prescriptible in the general extinctive prescription term of 3 years (article 2517 N.C.C.). It starts, according to the dispositions of the article 2529 N.C.C., as it follows:

- in case of violence, since the day when it ceased;

- in case of fraud , since the day it has been discovered;

- in case of error or in the other cases of annulment, since the day when the legitimate one, his legal representative or the person summoned by law to approve or to authorize the acts has known the annulment cause, but no later than 18 months from the conclusion of the legal act;

- in cases in which the relative nullity may be invoked by a third person, the prescription begins, if the law does not provide otherwise, from the date when the third party knew the existence of the nullity cause for revocation.

Regarding the annulment of the heir certificate issue, it is necessary to achieve the distinction between the following two hypotheses:

a) the claimant from the action in annulment of the heir certificate is an heir who has participated in the notarial procedure and who has consented to its release, in which case he may ask the annulment of the certificate, on grounds of vitiated consent or incapacity (Eliescu, 1966; Deak, 2002; Petrescu, 1975; Spirescu & Mihalache, 1981), respectively he may request the nullity ascertainment of the certificate for reasons such as fraud to the law, an illegally and immoral cause[1] etc. (Chirică, 1996. Deak, 2002; Bacaci & Comăniţă, 2006)

In such a case, the heir certificate, representing the result of the mutual recognition of the parties, of their status as heirs, has the probative force of a convention, in accordance with the dispositions of the article 1270 paragraph (2) N.C.C.

b) the claimant from the action in annulment of the heir certificate is a third party, in which case, to him, the heir certificate, being a *res inter alios acta,*, is not a proof of the ownership right of the heirs, but only the proof of the quality and of the share or assets everyone are entitled at, being able to be refutable by any means of evidence.[2] (Eliescu, 1966; Stoica, 2007; Macovei, 1993; Deak, 2002; Bacaci & Comăniţă, 2006)

Both from the analysis of the legal dispositions in force and from those of the article 1133 N.C.C. it results that the heir certificate does not represent a title of property, which can be enforced against the third parties, since the public notary from which it originates can not certify the fact that the assets owned by the deceased were his property and had been transmitted, by the inheritance's effect, into the successors' patrimony.

However, in light of the dispositions of the Civil Code in force, the literature (Deak, 2002; Chirică, 1996) appreciates that the probative force of the heir certificate in their dealings with third parties should not be underestimated, since it represents a mean of evidence to acquire the rights through the inheritance, by persons determined to be heirs of the deceased. This point of view can be equally sustained also in the light of the new Civil Code dispositions, which confers to the heir certificate the same effects like the Civil Code in force.

[1] Currently, most of the literature and also Law no. 36/1995, through the dispositions of the article 88 paragraph (1), speak only about the annulment of the heir certificate, for reasons of incapacity or vitiated consent, but not about the ascertainment of its nullity. Since the heir certificate is the result of the parties' convention, it is natural that the heir who considers himself wronged in his rights to have the opportunity to ask the court to declare its nullity on grounds of common law. As we have shown, the new Civil Code, through the dispositions of the article 1134, speaks about the ascertainment of the nullity, and also about its declaration. The mentioned law text has the following content: "Those who consider themselves injured in their rights through the release of the heir certificate may ask the court the ascertainment or, where appropriate, the declaration of its invalidity and to establish their rights according to the law".

[2] *De lege lata*, most of the evidence means issue is regulated by the Civil Code. But the new Civil Code does not regulate anymore this legal institution, it represents an exclusive regulation object for the new civil procedure Code. Therefore, Law no. 134/2010 regarding the civil procedure Code regulates the means of evidence in articles 243-382.

The probative force of the heir certificate can not be ignored, not even in relation with third parties, as long as, under this authentic document:

- are realised, based on the disposition of the article 888 N.C.C., the registration of the real rights, acquired through the inheritance, in the cadastral register (Dobrican, 2000);

- the amounts of money deposited by the deceased at the bank units are alleged and are valued, against the deceased debtor, the claims inherited by the successors from him.

The probative force of the heir certificate can not be neglected, at least considering that it is an authentic document, realized by a competent public notary and not a document under private signature.

According to the dispositions of the article 264 paragraph (1) from the new Code of Civil Procedure, "The authentic document is the full evidence, to any person, until it is declared as false, regarding the findings made in person by the one who authenticated the document, under the law conditions". According to the dispositions, paragraph (2) of the same law text, "the statements of the parties included in the authentic document are the proof, until the contrary, both between the parties and also to any other persons".

We see therefore that the new Code of Civil Procedure take over exactly the Civil Code provisions relating to the probative force of the authentic document.

In conclusion, the heir certificate, an authentic document, makes the full proof until its submission as false, in the hypothesis in which it contains personal observations of the public notary and until the contrary, in the hypothesis in which it contains statements of the parties.

Although the heir certificate, as we have shown before, is evidence against third parties, still they may contest some mentions of the heir certificate, claiming their own rights, such as:

- the heir quality of those registered in the certificate;

- the fact that those registered in the certificate are not the only heirs of the deceased;

In this case, the action in annulment of the heir certificate is accompanied by the heredity petition, if the successional assets are in the possession of the persons listed in the certificate, respectively by the action in finding the quality of heir, if the assets are in the possession of the complainant (Chirică, 1996).

- the fact that one (more) of the assets mentioned in the certificate are part of the successional mass.

In this case, the action in annulment of the heir certificate is doubled by the demand action (Petrescu, 1975).

It follows therefore that the action in annulment of the heir certificate does not have stand-alone character, but a complex, mixed one, which generates consequences on its prescriptible nature. Thus, to the action in annulment of the heir certificate will apply, as far as the extinctive prescription is regarded, the rules governing the actions that double it. Consequently, the action in annulment of the heir certificate for vices of consent is prescriptible in the general term of 3 years[1] (Turianu, 2001), and when the absolute nullity is invoked, finding the quality of heir, the heredity petition or the claim from the share of a third party, the actions are not prescriptible.

[1] It is considered that in the judicial practice and in the literature that the three years term starts, for the heir that has participated to the successional debate, from the date when he signed the closer given by the notary and since he was aware of the alleged irregularity. On the contrary, as the complainant who has not participated to the successional debate is regarded (especially if the heirs presented at the notary cunningly hid the existence of the others successors), the action in the ascertainment of heir certificate's nullity is indefeasible.

The Proof of the Heir Quality by Other Means of Evidence

Since the heir certificate is not a compulsory mean of evidence (Eliescu, 1966; Safta-Romano, 1995; Deak, 2002; Bacaci & Comăniţă, 2006), the quality of heir can be proved, in solving the heredity petition and by other means of evidence.

For the testamentary heirs, their quality can be proven, within the heredity petition, with the will, especially in the hypothesis in which between the heirs exist misunderstandings, not being possible the release of the heir certificate. Therefore, the exercise of the heredity petition is not conditioned by the release of the heir certificate. Consequently, the successional rights of the testamentary heirs and their scope will be determined by the court.

In order to prove the quality of legal heir, there can be used as means of evidence the documents of civil status (authentic documents, which can be combated only by their false registration), from which it results the kinship with the deceased or the spouse quality.

Also, the judicial practice and the literature (Deak, 2002; Bacaci & Coman, 2006) admit the possibility of proving the quality of heir, both in front of the notary public and of the civil court, by any other means of evidence allowed by law, as witnesses or the recognition of the defendants.

3. Conclusions

From the analysis undertaken in this paper it results that the new Civil Code, unlike the Civil Code in force, is concerned to regulate the heredity petition issue and the heir certificate. The latter is, in the light of the new civil matter regulation, the primary mean of evidence of the heir quality. Law no. 287/2009, taking over the dispositions of Law no. 36/1995 regarding the public notaries and the notarial activity, defines the heir certificate, determines its legal effects and establishes the ascertainment or the declaration possibility of its nullity.

In this context, we consider that the disposition of Law no. 36/1995 shall apply alongside with those of the new Civil Code, in fact between the two governmental decrees only some overlap and not contradictions can be identified.

The new Civil Code confers to the heir certificate the same proving power as *de lege lata*. Therefore, the heir certificate, an authentic document, released by the notary public at the opening place of the inheritance, is a proof, against any person, until its declaration as false, regarding the findings made in person by the one who authenticated the document and until the contrary, regarding the statements of the parties contained in the authentic document.

And in the light of the new Civil Code dispositions we can appreciate that the heir quality proof can be realised by means of evidence, like the will, the civil status documents, witnesses or the recognition of the parties.

In the end, we appreciate that the Civil Code assures, as the proof of the heir quality is regarded, a main, coherent and just regulation.

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The Changes Made to the Criminal Procedure Code by the law no. 202 of October 25TH 2010 and their Importance

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Abstract: Among the most important dysfunctions characterizing the Romanian justice, there were identified also several related to the lack of celerity with which the cases brought to justice are solved. As such, it has been discussed the matter of the efficiency in the administration of the act of justice which consists, inter alia, in the celerity with which the cases are solved irrevocably, especially the criminal ones. As a consequence, in order to create conditions which would lead to shortening the proceedings and deployment of the trials within optimum and predictable terms, in the Official Journal of Romania, Part I, no. 714 of 26.10.2010 it has been published the Law 202 of 25.10.2010 regarding several measures for the trial settlement process.

Keywords: Criminal procedure; judicial procedures; motives; mediation; celerity

In the explanatory memorandum accompanying the project of this Law it is shown that of the major dysfunctions of the Romanian justice, the harshest criticism has been directed towards the lack of celerity in solving the cases. Because the legal proceedings often prove difficult, formal, costly and long, it was realized that the effectiveness of administrating the act of justice lies largely in the celerity with which the rights and obligations established by the decisions of the courts of law enter in the legal circuit, thus ensuring the stability of the legal relations brought to justice.

By reforming the Criminal Procedure Code, was intended, as critical objective, the creation with respect to the legal proceedings of a modern legal framework which would fully respond to the imperatives of function for a modern justice, adapted to the social expectations, as well as to the necessity of increasing the quality of this public service.

Also taking into account the deadline for the expected entry in force of the new Criminal Procedure Code, it is imperative to be established several procedural rules with immediate effects on the preparation for implementing the code and in agreement to the legal solutions established by it, capable to facilitate the efficiency of the legal proceedings and the expeditious resolution of the trials.

In the following we will present several newly introduced procedural rules and mechanisms to the criminal proceedings, because on art. XVIII it is stated that the Criminal Procedure Code, republished in the Official Journal of Romania, Part I, no. 78 of April 30th 1997, with the subsequent modifications and completions, it is modified and completed for this purpose.

Article 10 lett. h) Criminal Procedure Code concerns one of the cases in which the criminal action can be instituted or, if it has been instituted, it cannot be exercised, leading to the finalization of the

criminal trial either by the termination of the criminal prosecution or by the cessation of the criminal prosecution [art. 11 par. 1 lett. c) Criminal Procedure Code - in the stage of the criminal prosecution], or by the cessation of the criminal trial [art. 11 par. 2 lett. b) Criminal Procedure Code - in the trial stage]. It envisages the incidence of two causes which eliminate the criminal liability, namely withdrawal of the preliminary complaint [art. 131 par. (2) Criminal Code] and the reconciliation of the parties (art. 132 Criminal Code).

The above mentioned article is completed with respect to lett. h) by introducing a mention regarding the signing of a mediation agreement as impediment in beginning or the continuation of the criminal trial, along with the withdrawal of the preliminary complaint or with the reconciliation of the parties, a newly introduced text corresponding to the provisions of art. 16 par. (1) lett. g) of the new Criminal Procedure Code.[1]

In order to ensure a coherent framework on the settlement of the civil side, it has been introduced art. 16^1 which governs the possibility of transaction, mediation and recognition of the civil claims, as well as their effects. In case of recognition of the civil claims, the court compels to compensations with respect to the recognition. Regarding the civil claims which are not recognized, evidences can be administered.

The modifications of art. 27 of the Criminal Procedure Code envisage the material competence of the tribunal as court of first instance. Comparing the contents of the two letters [d) and e^1)] after the modification performed by the Law no. 202 of 2010, we observe (Atasiei, Tit, 2010, p. 201) that:

- the offences to the rights of intellectual and industrial property will become the material competence of the court in terms of it general jurisdiction;
- will also become the competence of the tribunal as court of first instance, a part of the tax evasion offences, namely the offences provided by art. 9 of the Law no. 241 of 2005, the other offences of the above mentioned law will continue to remain in the competence of the court as court of first instance;
- for reasons of legislative technique, for a better systematization of the code, but without effects upon the competence, the money laundry offence[2], for which will continue the competence of the tribunal as court of first instance, it is moved within the par. (1) lett. d) on lett. e^1), along with the tax evasion offence.

The assembly of modifications operated regarding the competence through the Law 202 of 2010 converge towards the intention of relieving the tribunal of some of the cases which it used to solve (especially by eliminating the trials as appeal court and by the substantial diminishing of the appeals made at this court, with the aim that the legal activity of the tribunals to focus mainly upon the complex cases, especially those regarding corruption crimes and the ones of organized crime[3]).

Due to the fact that prag. 2 of art. 27 is revoked, we draw the conclusion that the tribunal will no longer have panel of judges for appeal cases, but it will deliver judgments as court of first instance (for the crimes provided in art. 27 par. 1) or as appeal court (for the crimes sentenced in first instance by

[1] The new Criminal Procedure Code has been approved by the Law 135 of 2010 and published in the Official Journal of Romania no. 486 of 15.07.2010, and it was intended to come into force at a date to be established by the Law of implementing this code, a law which is in stage of project.

[2] Provided by art. 23 of Law 656 of 2002 for the prevention and punishment of money laundry, as well as for instituting prevention measures for preventing the financing of terrorist operations.

[3] Opinion expressed by the initiator of the law, the Ministry of Justice, in the Explanatory Memorandum to the project of the law regarding measures for the acceleration of solving the trials.

the courts for which it is necessary a preliminary complaint of the injured person). Also, through the modifications to art. 27, par. 3, the court will function as legal restriction court, judging the appeals against the criminal decisions delivered by the judges regarding preventive measures, provisional releases or precautionary measures, of the criminal decisions delivered by the judges regarding the execution of the criminal sentences or of rehabilitation, as well as in other cases expressly provided by the law (Atasiei & Tit, 2010, p. 205)

Through the revocation of par. 2 of art. 28, in fact, it is eliminated the possibility of pursuing an appeal against those decisions delivered by the military tribunal for which the law previously provided such appeal mode (except the crimes against the military order and discipline punished by the law with at most 2 years of imprisonment, as well as the crimes judged in first instance by the military tribunals for which it is necessary a preliminary complaint of the injured party - for these it is provided only the appeal), appeal which it is judged by the territorial military tribunal. Through the two new letters introduced in art. 28^1 par.1 Criminal Procedure Code, it is expanded the competence of the appeal court as court of first instance regarding the crimes committed by persons having a certain quality on the date of the deed, the competence will be taken over by the supreme court, in order to release it of certain criminal cases.

The modification of art. 28,1 par. 3 envisages the cases in which the appeal court solves the case as court of appeal. The modification comes to correlate with the revocation of art. 27 par.2, operated by the same law. Thus, with the disappearance of the competence of the immediately inferior court of judging the appeal, the appeal court will solve as court of appeal the cases coming directly from court houses, namely those cases for which it is provided the possibility of appeal, other than the appeals placed in the competence of the tribunal.

The modifications operated with relation to art. 29 par. 1 of the Criminal Procedure Code aims at reducing the cases of first instance competence of the High Court of Cassation and Justice.

Through the new contents of art. 29 par. 1 of the Criminal Procedure Code, we conclude (Daniel Atasiei, Horia Tit, 2010, p. 205) that the following competence changes occur (as first instance court) for the supreme court:

- on lett. a), along with the crimes committed by deputies and senators, are also introduced the cries committed by MEPs.
- on lett. c) there have been removed the crimes committed by the members of the Court of Accounts, by the president of the Legislative Council and by the Ombudsman, the competence for these actions will be transferred, along with the entry into force of the Law 202 of October 25th 2010[1], to the court of appeal, according to lett. b^3) of art. 28^1 par. 1 of the Criminal Procedure Code newly introduced:
- the contents of lett. d), regarding the members of the Superior Council of Magistracy, it is identical to the one of lett. e^1) of the old form of art. 29 par. 1, without producing any modification in competence;
- on lett. e), it is taken a part of the contents of lett. f) of the old form of art. 29 par. 1, being eliminated from the competence of the supreme court a series of crimes which have been passed to the competence of the court of appeal;

[1] Published in the Official Journal of Romania, Part I, no. 714 of 26.10.2010

- the contents of lett. f), of the new rule, regarding the crimes committed by marshals, admirals, generals and officers, it is identical to the one of lett. d) of the old form of art. 29 par. 1, without producing any modification in competence;
- the contents of lett. g) remain the same.

Through par. (4^1) added in the structure of art. 45 of the Criminal Procedure Code there are governed the rules of extending the competence for the situation in which the object of the criminal investigation are the crimes with connection or indivisibility relationships, crimes which are passed in the competence of the National Anticorruption Directorate, and other in the competence of the Directorate of Investigations of Organized Crime and Terrorism.

Article 91^6 of the Criminal Procedure Code has the marginal title of "Verification of the means of probation" and aims at the possibility of disposing, on the request of the prosecutor, of the parties or *ex officio*, the expertise of the means of probation obtained through audio or video interceptions or those assimilated to them. The modification through par. 14 aims at replacing the expression "will be subjected to a technical expertise" with the expression "can be subjected to an expertise", thus, along with the entry into force of the modifying law, the verification of these means of probation (video, audio, photographic) is no longer limited only to a technical expertise, but, also to any type of expertise which can be administered in the criminal trial.

The introduction of article 127^1 was made on the background of some practical situations in which the tutelary authorities refused, on the request of the institution of legal medicine, to perform such social investigations and to place at their disposal, in the absence of a disposition of a legal organism. Through the new provision it is performed an acceleration of the criminal trial by the possibility of the sanitary unit of requesting this social investigation directly to the tutelary authority from the residence of the minor, authority which, in front of the new express dispositions of the Criminal Procedure Code, can no longer refuse or delay the performance of such an action.

The modification of art. 140 par. (3) of the Criminal Procedure Code, envisages the competent legal organisms in order to ascertain the rightful cessation of the preventive measures, expanding the role of the prosecutor on this matter.

The new text introduced by article 160^6 par. 4^1 eliminates the possible controversies related to the composition of the panel of judges of the competent court to hear the request of provisional release under judicial control. The formulation of the new text imposes that, regardless of the nature of the crime, the judgment competence attributed for the investigated cause to general or specialized panels of judges, the judgment of a request of provisional release formulated during the criminal investigation stage, to be made by a panel formed of a single judge.

The modification of par. 3^1 of art. 184 has a correspondence in art. 266 par. (1) 2nd thesis of the new Criminal Procedure Code, although the text of the later covers a larger area of individuals whose presence in front of the judicial organism can be accomplished through constraint in the situation of issuing a summons mandate. The only modifications operated in the structure of art. 184 par. (3^1) of the Criminal Procedure Code refers to the possibility of execution of the summons mandate through constraint not only towards the accused or defendant, but towards the witness as well.

The text of article 184^1 newly introduced is novelty in the Criminal Procedure Code and has an identical content with the provisions of art. 267, the new Criminal Procedure Code envisaging the right of direct access of the prosecutors and of the courts of law to the electronic database held by the

authorities such as Local Register Office, the Registry of Commerce, the National Administration of Penitentiaries, the National Agency of Cadastre and Real Estate Publicity.

The new text introduced by par. (1^1) of art. 192 is a novelty only by the fact that establishes the payment of legal expenses advanced by the state in case of a decision of not to commence criminal prosecution. It provides that by the prosecutor's ordinance, deciding not to commence criminal prosecution, to rule that the payment of the legal expenses advanced by the state to be paid by the person who made the referral, only to the extent that it finds "the abusive exercise of this right". By the new text introduced through letter k) on paragraph (4) of art. 198 it is accomplished to complement art. 198 of the Criminal Procedure Code regarding the judicial deviations of a new conduct appreciated as being incorrect in the criminal trial, namely the actual abuse related to the exercise by the parties or their representatives of the process or procedural rights (Atasiei & Tit, 2010, p. 205).

The text of art. 230 it is modified in order to adapt it to the modifications operated on the content of art. 228 par. (2) of the Criminal Procedure Code to which it makes reference. Thus, art. 230 provides the possibility of the prosecutor to decide, in case of incidence of the case provided by art. 10 par. (1) lett. b^1 of the Criminal Procedure Code, not only the solution of not to commence criminal prosecution, but the solution of not to commence criminal prosecution, when the investigative organism makes such a proposal before it begins the criminal prosecution. Art. 230 of the Criminal Procedure Code is completed similarly with the provisions of art. 228 par. (6) of the Criminal Procedure Code, in the sense that, after the disposal of the solution of not to proceed to trial, copy of the ordinance and, if necessary, of the proposal of the criminal investigation organism it is communicated to the interested persons – the person who made the referral, but also, as an element of novelty in comparison to the previous form of the text, and the person against whom there were performed the prior acts or the acts of criminal prosecution.[1]

The modification of art. 243 of the Criminal Procedure Code envisage in fact the 2nd thesis par. (3), the 1st thesis remains unmodified. Given that art. 140 par. (1) lett. b) of the Criminal Procedure Code requires that the solution of ceasing the criminal prosecution ordered by the prosecutor against an accused or an arrested defendant has as consequence the actual cessation of the preventive measure, art. 243 par. (3) it was necessary to be modified in order to correlate it with the modification operated by the same law 202 of 2010 regarding art. 140 par. (3) of the Criminal Procedure Code.

Being a case of actual cessation of the preventive measure, this cessation, in order to take effects, it must be ascertained by a judicial organism which, checking the incidence of the case of actual cessation, will order the immediate release of the accused or defendant, so that the order of release it must be communicated to the place of detention. On the same line it is recorded as well the modification of art. 245 par. (3) of the Criminal Procedure Code regarding the complementary dispositions of the ordinance by which the prosecutor ordered the cessation of the criminal prosecution. As long as the release of the accused it is made directly based on the ordinance given by the prosecutor, without requesting the permission of the court to order the revocation of the preventive measure, the legislator also intervened within the art. 245 par. (3) of the Criminal Procedure Code removing, of the mentions of the ordinance for the cessation of the criminal prosecution, the necessity of making reference to the conclusion of the court, to the revocation of the preventive measure (Atasiei & Tit, 2010, p. 278).

[1] Although art. 230 of the Criminal Procedure Code, in the previous form of the modification by Law 202 of 2010, did not expressly provided that the delivery of a solution based on art. 18^1 of the Criminal Procedure Code to be communicated to an investigated person, in practice this resolution communication was made compulsory, because, indirectly, art. 249^1 par. (3) of the Criminal Procedure Code required this.

Article 251 of the Criminal Procedure Code it is included in Section IV of Chapter IV, titled "Procedure for presentation of the criminal procedure material", which treats more accurately only the procedure of presentation of the criminal procedure material in the cases in which it has been disposed the initiation of the criminal action.

The modification operated on art. 251 of the Criminal Procedure Code refers to the replacement of the sentence "organism of criminal investigation" with the sentence "criminal prosecution organism".

The modification of art. 254 par. (1) concerns the situations in which, upon the completion of the criminal prosecution initiated, the presentation of the criminal prosecution it is not possible due to reasons such as the absence of the defendant or, more recently, of his defender.

A first modification operated at the level of this article is the replacement of the sentence "organism of criminal investigation" with the sentence "criminal prosecution organism". Another modification refers to the impossibility of presentation of the criminal prosecution material in case that, even though the defendant is present, he refuses unjustifiably to fulfill this procedure. The last modification is related to the refusal of the defender to appear before the judicial organism, to assist his client or in the development of this procedure, refusal which has to be unjustifiable. The text of art. 278 par. (2^1) as a newly introduced one and has an equivalent in the provisions of art. 339 par. (5) of the new Criminal Procedure Code.[1] The completion refers to art. 278 of the Criminal Procedure Code, which has as marginal title "Complaint against the actions of the prosecutor". By introducing this new text it was intended that the right of filing a complaint through administrative channels to be limited to a single administrative stage, preventing the formulation of successive complaints through which to reach the entire hierarchy of the prosecutor offices to be called to solve a complaint directed against a solution delivered by a subordinated prosecutor (Daniel Atasiei, Horia Tit, 2010, p. 284) The provisions of art. 85 1st thesis of the Criminal Procedure Code, regarding the previous complaint, has been completed with the sentence "through administrative channels". By this completion it is desired that the misdirected[2] complaint to be submitted through administrative channels, without the court considering itself notified, delivering a trial date, to summon the parties, and then to be able to deliver through a decision the withdrawal of the notification, thus avoiding the overload of the courts or the development of useless judicial proceedings.

The modifications to art. 291 par. (1) and (3) have a correspondent, in most part, in the provisions of the new Criminal Procedure Code[3], which radically modifies the summoning procedure of the parties in the criminal trial and extending the cases in which the parties take term knowingly, without being compulsory their summoning for the next trial date.

The text introduced by the new art. 320^1 is a novelty in the criminal procedure and has a correspondent in the provisions of art. 374 of the new Criminal Procedure Code. The newly introduced dispositions are circumscribed exclusively to the trial in the first instance court and applies in case the

[1] Art. 339 of the new Criminal Procedure Code, having the marginal title "Complaint against the actions of the Prosecutor", provides on par. (5): "The ordinances which solve the complaints against the decisions, actions or measures can no longer be appealed by complaint to the superior hierarchical prosecutor and will be communicated to the person who filed the complaint and to the other interested persons"

[2] The complaint can be "misdirected" only to the court, given that, according to art. 279 par. (2) of the Criminal Procedure Code, "the previous complaint it is addressed to the criminal investigation organism or to the prosecutor according to the law", no longer being a crime for which the prior complaint can be addressed directly to the court of law.

[3] According to art. 353 par. (2) of the new Criminal Procedure Code., "The party present in person, by a representative or by a defendant elected on a trial date, as well as the party to whom, through a representative or an elected defendant or through the clerk or the person assigned to receive the mail, it has been lawfully handed the summons for the trial date are no longer summoned for the subsequent trial dates, even though that person would miss one of these trial dates, except for the situations when his presence is mandatory."

defendant fully admits the facts retained in the document of notification, triggering a more simplified and fast trial procedure, being capable of ensuring the celerity of some of the criminal trials, with benefits both for the defendant, the application of punishments within narrow limitations towards the provisions of the criminal law, as well as for the state, by shortening the proceedings, of the costs implied by the proceedings, as well as the relieving of the judicial organisms of some difficult and, very often, useless proceedings. The new provision mentioned on art. 397 par. (4) is a novelty and refers to the solving procedure of the extraordinary method of appeal of the revision. The revision procedure imposes, previous to the notification of the court, to file the request to the prosecutor at the prosecutor's office within the court which has judged the case in first instance and the performance of acts of research by the prosecutor in order to verify the validity of the revision request.

The new provisions of art. 402 par. of the Criminal Procedure Code have a correspondence in the provisions of art. 459 par. (1) of the Criminal Procedure Code[1] and hey determine that, on receiving a revision request, the president of the court establishes a date for its examination. The change in terminology, from trial term into term, is correlated with the modifications of art. (403) par. (1), according to which the admissibility in principle of the revision request it is made in the council chamber, without summoning the parties and without the participation of the prosecutor, thus we do not find ourselves in the presence of a disposition given by a trial decision, whose date is established through a trial date (Atasiei & Tit, 2010, p. 330). Through the revocation of art. 484 par. (1), the special trial procedure of the cases with underage offenders it is aligned, in terms of the persons summoned on the trial of the underage offenders, with the existing procedures of the new Criminal Procedure Code[2], and, also, to waiver as well the obligation of presence of the defendant before the court in the cases of crimes committed by underage offenders. Yet, the abrogation of the mentioned text, does not have an effect upon the obligation of the court to dispose the summoning of the underage person and of the other persons established by art. 484 par. (2) of the Criminal Procedure Code, and the failure of such persons to appear, if they have been legally summoned, does not prevent the trial of the case.

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[1] According to art. 459 par.(1) of the new Criminal Procedure Code, "On receiving the request of revision, the president of the court establishes a trial date for the examination of the admissibility in principle of the revision request, ordering that the file should be attached to the case".

[2] The new Criminal Procedure Code does not require the obligation of the underage offender to be present on trial during the trial of the case. According to art. 508 of the new Criminal Procedure Code, "(1) During the proceedings of the trial will be summoned the probation service, the parents of the underage child or, if it is the case, the legal guardian, custodian or the person under whose care or supervision the underage person might be for a temporary amount of time. (2) The persons mentioned on par. (1) have the right and the obligation to offer explanations, to file requests and to present proposals regarding the measures to be adopted. (3) the failure to appear of the summoned persons does not prevent the proceedings of the case.

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REALITIES AND PERSPECTIVES

The Protection of the Right to Life in the New Criminal Code

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Abstract: The present article illustrates general aspects of the actual regulation on the protection of the right to life, in comparison with the new regulation, which shall be analyzed more carefully. The paper is based on the study of the new Criminal Code, emphasizing the most important differences between the actual regulation and the new Criminal Code, and the few texts elaborated in this area. The approach of the subject is a more practical one, because few texts were written about the new Criminal Code, at the moment of its entrance into force, the doctrinaires will need to know the differences and the innovations brought by it. The result is meant to increase the understanding of the new text and to enrich the analysis and synthesis of the new Criminal Code.

Key words: right to life; offences against human life; new Criminal Code; homicide upon request

1. Introduction

The right to life is fundamental. Life is itself the fundament of any other right, the very breath that animates and supports us in everything we do. Without it we could not discuss of any other right or anything else, no matter how good our intentions, aspirations and wishes to personal achievement may be. But, as important life may be, it sometimes seems so fragile "in the hands" of persons arguing with the law or with their own consciousness. So, mostly, as a coin with two sides, life goes along with death, without denying and contradicting one to another, being one of the paradoxes in our existence. A truth putted in metaphorical words by Lucian Blaga, a great philosopher and poet: "*If each life is ended by death, it does not necessarily mean that the purpose of life is the very death*" (Iulian Poenaru, 1999).

Correlating now, this fundamental right with the law, we shall notice that it is protected in the fundamental law, which by its Art 22 shows that: "1. The right to life, as well as the right to physical and mental integrity of person is guaranteed; 2. No one may be subjected to torture or to any kind of inhuman or degrading punishment or treatment; 3. The death penalty is prohibited".

Being such an important right, it was appreciated and protected since immemorial times. All known regulations kept until nowadays refer to the punishment for those who committed murder. This is why the protection of this right was and is associated with the criminal right and with the idea of offence and punishment.

2. Incrimination of Offences against Life in the Criminal Code

2.1. The Regulation in the Current Criminal Code. General Aspects

The actual Criminal Code[1] incriminates a series of offences which result in the death of a person. The most important ones are found in Title 2 *Offences against person*, Chapter I *Offences against life, corporal integrity and health*. This chapter was divided into three sections, Section 1 *Homicide*, comprising the offences having life as special legal subject, in different stages, and as final consequence the immediate death of the victim[2]; Section 2 *Hitting and harming the corporal integrity or health*, were are found the offences having as special legal subject the person's corporal integrity or health, and sometimes even the death of the victim[3], and, finally, Section 3 Abortion, comprising a single offence, that of abortion, having as special legal subject the corporal and psychical integrity or life of the woman, and as immediate consequence the lost of the result of conception and the corporal injury of the woman[4]. We have presented this, in the idea of comparing the actual regulation with the new one and to emphasize the qualitative and quantitative differences.

As mentioned above, outside Chapter 1, Section 1, dedicated entirely to offences of murder, the Code also states, especially in its Title 1, other offences resulting in the death of the person, only the fact that their placement in other chapters dues to their *prater intentioned* consequence, harming the social relations, fundamental values of the human being such as freedom[5] or sexual life[6]. Also, the Criminal Code settles offences resulting in the death of a person in other titles and chapters, such as robbery[7] or piracy[8], comprised in Title 2 *Offences against property*, some offences such as failure to fulfill service duties or their erroneous fulfillment, out of negligence committed by railway employees[9] settled in Title 6 *Offences that infringe upon activities of public interest or upon another activities regulated by the law*, Chapter 3 *Offences against railway traffic safety*, the offence of non-compliance with the legal treatment of nuclear material or of other radioactive materials[10] or non-compliance with the legal treatment of explosives[11], both in serious forms, regulated by Title 6, Chapter 4 *Offences regarding the legal treatment established for certain law-regulated activities* etc.

Even the exhaustive enumeration of those offences directly or indirectly committed against life shows us a vast regulation of this situation, as the importance of the right protected. What most interests us in this moment is the way in which the new Criminal Code has understood to protect life, this being the main subject of the article.

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[1] The Criminal Code was published in the Official Bulletin No. 79-79 *bis* of 21 June 1968 and entered into force on 1 January 1969; republished for two more times, once in 1973 and once in 1997, being subjected to many modifications and amendments especially after 1992.

[2] These offences are: murder (Art 174), first degree murder (Art 175), particularly serious murder (Art 176), infanticide (Art 177), determining or facilitating suicide (Art 179) of the actual Criminal Code.

[3] These offences are: hitting or other forms of violence (Art 180), bodily harm (Art 181), serious bodily harm (Art 182), hitting or injury causing death (Art 183) and bodily harm by negligence (Art 184) of the actual Criminal Code.

[4] See Art 185 – illegal causing of abortion, in the actual Criminal Code.

[5] We hereby refer to the illegal deprivation of freedom **(**Art 189, Para 6), settled by Title 1, Chapter 2, *Offences against the freedom of persons*.

[6] We hereby refer to rape (Art 197 Para 3), sexual intercourse with a minor (Art 198 Para 6) and sexual perversion (Art 201 Para 5) settled in the actual Criminal Code, Title 1, Chapter 3 *Offences regarding sexual life*.

[7] See Art 211 Para 3 of the actual Criminal Code.

[8] See Art 212 Para 3 of the actual Criminal Code.

[9] We are referring to the failure to fulfil service duties or their erroneous fulfilment, out of negligence (Art 273 Para 1, when a catastrophe on the railway has occurred), Non-fulfilment of service duties or their erroneous fulfilment, in awareness (Art 274 Para 2, when a catastrophe on the railway has occurred), leaving the post, and inebriety during service (Art 275 Para 3), destruction and false signalling (Art 276 Para 3-4) of the actual Criminal Code.

[10] See Art 279[1] Para 5 of the actual Criminal Code.

[11] See Art 280 Para 5 of the actual Criminal Code.

2.2. Regulation in the New Criminal Code; Comparison with the Current Regulation; General Aspects

The new Code regarding the offences against life was systematized, eliminating confusing regulations, the new Code being completed with general or special provisions. From this point of view, the simplification of texts, has sometimes determined a specialization of them, thus sometimes the number of offences is bigger, new one appearing, inexistent until now in the previous Romanian codes.

The first aspect noticed in the new regulation is the fact that the *Offences against life* are settled in Title 1, unlike the actual regulation where are stipulated by Title 2, the first title being dedicated to *Offences against state security*. Though, the new political vision wishes to create the impression that the life and the person comes first, yet, in our opinion the order settled by the actual Code should have been maintained. Although we agree to the fact that a person's life is the most important asset, is no less true that the values ensuring the state security are those who help the person fulfill her destiny, creating the necessary environment, the "stage" to perform it.

Beyond this fact, we notice that confronted by the three chapters in force contained by the second title of the actual code (Chapter 1 *Homicide*, Chapter 2 *Offences against freedom of persons* and Chapter 3 *Offences regarding sexual life*), the new Code sees a multifaceted person, settling no less than 9 chapters (Chapter 1 *Offences against life* – the subject of the hereby article, Chapter 2 *Offences against corporal integrity or health*, Chapter 3 *Offences against a family member*, Chapter 4 *Offences against the fetus*, Chapter 5 *Failure to assist endangered persons*, Chapter 6 *Offences against the freedom of the person*, Chapter 7 *Trafficking and exploiting vulnerable persons*, Chapter 8 *Offences regarding sexual freedom and integrity*, Chapter 9 *Offences regarding domicile and private life*).

Among these chapters are some new ones, and among the latter ones are some directly connected to the right to life, even if this fact does not result explicitly, from the name of the chapter which included them or from the marginal name of the texts. Directly, the right to life is protected by Chapter 1, whose title was changed from *Homicide* with the more appropriate one, *Offences against life*. Then, also directly, but less explicitly as shown above, life is also protected against the offences stated by Chapter 3, regarding a family member. These offences are specialized because refer to all offences committed by violence against a family member, including those causing the immediate death of the family member, or the death of the newborn child.

Finally, among the offences stated by Title 1 are found, as well as in the actual Criminal Code, offences which are not directly against life, have a second special legal subject, such as hitting or injury causing death (Art 195 of the new Criminal Code), illegal deprivation of freedom (Art 205 Para 4 of the new Criminal Code), aggravated rape (Art 218 Para 4 of the new Criminal Code), sexual aggression (Art 219 Para 3 of the new Criminal Code) etc have as result the death of the victim, as a prater intentioned result of the main offence.

2.3. Offences against Life in the New Criminal Code. Comparison with the Current Regulation

Chapter 1 of the new Criminal Code states five offences in Art 188-192 as following: murder (Art 188), first degree murder (Art 189), homicide upon request (Art 190), determining or facilitating suicide (Art 191) and homicide out of negligence (Art 192).

a. Murder – Art 188. The new text is identical to the actual regulation; even the penalty is the same.

b. First degree murder – Art 189. Regarding this text, it is the only one legally qualifying murder, unlike the actual regulation, which in tow articles expresses a gradation of consequences, the most serious forms of murder: first degree murder (Art 175 of the actual Criminal Code) and particularly serious murder (Art 176 of the actual Criminal Code) (exposure of reasons)[1]. But this is not the only difference, the new Art 189 states a simplification of the regulation, comprising the offences which can be committed by any person, but in certain circumstances have a particularly serious form, rather than the simple one. Therefore, we shall notice that some of these aggravated forms resulting from the existence of an active or passive subject were included in other offences. The first of these is the aggravation resulting from the murder against the spouse or a close relative (Art 175 Para 1 Point c). In the new Criminal Code, this aggravation is no longer found for murder, being stated by Art 199 Family violence, as part of the constitutive element, not as a circumstantial one. Though, Art 199 has a broader regulation, referring to a family member, in that the active and the passive subjects are family members, but in the new definition given by Art 177. Unlike the actual framing of the term of family member, the new definition does no longer assume that the spouse or the close relative lives or shares a household with the perpetrator[2], adding between family members those who are not legally married but have a relationship similar to that between spouses or between parents and children, explaining the term of close relatives for the adopted person, as well as for his/her ascendants or descendants with regard to the natural relatives. Another aggravated form which is no longer found and resulted from the quality of the passive subject of the offence is that stated by Art 176 Para 1 Point f, namely murder committed against a magistrate, police officer, gendarme or member of the military, during or in connection to the fulfillment of their service or public duties. This aggravation is also found in the new Criminal Code in two of its texts, namely Art 257 Para 1 and 3 incriminating *insult* and Art 279 Para 1, incriminating *judicial insult*. Art 257 Para 1 refers to murder or praeter intended murder against a *public officer performing a position assuming the state authority, during or in connection to the fulfillment of his public duties*. In this case, the special limits (both, namely the inferior as well as the superior limit) shall be increased by a third[3]. Para 3 of the same text expressly mentions police officers and gendarmes, connecting their murder, with intention or praeter intention, with the fulfillment of their service duties, increasing even more the limits of the punishment, i.e. by half of the special limits for the offence committed against them[4]. Nevertheless, this differentiation between military and police officers and gendarmes has no rational or criminal justification. It is rather the product of a mistake, because it is hard for me to consider that the legislator could have generated such a hierarchy between law enforcement and homeland defense forces. Continuing our analysis with the situation of murder against a magistrate, we shall notice that in the new Criminal Code, was taken by Art 279 Para 1, stating that the offence of hitting, injuring causing death or murder against a judge or prosecutor (magistrate – in the actual text) is punished with the punishment provided for this offence whose limits are majored by half (as in the case of *judicial insult*).

Two aggravated forms entirely found in the new text of Art 189 Point a) and b) are those stated initially by Art 175 Point a) and b), regarding *murder with premeditation* or *out of a material interest*.

Further, the aggravated forms currently stated by Point d) and e) of Art 175, namely those stating *murder by taking advantage of the victim's inability of defense* or *by means that jeopardize the life of*

[1] The choice for this regulation was made for the concordance of our criminal legislation with the occidental European legislations.
[2] See Art 149[1] of the actual Criminal Code.
[3] If is committed murder against a military, the punishment shall be between 13 years and 4 months and 26 years and 8 months of imprisonment.
[4] According to this text, if a police officer is murdered during the fulfillment of or in connection with his service duties, the punishment limits are between 15 and 30 years of imprisonment.

several persons, are no longer stated in the new Criminal Code. These two aggravated forms are also no longer stated in the special part, but have become legal aggravated circumstances applicable to any offence, in the case they are found as circumstances of a situation. Thus, according to Art 77 Para 1 Point c) represents an aggravated circumstance *the commission of the offence by means endangering other persons or goods*, and according to Point e) is an aggravated circumstance *the commission of the offence by taking advantage of the victim's vulnerability, due to his age, health condition, disability or other causes*. Even if the phrasing is not identical with that of Art 175 Point d) and e), has the same legal value, but not the same punishment. Following the same reasoning, the legislator should have noticed that the aggravating circumstance stated by Art 189 Para 1 Point h), currently Art 176 Point a), namely murder by cruelties, would not have justified the difference of statute, because both in the actual code, as well as in the new code the commission of murder by *means of cruelties*[1] is an aggravated circumstance which can be valued, as well as in the previous cases, just as a general legal aggravated circumstance. There is though a difference in the legal regime regarding the statement of this circumstance as an aggravated form of murder. As simple general legal aggravating circumstance its regulation would have eventually determined a punishment by its special maximum, and possibly an increase in this maximum of a further 2 years[2], i.e. punishment by 22 years. Its statement as an aggravating circumstance for murder determines a mandatory increased punishment, whose maximum can reach 25 years. We consider that the legislator sees this circumstance as a more aggravating one than the tow previous one which he excluded from first degree murder, but will value as aggravating circumstances of murder.

Another circumstance no longer states is that determining the consideration of murder as *first degree murder connected to the victim's accomplishment of service or public duties*[3]. But when we have analyzed the circumstance stated by the actual code in Art 176 Para 1 Point f) we have noticed that such an aggravating circumstance is also stated for insult –Art 257 Para 1 of the new Criminal Code.

The circumstance stated by the actual Criminal Code in Art 175 Para 1 Point g) "*in order to elude or to elude another person's prosecution, arrest or penalty service*" is rephrased by Art 189 Point c) of the new Criminal Code "*in order to elude or to elude another person's criminal liability or penalty service*". The phrase *prosecution or arrest* was replaced with the more appropriate one *criminal liability*, because it comprises the entire criminal process, not just the stage of prosecution or arrest, which can be ordered both in the course of the prosecution, as well as during the criminal trial.

Stated by Art 175 Point h), *commission of first degree murder in order to facilitate or conceal the commission of another offence*, completed with Art 176 Point d), *commission of first degree murder in order to commit or to conceal the commission of a robbery or piracy*, the two circumstances were joined in Art 189 Point d), without distinguishing the type of offence which is committed or concealed.

Finally, having discussed the situations aggravating murder, considered first degree murder by the actual regulation, we shall note that the condition that murder must be committed *in public*[4] is no longer stated by the new Art 189, nor by any text of the new Criminal Code, considering that is no longer justifiable (exposure of reasons).

[1] According to Art 77 Para 1 Point b) of the new code it is an aggravated circumstance the commission of the offence by means of cruelties or by subjecting the victim to degrading treatment, while the provisions of the actual Art 75 Para 1 point b[1]) states this aggravating circumstance: *commission of the offence by acts of cruelty, by violence against family members or by methods or means that represent a public danger*.

[2] See Art 78 Para 1 of the new Criminal Code.

[3] See Art 175 Para 1 Point f) of the actual Criminal Code.

[4] Stated by Art 175 Para 1 Point i) of the actual Criminal Code.

Two circumstances of the actual Criminal Code which have enough troubled jurisprudence are also stated by the new Criminal Code, similar in phrasing. We refer to Art 176 Point b) and c), i.e. particularly serious murder against *two or more persons* and *by a person who has previously committed another murder*. These two are also stated by the new Art 189 Point e) and f), where e) of the new Criminal Code corresponds to Art 176 Point c) of the actual Code and vice versa. Art 189 Point e) seeking to clarify things, uselessly explained it. As we were saying, the completion with *attempt to murder is useless*; this text should only have been corroborated with Art 174, few pages before, according to which the attempt of an offence is the attempt to the commission of any action punished by law as offence or as attempt, as well as the participation to the commission as co-author, instigator or accomplice.

To complete the comparative analysis between the forms of murder in the actual and new Criminal Code, we only have two circumstances, both stated as forms of particularly serious murder – Art 176 Point e) and f). Point e) states as particularly serious murder the murder committed against a pregnant woman, circumstance identical in Art 189 Point g) of the new Criminal Code. The difference is that the new code raises another question. The aggravation of Art 189 Point g), if the perpetrator deliberately or assuming that the woman is pregnant commits murder against her. What if the perpetrator is a member of the pregnant woman's family? In the actual regulation, the situation is simple, meaning that it is considered to be in the presence of a particularly serious murder, comprising the aggravating circumstance of Art 175 Point c), and if it did not match its provisions, would have been applicable the general legal aggravating circumstance stated by Art 75 Point b[1]). But in the new Criminal Code, the aggravating circumstance of Art 175 Point c) was included in the constitutive element of the offence stated by Art 199. We consider that in this situation we have a concurrence of offences between Art 189 Point g) and Art 199 Para 1 of the new Criminal Code.

The last of the actual circumstances not stated at all in the new Criminal Code is that stated by Art 176 Point f), namely the *commission of murder against a magistrate, police officer, gendarme or member of the military, during or in connection to the fulfillment of their service or public duties*. We appreciate that such a circumstance should have been maintained, especially that there is not another general legal aggravating circumstance, and that it was not "redistributed" to another offence, as seen before for other elements of circumstances. Such situation, although it did not occurred in practice, if it did it would generate a serious social inequality; in other words, a simple person committing murder against a magistrate or police officer etc shall be punished up to 30 years of imprisonment; but if the same offence is committed by a magistrate or police officer, who should have protected and enforced by his attitude and behavior order and justice, shall be punished up to 20 years of imprisonment. Moreover, the new Criminal Code, in the lack of an express text, as found in Art 75 Para 2, the judge trialing such a case, would no longer consider the situation as a judicial aggravating circumstance, because the new law no longer allows it[1] (exposure of reasons).

c. **Homicide upon request**, is a mitigated form of murder, reinserted in the Criminal Code, in accordance with the Romanian tradition (Art 468 of the Criminal Code in 1936), but also in accordance with the occidental regulations (Art 216 of the German Criminal Code, Art 77 of the Austrian Criminal Code, Art 143 Para 4 of the Spanish Criminal Code etc) (Alexandru Boroiu, 2011, p.51). Reinserting this text is required because of the new regime of aggravating circumstances, enshrined in the general part. According to the new regulation, the statement of the judicial aggravating circumstance does no longer assume the reduction of the punishment under its special

[1] According to the exposure of reasons, the elimination of the judicial aggravating circumstances was made because are placed at the limit of the principle of predictability of law.

minimum. Thus, to allow the application of a punishment corresponding to the degree of social danger of the offence, a distinct regulation became necessary (exposure of reasons). The offence, regulated by Art 190 in the new Criminal Code is defined as *murder committed upon explicit, serious, conscious and repeated request of the victim suffering from an incurable disease or a serious medically attested infirmity, causing permanent and unbearable sufferance*.

The wording of the material element of offence raises several questions. One of them is that of how to define the phrase *explicit, serious, conscious and repeated request of the victim*. The request is explicit when there is no place for interpretations and doubts (Alexandru Boroiu, 2011), when it is written or clearly expressed.

The request is serious when it is not made as a joke or as a game; it is conscious when the person issuing is in the fullness of his mental faculties, it is awake and responsible; and, finally, the request must be repeated for several times. The issue is how many times? Two times is sufficient to consider it repeated, or must be made for 4-5 times to have this feature? We sustain the latter point of view, because it also a way to support the seriousness of the request.

Beside these conditions, the material element of the offence relies also on two essential conditions, namely that the victim must suffer from an incurable disease or a serious medically attested infirmity. A disease is incurable at a given moment. It does not last indefinitely, at any moment possibilities of healing can be discovered, regardless of the disease.

This is why the incurability must be appreciated at the moment of the request referring to real and predictable medical progresses which can be made at that moment or in a near future. An infirmity is serious when it determines a serious immobility of the person, or a restriction of the activities and physiological needs. Both the incurable disease and the serious infirmity must be medically confirmed by medical documents.

The second essential requirement refers to the fact that the disease or infirmity must cause permanent and unbearable sufferance for the victim. The sufferance is permanent when is daily and become a major inconvenient for daily living, because cause serious pains, eventually needing other medicines to alleviate it.

The introduction of this offence shall be the subject of discussion regarding the possibility of euthanasia in Romania. Though it is obvious that euthanasia is prohibited, by its regulation it receives an easier regime of punishment, given the victim's situation.

d. Determining or facilitating suicide, stated by Art 191 of the new Criminal Code, is different from the actual regulation, the differentiations made by this new regulation being inspired from the Italian, Portuguese or Norwegian criminal codes. The new text, on the one hand, differentiates between the situation in which the determination or facilitation of suicide resulted in the suicide of the victim (Art 191 Para 1-3 of the new Criminal Code), and the situation in which though the victim's suicide was determined or eased it did not resulted in the victim's death (Art 191 Para 4 of the new Criminal Code). On the other hand, the first three paragraphs of Art 191 sort between different forms of determination or easing suicide, regarding of the passive subject. If the subject is a mature and conscious person, then the offence is similar to that stated by Art 179 Para 1 of the actual Criminal Code, with the difference that the special minimum of the punishment, in the new code, is increased by a year, from 2 to 3 years of imprisonment. The difference in given by Para 2 and 3 of Art 191 of the new Criminal Code, an auspicious explanation from Art 179 Para 2 of the actual code. Though, the new code mainly stated lower punishments for most offences, in this case, we notice a justifiably

increment of punishments. Thus, according to Art 191 Para 2 of the new code, the offence is more serious if the attempt to determine suicide is made upon a minor between 13-18 years old, or upon a person with a diminished discernment at the moment of the commission of the offence, for other causes than minority of age, the punishment in this situation being between 5-10 years, confronted by the punishment of 3-10 years of imprisonment from the actual code. Moreover, if the determination or facilitation of suicide is against a minor person underage of 13 or a person, who from other reasons than minority, could not realize the consequences of his actions or inactions, the offence is assimilated to the offence of murder, punishable with the same punishment, i.e. 10-20 years of imprisonment. But, for some doctrinaires, this aggravating circumstance is questionable. One might sustain that the determination of a person without discernment, namely medically irresponsible, is rather murder, and to frame the offence in this regulation, the person must have at least a partial capacity of understanding and will (Alexandru Boroi, 2011).

e. Homicide out of negligence is stated by Art 192, having a much more simple regulation, jointing in its two paragraphs the aggravated forms stated in Art 178 of the actual code and eliminating some of them. The aggravated form stated by Art 192 Para 2: *homicide out of negligence because of failing to observe legal provisions or precaution measures for the exercise of a profession or a trade, or by carrying out a certain activity, shall be punished by imprisonment from 2 to 7 years*. In the case in which the failure to observe legal provisions for the exercise of a profession or trade is offence, being stated by another law, is applicable the punishment of the concurrence of offences. Another regulation aimed to settle the dispute in the jurisprudence in favour of the rules applicable for the concurrence of offences, clarified by the High Court of Cassation and Justice in favour for the uniqueness of offence as the complex offence[1] (Jurisprudence of the Supreme Court, 2008).

This short and simple regulation, undistinguishing, shall apply regardless of the provisions violated and of the professional environment in which it occurs. In other words both when the offence is committed by the driver of a vehicle with mechanical traction, when it occurs as a result of driving inebriated (actual Art 178 Para 3), as well as when the offence is committed by a doctor in the exercise of his profession, whether because was inebriated or not (actual Art 178 Para 4). Returning to the application of rules of concurrence of offences, we must note that offences regarding circulation on public roads, which determines the majority of the homicides out of negligence are stated in Title 7 *Offences against public safety*, Chapter 2 *Offences regarding circulation on public roads*, the offence stated by Art 192 concurring with one or more offences stated by this chapter, namely the offence of driving a vehicle without driving licence – Art 335 of the new code, or with the offence of driving inebriated or under the influence of other substances – Art 336 of the new code. A final change of the offence of homicide out of negligence stated by Art 192 Para 3 of the new code refers to the possible applicable punishment. When it immediately resulted in the death of two or more persons, both limits, not just the maximum as actually stated, special of the punishment stated by the previous paragraphs shall be increased by half.

3. Conclusions

The new Criminal Code inserts novelty aspects and simplifies the actual regulation. Not all the modifications are tangible and untouchable, but most of them are a step forward to the modernization of the regulation. If we appreciate the simplification of the regulation of first degree murder, we do not

[1] High Court of Cassation and Justice, Decision 1/2007 given in an appeal for the law.

agree to the fact that some of the aggravating circumstances are eliminated; regarding the homicide upon request we consider that it will raise numerous interpretations and controversies, even if the text seems legally and historically correct. Also, we agree to the decrement of the number of aggravating circumstances for the homicide out of negligence. The simplification of the wording, that we mentioned several times, is also auspicious.

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Practice Problems Concerning the Decision to Grant Access to Asylum in Romania under "Dublin II" Regulation

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Abstract: The transfer of responsibility between the States Parties to the Dublin Convention as amended by Regulation no. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the EU Member States by a citizen of a third country, plays an important role in stopping the phenomenon of "asylum shooping . However there are situations in which states should assume responsibility, under the sovereignty clause, governed by this community legislation. In some cases the authorities responsible for examining an asylum application in administrative phase should suspend the transfers, to the State believed to be responsible, until the reforms are implemented in that state, ensuring that appropriate levels of protection of human rights are met for the asylum seekers subjects of the transfer of responsibility between Member States.

Keywords: sovereignty clause; asylum seeker; "Dublin" procedure; member state responsible

1 Introduction

Due to problems arising in practice about a particular aspect of challenging the decision to grant access to the asylum procedure in Romania we decided to examine this issue in order to find a possible solution or to discuss possible legislative changes in this area . In practice there are frequent the cases where an applicant has asked for recognition of a form of protection in Romania, but after the statements, the fingerprinting and photographing resulted that the person has applied for protection in another EU member state or had the opportunity to seek protection in such a state.

Dublin II Regulation[1] applies to asylum seekers, illegally staying foreigner detained who previously filed an asylum application in another Member State or an foreigner who illegally entered the Dublin territory and has submitted an application for asylum in another Member State than that which he entered.

Because of this fact the person concerned may be subject to the 'Dublin II' governed by Regulation 343/2003 of the Council of 18 February 2003, which establishes the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the member states of the European Union by a citizen of a third country[2].

[1] This Regulation specifies the rules for determining the State responsible for examining an asylum application, applicable in the Member States of the European Union, Norway, Iceland and Switzerland.

[2] The Regulation replaced the Dublin Convention of 1990 that talked about the transfer of responsibility, but could not be applied. Also, the applicability of the Convention depended on the adoption of other Community instruments such as, for example the Council Regulation EC no. 2725 of 2000 on the establishment of the 'Eurodac' sistem for the comparison of

Since the entry into force of the Treaty of Accession to the European Union, Romania has started using Eurodac database, also Law 122/2006 on asylum in Romania includes in Chapter VII Section 2 of the provisions relating to the procedure to determinate the responsible Member State, in case there are proofs or circumstantial arguments which lead to the establishment of responsibility of another State in accordance with Community law. In this case Romania may suspend the national asylum procedure to ask the State held liable under community's aquisu.

Romanian Administrative authority responsible for examining an asylum application[1] will give a decision that either will reject access to national asylum procedure[2] and will have the foreigner transferred to the Member State responsible, either will give a decision that will be given access to the asylum procedure in Romania.

The decision of the responsible administrative authorities can be appealed within two days from the date of receipt of the proof of communication or the document stating that the asylum seeker is no longer in the last residence declared[3]. We can also lead a discussion about the possibility of knowledge by the applicant of the things specified in the communicated decision and that because only the communication is translated[4] and not the content of the decision where are mentioned the reasons for such a decision.

Going forward, although the practice has faced many problems from the exposed above ground, according to art. 121 paragraph 4 of the law on asylum in Romania, the court may issue a reasoned decision which either rejects the complaint and maintains the decision of the Romanian Immigration Office - Asylum and Integration Division (RIO-AID) or allows the complaint, cancels the transfer in the State responsible and disposes access to the asylum procedure in Romania.

It was considered, at the time the law was adopted, that its regulation is plentiful, that covered all situations that may be encountered in practice. Unfortunately, the practice has met with a third case which is not regulated but, due to changes in society, has emerged, which needed to be resolved.

In the following we intend to examine this issue and could top a proposal to amend the current legislation, or just to seek answers that can be used by practitioners.

fingerprints for the effective application of the Dublin Convention and the Commission Regulation 1560/2003 laying down detailed rules for implementing the EC Regulation. 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the EU Member States by a citizen of a third country

[1] That is the Romanian Immigration Office - Asylum and Integration Department, which has five subordinate Regional Reception and Acomodation Centres for Asylum Seekers (open centers) in Bucharest, Timisoara, Soncuta Mare, Galati and Radauti; and two other detention centers in Otopeni and Arad.

[2] The decision for rejection will contain reasons why the access to the asylum procedure in Romania is denied and the transfer disposition into the Member State responsible for examining the asylum application. This decision will be communicated in writing to the applicant, depending on the case by direct communication, by mail or by posting.

[3] According to article 19 letter "c" of Law 122/2006 on Asylum in Romania the asylum seeker has to inform authorities of any change of residence.

[4] Translation is in a language that the applicant "shall be reasonably assumed that he knows" - although on this issue can be put into question whether the applicant understands that language because it is even possible that there is more than one official language in the country of origin and the language "is reasonably assumed that he knows" is not even known by the applicant. See here for example the situation of Pakistan and the Democratic Republic of Congo.

2 Problems Encountered in Practice on Challenging the Decision to Grant Access to the Asylum Procedure

The situation which we will analyze refers exclusively to Greece as a Member State held responsible under Regulation 343/2003, which establishes the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States of the European Union by a citizen of a third country. We bent over Greece because there is a special situation, in practice we are meeting with cases of asylum applications lodged by asylum seekers in Romania which could be subject to the 'Dublin' procedure, and the country held responsible, is the Greek State – taking into account the community provisions incidents.

As I mentioned at the beginning, the asylum procedure is suspended when Romania, actually the responsible administrative authority in this respect, decided to ask Greece if he wants to take responsibility for examining the asylum application in question. As is known, there is no obligation on the receiving State of such request, to ask another state, but Regulation 343/2003 leaves each state to decide what it wants to do.

However, to stop the "asylum shooping" phenomenon[1] it should, in all cases, that the Member State believed to be responsible, to be asked about their willingness to review an application for asylum. It is also well known that the requested state must respond to the requesting State within a determined period of time[2]. If the requested State does not respond within the prescribed time it is considered to have tacitly agreed to assume responsibility for examining the asylum application in question. Also, the requested State may accept or refuse the application examination.

Returning to the situation we want to analyze, the practice has experienced some cases where an applicant has applied for international protection in Romania, but after the statements made by him, or after fingerprinting, it results that the Greek State is the one considered to be responsible for examining the asylum application, in accordance with European legislation in force.

In the case analyzed the administrative authorities responsible for examining the applications for asylum in Romania have decided the suspension of the procedure in order to ask Greece if it wants to assume responsibility for examining the asylum application. The Greek State did not respond within the time specified, and if we consider the provisions of Regulation 343/2003 we talk about a tacit acceptance.

However after considering the existing situation in Greece, the Romanian State decide to allow access to the asylum procedure in Romania, after an earlier suspension, communicates the decision to the person concerned, while giving him the opportunity to challenge the decision within two days. The applicant disputes the decision to grant access to the asylum procedure in Romania wanting the Greek State to consider the request.

If we consider the provisions of Law 122/2006 on asylum in Romania, talking about the decision that can be rendered by the national court, we conclude that in this situation are not talking about an

[1] Phenomenon in which the applicant seeks, as a country for asylum, besides international protection also a host country where social and economic conditions to be high. United Nations High Commissioner for Refugees has always campaigned for the provision of decent living conditions in the country of asylum, but of course these decent conditions depending on the development of each country.

[2] For the detaliation of this period, depending on various situations that may exist see Regulation 343/2003, which establishes the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States of the European Union by a citizen of a third country.

effective appeal because the decision given by the judge may not have as result also a favorable decision because:

a) the court may reject the complaint and remains committed to RIO - DAI (Art. 123, paragraph 4, lit. a of Law 122/2006 on asylum in Romania) - that is, in our situation, gives access to the asylum procedure in Romania, the conclusion is not the desired situation of the asylum seeker;

b) allows the complaint, cancels the transfer to the responsable state and grants access to the asylum procedure in Romania (art. 123, paragraph 4, lit. b of Law 122/2006 on asylum in Romania) - or in this case we are not in the situation desired by the applicant for asylum.

We face a situation that we can find hilarious because it gives the right to challenge a decision of an authority responsible for examining applications for asylum in Romania, but what the court decides can not be, under any circumstances, in accordance with the applicant's request which, in this case, wants to transfer in Greece.

We believe that in such case we are talking about the impossibility of exercising an effective appeal, as it should, if we consider the constitutional provisions and those contained in the European Convention on Human Rights.

It is true that the situation in the Greek State is difficult, which is why since 2008 the United Nations High Commissioner for Refugees (UNHCR), European Council on Refugees and Exiles and Amnesty International have taken a stand on the existing situation in Greece requesting the suspension of transfers to the Greek State, transfers made under Council Regulation 343/2003 and takeover the responsibility under the sovereignty clause prescribed by the same regulation. Also UNHCR issued, in December 2009, a report stating the circumstances in which the Greek State gives access to the asylum procedure, to ensure the rights of the asylum seekers and the quality of the asylum procedure[1].

Amnesty International also published a report in March 2010 which stated that persons transferred under 'Dublin' Regulation are facing a multitude of risks on human rights in Greece, the worst being the risk of return due to malfunction in the Asylum system at both procedural and background level[2]. The deficiencies of the procedure include the elimination of a substantive appeal, lack of legal advice, translation and information about the asylum procedure. In addition to these systemic deficiencies, the expulsions of asylum seekers to Turkey, create a risk of indirect or chain return.

Moreover many asylum seekers transferred under Council Regulation 343/2003 are automatically held in inadequate conditions at the airport upon arrival in Greece. Amnesty International has repeatedly called on the States parts of "Dublin" Regulation to immediately suspend all transfers to Greece until the reforms will be implemented, ensuring that the required levels of protection of the human rights for the asylum seekers are respected.

On October 24, 2010 the Greek Government sent an urgent appeal to Brussels in order to provide assistance to protect the external borders to Turkey. Twenty-six Member States have decided to help this country, among them Austria, Bulgaria, Denmark, Germany, Romania, Slovakia and Hungary. Also, the Greek State has adopted on 22 November 2010 the Presidential Decree no. 114/2010,

[1] In the report in question UNHCR recommends to the Dublin Convention States Parties not to transfer to Greece any asylum seekers and to take responsibility for considering asylum applications where the Greek State would be responsible, in this way not to infringe the asylum seekers rights, to ensure their access to asylum procedures and a fair analysis of the persecution, action that it is not possible at this time in Greece.

[2] These deficiencies relate to the difficulties encountered in accessing the asylum system and filing an application, incorrect examination of asylum applications, a lack of procedural safeguards as required by international law to ensure a correct identification of those who need international protection and for the application of the non-refoulement principle.

published in the Government paper no. 195, designed to repair all the deficiencies existing at this time[1].

After examining the above we might ask, quite rightly, why was suspended, however, the asylum process knowing the situation in Greece, more than that in cases where asylum seekers want this transfer to the Greek State we consider that it should be given an effective opportunity to challenge the decision of the administrative authority responsible for examining the asylum application.

However the situation could be avoided if the asylum procedure was not suspended for asking a state facing a difficult situation, more than that organizations specialized in this issue have recommended to member not to transfer people to this state. In this case there is a possibility for Romania to be sentenced to the European Court of Human Rights[2], something that we should be aware.

Therefore the existing situation leads us to the conclusion that the asylum law in Romania needs to be modified, as soon as possible, so as to be provided also the examined situation or, to avoid these causes, to be taken measures by national authorities so that when there are reports, as mentioned above, Romania to assume responsibility for examining an asylum application under the sovereignty clause.

3 Conclusions

On adoption the normative acts there can not be provided all the situations that can arise in a society. Due to the large number of asylum seekers trying to choose the country of asylum there was adopted Regulation 343/2003 which aims to trigger the Dublin Convention of 1990. Eurodac database was the mechanism by which persons could be detected with an application for asylum in another State Party to the Regulation or which were found staying illegally in a State Party.

National legislation transposed the regulations contained in the Dublin Convention to facilitate its implementation.

The problems encountered in practice on challenging the decision to grant access to the asylum procedure in Romania under 'Dublin' Regulation draw our attention to the fact that we must change the law so that will give the person an effective right to challenge a decision of the administrative authority, or in situations such as those existing at this time in Greece, the national authorities to assume responsibility under the sovereignty clause without to suspend the proceedings in order to ask the state believed to be responsible under Regulation 343/2003.

Or, another solution to avoid transfers to states that at some point may go through similar situations as Greece, the responsible authorities to immediately suspend all transfers to that State, until the reforms are implemented in the State concerned, ensuring that the required levels of protection of the human rights for the asylum seekers are respected.

A proposal to amend art.123 par. 4 could consist in introducing a new article providing for the possibility of being transferred to a state be held liable, although the Romanian authorities, after the

[1] For a detailed study see Sergio Carrera and Elspeth Guild, Centre for European Policy Studies, Liberty and Security in Europe, "Joint Operation RABIT 2010 - Frontex Assistance to Greece's Border with Turkey: Revealing the Deficiencies of Europe 's Dublin Asylum System" , November 2010 or on site www.ceps.eu.

[2] In 21 January 2011 the Grand Chamber of the Human Rights ruled that returning asylum seekers to Greece violates the European Convention on Human Rights (ECHR) - to more information see: "The European Court of Human Rights condemns Belgium and Greece - A major blow to the Dublin System: Returning asylum seekers to Greece violates the European Convention on Human Rights – cause of M.S.S. v Belgium & Greece " / www.ecre.org.

suspension have decided that they also have to consider the application for asylum; or changing of lit. b of the same article by regulating only the possibility of the admission of the complaint without being mentioned the cancellation of the transfer provision in the Member State responsible.

In the latter possibility of change we could face another problem such as in which the court has not acted on the cancellation of the transfer provision that could trigger, by law of foreigners in Romania, other problems that initially were not in mind. Since the initial complaint against the decision to transfer to a Member State responsible did not suspend the order to leave the territory, until the Constitutional Court ruled on this issue, the law be amended so that in the complaint may also be required to suspend the provision to leave the Romanian territory pending resolution of the main claim.

Will see what will be the answer given by the court in such cases and if the law will be amended to eliminate such a situation.

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REALITIES AND PERSPECTIVES

Importance and Necessity of International Judicial Cooperation in Criminal Matters

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Abstract: Development of human society as a whole, the states and nations of the world has been possible due to international relations have been established and settled in time. In bilateral or multilateral international relations, countries have developed cooperative activities in a variety of areas, focusing on economic, cultural, environmental, political, military and legal. Progress in all areas in the past century have imposed structural changes in the architecture world, something which inevitably led to the creation of a new international order, with the intensification of political dialogue that promoted peace, the need to respect human rights and fundamental freedoms, the principles of democracy and the rule of law. .International cooperation is based on the principle of the permanent status and thus independence and sovereignty of their domestic law, held in legal rules produced. Over time, cooperation of states was carried out under bilateral or multilateral legal instruments, resulting in agreements, conventions, treaties etc. These legal instruments have a regional, regional or universal, against the interests of the signatories, the magnitude and importance of the areas addressed. Concerns in the direction of international cooperation have existed since ancient times (particularly in military and commercial), developing and diversifying them into permanent, over time, according to the existing common interests at a time between different states.

Keywords: legal instruments; national legislation; crime

International judicial cooperation in criminal matters is only one specific area of cooperation activities between countries of the world, very important area that has become a necessity since the beginning of last century.

In its historical development, the company sought and always found different ways of self-defense, which accounted for more than immediate reactions to a number of dangers that threatened peace and even existence. The dangers faced by human society can of course be considered, but only resulted in the general context of the overall evolution of society itself. Thus, some were quiet and even dangers which threatened the existence of the slave community, others in feudalism and thus other stage. Given the historical development of society, we find that these dangers are not identical, they are ultimately determined by a number of specific features of certain human communities, zonal, regional and global.

After careful consideration, we can say that in its evolution, human society was and is threatened by a number of factors can generally be divided into internal, external and natural. At present, it is hard to assess which are the most dangerous threats to a community, requiring a rather complex analysis, which will eventually highlight the fact that every threat, minor as it would be appropriate untreated

immediate reaction in terms of society, may in time become a real threat, lower or higher. It is known that most of the times, the company acted after an event, taking take a series of self-defense or coercive measures.

The unprecedented development of international relations in contemporary society has been accompanied by an increase also unprecedented, international crime, the proliferation of forms of organized crime in several states. Scientific and technical progress made, as well as enhancing the democratization process in several states, created the possibility of easy movement of people and goods, the default leading to the development of human society as a whole. Unquestionably beneficial effect for the entire humanity, and created some advantages in terms of broad opportunities for proliferation of the phenomenon of crime worldwide.

The growing danger caused by the growth of transnational crime, the need to prevent and fight more effectively in a globally organized, led to the adoption of international instruments, regional, regional and global efforts to unify the countries of the world.

Thus, the United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of migrants by land, air and sea (both additional to the Convention) adopted in New York on November 15, 2000, established a series of measures aimed primarily international judicial cooperation in criminal matters aimed at preventing and combating more effectively (through a joint effort of the states) transnational organized crime.

Contemporary terrorism is the most advanced form of organization and action in the service of anarchist groups, often religious, with claims often political. A general analysis of the forms of international crime show highlights the first diversification of methods of action, organization and logistics of the perfect often involved in such events in the past 30-40 years, in addition to terrorism, were developed other forms of crime, namely drug trafficking and abuse, trafficking in arms, human trafficking, human trafficking etc. immigration purposes, criminal activities, even if not up to the dangers of terrorism, may the subject of analysis and concern at the level of any state. Romania's accession to the European Union in January 2007 since it involves a series of new obligations imposed by other EU status, obligations mainly focused on the need to contribute to achieving a European area of freedom, security and justice to the highest standards. In this context, Romania became a EU border country, with the mission of ensuring the external border of EU states against illegal immigration, trafficking of arms, ammunition, drugs, radioactive substances, etc.

Schengen enlargement, which includes Romania, will create new facilities for easy movement without risk of offense elements to another corner of Europe.An absolute must is the improvement of legislative framework aimed at criminalizing the threat of new acts committed in different villages States. .Approximation to criminalize acts of danger and discovery procedures, research and trial in the Member States, will allow the best conditions of public safety.

Over time, cooperation of states was carried out under bilateral or multilateral legal instruments, resulting in agreements, conventions, treaties etc. These legal instruments have a regional, regional or universal, against the interests of the signatories, the magnitude and importance of the areas addressed. Concerns in the direction of international cooperation have existed since ancient times (particularly in military and commercial), developing and diversifying them into permanent, over time, according to the existing common interests at a time between different states. A key element that led to the emergence and further development of international cooperation without which it could not conceive, was the mutual trust in a well regulated institutional framework. In this context, we define the

international cooperation as a means of mutual assistance among different states, in various fields, specifically established by treaties, conventions, agreements etc. Ultimately aimed at promoting and protecting national interests, regional world, based on the principle of the independence and sovereignty of each contracting party. International judicial cooperation in criminal matters is only one specific area of cooperation activities between countries of the world, very important area that has become a necessity since the beginning of last century. United Nations Convention against Transnational Organized Crime, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol against the Smuggling of migrants by land, air and sea (both additional to the Convention), adopted New York[1] on November 15, 2000, established a series of measures aimed primarily international judicial cooperation in criminal matters aimed at preventing and combating more effectively (through a joint effort of the states) transnational organized crime.

According to convention, "Organized criminal group means a structured group of three or more persons existing for a certain period and act in concert, the purpose of committing one or more serious crimes or offenses under the Convention to get direct or indirectly a financial or material advantage."

A particular danger to the security stateliest unprecedented development represented by organized crime, with all its manifestations. The current phase of development of human society is faced with other hazards models, much different from those known from earlier historical periods.

The great and important in this regard is the danger of terrorism. About terrorism, although it is known in some form since antiquity, has been written and will write a long time, because at present the most dangerous manifestation of organized crime. Contemporary terrorism is the most advanced form of organization and action in the service of anarchist groups, often religious, with claims often political. A general analysis of the forms of international crime show highlights the first diversification of methods of action, organization and logistics of the perfect often involved in such events in the past 30-40 years, in addition to terrorism, were developed other forms of crime, namely drug trafficking and abuse, trafficking in arms, human trafficking, trafficking in persons for immigration etc., criminal activities, even if not up to the danger of terrorism may be the subject of analysis and concern at the level of any state.

The most important aspect in preventing and combating crime is the specific activities to enhance and improve the identification, mounting and criminal liability for the perpetrators of criminal acts. In addition to this very important, should be considered another, simplifying the teaching of individuals who have committed criminal acts in other member states. It is known that all persons who have committed criminal trying to escape from liability established by law, by adopting different strategies becoming more sophisticated, which stretch from corrupting members of law enforcement institutions responsible to hide the in other states. If in Romania before accession to the European Union target criminals hiding elements that only location in the country or in some cases, risk and other countries by illegally crossing the border now, especially in the perspective of the Schengen area. their escape and hiding them in other Member States is much simpler, without involving any risk. At the same time, our country can become a place to flee to escape the consequences of the law, other elements of offenses in other countries within the European Union, other countries that are not part of the Union or even from other continents. Legislative and procedural measures taken in implementation of legislation should be consistent with respect for human rights and fundamental freedoms enshrined in international legal instruments and the European Union. The unprecedented development of human

[1] Ratified by Romania by Law no. 565/2002 (Official Gazette. no. 813 of November 8, 2002).

society as a whole in the twentieth century created the premises for a permanent development in accordance with the new achievements of science and unwanted in crime. In this context, emerged a more pronounced increase in crime, reaching the peak by the development of complex forms of manifestation of organized crime, namely terrorism, manufacture, trafficking and consumption of drugs, human trafficking, trafficking Arms and ammunition, forged currency or other valuables, etc.

In recent years, these complex forms of manifestation of the crime exceeded the boundaries of one state, manifested in most situations in several countries or continents. Although difficult, countries with democratic regimes known, however, understood that the only way to achieve a better control in the preventive aspect (the phenomenon itself) is related to the achievement of appropriate international judicial cooperation. Organized crime is now able to create great economic or political stress, causing even the fall of governments, where it has managed to penetrate into the governing structures of political parties in the ruling coalition. Criminal organizations take full advantage of the strong growth of international tourism, a certain relaxation in the liberalization of immigration policy, free trade expansion, advanced communication equipment and not least the money laundering techniques to realize and protect goals. Service facilities offered to citizens within the European Union, especially in the Schengen area, create other benefits criminal organizations. Moreover, due to difficulties experienced by the economies of many countries and especially those in developing countries, criminal organizations have been directly involved in the process of privatization. Buying certain businesses sold by some governments that are trying to restart the national economy after long periods of crisis. Thus, banks that belonged to the purchase of state production companies, telecommunication services and have served them as a shield covering their illegal operations, while contributing to increased power and influence in the contemporary world.

Crime developed and that's always growing so-called "white collar" is a particular danger, always present, to the rule of law, because these structures are directors of economic and political power of governments to change certain decisions to their advantage. At the moment, but in perspective, the most serious threat to human existence is the resurgence of international terrorism, which has reached an unprecedented scale, often affect the security of States, destabilizing national economies, organizations and institutions, the default population, panicked, frightened and outraged by cruel and despicable means used by terrorists. The bloody events of recent years, culminating in the U.S. blow 11 September 2001 by members of the terrorist network Al-Qaeda, headed by billionaire Osama bin-Laden (view accountable and bomb attacks on American embassies in Kenya and Tanzania on 7 August 1998) were both horrified and realized the whole humanity in the same context enroll and terrorist attacks in Russia, Spain, England, Italy and Japan, causing casualties and significant damage. During this period, daily, press play, through all media and especially television, cruel consequences of acts of terrorism perpetrated by extremist elements in Iraq who do not want the establishment of a genuine democracy in this country. Hijacking of aircraft, bacteriological substances attacks, bomb attacks on trains or subways, suicide bombings are just some of the ways and places used by terrorists in recent years. The presence and proliferation concern international crime caused a response of solidarity from the states, making them aware of the need to strengthen collaboration in specific activities of identifying, fixing, restraint and conviction of the guilty. The ultimate goal of the activity of judicial cooperation between different countries is to achieve a reduction to acceptable levels of crime and therefore more safety nationals. The main problem which arises in the present process of globalization is accelerating in the coordination of national policies and strategies with the strategies, policies and regulations stated and accepted internationally. In recent years, international judicial

cooperation has seen new and diverse forms, some national legal rules enacted by other under the various international treaties and conventions.

Specialists in the field have made the definition of international judicial cooperation, this institution is appearing and showing only very active lately, due to mutations occurring in organized criminal activity and the need to prevent and reduce crime generated.

We think that this institution can be defined broadly or narrowly, in relation to quite complex issues addressed. Thus, broadly, the international judicial cooperation can understand that this form of cooperation designed complex activities by world governments to reduce crime and increase safety of their citizens, acting together, giving and helping each other to achieve specific activities as: extradition, surrender under a European arrest warrant, transfer of proceedings in criminal matters, recognition and enforcement, transfer of sentenced persons, mutual legal assistance in criminal matters or other similar forms or rules established by law, treaties, agreements, conventions or reciprocity. In a narrow sense, by international judicial cooperation means a specific way of action by world governments and unions act giving the forms established by law, agreements, treaties, conventions, the goal of capturing, proving and punishing perpetrators of criminal activity facts proceedings and of the reduction in crime.

The most common form of judicial cooperation in criminal matters is undoubtedly extradition; there is a certain period of Romanian law which was the only one. Regarding the provisions in the Penal Code prior to Charles II, to Constitution appreciate that: old Romanian criminal lawful does not contain any provision governing extradition. Article 32 of the 1923 (was 30 in Constitution of 1866) provides only that "the extradition of political refugees is stopped." Also, article 6 of the Act of 9 June 1886 concerning the abolition of the State Council stipulated that extradition Council of Ministers shall decide, after a preliminary inquiry. They were only available until the coming of the new penal code of Charles II. So, until the appearance of the Criminal Code of Charles II (Dongoroz, 1939, p. 165-166) there were no provisions governing judicial cooperation, even for extradition. Nevertheless, Romania, during the end of the twelfth century and the beginning of the twentieth century, concluded many conventions on extradition[1]. Regarding the substance of extradition, criminal law rules provide that they are "the established international conventions, and their lack of reciprocity exists and the provisions of this section."
As noted, the Criminal Code is not provided other forms of international judicial cooperation in criminal matters.

During the communist dictatorship, according to treaties and conventions ratified by Romania, with the declarations of mutual bilateral forms of cooperation has diversified, but the most important remaining extradition.

The principle of universality, the Romanian criminal law applies to crimes committed abroad by a foreign citizen or stateless person who does not reside in the country, if the act is provided as a crime and the criminal law of the country where it was committed, and the offender is in the country. Criminalization of the Romanian penal law of dangerous acts, following the ratification of international conventions amid intensifying the fight against crime, countries have agreed to provide mutual support in this area.

Currently, there are many such conventions for the suppression of crimes that harm or endanger the common interests of states and that Romania has ratified or acceded to that by entering the appropriate criminal law provisions incriminating. These include the following: Convention against Torture and

[1]"the Romanian State has concluded, however, many extradition treaty, namely with Belgium, 15 August 1880, with Italy, 17 August 1880, with England, 21 March 1893", etc. (Dongoroz, 1939, p. 166)

Other Cruel, Inhuman or cruel, inhuman or degrading treatment, adopted at New York's United Nations General Assembly on 10 December 1984, ratified by Romania by Law no. 19/1990, the European Convention for the Suppression of Terrorism, adopted in Strasbourg on 27 January 1977, ratified by Romania by Law no. 19/1997, the Convention for the Suppression of human trafficking and exploitation of prostitution of others, to which Romania joined in 1955 etc. Based on these international instruments ratified by Romania and in accordance with its provisions in criminal law have been provided for criminal penalties for certain offenses relating to: the right to life, prohibition of torture, inhuman or degrading treatment or punishment, prohibition of slavery and forced labor , inviolability of residence, inviolability of correspondence, freedom of assembly, freedom of association, etc. Thus, at the request of another State, the Romanian state, under reciprocity, can transmit information and data on the antecedents of person's copies of or extracts from the judgments or any other information of interest to that State and which may contribute to the fight against crime. According to the above-mentioned normative act, the Ministry of Interior and Administrative Reform, Ministry of Justice and Public cooperate directly and immediately, under the law and in compliance with obligations under international instruments to which Romania is party, with institutions having similar powers other countries and international organizations specialized in the field.

Criminal Code came into force on January 1969 provides that "extradition is granted or may be required based on international convention on the basis of reciprocity and, failing that, under the law."

In addition to these standards have been issued Law no. 4 of 18 March 1971 on extradition[1], which contained the substance and form under which the Romanian state or admitted extradition request. However, note that the provisions of this law could be applied only if there is no international convention or a declaration of reciprocity, which of course provide other rules of procedure.

In addition to extradition, which continues to be so this time the main form of international cooperation in criminal matters, reviewed the literature and other such forms. Forms of international legal framework was established and has grown gradually in the twentieth century and the trend is not only to enhance current forms of international legal assistance, but also their universalization. We divided, then, from this point of view, forms of criminal assistance in the informative forms (which relate to crime in general) and procedural character shapes (which relate to a specific crime), in addition to these informative or procedural forms meet According to the first classification listed above, both forms of law, and any acceptable form.

In the literature, showed that "are part of the object established forms of information acquisition, so informative forms: the furnishing of copies or extracts from criminal convictions, criminal history records remission and, ultimately, the exchange International information on a number of issues of concern to the states count in their joint fight against crime.

The same author, in examining these institutions, noted the contents of this information and its transmission. With reference to the forms informative, it is considered that they may serve to "fulfill the fight against crime in general, facilitating the transmission of information, combating crime, especially in terms of general prevention," further stated that: " Information acquired through these forms may, however, often serve and to the discovery, tracking and resolving a specific case and the

[1] According to art. 19 par. (5) of the Constitution, extradition shall be ruled by the court. Consequently, the final decision always lies with the judge, not the executive power, even if 'in Romania, the executive, through the Ministry of Justice, maintains a number of important matters of extradition, determined by the nature of extradition, as an act of sovereignty state, and that international treaties are concluded by the executive, which must ensure and enforce them.

background knowledge of offenders, facilitating their identification and individualization of punishment to apply. "

Information is targeted; generally, achieve a double purpose, understanding and knowledge of the phenomenon as a whole personality of the offender. "For the good fight against organized crime, a state has to know this phenomenon, both in relation to crimes committed on its territory and national data on people with criminal records and progress against crime and other states. For this reason a country is particularly interested to know that its citizen's crimes they have committed in other states and against their convictions. Cooperation judicial police (Interpol) is analyzed in the context of the idea of association of states in their fight against the crime of qualified trainers. Thus, the need for police cooperation has been asked, but rather sporadically addressed before the outbreak of WWI. The increase in crime in all states, especially border, determined to take concrete steps on the line, measures have resulted in the establishment in 1956 of the International Criminal Police Organization, based in Paris. Note is the fact that Romania is one of the founding members of this organization. The organization has affiliates in each country national police organization, with specific responsibilities in cooperative activity, without engaging in activities aimed at acts of criminal probation, in this context, taking account of its status, Interpol does not intervene directly, but by application to the national central offices affiliated to the identification of persons wanted by law and through exchange of information. The request is made at that time by means of a form "with the word, in case of discovery, to make the arrest, which is to be informed immediately asked the national headquarters and a secretariat, to prepare terms of reference Arrest and extradition request with an indication of settlement (shelter) that previously could not be specified.

Thus, as shown by its statutes, Interpol activity "is not only a procedural character, but one of information. As noted, the literature included in the category of procedural nature and business activities of police cooperation through Interpol, based on the fact that this organization carries out activities in specific tracking, identification and arrest of persons wanted by law in relation to this suspect, states that: "But being predominant activity aims to identify and arrest some criminals, I sat on the exposures that form in procedural forms character." Cooperation by way of letters rogatory is another form of international cooperation with procedural character, which is conducted at the request of the unit State concerned. The discovery and identification of perpetrators of crimes are only first steps in the international legal assistance. Often, during prosecution, and in that trial, examining the samples may also need international cooperation. " One can appreciate that assistance through this pathway could be achieved when the judicial body or court to prosecute a case for fair settlement stated that it required the administration and some other evidence or evidence, but which are abroad. In this situation, via letters rogatory may exercise the following activities: examination of witnesses, conducting research on-court communication of parts etc. Also, all within the means of cooperation may include the examination of witnesses by the state authorities of the requesting State or other persons in custody in the territory of the Requested State, etc. confrontation.

Concerning this form of judicial assistance, the doctrine was made a comprehensive review, insisting on two situations where it may be, namely that the facts and on documents.

In the literature, were analyzed and other forms of cooperation called "complementary forms." These special cases are listed refers to bringing a witness who is in a position to own or give relevant parts or extra-judicial evidentiary (objects, documents, etc.). Other forms of special immunities complementary aims, relating to immunity from prosecution and arrest of witnesses who come into the country for acts committed by them before being present in the country. Naturally, this immunity does not operate when the witness in question commits a criminal offense, after coming home or not leave

Romania within a certain period. Another relates to operations as additional derivatives. Thus, proof of service of summons or a finding of impossibility of handing over should be applied to the State. When submitting a prisoner is made pursuant to certain arrangements, it may be subject to certain conditions laid down in treaties or conventions. Effects of handing a prisoner for the purpose of the hearing or confrontation are limited to acting as a witness in the case which was resolved.

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The Provocation to an Unpremeditated or Affective Intention

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Abstract: Within the article, the author examines the crime committed in a state of provocation, and concludes that it represents a conscious and deliberate response to the provocative act, committed against the perpetrator or another person. In this context, the author underlines the fact that the perpetrator, although it was in a strong state of agitation or emotion which diminishes his inhibitory power, he represents the natural consequences of his action, which he seeks or accepts and wishes to accomplish, but, among others, also the fact that the commitment of a crime in a state of provocation excludes the unintentional form of that crime.

Keywords: provocation; intention; crime; motive; mitigating circumstance; perpetrator; violence

In the current vocabulary of the 12th century, *provocation* comes from the Latin word *provocatio* and will be defined as "*action of provoking*, meaning a personified process through the provocative behavior of the victim, thus, that victim is the one who composes a fact or an assembly of raw facts about which we can say they are forming and instituting themselves". (Grand, 1992, p. 864)

From the point of view of the legislative technique adopted through the respective law, it can be observed that the provocation is considered both as accomplishment procedure and as produced psychical result. (Defferrard, 2002, p. 233)

Thus, the legislator sometimes envisages a procedure simply called "the act of provoking". For the repression to be risked, it is necessary that the plot of the provoker, not taking into consideration the intention and the motive had by the carrier in order to provoke such an outcome or state of mind, to be of a provoking nature, after which to undertake and to commit an action opposite to a protected interest[1]…

Thus the provocation is *a plot* which the criminal law incriminates as an *autonomous crime*[2] (Carbonier, 1952) be it as a *material* or *formal*[1] crime, which involves a generating fact stated by the law and by which it is sustained to be *instituted* necessarily *a causal and injurious report.*

[1] Civ. 2e, 8 mars 2001, D. 2001, IR 1077. Dans le meme sens, Crim., 29 oct. 1936, Bull. Crim., nr. 104.

[2] About this matter it is noted the fact that sometimes the provocation is elevated to the rank of „*autonomous crime*", especially when it is in itself a crime, but, in some cases, the legislator, in particular, can *not punish some provocations which are not followed by execution.* The action of committing suicide, for example, cannot be punishable, if it was not followed *by at most one attempt at such a crime*

Regarding the notion of *autonomous crime,* we note that in accordance with art. 431-6 of the French criminal code, it is thought to be "A generating fact of the provocation and which accordingly may constitute, certain public speeches or outcries, letters displayed or broadcasted by any means of transmission: in writing, picture or verbal…", oriented through a behavior directed with the intention of provoking regardless of the public it is aimed to or by the type of support it is made available (poster, journal, etc.). In the law of July 29th 1881 on art. 23 and 24 it is incriminated the behavior of consummation or of the attempt of committing the crime, meaning that it is a provocation which is taken into consideration as an autonomous factor of a social disorder.

Also, *the generating fact* of the provocation can take place as well by a material behavior or an imaginable one, thus even regardless of the usable means (show, sports game, etc.)[2].

A classical method of peremptory exercise consists, at the moment of studying a concept, of a certain situation or behavior aimed at making heard various acceptations which the ordinary language assigns before examining, and to what extent the law captures, absorbs and shapes them according to its interest with the perspective of offering its own legal direction and utility.

The provocation is thus a simple mechanism consisting of *two main components.* It can be defined as the intentional action by which a person, through any legally admitted means, intents to *influence another motive in order to establish the most favorable conditions to committing a crime* (Defferrard, 2002, p. 235).

The human action, if it is accomplished, it is likely to incite significantly *the instincts* and *the reason* of the persons, which can become determinant for them and which can be provoked by a single act or *a sum of acts* (Defferrard, 2002, p. 233) which, in turn, can be of a *material nature*[3] (physical) or *psychical* (moral). (Boulan, 1989, p. 7; De Lamy, 2000; Dupuy, 1978). Regarding the contents of the *psychological means* of the provocation, they *compel a greater complexity.*

The unilateral dependency relationship it is assessed by *the nature* and *intensity of the provoking act* which in turn can be variable, and thus this contradicted relationship confers signification only to the recipient of the provoking act which in a certain way *lacks the will to act* (Memmi, 1979, p. 32). The provocation does not "intimidates", it *stimulates.* If the provoked individual's motivations would not exist it would not mean anything else than an "*overimpression",* and even if the action of the provoker has been intentional it only represents a *"corrupt intention" pressed by another person's efforts.* From a *legal* and *semantic* it can also be considered as a "*plot"*[4] (Salavage, 1981, p. 29).

Thus, *the state of provocation generates a strong disturbance* or *emotion* of the perpetrator determined by a provocation from the injured person or due to the disturbance caused by the process of birth. It is stated *in the general section* of the Criminal code as a *statutory mitigating circumstance* in art. 73, letter b (provocation), as well as in the *special section* in art. 177 Criminal code (infanticide) or in art. 322, paragraph 2, Criminal code (scrimmage) (Mitrache, 1997, p. 92-93).

For example, about *infanticide*, some authors (Tadevosean, 1940, p. 157-158; Borodin, 1966, p. 114) believe that the assessment of this crime as being one of the *less serious crimes, it would not exactly be a reasonable solution.* Others (Şargorodschii, 1948, p. 88; Sluţchii, 1947, p. 11) on the contrary,

[1] This is the case, for example, for the provocation of the abandonment of a born child or of a child about to be born (art.227-12 paragr.1 Criminal code) or to commit safe crimes or crimes through mass media (art.24, law of July 29th 1881).
[2] TGI Nevers, 21 avril 1988, cite *in* J. Boricand, *La répression de la provocation au suicide: de la jurisprudence a la loi*, JCP, 1988. I. 3359, n. 19.
[3] The material means contained by the provocation can be diverse, namely of a human, natural nature, etc.
[4] *Regalement Provocation* (2) *in* G. Cornu, *Vocabulaire juridique Capitant, Quadrige IPUF,* 2 2. ed., 2001, p. 691.

regard the act as a crime *separated by homicide with mitigating circumstances.* To give a proper solution to the problem, it is essentially required to study all the aspects in order to assess correctly the problem of the *motive* for that crime according to the state of *psychological disturbance* caused by the result of the birth. As a *determinant* factor of the state of provocation, may be also some states of a physiological nature. *There is also a differentiation* between *the determination*[1] of the state of *disturbance caused by the birth* and the first degree murder, even when the newborn child murder takes place shortly after birth. For this act to be classified as article 177 Criminal code - infanticide, it must be established both from the *previous behavior,* as well as *the subsequent behavior of the perpetrating mother,* if she *effectively was or was not in a state of disturbance provoked by the birth.* Thus, it is correctly assessed if on the crime of *infanticide* it is proven that the mother, who murdered her newborn child shortly after birth, did not act with a *spontaneous intention determined by the state of disturbance caused by the birth,* or if she put into effect the decision *made before this moment,* the committed crime will be classified as first degree murder according to art. 174, 175 lett. a. and d. of the Criminal code and not the crime of infanticide provided by art. 177 Criminal code[2].

In this case, the evidence adduced in the case, revealed that the defendant sought to *deliberately* murder the newborn child, and for that she has hidden the pregnancy and did not inform the medical specialists, gave birth alone with no assistance from anyone, then she has abandoned the child in a less circulated area, only after the act has been committed. Thus, the correct legal classification of the act is provided by art. 174, 175 lett. a. and d. of the Criminal code - first degree murder.

In terms of *affective* or *emotive aspects,* regarding the crime of *scrimmage* governed by art. 322 Criminal code, they can be governed, in fact, as the most common cases and by some physical states or activities. Thus, the distinction and individualization of the activity of each participant, namely of the *individual acts of violence which are intertwined in such situations, it is determined by the common action of the two sides* through which it is materialized the subjective side of the crime. Thus, the subjective position of each participant must be reported to *the concrete conditions,* circumstances which affect and influence *the quality* and *the intensity of the intention* through the *disturbance* and *excitement* which accompany the conflict (Clocotici, 1979, p.20).

More than that, the common will and action of each participant cannot be detached from the particularities regarding the *psychical position* and the concrete action of each participant. In this case, the will of each participant, represents *the common will* of this type of crime, *but which, in fact, maintains its individual features.* The disturbance, determined by a provocation, can overlap to the *subsequent state of excitement* specific only to those clenched in the scrimmage, thus resulting an *unique disturbance* which influences *the subjective position* of the provoked participants. The fact that the scrimmage, as any other conflict arising in people's life, determines a *psychical disturbance* cannot be challenged. The problem is that, in the case of the *scrimmage*, only this disturbance or other grounds have determined the legislator to diminish the criminal responsibility.

In the legal literature, it has been forwarded the opinion that *the scrimmage* can be assimilated to a *mutual provocation between the participants* (Pop, 1932, p.863). It was considered, in this respect, that the legislator has regulated the scrimmage starting both from the existence o a *certain* disturbance, as well as of a *common guilt* (Clocotici, 1979, p. 20) of all the participants.

Otherwise it has been mentioned that the existence of the provocation will not be presumed, but, in these situations, it has to be proved and it cannot be considered as existing in the mental state of each

[1] Supreme Court, criminal department., dec. no. 867 of April 13th 1983 in *R. R.D.* no. 7 of 1984, p. 68.
[2] Supreme Court, criminal dep., dec. no. 2067 of November 1977, in *R.R.D* of. 1978, no. 4, p. 67.

participant to the crime. In this respect in the specialty literature it has been shown that "On any risk, we can find a type of provocation in the strict sense of the pretence of the provocation in the Criminal code, but more broadly, or it is hard to establish, in this exchange of words, which have been entitled" (Dongoroz, 1939, p. 557; Tanoviceanu, 1925, p. 723).

More recently, the inherent disturbance of the scrimmage has been characterized "by the manifestations of violence involved, by the screams and alarm which accompany it, the scrimmage creating a state of agitation or anxiety…" (Bulai, 1970, p. 676; Tanoviceanu, 1925, p. 723). Thus, in the case of scrimmage, the psychical disturbance differs both *qualitative* and in *intensity* by the state of *disturbance specific to the provocation* (Clocotici 1979, p. 21). Between the mitigation of the provocation and the one on the art. 322 Criminal code *there is no identity,* being *causes differed by the reduction of the sentence.* Thus, the legislator understood to give a unique punishment regardless of the number of victims. In general, the number of the victims of the crimes against a person it is equal to the number of crimes in progress[1] (Antoniu, 1972, p.124).

We believe that, in fact, in these circumstances would be about a *disturbance similar to the provocation* which, being regulated as *distinct mitigating circumstance with general application,* in the case of the crime of scrimmage it can find its legislative appreciation in a special manner.

To be more explicit in explaining the notion of provocation we will bring some examples. Thus, the fact of the defendant, a guard at a gas station, during a conflict with some clients, of taking the hunting rifle, he shouted *"Down"* and fired a shot which injured the victim, constitutes attempted murder. The fact that the victim had an *irreverent attitude* cannot be considered a provocation, according to art. 73 lett. b. of the Criminal code. The fact that the defendant has been awakened from his sleep and notified of the behavior of the victim, that he initially turned towards the unarmed group, but, noticing the athletic stature of the victim, considered that he is facing an attack and took the rifle with the intention of intimidating, that the defendant requested the group to leave the gas station, but the members of the injured party laughed at him and told him that they will beat him up with his own weapon until it breaks, it is a legal mitigating circumstance of the state of provocation[2].

If the committed act occurred *after the termination of the attack,* it is situated outside the self defense. But in such a situation, if from the circumstances of the cause it results that the requirements provided in art. 73 lett. b of the Criminal code are fulfilled, the court is to determine the existence of the mitigating circumstance of the provocation, with the corresponding consequences upon the punishment and the responsibility for the damages caused to the victim[3].

There is a *mitigating circumstance* of the provocation provided by art. 73 lett. b, Criminal code and in the case in which the defendant, being hit by a person and being in a state of strong disturbance caused by the violence exercised upon him, has turned against the author of the aggression with the intention of hitting, but has hit another person by mistake, a person who was together with the one who committed the provocation act.

Also, in fact, it was noted as well that in the day of June 19th 1977, the victim M.I. accompanied by I.N., both drunk and armed, the first one with a club and the second with a fork, were walking together through the village of Bărbuleşti. Arriving at the courtyard where the defendant M.A. was, I.N. begun an argument with him. The defendant was armed himself with a spear made of an iron pipe 2.07 m

[1] The Regional Court Iaşi, criminal dec. no. 1826 of 1963, in *J.N.* no. 5/1964, p. 171; Regional Court Crişana, criminal dec. no. 449 of 1965, in *J.N.,* no. 10/1965, p. 165.
[2] Pandectele Române/*Romanian Pandicts* no. 4/2001, 156, p. 69; criminal decision no. 2266 of May 23rd 2000.
[3] Court house of Hunedoara County, criminal decision no. 620 of September 5th 1977, in *R.R.D.*, no. 5 of 1978, p. 62.

long at the end of which there was welded a military bayonet of 23 cm in length. After a short while, I.N. hit the defendant with a fork over the hand, and he, with the intention of hitting him with the spear, has thrown it at him, but instead he has hit M.I., who was close by, in the chest.

As a result of the injury, the victim suffered a right hemithorax pasternal penetrated wound, sectioning the lower right pulmonary lobe, open pneumothorax, severe hemorrhagic shock, which required approximately 100 days of medical care, his life being saved after the emergency medical interventions.

The defendant M.A. appealed against the sentence. The defendant pleaded a single reason for cassation, consisting of the fact that it was wrongfully discarded the application of the legal mitigating circumstance provided by art. 73 lett. b. Criminal code, the crime being committed in a psychical disturbance state provoked by the hit from I. N. and taking this into consideration, he considers that it is irrelevant the fact that he accidentally hit another person than the one who provoked him.

Regarding the criticism which has been formulated it is found unequivocally that the defendant has thrown the spear towards I.N. only after he has been hit by him, a situation which has been correctly established.

That being the case, the serious violence exerted on the defendant, who required several days of medical care, was capable of producing that psychical disturbance under whose influence he acted, as provided in art. 73 lett. b. of the Criminal code. The point of view expressed in the indictment as well as in the decision, meaning that in the given situation it cannot put in practice the provocation, due to the fact that the provocative act does not come from the victim, is invalid, given that the mental disorder which caused the actions of the defendant, and which is in an effective state has the nature of being provoked[1].

In the legal practice it has been decided that the case when a murder victim has been caught in *flagrante delicto* of adultery does not constitute a provocative act as provided by article 73 letter b. This text refers exclusively to the situation in which the murder has been committed by the husband exactly in the moment of catching the victim in the act of adultery[2].

As we can see, some of the courts confer the value of mitigating circumstance to the provocation provided by art. 73 lett. b, Criminal code, and other courts do not attach such significance, as in other cases, although it concerns *situations and occurrences with different intensities* with respect to their influence upon the psychical state of the perpetrator, however they were given the same juridical efficiency in establishing the degree of guilt of the victim in determining the commission of the crime (Daneş, 1984,p. 20).

Thus, regarding the situation of the provocation, it justifies the mitigation of the legal responsibility, it also constitutes, as it has been mentioned regarding the essence of the institution, *the state of strong disturbance,* namely of *excitement* or *nervous tension, anger* or *indignation* (Bulai, 1982, p. 213-214).

The strong state of emotion generated within the mental state of the perpetrator and which, by weakening the power of his inhibition, explains the criminal decision and its accomplishment[3], not because he has been hit, but because that hit has produced within his mental state a disturbance which made him partially loose control upon his actions, to reduce his power of self control, and in this state to commit a crime in the prejudice of the aggressor (Pavel, 1965, p.55). In these circumstances, the

[1] Supreme Court, criminal depart. dec. no. 522 of March 24th 1978 in *R.R.D.,* no. 4 of 1978, p. 67.
[2] Supreme Court of R.P.R., col. pen., dec. no. 693 May 23rd 1962, in *J.N.,* no. 5 1963, p. 170.
[3] Plen. Of the Supreme Court, dec. no. 3/1959, in *L.P.,* no. 5/1959, p. 83.

committed crime is, to an extent, the consequence of the unjust behavior of the victim, as the perpetrator, although *guilty, he would have not committed the crime, if he would not have been in a state of strong emotional disturbance or emotion determined by the provocative act.*

On the other hand, however, it is the *consequence of the psychical attitude, education, mentality of the provoked person,* who was unable to control himself and responded, committing the crime. The fact that the perpetrator, even though he was disturbed, acted in guilt anticipating and, at the same time, accepting the consequences of his response, maintains the criminal act within the criminal boundaries regardless of the severity of the provocative act. However, the fact that, in the absence of the aggression which brought him into a state of deep disturbance or emotion, he would have not infringed the criminal law, displays a lower risk to his person, which justifies, in all cases, the mitigation of the criminal liability (Daneş, 1984, p. 21).

Thus *the provocation* involves a criminal act *in which the subjective side is completely achieved,* existing also the anticipation of the result as well as the desire to produce it, all these taking place within a *free, but disturbed consciousness. The emotion, disturbance* produced by the aggression explain the violent mode of reaction and that is why attract a mitigation of the penalty, but *does not remove the contents of the subjective side of the crime which has been completed in full* (Pavel, 1965, p. 55). The essence of the provocation stems from the fact that it is a *psychical state from which the criminal decision and the will to achieve it start,* being *personal,* with all the consequences arising from this characterization for the punishment of the participants (Daneş, 1984, p. 21).

The legal literature has shown that on provocation, establishing *the degree of severity of the facts* which affect the dignity of a person, it is important to take into consideration the explicit or implicit character, the allusive or direct character of the statements from the person to whom he has responded, to a group, the relationships between the persons, if the statement or imputation have been made as jokes or in order to reprehend its recipient, the pejorative meaning of the words or of the behavior or a pejorative significance (Grigoraş, 1967*,* p.147-149). Specifically, it has been claimed that it cannot be considered to have been produced a serious interference with the dignity of the person liable to cause a strong disturbance or emotion when, immediately after insulting the defendant, the victim apologized[1]; neither in the case when the insult comes from an irresponsible[2] person or from a person in an obvious state of intoxication[3].

It is noted the fact that by *other unlawful action* it is understood any act, action or inaction contrary to the law and presenting, both objectively and *subjectively* in relation to the author of the provoked crime, a particular sense of severity under the provisions or art. 73 lett. b. of the Criminal code. By this it is meant not only an act which would fall under the criminal law, but also an action illegal and outside the criminal law, for example an administrative violation, a civil injurious act, severe of course, *susceptible of producing a strong state of disturbance, of nervous excitement* (Bulai, 1997, p.150). Thus, it has been rightfully considered, as an act of provocation, not only an attempt of the victim of being provoked, but it has to take place as well the provocation itself[4].

Thus, *the act of provocation* must have produced in the mental state of the perpetrator a *strong*

[1] Court house of the county of Timiş, crim. sentence no. 155/1970, in *R.R.D.* no. 1/1971, p. 157.
[2] Supreme Court, col. pen., dec. no. 1483/1963, in *J.N.,* no. 3/1964, p. 169.
[3] Supreme Court, in the composition provided in art. 39 paragr. 2 and 3 of the Law on Judicial Organization for the Judicial Organization, dec. no. 25/1980, in *Culegere de decizii 1980 / Collection of decisions 1980,* p. 249 and the following and in *R.R.D.* no. 1/1081, p. 70 ; Supreme Court, criminal depart.., dec. no. 2552/1982, in *C.D.* of 1982, p. 225 and the following
[4] Supreme Court, Crim. Depart. , dec. no. 2249/1971, in *R.R.D.* no. 6/1972*,* p. 169; Supreme Court, crim. depart., dec. no. 64/1975, in *C.D.* of 1975, p. 303 and the following

disturbance or emotion. If it has not generated to the perpetrator such an emotional state of great nervous excitement, of revolt, indignation, anger, namely of emotion, the action of the victim cannot be recognized as having the characteristics of a provocative act as stated in art. 73 lett. b. of the Criminal code, being just a simple circumstance of committing the crime, for which the judges will recognize or not the character of *legal mitigating circumstance.*

Thus, in the legal practice[1] it has been decided that the one who murdered the man who was having intimate relations with his wife cannot benefit of the mitigating circumstance of provocation. And this is true as long as being separated in fact for a long time with no perspective of resumption of the cohabitation, he cannot consider himself offended in his dignity as a husband. Also, the existence of the *disorder or of the emotion* and *its intensity are not presented, based on a legal assumption*[2] in case of committing one of the actions listed in art. 73 lett. b. of the Criminal code, but they must be established, based on evidences, in each case. In order to review the state of disorder, the judicial body cannot report to the type of the average person as a psychical balance, but to the real person, of the perpetrator of the type that he is investigating. In this regard it has been decided, for example, that if the defendant is suffering from organic disorders which increase his impulsiveness, in order to apply the mitigating circumstance of provocation, the court must verify if the activity of the victim, *reported to the background of the defendant's disorder,* could or could not have provoked him a strong disturbance or emotion for him to subsequently react (Manoliu,1959, p. 9). In order to establish the disorder or the emotion, its intensity and duration, the court has to take into consideration *the psychical particularities of the perpetrator, the relationship between the parties,* to perform a *concrete analysis of the mental state in which the perpetrator was* after the victim has committed the provocative act until the moment of committing the crime, aspects which could exclude the possibility of the single use *of several objective criteria* based on which to be decided, in an apriori manner, if the action of the victim produced or not, into the mental state of the defendant, a strong disorder or emotion. Each time, the existence, intensity and duration of such an emotional state must be verified specifically in relation to all the data of the cause[3]. Thus, the absence of the perpetrator from the place of committing the provocative act upon another person does not exclude the possibility of him being strongly disturbed of its discovery[4] (Manoliu, 1959, p.8-9).

The provocative act committed by the victim must have not been preceded by an aggression or a provocation from the perpetrator. The provoked crime must have been committed upon the person who committed the provocation[5]. The rule according to which the provoked crime has to target the author of the act of provocation knows an *exception*, namely when the victim has responded *by mistake* upon another person than the aggressor, confusing that person with him. In such a case, the mitigating circumstance of provocation operates as if the crime would have been committed upon the

[1] Supreme Court, crim. depart., decided, (dec. No.1195/1972 in *C.D.* of 1972*,* p. 309 and the following., as well as in *R.R.D.* no. 8/1972, p. 165.

[2] Regarding some issues appeared in the practice of the Supreme Court with respect to the mitigating circumstances of the provocation, in *L.P.* no. 5/1958, p. 9; Supreme Court, col. pen. dec. no. 1501/1962, in „Justiţia nouă" no. 2/1963, p. 155 ; Supreme Court, crim. depart., dec. no. 271/1977*,* in *Repertoriu...* 1976—1980, p. 328.

[3] See Supreme Court, in the composition provided in art. 39 paragr. 2 and 3 of the Law for Judicial Organization, decision no. 25/1980, in *Culegeri de decizii* 1980 / *Collection of decisions 1980*, p. 249 and the following*,* and in *R.R.D.* no. 1/1981, p. 70 and no. 475)1979, in Culegeri de decizii 1979, p. 346 and the following, and in *R.R.D.* no. 10/1979, p. 67; decision no. 277/1977, in Repertoriu de practică alfabetică of 1976-1980 by V. Papadopol, M. Popovici, p. 328; Supreme Court, col. pen., dec. no. 2025/1968, in *R.R.D.* no. 6/1969, p. 170.

[4] Supreme Court, criminal college, decision no. 371/1964, in *J.N.,* no. 12/1964, p. 160; Supreme Court in the composition provided in art. 39 paragr. 2 and 3 of the Law for Judicial Organization, dec. no. 50/19776, in *Culegeri de decizii*1976, p. 284 and Supreme Court, criminal department, decision no. 589/1981, in *R.R.D.,* no. 12/1981, p. 109.

[5] See Plen Supreme Court, guidance decision no. 12/1966 in *R.R.D.,* no. 2/1979, p. 55.

person who committed the act of provocation[1].

Regarding the *spontaneous intention,* this form of intention is characterized by two main elements: *the decision is made in a state of disorder or emotion,* respectively, *it is immediately executed* (Mitrache, 1994*.,* p. 92-93). *For example, the perpetrator is punched by the victim,* thus causing him a state of disorder, and he responds by stabbing the aggressor with a knife. The murder committed under these circumstances *will be characterized by a spontaneous intention.* As we have already sown, the same intention exists as well in the case of the mother who, in the state of disturbance caused by the birth, takes the life of the newborn, immediately after birth (art. 177 of the Criminal code). *The unpremeditated or spontaneous intention (also called provoked) arises from a strong state of disturbance or emotion* of the perpetrator determined by a provocation from the injured person or due to the disturbance caused by the process of birth. It is stated *in the general section* of the Criminal code as *a legal mitigating circumstance* in art. 73 lett. b. (provocation), as well as in the *special section* in art. 177 Criminal code (infanticide); art. 322, paragraph 2 Criminal code (scrimmage)[2].

Thus, *the spontaneous intention* constitutes *a legal mitigating circumstance* because the decision has been made by the perpetrator in special circumstances, in a *strong state of disorder or emotion,* which *has an influence upon the degree of anticipation and will (self control) of that person, which it diminishes, but without excluding them.* Also, the decision making has been determined by causes provided by the law (provocation, birth, etc.). For these reasons, we do not share the opinion that the acts committed in a moment of anger (*impeto animo),* from a momentary impulse, "*do not leave room for a prior deliberation in taking the criminal decision"* (Dongoroz, 1969 p. 143; Brenciu, Panţurescu, 1984, p. 53).

Thus, we support the opinion that, *any mode or degree of intention* means both *the appearance of the criminal idea* as well as *the deliberation in making the decision* even though the deliberation is sometimes *longer,* while sometimes is very short (Basarab,1997, p. 181).

Also, in this context, we would mention as well the fact that the crime committed in a state of provocation, is *a conscious and deliberate response* to the provocative act, committed against the perpetrator or another person. *The perpetrator,* although in a strong state of disorder or emotion which diminishes his power of self control, *represents the natural consequences of his action, which he follows or accepts and whishes to accomplish.*

Having mentioned these facts, it would follow that the crime committed in a state of provocation excludes the *unintentional* form of that crime.

However, in the Russian (Tcacenco, 1964, p. 49; Ragor, 1996, p. 30; Scuragor, Lebedev, 1996, p. 213; Borodin, 1994, p.19) doctrine, regarding the *provoked crime,* it has been discussed if it an be done either in the *form of director indirect intention,* or with *praeterintention.*

Regarding only the discussions *upon* the form of the *provoked, unpremeditated or affective* (Tcacenco, 1996*,* p. 49; Ragor, 1996*,* p. 30; Scuratov, Lebedev, 1996*,* p. 213, Borodin, 1994, p. 16; Tcacenco, 1996*,* p. 31) intention, in general, it has been mentioned that the supporters of *the first point of view* claimed that the issue deserves to be solved only as a form of a *direct intention,* namely only in such a form it can be *affective,* where it is mentioned that "The person guilty of committing the crime, even if that person was in an affective state, that person still can be aware of the social danger, *with an*

[1] See Plen Court House of Suceava county, dec. no. 624/1978 in *R.R.D.,* no. 2/1979, p. 55.
[2] See decision no. 1035/1968of the Crim. C. of the Supreme Court., in *C.D*., 1968, p. 238-240.

amount of volitional efforts in order to accomplish certain criminal activities (Sidorov, 1978, p. 78-79).

The authors of *a second opinion,* in the analysis of the *affective aspects* of the intention, noted about these crimes that in fact they could have been committed as well in the form of *indirect intention* (Tcacenco, 1996, p. 31). Thus it is mentioned that "*The imagination regarding the purpose* appears, as it is known, *as a part of the volitional process as well as the desire* in fact, and if the crime is committed without a qualified purpose, then no crime with affective intention cannot be committed with the form of *the direct intention, but with the form of indirect intention"* (Tcacenco, 1996, p. 49; Rarog, 1996, p. 30; Scuratov, Lebedev, 1996, p. 213, Borodin, 1994, p. 16).

Finally, *the last doctrinal position,* shared by most of the authors, regarding the form of the intentional *affective* crimes, it is presented as being possible only in a form of *the indirect intention,* and this because the psychical attitude of the person towards his actions, can be accomplished only with *the purpose* of causing certain criminal results, injuries which are explained by the fact that the perpetrator, being in an affective state of disturbance or emotion, aims at *committing the crime represented as such,* and thus, *it can overcome any obstacle in order to reach his goal of revenging his own offense.*

In these situations, the perpetrator *does not think concretely* what a dangerous social result will be created, *that person acknowledges what he desires to cause to the victim,* namely *that person is following the purpose of getting satisfaction from revenge.* Thus in these *affective states,* to the perpetrator it is *irrelevant what will follow after,* thus the *intention* being an *indirect one. The nearest goal in these situations is only to commit the crime,* not to attain any results. Usually, in these situations, subsequent to the commitment of a crime, most of the perpetrators have an attitude of *repentance, willingness to help*, *calling the police* or even one which is inadequate to those previously mentioned, such as the one of leaving the crime scene (Sidorov, 1978, p.88).

As far as we are concerned, we support the advocates of the second opinion, mentioning the fact that for the crime, as a *volitional element,* will be present because it exists on any conscious activity, or at least will be a less than usual one. We must also mention that the *state of provocation* cannot change the *contents of the intention* and, consequently, *neither the legal classification of the act,* only in certain cases which we have previously mentioned, namely art. 177 of the Criminal code (infanticide) or art. 322, paragraph 2, Criminal code (scrimmage). Thus, if the *provocation* cannot change the contents of the intention, neither the legal classification of the act, except for certain cases, where it could not be claimed that, even though he has struck the victim with a knife in the chest area, *the perpetrator,* who was *governed by a strong emotion* produced by the provocative act, *did not realize,* because of that, *that his action could have as result the death of the victim* and thus the committed crime would not become the crime of death blows[1], as we could wrongfully believe that it was claimed, but the crime of murder with direct intention. In our view, we see no impediment for the crime committed in such states to be unlikely of being committed also in the form of the praeterintentional guilt.

[1] See Supreme Court, crim. depart. dec. no. 2092/1980 in *R.R.D.* no. 8/1981, p. 66-67.

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THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

Re-Individualizing the Criminal Sanctions of Deprivation of Liberty in the European Union

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Abstract: The subsequent recognition of the execution of criminal penalties of deprivation of liberty by another Member State, other than the one of the conviction, is an act of mutual trust between Member States of the European Union. However, the differences between criminal legal norms, particularly regarding the minimum and maximum limits of some punishment prescribed for the same offense, require a different approach in the sense that a member cannot recognize and then enforce a sentence of deprivation of liberty with the maximum limits greater than its own legislation, for the same offense. This very sensitive issue was solved by adopting the Framework Decision 2008/909/JHA of the Council from 27 November 2008, where the European legislative act allows the executing Member State the re-individualization of the deprivation of liberty sentence, the goal being that the penalty imposed is compatible with the internal law of the enforcement state. In the implementation of European legislative act depositions, any member State which has recognized such a court order, based on a legal decision ordered by a competent judicial body may still re-individualize the penalty regarding its maximum limit. The examination of the European legislative act highlights also some flaws that must be corrected, taking into account the possibility for the executing Member States to fully modify the applied punishment, as regards both its nature and its proportion applied in the sentencing State.

Keywords: deprivation of liberty; re-individualization; European legislative act

1. Introduction

European legislative act governing the recognition of judgments imposing custodial sentences or measures involving deprivation of liberty in order to execute them in another EU country (other than the issuing state) is 2008/909/JHA Council Framework Decision of 27 November 2008 on the appliance of the principle of mutual recognition in case of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

As stated in the title, the European legislative act provides the possibility to execute a penalty of imprisonment in the state other than the convicting one, that is the Member State that has received a court order for its recognition and enforcement.

The penalty of imprisonment in the executing State is meant to increase the chances of social rehabilitation of the sentenced persons. (Rusu, 2011, p. 561)

The execution of the sentence in a state, other than the convicting one, has the role to increase the chances of social rehabilitation of the sentenced persons. In this respect, the judicial authorities of the

condemning State will take account of the person's attachment to the executing State, the fact that the person in question considers or not the executing State as a place where he has family, linguistic, cultural, social, economic ties or any other type.

Although the European legislative act was not implemented in our legislation, currently, if the Romanian state is required by another EU member state to recognize and enforce such a court, the Romanian judicial authorities under the European legislative act will recognize and enforce, with certain exceptions.

In these circumstances, the executing Member State has the possibility of re-individualizing the criminal law sanction of deprivation of liberty applied to the person in question.

2. The Necessary Conditions

According to European legislative act depositions, under the condition that the convicted person is in the issuing or the executing State and that the person in question gives the consent (if necessary), a court order, accompanied by the certificate may be submitted to one of the following states:

- to the Member State of the convicted person's citizenship, where the person lives, or
- to the Member State of citizenship, in which, although is not a Member State where the person lives, the convicted person will be deported, as soon as he is exempted from the execution under a sentence of expulsion or deportation order included in the court decision or in a judicial or administrative decision or in any action taken as a result of that decision, or
- to any Member State other than the ones mentioned above, whose competent authority agrees to transferring the legal decision and the certificate towards the member State in question.[1]

Proceeding to the interpretation of European legislative act depositions, it results that the Romanian state, will also receive such a certificate in the following situations:

- the convict is a Romanian citizen or although is not a Romanian citizen, he lives on the Romanian territory;
- the convicted although is a Romanian citizen he does not live in Romania, but is in course of being deported under an expulsion order as soon as he is relieved from the execution of the sentence;
- the Romanian state accepts the transmission of judicial decision and the certificate, under the conditions other than those mentioned above.

The general rule for transmitting a court order accompanied by a certificate is that these documents may be transferred only with the consent of the sentenced person. However, in accordance with the European legislative act, the consent of the sentenced person will not be required when the court decision accompanied by a certified is rendered to:

- Member State of citizenship where the convicted person lives;
- Member State in which the convicted person will be deported after being released from the execution of the sentence under an expulsion or deportation order included in the judicial or administrative decision or any action taken as a result of that decision;

[1] 2008/909/JHA Framework Decision of 27 November 2008, article 4.

- Member State in which the sentenced person has fled or if he has returned because of ongoing criminal proceedings against him which is in the issuing state or following the conviction in the issuing state. (Rusu & Rusu, 2010, p. 229)

3. Re-Individualization of Criminal Penalties of Deprivation of Liberty

If a Romanian citizen residing in Romania, has committed a crime on the territory of a EU member state, after being convicted by the judicial authorities of that State, the convicting state may issue the certificate and the legal decision in the Romanian State, in order to acknowledge and subsequently enforce that decision in Romania, without requiring the consent of the convicted person.

After receiving the above mentioned documents, the competent court of appeal, shall have a few options, namely:

1. When it finds that there are accomplished all the conditions provided by the internal legislation and European legislative act, it will recognize the judicial decision issued by the judicial authority of the convicting Member State and it will enforce it as it was passed; in this case, imprisonment will be performed within the limits set by the convicting court of the Member State, the Romanian court has no jurisdiction to re-individualize it. We mention that the competent Romanian judicial authorities shall also have the opportunity and obligation to proceed to the individualization of executing the penalty in prison. Also, any acts of amnesty, pardon, will produce legal effects and in this case, the Romanian judicial authorities have the obligation to inform the judicial authorities of the convicting State. (Rusu, 2011, p. 562)

2. It will proceed to partial recognition and enforcement of the decision emanating from a competent judicial organ of the convicting state. In this situation, the competent territorial court of appeal may consult the competent authority of the sentencing state to find a solution acceptable to both parties. According to the depositions of the European legislative act regulation, the two competent authorities may reach to an agreement, as part of the recognition and partial enforcement of a sentence, under the condition that such recognition and enforcement may not result in prolonging the duration of the sentence.[1]

Partial recognition and enforcement of judgments relating to a penalty or other deprivation of liberty measure, are not covered by our legislation. In this context, the European legislation does not expressly provide, what is the partial recognition, or in other words what can be recognized as partial. We believe that the European legislator referred to the quantum of punishment and the execution regime of the sentence of deprivation of liberty.

We appreciate that in such a case we are not in the position of re-individualization of sentence, because the Romanian court will recognize for example the executed period by the convicted person in the sentencing State before transferring to Romania, during which it will be deducted from the total length of sentence. (Rusu 2011, p. 562)

We are instead in the presence of re-individualization, in terms of the executing regime and facilities that the convicted could benefit from (by the consideration of the executing part of the sentence).

3. Postponing the recognition of the decision is that a third option available to the competent court of appeal, a variant that does not involve specific activities of individualization.

[1] 2008/909/JHA Framework Decision of 27 November 2008, article 10.

4. Re-individualization of punishment is a last resort that the court may adopt, in certain circumstances, expressly provided by the European legislative act.[1]

As regards the nature and the length of sentence, the general rule of recognition and enforcement of such penalty is the existence of double incrimination. The European legislative act provides other categories of offenses for which it is not imposed the necessity of double incrimination, only under the condition that, according to the law, the maximum penalty should be of at least three years.

As mentioned above, according to the provisions of the mentioned European legislative act, the general rule is that the judgments concerning the sentences of deprivation of liberty are enforced in the executing Member State as they were ordered by the court of the convicting Member State. Under these conditions, the re-individualization of the sanction of criminal law applied by a court of another Member State may take place in two situations, namely: when the applied sentence does not correspond to our law in terms of its quantum (or any other Member State) and when the penalty does not correspond in terms of its nature. Thus, when the sentence imposed in another EU country is incompatible with the depositions of our internal legislation as regards its duration, the Romanian court may proceed to its re-individualization (adaptation). But it will proceed to re-individualization only when the penalty imposed by the sentencing State court exceeds the maximum penalty prescribed by our law for similar offenses. The sanction being individualized as such, it cannot be less than the maximum penalty provided for similar crimes according to our internal law [article 8, paragraph (2) of the European legislative act]. For example, note that we will be in such a situation, when a Romanian citizen who is resident in the country, is convicted in an EU member state for committing an offense of destruction by guilt, to a punishment of 4 years imprisonment. Territorial competent court of appeal will proceed in the first phase to the recognition of the judgment in question, and then it will proceed to the re-individualization of the sentence. (Rusu, 2011, p. 563)

In this situation the re-individualization of punishment is required because according to the provisions of article 219, paragraph (1) of the Penal Code, the punishment provided by the law is imprisonment from one month to two years or fine. Noting that the penalty imposed by the sentencing state court is of four years, so more than the maximum sentence under the Romanian law for committing the same offense, the court of appeal, within the framework of re-individualization process, shall take note of this situation and will establish a 2-year prison sentence. We note that in this situation, the Romanian court has no other options available; it cannot even apply the general criteria of individualization of punishment under the Romanian law, or other provisions of the Romanian law. The only criterion, for the court is obliged to take into account, is the maximum sentence provided by the Romanian law for the offense committed abroad. We appreciate that this individualization is somehow inappropriate because the court, within the individuation process, will not take into account the criteria established by law, but an express provision of the European legislative act which cannot be ignored (Rusu 2011, p. 563).

Although in our law the penalties are quite high, in judicial practice situations may arise in which the penalty imposed in the sentencing Member State is less than the minimum sentence required by Romanian law for committing that same crimes. Because, according to the European legislative act and the special law, the situation of the convicted cannot be aggravated, this time the punishment will not be re-individualized, following to be executed in the specified quantum in the sentencing State.[2] But we note that the re-individualization is not mandatory for the Romanian state, the measure itself is

[1] 2008/909/JHA Framework Decision of 27 November 2008, article 8.
[2] 2008/909/JHA Framework Decision of the Council article 8, paragraph (4) and Law no 302/2004 with its subsequent modifications and completions, article 146, paragraph (1).

left for the use of the judicial authorities. Also we note that the procedure described is valid for all Member States, which are in the situation of being the issuing or the executing state.

The second situation in which the re-individualization of the sentence is imposed by the Romanian courts is where the penalty applied by a competent court of another Member State is incompatible with our internal legislation regarding its nature, in which case the competent judicial authority (the court) can decide to adapt the provided penalty or measure to similar offenses in our internal legislation. Such a penalty, after individualization, must correspond as closely as possible to the punishment imposed in the sentencing State and therefore, the punishment cannot be turned into a financial penalty under the provisions of article 8, paragraph (3) of the European legislative act (Rusu & Rusu, 2010, p. 231).

As we mentioned before, in both cases in which the Romanian judiciary bodies have made a re-individualization of the penalty applied by a court in another Member State, the applied sanction should not be by its nature or duration greater than the sanction applied in the issuing State. Therefore, the judicial authorities of the Romanian state, may proceed to the re-individualization of the applied penalty by a competent court of another Member State, only in the two cases expressly provided by the European legislative act, both being cases of incompatibility with our legislation in the length or nature of the punishment.

4. Conclusions

Achieving one of the most important proposed objective, namely to ensure an area of freedom, security and justice in the European Union, involves certainly the improvement of the complex system of judicial cooperation in criminal matters between Member States. Obtaining positive results in the activity of judicial cooperation in criminal matters in the European Union can only be achieved under the recognition and enforcement of judgments between Member States. The current differences between Member States' laws, visible differences in the quantum and nature of punishments for the same offense or of the same kind cause some difficulties in terms of opportunity recognition and subsequently the execution of punishments. In these circumstances, it has become a necessity drafting a new legislative act that would allow the executing Member States the re-individualization of punishment in the sentencing State, under certain conditions. The purpose of enforcing custodial sentences, in another Member State, other than sentencing one, is to increase the chances of social rehabilitation of the sentenced persons. Although the European legislative act has not been transposed in our internal legislation, in accordance with the Romanian Constitution depositions[1] and the Treaty of Lisbon,[2] it will produce legal effects, being applicable to the Romanian courts. Undoubtedly the adoption of this legislative act was necessary and its implementation by all Member States will lead to

[1] The Romanian Constitution, published in Official Monitor no. 233 of 21 November 1991, revised by Law no. 429/2003, law which was approved by national Referendum on 18-19 October 2003 and entered into force on 29 October 2003, its publication in the Official Monitor no. 758 of 29 October 2003 of the Constitutional Court Decision no. 3 of 22 October 2003 for the conformation of the national referendum from 18-19 October 2003 on the Romanian Constitution Law Review. Following the review, the Constitution was republished by the Legislative Council under article 152 of the Constitution, by updating the names and giving the texts a new numbering, in the Official Monitor no. 767 of 31 October 2003. See article 11, paragraph (1)

[2] Lisbon Treaty signed on 13 December 2007 brought a series of additions and changes to the existing treaties. The consolidated version of the Treaty on European Union and the Treaty on the functioning of European Union was published in the Official Journal of the European Union C 115 / 1, 09.05.2008. The Lisbon Treaty was ratified by Romania by Law no. 13 of February 7, 2008 for ratifying the Treaty of Lisbon amending the Treaty on European Union and the Treaty on establishing the European Community signed in Lisbon on 13 December 2007, published in the Official Monitor no. 107 of 12 February 2008.

the achievement of the EU goals on the line of judicial cooperation in criminal matters. According to the stated ones, the examination of the European legislative act, leads to the conclusion that it contains some depositions that may hinder the activity of re-individualization of deprivation of liberty sentence in the executing State.

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THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

The Importance of Probation under the Current Circumstances

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Abstract: Implemented in our legislation with the entry into force of the Criminal Code of Charles II, the probation system has been developed continuously, increasing its importance from one stage to another. Thus, under the current circumstances, the probation service has a crucial role in the complex activity of rehabilitating the person sentenced to a deprivation of liberty sentence through community supervision of the measures and obligations imposed by the court to the convicted person. Although the most important tasks of the service are those of monitoring sanctions and of measures ordered by the court, however, this institution performs other activities almost equally important in the stage of trial and of execution of custodial sentences. Among the core values of probation that were imposed in recent years both in our country and in the European Union there are: respect for persons, reconciliation between offenders and the communities to which they belong, non-discrimination in the community of persons who have committed criminal acts, supporting and encouraging permanently these individuals to form a correct attitude towards work, the rule of law and to obey the rules of social life. The research of the legal rules that govern the probation service activity highlights some shortcomings as well, which should be corrected, the ultimate goal being that of making them compatible with the EU norms, especially in the cooperating area which must be achieved between these institutions at European level.

Keywords: probation; Criminal Code of Charles II; deprivation of liberty

1. Introduction

We believe that in Romania, the probation system was implemented with the entry into force of the Criminal Code of Charles II, which provided a series of specific rules.

Thus, article 50 states *that along with every court it will operate a patronage company, under the supervision of the Minister of Justice, assisted by a central board for social reclassification of freed prisoners and the fulfillment of the legal attributions relating to minors. These companies will be led by local courts' magistrates.* Although inspired by the Italian Criminal Code, the doctrine of that time, referring to the origin of the text, noted that it "*does not have an identical corresponding text in the foreign codes. It is inspired by the tendency of modern criminal science to help the reclassification of the convict, after finishing the sentence, in order not to recur."* (Rătescu et al., 1937, p. 234).

At the same time note that in the article 65-69 of the same Code it is regulated the institution of suspending the execution of sentence, for three years, plus the duration of the sentence, in case of a conviction of up to two years of imprisonment, simple imprisonment or fine, only if the two conditions are met, namely:

- the convicted had not being sentenced previously to any custodial sentence for felony or misdemeanor, even though it was rehabilitated, and

- if according to the circumstances of the fact and the convict's history, the court considers that, in the future, his conduct will be good, even without the enforcement of the sentence (1936, Penal Code of Charles IInd).

We note that under the purpose of the reintegration of the convicted persons, there was established a collaboration between the courts and patronage companies, which were led by the magistrates of the locality. In this context we note that the patronage company established by the Penal Code of Charles the IInd, represents to the Romanian law the first probation institution having specific tasks on supervision in the community of persons convicted to sentences of deprivation of liberty. Subsequently, the institution of probation was taken also in the Criminal Code of 1968, as provided in the new Criminal Code,[1] having permanent tendencies of development and modernization in full agreement with the evolution of modern European criminal science.

Regarding the importance of probation during the running trial, the doctrine sustains that the "intervention area of probation can be identified at all stages of criminal proceedings:

- Pre-trial, the probation counselors prepare a report for the court, a sort of social layout, which comes with extra information regarding the criminological perspective on the defendant, it is a psycho-social report that should not be confused with the intervention of a lawyer, the prosecutor, or social assistant, but a legally qualified point of view of an independent institution that supports the court in the individualization of punishment;
- In prison, the probation counselors contribute to the penalty planning, preparation for freedom and, in general, work with education services and psychosocial assistance in prisons;
- The most important activity of probation activity is supervising the sanctions and community measures. In other words, taking into account the proposal of the probation service expressed by the assessment report, the court may decide a punishment other than imprisonment, entrusting the probation service the supervision of the way it is enforced; the probation service is the one that manages all these measures and informs the court if their failure leads to the revocation of the measure of executing the punishment in the community and on to the conviction to imprisonment" (Barbu & Serban, 2008, p. 123).

Other author referring to the core values of probation that were imposed on the international level, mentions the following:

- respect for persons, human value, integrity, and privacy;
- fairness, descent and accountability;
- reconciliation between offenders and the communities to which they belong;
- non-discrimination of persons who have committed criminal acts on no grounds;
- the ongoing support and encouragement of supervised people, assisted and counseled to reintegrate into the society and to assume responsibility for their own actions by forming a correct attitude towards work, the rule of law and rules of social intercourse. (Rusu, 2007, p. 146)

No doubt in the context of criminal sciences development, in agreement with the diversification of re-socialization opportunities for convicted persons, of the requirements imposed by the overall evolution

[1] Adopted by Law. 286/2009, published in the Official Monitor of Romania, Part I, no. 510 of July 24, 2009.

of the society, the probation service will become an institution with a major importance in the Romanian judicial system architecture.

2. Community Supervision

Referring to the establishment of the most effective measures that would lead to a decrease in crime, our doctrine has sustained and consistently argued, based on criminological studies performed on this line, that "in general, it cannot be determined a direct correlation between heavy use of prison punishment and crime reduction. For the United States of America, for example, it has been calculated that it needs another million prisoners to reduce the crime index by a percent. Also, nowhere in the world tightening the sanctions did automatically lead to lower crime index). Prison, no matter how modern it is, how many experts would be involved in the social rehabilitation programs is rather an area of diversification of criminal techniques than of penance or of premises for the renunciation to criminal career" (Rusu, 2007, p. 167).

No doubt that probation, in our opinion (and others as well), will hold in the near future the most important role in complex work of reforming the judiciary in all states with democratic regimes recognized in the whole world. Without diminishing the role and importance of other tasks of the probation service, we appreciate that the *supervision in the community* is the main attribution, with direct effects on the entire set of functions conferred on these judicial institutions.

According to the law, the community supervision is carried out by the probation service or a judge for the following categories:

1. The convicted persons to whom the court imposed during the probation period to follow the next supervising measures:

- to present, at fixed dates, to the judge assigned to his supervision or to the Probation Service;
- to announce in advance any change of domicile, residence or dwelling and any travel exceeding eight days and the return;
- to communicate and justify the change of workplace, and
- to communicate the information which can be controlled by the existence means.

2. Persons convicted to whom the court imposed to follow one or more of the following obligations:

- to carry out a task or to follow a course of education or qualification;
- not to change residence or the owned residence, or not to exceed the established territorial limit, other than the conditions set by the court;
- not to frequent certain places;
- not to come into contact with certain persons;
- not to drive any vehicle or certain vehicles, and
- submit to control measures, treatment, or care, especially for detoxification.

When the convicted person does not meet the requirements set by the court, the judge or chief of the probation service will notify the competent court. When the informed competent court finds that the convicted person does not meet, in bad faith, the supervision measures or obligations imposed by the court (as mentioned above), it revokes the suspended sentence under supervision, ordering the execution of the full penalty of deprivation of liberty.

In this situation, we note that the court will revoke the suspended sentence under supervision only if it finds that the convicted one has not fulfilled its supervision measures *in bad faith* or its obligations

established by the court. Consequently, when the adduced evidence does not indicate the existence of this requirement, the court can not proceed in suspending the execution of the sentence under supervision and implicitly the disposition of fully executing the sentence.

The interpretation of the text referred to in article 864 paragraph (2), it results that the court, when the convicted person does not meet in bad faith the supervision measures or the obligations imposed, will have to decide the revocation of suspending the execution of the sentence under supervision.

Note that revoking the suspension of sentence execution under supervision may be taken by the court also when committing a new crime or not executing the non-civil obligations, situations where the court is informed by the prosecution or the injured party.

3. Minors whose court-imposed the compliance with one or more of the following obligations:

- not to frequent certain places;
- not to come in contact with certain persons, and
- to perform an unpaid activity in a public institution set by the court, lasting between 50 and 200 hours, maximum of 3 hours per day, after-school, holidays and vacation.

According to G. D. no. 1239/2000 regarding the approval of the Application Rule of Government Ordinance stipulations no. 92/2000 on the organization and operation of probation services,[1] the probation counselor, in charge of the case will maintain a permanent contact with the child's family, or where appropriate, with the legal person or institution responsible for supervising the juvenile, with local authority representatives, of local police, and with any natural or legal person that could provide information on the compliance of the juvenile with the obligations imposed by the court. When the child avoids the exercised supervision or has bad manners or commits an offense under the criminal law, the court shall revoke the supervised freedom and decide the hospitalization in a rehabilitation center. At the same time, if the act under the criminal law constitutes an offense, the court decides the hospitalization measure or applies a penalty.

3. Conclusions and Critical Remarks

In the current context, the Probation Service is an institution with a major importance in the legal gear of Romania and EU Member States, whose role is to contribute to the achievement of justice. Despite having a number of complex attributions, the most important of these remains the supervision of convicted persons sentenced to deprivation of liberty punishments in the community in which they were established. Although in the recent years, at legal level, there have been taken important steps on this line, however, the current national and European legislation has some weaknesses. Thus, on the cooperation at EU level, a first issue that needs to be settled in our special law is the one referring to the document through which the Member States seek recognition and enforcement of such legal decision. Thus, while in the special law it is mentioned the application for the recognition of foreign criminal judgments, the European legislative act refers to as a document accompanying the certificate of final judicial decision.[2]

Other fundamental differences between the European legislative act and the special law regard the procedure for the recognition of such judgments.

[1] Republished in the Official Monitor of Romania, Part I, no. 844 of December 16, 2000.
[2] The drafting model is referred to in Annex 1 of the Framework Decision

Also, the examination of the European legislative act[1] highlights some provisions which, in our opinion, are at least questionable.

Thus, the wording of article 11 called "grounds for refusal of recognition and supervision", even in the context of paragraph (1) states that "the competent authority of the executing State may refuse the recognition of the judicial decision or, as appropriate, of the decision for probation or alternative sanctions ...."

After the interpretation of those provisions, it results that although the article's name leads to the conclusion that there are obligatory reasons of non-recognition and non-execution of such judgments, and then in the paragraph (1), it is written the word "*may*", something that induces the idea that the recognition and enforcement of such a decision is still optional for the executing state. Therefore, the reasons for non-recognition and implicitly of non-execution of such judgments referred to in the European legislative act, remain only optional and not mandatory. We also believe that it is necessary to make a judicial cooperation between the involved states, since the prosecution phase, or pending a final court decision, thus avoiding the possibility of refusing the enforcement of the decision by the executing state. Another observation refers to a situation where the convicted person has disappeared from the territory of the sentencing state, in which case it is necessary to consider pursuing the concerned person within the European Union space, with urgent informing the possible executing state, taking into consideration the citizenship or residence of the convict. Please note that the European legislative act contains no provision for this situation, which is very common in the legal practice. Based on the above, we believe that the European legislative act should provide these issues, or they should be covered by other legislative act.

The European legislative act provisions make no reference to the situation where, the person convicted in Romania (or in any other Member State) with the suspension of sentence under supervision, subject to the execution of supervision measures and / or obligations, began the execution, but during the execution a number of changes on its status have occurred.

Here is the situation which after starting the execution, and being taken out by the probation service, the concerned person:

- obtained a contract of employment in another Member State;

- became a family member of a citizen of another Member State residing in that State (by marriage), and

- intends to study or other form of qualification in another Member State.

We appreciate that each of the three different cases, the court, at the request of the concerned person, will have to decide its status. In these circumstances, the probation service will be required to inform the court, after conducting checks to certify the new mutations occurring in the concrete situation, checks specifically involving the cooperation with similar institutions in that Member State or other institutions of the Romanian or executing Member State. We believe that in such situations, the competent court can be asked by both the probation service and the concerned person.

In response, the court will consider primarily the achievement of the purpose of the European legislative act namely to *increase the chances of social reintegration of the sentenced person, allowing*

[1] 2008/947/JHA Framework Decision on the application of the principle of mutual recognition to judgments and probation decisions with the supervision of probation measures and alternative sanctions, published in the Official Journal of the European Union L 327/102 of 16.12.2008.

him to preserve family, linguistic, cultural connections and of any other nature, but also improving monitoring of compliance with probation measures and alternative sanctions, in order to prevent recidivism, thus paying due attention to protecting victims and the general public.

Given these issues that can become in the near future quite frequent, we consider it necessary to amend and supplement the European legislative act according to the ones mentioned above. Also, the European legislative act contains no provision on the obligation of the States concerned to achieve a record of persons who have suffered such convictions. Another critical remark concerns some legal terms and phrases used in the European legislative act, which are not listed in our legislation.

Given Romania's status as an EU member state, a status which will be based on specific national measures for enforcement of European normative acts related to increased specific activities of international judicial cooperation in criminal matters (in particular as regards the recognition and enforcement of judgments emanating from a competent authority of another Member State), and the terms and phrases used in our legislation, we consider it necessary the adoption of an interpretation law. A last remark concerns the status of the probation service in the current context. Thus, the development of this institution was determined by considerations of criminal policy of the state, influenced by developments in legal sciences, the criminological research being carried out by proposing another way of re-socialization of the convicted persons, other than the one of deprivation of liberty, which in many cases proved to be poor.

Under the current regulation, the institution has a double subordination, on the one hand, being subject to supervision and control of the judiciary authority on insuring the legality enforcement measures ordered by the court, on the other hand it is subordinated to the Probation Department within the Ministry of Justice, which provides staff training and other activities circumscribed to the functional responsibilities of this institution. But according to Law no. 275/2006, probation counselors are under the authority of the judge, while both the Criminal Code and Criminal Procedure Code or the special law specifically mention the probation service, which implies (correctly, in fact), the existence of an institution with specific functions and powers and also a system of organization and operation, plus its own standards of professional performance. In this context we consider that, under the hierarchical aspect, the probation counselors should be under the authority and to be accountable to the Head of the probation service.

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THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

Premeditation to the Criminal Intention

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Abstract: In the present study the author is concerned, in the case of the perpetrator, on the states of consciousness and mental states that precede and accompany the external actions, justifying with good arguments the fact that guilt, as actual mental process must be seen as subsequent or after the criminal act, namely after typical elements or features have been identified. Consequently, the author emphasized the fact that these states of mind and of consciousness occurs first, or from the beginning, in an internal deliberative phase, but they are considered and judged in the end, because they are derived from factual thinking.

Keywords: intention; preparation; premeditation; deceit; perpetrator

Sometimes *intention* reveals *quantitative* differentiations regarding the *degree of guilt,* underlining *the higher or lower intensity of the intention;* in this regard it is noted the fact that there would be differentiations regarding the *clarity and the certainty of the representation.* Such differences reveal *the immediate deceit* unlike the *premeditated* one, in the first case *the decision to act being prompt,* while in the second case, the perpetrator *deliberates and prepares the commitment of the crime.*

Although in most of the situations the intention appears in its basic form, namely of the direct or eventual intention, there are also hypothesis in which, along the specific elements of the two forms, it is added also a certain psychical state of the author which determines an additional qualification of the intention. Thus, along the intention in its basic form, we can have, *according to the state in which the author is at the moment of the decision making,* and *the spontaneous decision (unpremeditated)* or *the premeditated intention* (Streteanu, 1999, p. 375).

Thus, it is debatable the fact *if the mental states as well* of the perpetrator could be likely to determine *quantitative differentiations of the intention.* The dominant opinion is that this, most of the times or, *not being under the perpetrator's control,* could not be imputed to him (Dongoroz, 1969, p. 115). In contrast, the premeditated intention (*the premeditated deceit)* or the premeditation, provided in art. 175 lett. a. of the Criminal code (first degree murder) as an aggravating circumstance, it is not defined in the current Romanian Criminal code. However, the French Criminal code on art. 297 shows that it consists of the *plan* (planning), formed *before the action,* of attempting to the person of a determined individual or to the one who will be found or encountered, even if the plan will depend of some circumstances or conditions (Basarab, 1988, p. 181), opinion which we consider to be the most appropriate and fully correct.

In the theory of the criminal law (Dongoroz, 1969, p. 123) and in the judicial practice[1], it is noted the fact that they could also be differentiated also *after the moment of apparition of the intention,* so that we can differentiate *the intentions calculated in time* from *the suddenly appeared intentions.* In the same context as well, it could also be noted the fact that, after the *time passed after the decision making until the beginning of the action, the deceit* could have two modes such as the *deliberatinus (proposito)* deceit and the *repentinus (impeto)* deceit. Between the two, *the first is the deceit prepared in advanced which accompanies the premeditated act – the decoy, the lurch,* etc. - so that, *the exterior manifestation follows after a while after the decision making, during this time interval, the subject reflecting upon the mode of action and preparing the means to accomplish the decision made, and* the second *we can find on the crimes committed in a moment of rage, pain, emotion,* etc, thesis in which *the action follows immediately after the resolution adopted by the perpetrator. The spontaneous deceit,* it is also shown (Dongoroz, 1969, p. 123), can also be a result of a *passion* but it can also be identified on *calm persons.* In the judicial practice[2] it has also been decided that the *premeditation* means the fulfillment of *two conditions:* on one hand, the decision making which must precede in time the material activity, and on the other hand, this decision, previously made, has to be materialized in certain *activities of preparation of the crime,* such as obtaining information, acquiring the means, seeking accomplices, stalking the victim, drawing the victim into a trap, etc.

Other authors call the *spontaneous deceit* as being *a simple deceit,* and *the premeditated deceit* as being *aggravated deceit,* to this adding as well *the attenuated deceit (the provoked deceit)* (Antoniu, 1976, p. 145). In the same context it is noted the fact that, in the Romanian criminal law, the premeditated deceit constitutes a special aggravating circumstance (art. 175 letter a, of the Criminal code) or at least it can be a legal general aggravating circumstance (art. 75 paragr. 2 Criminal code). Likewise, *ibed ration,* it is brought the example of art. 221-3 of the New French Criminal Code in which *the murder committed with a premeditated intention* it is considered *an assassination.* Also, the premeditation is an aggravating circumstance as well in the case of *the crime of torture* and in *barbaric acts* as well as in the case of some violent crimes (art. 228-8, art. 222-10, art. 222-13.) (Merlè, Vitù, 1997*,* p. 274).

As a summary of all the previously mentioned facts, regarding the *forms, manners* or *degrees* of the intentional criminal guilt, we consider to be correct the opinion according to which both the use *of the formation mode, the duration of their formation* as well as *of the circumstances in which they are formed* (Biro, Basarab, 1963*,* p. 136) refers rather *to the degrees of the criminal intention* and *not to its forms or modes.*

As correctly argued, the circumstances of formation for the intention, cannot be considered as its criteria of individualization into *degrees* because it determines, along with other causes, *the mode of formation of the psychical processes from the contents of intention, as well as their development in the consciousness of the subject; they only create those mental states favorable for maintaining it into his consciousness and of making the criminal decision,* yet these degrees and situations must be valued more highly in relation to *the moment of their formation.*

The author mentions, correctly, that only the moment of formation of the intention is a criterion for its distinction into degrees is a unilateral one, because it *marks only the beginning of its existence as a form of guilt,* seen from a final point of view of the criminal action. This criterion places emphasis only on the duration of development of the psychical processes in the consciousness of the subject,

[1] Supreme Court, crim. depart. dec. no. 446 of 1974, in *R.R.D.,* no. 8/1974, p. 70.
[2] Supreme Court, crim. depart. dec. no. 446 of 1974, in *R.R.D.,* no. 8/1974, p. 70.

although, in a correct manner, it is also noticed the fact that it would be only a criterion for distinguishing it unilaterally into degrees of intention (Mircea, 1987, p. 11). While the real quantitative distinctions of the intention, will be made both by *the mode of formation of the processes of its contents,* and *by their duration of existence in the consciousness of the subject.*

The author also notices the fact that, in the literature, it has been mentioned that *the premeditated intention* it is usually *more dangerous to society* than the situation in which it has been committed a similar crime, but with an affective intention. However, contrary to that, the same author notices also the fact that in the literature existed a concept which asserted that *the person who decides more easily* to commit a certain crime *would be more dangerous (the unpremeditated intention)* than on *the premeditated intention* where there is a *longer* amount of time and in which *the subject decides with more difficulty and with more subjective efforts* upon committing the crime (Mircea, 1998, p. 85).

We appreciate the fact that, on *the premeditated intention,* it is mistaken *the existence of the intention* with *making the criminal decision. Premeditation* exists when the decision of committing the crime has been taken in a state of *relative calm, after a longer deliberation* as opposite to the usual mode, regarding the action which will be committed, on the time, the mode and the means of committing it, so that there are more chances to produce the foreseen and desired result, because from more possible options, the author selects *the one which is least risky* for him, more precisely, which is more difficult to be discovered. The premeditated intention (the premeditated deceit) or the premeditation provided by art. 175 lett. a. Criminal code (first degree murder) as an aggravating circumstance, it is not defined in the current criminal legislation. The French Criminal code, in art. 297 shows that it consists of the plan (planning), formed before the action, of attempting to the person of a determined individual or to the one who will be found or encountered, even if the plan will depend of some circumstances or conditions.

Related to its contents, in the doctrine and practice of the criminal law, there were outlined *two points of view.* According to one of them, *the premeditation has an objective character* because it is not *enough to pass a longer amount of time between the decision making for committing the crime, its execution* and the existence of a *state of relative calm,* but it must exist also *material acts* or *spiritual acts of preparation of the crime* which make the result to be concrete, namely, if the preparation is missing, the deceit is not deliberate[1] (Oancea, 1999, p. 189; Rîpeanu, 1969, p. 97-98; Grigoraş, 1969, p.152; Vasiliu, 1972, p. 86; Loghin, 1974, p. 127-128; Silaghi,1992, p. 11; Daneş, Papadopol, 1985, p. 137; Tanoviceanu, 1924, p. 253)

According to the other point of view, which we share as well, premeditation *has a purely subjective character* and consists of *a longer deliberation* than the usual one and *in a state of relative calm*, regarding the action (inaction), time, place and mod of accomplishment, as well as passing of a longer amount of time from *the decision making until its application in order to exist more chances for the action to produce the desired result*[2] (Biro, Basarab, 1963, p.136; Basarab, 1977, p. 55; Niculescu, 1995, p. 48-51). When a decision *is immediately executed it cannot be considered premeditation,* even though, concretely, the development in time of the action would take longer.

Even though in many cases the intention is exteriorized by material or spiritual preparation acts, they are not related to premeditation, but are *only means with which its existence is proven* which remains

[1] Plen. Supreme Court, guidance dec. no. 2/03.04. 1976 (unpublished); Supreme Court, c.depart., dec. no.446 of 19.02.1974, in *R.R.D.* no. 8/1974, p.70, which in fact refers to proving the premeditation; dec. no. 1554 of 09.11.1978, in *R.R.D.* no. 2/1979, p. 67; dec. no.181 of 01.02.1975, in *CD.*/1978, p. 386; dec. no. 862 of 24.04.1985, in *R.R.D.* no. 2/1986, p.79; C.S.J., crim. depart., dec. no.1047 of 21.09.1990, in *Dreptul*/Law, no.12/1991;

[2] Supreme Court, col. pen., dec. no. 433/1957, in *C.D.* of 1957, p. 432 and the following.

only an internal, exclusively psychical factor. For example, it can be proved that X premeditated the commitment of the crime because he stated, in the presence of more persons, that he will commit the crime without being actually prepared to commit it. Thus, X has in his care a person suffering from *general paralysis* for several years and decides to suppress that person by not providing food an care, which he does, and the ill person dies. In order to commit the crime *it is not necessary to make any act of preparation,* being a crime which can be committed by omission. If it would be otherwise, it would mean that the crime of first degree murder (aggravated) as a result of the premeditation would only be committed by action, which is not accurate.

Also, although there may be specific acts of preparation, we are not in the presence of premeditation. For example, the perpetrator, after he found the garden kiosk burnt and suspecting that the authors are the two victims, he decided to take revenge. After that he went home, armed himself with a hammer and left to the place he knew he would find one of the victims to whom he inflicted a hammer blow and then he pursued him running, up to his courtyard where he continued to inflict hammer blows. From there, the perpetrator went to the house of the other victim and inflicted hammer blows as well[1].

In another case, the perpetrator, in order to revenge his father who has been hit by one of the victims, armed himself with a knife and came to the place where the witnesses believed that one of them was the man he was seeking. Finding out who was the real culprit he went to his home, after having consumed a quantity of alcoholic beverages, and there he committed the crime.

It has been decided that, *not being in the situation of meditating* regarding the commitment of the crime, upon the time, place and means of revenge and even of the legal consequences related to the *decision made* (Basarab, 1988*,* p.136)*,* wrongfully the court has characterized the act committed by the perpetrator as being first degree murder[2]. Contrary to the reality, it has been argued that he "did not meditated" since "meditation" (deliberation) is *a moment of the intention,* more so while, subsequently, it is about "the decision made". While a decision can only exist with"meditating". This observation is valid also regarding the "deliberate deceit".

In another case, the perpetrators have agreed, at the suggestion of one of them, to beat the victim, without deciding from the beginning to murder the victim. In this purpose, armed with pieces of wood taken from a fence, they inflicted severe violent blows on the head of the victim causing a head injury which lead to the victim's death[3].

Sometimes,"*preparation" can take place exactly during the development of the criminal activity.* For example, the perpetrator takes a stone or any other blunt object at hand, with which he strikes the victim whom he has attacked before without using any object, or the provoked person reacts spontaneously and uses an object at hand.

Thus it has been considered that there were not fulfilled the conditions of premeditation because the perpetrator commits the crime in an accidental manner, between the two phases of the conflict passing only a few minutes, "*insufficient time for the perpetrator to have reflected* (underlines M.B.) regarding the commitment of the crime". The motivation is unreal because, if he would have not been meditating upon the crime, then there would have been no intention. In fact, the conflict between the perpetrator an the victim appeared near the house of the perpetrator who, in order to take revenge, entered into his

[1] Supreme Court, crim. dep., dec. no.1554 of 09.11.1978, in *R.R.D.* no. 2 of 1979, p. 67.
[2] Supreme Court, c.dep., dec. no. 493 of 12.03.1980, in *R.R.D.* no.1 of 1981, p. 69; in *C.S.J.,* crim. department., dec. no. 1014 of 09. 06.1993, in *Dreptul* no. 7/1994, p. 99.
[3] Supreme Court, crim. dep., dec. no.97 of 17. 01. 1979, in *C.D./*1979, p. 392-394; in *C.S.J*., crim. dep., dec. no. 1047 of 21. 09. 1990, in *Dreptul* no.12/1991, p. 104.

home, took a knife and begun pursuing the victim inflicting several blows, but the victim has been rescued by emergency surgical intervention. The crime committed under these circumstances, must be classified as simple attempted murder.

The premeditation has to be proven, and this is made, in most of the cases, *with the aid of the preparation acts, but without limiting itself to that, because it can also be proven with other evidences.* Otherwise, it would be limited the principle of freedom of the evidences from the Code of Criminal Procedure (art. 63).

To admit that the acts of preparation – as acts subsequent to the criminal decision making and which constitute evidences – are part of the intention, leads to their being mistaken with the object of probation itself (with the guilt which is to be proven). Also, in this case we would be in front of an exception from the rule of not punishing the acts of preparation, established in our criminal code, which is inaccurate.

All authors, with no exception, when analyzing the forms of the intentional crime, admit that the preparation acts are part of the external phase and take place after the criminal decision making (resolution) which concludes the internal phase, being its final moment. But, everything that it is happening after the decision making, is nothing more than its exteriorization by acts of preparation or execution, yet only the executed ones fall under the incidence of the criminal law.

We consider that, if in a future criminal legislation will be accepted the *objective theory,* it would have to be seen as aggravated not the premeditation, but the preparation of the murder. This way any discussion would cease, and the solution would be legal.

When other crimes than those provided in art. 175 lett. a of the Criminal code, are committed with premeditation, they will be able to be retained by the court as a legal aggravating circumstance (art. 75 paragr. 2 Criminal code). We consider that some crimes cannot be committed *in their simple form* (basic), but only with premeditation, which is, implicitly, a part of the contents of that crime, for example the most of the crimes against the security of the state.

It is necessary to be noted the fact that, on the *premeditated or planned* crimes, in the real practice are not so often encountered. In the opinion of the experts, very carefully planned are the crimes for material profit (54% in the opinion of the scientists and 49% in the opinion of the practical workers) the violent murders (23% and 30%), respectively 6.4% and 4.1% robberies.

Regarding *the incomplete and faulty planning* it is explained by not knowing the circumstances in which it will be necessary to act, incomplete information regarding the crime and the victim, the limited intellect of many of the criminals, the status of stress at the moment of committing the crimes, and others. (Cudreavţev, 1998, p. 53)

Those mentioned above do not refer to the organized crime, whose structures, within which very well trained persons deal with the planning of the operations, and sometimes specific sections are created (Ivanov*,* 1996, p**.** 330). Thus, it is obvious that the detection and the destruction of these criminal plans, is one of the most important issues of criminal prophylaxis of the criminal law.

From some data of the *criminology* which studies the process of planning of the crime and of the decision making, it has been evidenced several optimum criteria of the criminal plan which lead into action the perpetrators. Analyzing the cases of intentional murders in planned form, a series of criteria concern: rapidity of attaining the proposed goal 40%, efficacy in 45.5%, success in accomplishing the

planned actions 36.3%, safety and security of the perpetrators 18.12%, and in the crimes of robbery the efficiency of the criminal plan is higher than 80% (Dubovic, 1971, p. 154-155).

As it can be observed, these aspects which study the process of planning the crime and of decision making cannot regard the crimes committed by negligence (Cudrevţev, 1998, p. 55).

Thus, leading himself by certain motives of the behavior, the subject reflects upon a *model of activities* and this *makes possible a certain criminal plan* which takes into consideration the affective aspects and certain impulses for which the motive of behavior is *a momentary feeling of the subjective factor* (Cihartuşvili, 1958, p. 327).

The planning of the crime is in turn constituted of a number of operations and stages (Miller, Galanter, Pribram, 1965), and in this respect, it is first relevant *the purpose* of the criminal activity, the object, methods and means of committing the crime, foreseeing or prediction of the eventual difficulties which the author can encounter on committing the criminal act, as well as creating a certain *pattern of future behavioral activities* (Cudrevţev, 1998, p. 48).

Thus premeditation means, *a decision made, exteriorized and maintained a while* under the control of the perpetrator's reasoning, *a state of mind* which is capable *to allow him to reasonably assess the future activity with its consequences.* Therefore, *not only the passing of an amount of time since the decision making until its accomplishment* creates premeditation, but also *the creation of the necessary conditions in order to produce the result, the persistent meditation in cold blood* upon the possibilities of accomplishment and upon the consequences of the decision made[1].

The premeditated intention (the deliberated deceit) is the legal aggravating circumstance of the state of premeditation. The premeditated intention is situated on a diametrically opposed position towards the unpremeditated intention. Thus, in the case of the premeditated intention, the author takes the decision in a state of relative calm, and until the moment of its execution passes a longer amount of time. Of course, for the duration of this time interval, the criminal decision is maintained and even consolidated.

The commitment of a crime characterized by premeditated intention means, usually, both the analysis of all variations of being committed as well as its preparation, regardless if the preparation takes the form of some material acts – acquirement of instruments, or intellectual – collection of information. It should be noted, however, that *the premeditation is not conditioned by the performance of some acts of preparation,* because it is possible also in the case of some crimes which are not susceptible of such acts. For example, in the case of a crime committed by omission - the murder of a newborn by the mother by not feeding it – it is not possible to perform material acts of preparation, by the crime is usually premeditated.

Therefore, it can be asserted that the acts of preparation do not consolidate the existence of premeditation, instead they help proving it[2] (Mantovani, 1988, p. 340).

The premeditated intention draws an aggravation of the criminal liability in comparison to the intention in its basic form, proving a more pronounced effect upon the value protected by the criminal law. In our legislation, the premeditation appears as a legal aggravating circumstance in the case of murders, but it can be retained as legal aggravating circumstance also in the case of other crimes, according to art. 75 paragraph 2 Criminal code.

[1] Supreme Court, crim. col , dec. no. 2848 of November 23rd 1967, in *R.R.D.* no. 4 of 1968, p. 173-174.
[2] On the contrary, G. Antoniu, *Comentariu / Comment***,** în *Codul penal comentat 2 The Criminal Code Commented 2,* p.82.

We cannot agree to the assertion made by some authors in our doctrine, that both the *direct intention* and the *eventual intention* can take the form of the premeditated or unpremeditated intention. For example, in the state of provocation (characterized by a spontaneous intention) it can be committed not only a murder with direct intention, but a murder with eventual intention as well (Streteanu, 1999, (1), p. 375).

As far as we are concerned, we support the opinion according to which the two forms are specific only to the direct intention (Basarab, 1988, p. 182). We consider this to be correct based on the fact that specific to the direct intention is the volitional psychical process - the desire. And that is why the subject premeditates before committing the crime, exactly in order to satisfy his pursued wish or will, namely for accomplishing his own purpose or necessity.

On the other hand, the situation of the eventuality is a psychical state of insecurity or hazard manifested by the perpetrator, or the perpetrator premeditates, plans the commitment of the crime exactly in order not result from its achievement other undesirable events for him.

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THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

The Mandatory Force of the Contract in Relation with the Thirds. Positive Consecration in Comparative Law and in the New Romanian Civil Code

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Abstract: The drafters of the Romanian Civil Code at 1864 supressed the last part of the corresponding article of French Civil Code (art. 1165) so that the appearance was created of a rigid principle that did not allow for exceptions. The relativity of contractual bond provided under art. 973 Civ. c. shall however create both integrating mechanisms and contain mitigations of the principle by virtue of principles of commutative justice and juridical security. In the quasi-majority of legislations there are a series of situations when a contract may produce effects versus thirds, for an example the stipulation for another in the French civil Code, Civil Code of Quebec Province and Civil Code of Louisiana State. The new Romanian Civil Code reformulates the principles into affirmative draft in art. 1.280 that only maintains limitation of mandatory effects versus parties and even if no reference is explicitly made to thirds the collocation „unless otherwise provided by law" may however result by deduction in that a contract may under certain circumstances produce effects versus thirds too.

Key words: pacta sunt servanda; relativity; stipulation for another

L'article 973 du Code Civil Roumain consacre le principe de la relativité des effets des conventions dans les termes suivants: «Les conventions n'ont d'effets que entre les parties contractantes»

Le principe de la relativité des effets du contrat donne ainsi expression a l'idée exprimée dans un vieux adagio conformément auquel *res inter alios acta aliis neque nocere, neque prodesse potest* – l'acte juridique conclu entre certaines personnes ne peut ni nuire ni faire profit pour d'autre personnes.[1]

La relativité est comprise comme principe par l'intermédiaire duquel on réalise la protection des tiers. Tout de même, la forme dans laquelle cela se présente est négative et indirecte: les conventions n'ont effets qu'entre les parties. Vis-à-vis de ceux-ci la règle de la relativité joue un rôle décisif: les tiers ne

[1] „La chose convenue (l'entente) par les uns ne pourrait être ni nuisant ni profitable pour d'autres"; la formulation de ce principe n'est pas en roumain, seulement les derniers mots peuvent être trouvés chez Paul, mais avec un autre signification, et dans *Corpus Iuris Civilis* ils apparaissent sous la forme *per liberam personam adqiuri nihil potest*. Dans ce sens consultez (Săuleanu & Răduleţu, 2007, p. 285). D'une autre opinion on soutient que la locution serait d'origine roumaine, ayant comme fondement le « formalisme du temps où le contrat n'apparaissait que par un échange de mots solennels » (Deleanu & Deleanu, 2000, p. 353)

sont ni créditeurs, ni débiteurs de l'obligation contractuelle[1]. Quand même, envisage comme réalité juridique, le contrat peut devenir opposable aux tiers, malgré son effet relatif.

L'opposabilité ne va créer nulle obligation contractuelle a la charge des tiers et aussi elle ne va pas créer des droits de la même nature, comme elle ne permettra non plus a ceux-ci d'ignorer le contrat comme s'il n'existait pas. Dire qu'un contrat est opposable aux tiers n'implique aucune agressivité dans leur milieu juridique La véritable signification de l'opposabilité est parfaitement neutre: en tant qu'élément de la vie sociale, le contrat ne saurait être ignoré par les tiers[2]. En conclusion, on peut affirmer que les effets et l'opposabilité d'une convention sont deux choses différentes qui permettront faire la distinction entre les conséquences de la non-exécution d'un contrat envers les parties et envers les tiers[3].

La relativité - opposabilité c'est la relation qui exprime la condition juridique des personnes lie à un élément juridique déterminé, de nature à produire des effets juridiques. À l'intérieur d'une telle relation on pourra établir envers qui et de quelle manière de tels effets se produisent. Les termes de la relation se trouvent aux extrêmes, ils sont indubitables et irréconciliables[4].

La doctrine considère que les prévisions de l'art. 973 C. civ. „n'ont pas la signification d'une interdiction légale, impérative et irrépressible, mais celle d'une règle a valeur de principe qui, dans l'ambiance sociale, dans le système de relations et interrelations sociales n'en refuse pas les exceptions"[5]. Ainsi, abstraction faite de la catégorie des ayant cause[6], quelquefois les effets du contrat arrivent à dépasser la sphère des sujets qui l'avaient convenu[7].

Les rédacteurs du Code civil roumain de 1864 ont supprimé la dernière partie de l'article correspondant du Code civil français (art. 1165), de telle manière qu'on a créé l'apparence d'un principe rigide n'admettant pas d'exceptions.[8]. En pratique et en doctrine on a admis cependant que la relativité de la liaison contractuelle prévue par l'art. 973 C.civ. doit créer des mécanismes d'intégration ainsi que contenir des atténuations du principe en vertu des principes de la justice

[1] „Aucun individu n'a droit d'imposer aux autres sa propre volonté" – H. Kelsen, *Absolutism şi relativism în filozofie şi politică (Absolutisme et relativisme dans la philosophie et la politique)*, dans The New Journal of Human Rights no. 1/2006, p. 156.

[2] J. Flour, J.-L. Aubert, E. Savaux, *Droit civil. Les obligations. 1. L'acte juridique*, 9e éd, Armand Colin, 2000, no. 432, p. 313. Pour un examen attentif de l'opposabilité des conventions sous deux aspects: opposabilité probatoire et opposabilité substantielle, a voir (Deleanu, 2002, pp. 241-248) (Pop, 2009, pp. 575-578)

[3] Strictement littéral, art. 973 C.civ., cela signifie le fait que les effets des contrats se réalisent seulement entre les parties contractantes, donc nul effet juridique ne pourrait se produire sans des tiers. De nombreux mécanismes juridiques dérogatoires admis au cadre des rapports de droit prive, gouvernes par l'autonomie de volonté et la liberté contractuelle peuvent induire l'impression d'un prétendu principe de la relativité (un principe est, avant tout, une règle abstraite, un cadre intellectuel qui reste utile s'il offre un modèle de référence, si un principe admet beaucoup d'exceptions ces exceptions peuvent attaquer l'être même du principe). Pour une réponse a la question: quels effets ont ces mécanismes-là sur le principe de la relativité, à voir (Circa, 2009, pp. 177-479)

[4] Pour une présentation détaillée de cette relation, à voir (Deleanu, 2002, pp. 14-20)

[5] *Ibidem*, p. 240.

[6] „(...) le neveu de frère prédécédé a la qualité d'ayant-cause et comme tel il est subi aux effets des actes juridiques conclus par son auteur exactement comme s'il en avait participé à la conclusion. Le légataire universel n'est envisagé comme étant tiers que dans certaines circonstances comme par exemple le contrat *intuitu personae* et celui où l'on a prévu explicitement que le droit vise par l'acte n'est pas transmissible par voie successorale. Pour l'ayant-cause l'acte juridique conclu par l'auteur ne représente pas un fait juridique comme dans le cas du tiers vis-à-vis du contrat, comme tel, est tenu à prouver l'existence et le contenu de l'acte par des moyens d'preuve prévus par l' art. 1191 et les suivants du C. civ., la preuve testimoniale étant admissible dans l'hypothèse de l'existence d'un commencement d'évidence écrite ainsi que de l'impossibilité de pré constituer un écrit. " – C.A. Bucarest, Section IXème civile et pour des causes concernant la propriété, déc. N. 483/R/07.09.2006, à la Cour d'Appel de Bucarest, *Culegere de practică judiciară în materie civilă 2006/ Reports of judicial practice in civil matters 2006*, p. 181.

[7] Pour clarifier les notions de „parties", „tiers", „ayant-cause" et la liaison dans laquelle ils se trouvent avec le contrat, à voir (Dogaru & Drăghici, 2009, p. 137; Pop, 2009, pp. 563-574).

[8] Dans ce sens, (Circa, 2009, p. 485).

commutative et de la sécurité juridique: les effets du contrat se produisent entre les parties et a leur mort ils seront substitués par les légataires universels, Pendant que les légataires a titre particulier vont reprendre les droits accessoires ou étroitement lies au bien acquis de leur auteur. Ces idées ont reçu la consécration exprès dans le Nouveau Code Civil, dans l'art. 1.282: „(1) A la mort d'une partie les droits et obligations contractuelles de celle-ci se transmettent à ses successeurs universels ou a titre universel, si par loi, de la stipulation de parties, ou bien de la nature du contrat ne résulte pas le contraire. (2) Les droits contractuels accessoires à un bien ou qui sont étroitement liés à cela se transmettent avec le bien aux successeurs a titre particulier des parties".

Il y a, donc, une série de situations ou un contrat peut produire effets envers les tiers.[1]. Parmi les mécanismes par lesquels on réalise l'intégration des tiers dans la sphère contractuelle on pourrait énumérer la stipulation pour autrui[2] et les actions directes[3], et parmi les mécanismes qui permettent étendre les effets d'un contrat envers les tiers on pourrait énumérer le contrat collectif de travail[4].

Des dispositions équivalentes a celles contenues dans l'art. 973 C.civ. on trouvera dans d'autres législations. Ainsi, le Code civil français et le Code civil belge[5] prévoient dans l'art. 1165: „Les conventions n'ont d'effet qu'entre les parties contractantes; elles ne nuisent point au tiers, et elles ne lui profitent que dans le cas prévu par l'article 1121".

[1] Dans la littérature de spécialité, on soutient que les exceptions à la relativité des effets du contrat soient de deux sortes : apparents et réelles ou véritables. Les auteurs qui font cette distinction incluent dans la catégorie des exceptions apparents : représentation, actions directes, accords collectifs, promission de l'action d'autrui (convention de porte-fort); ils soutiennent aussi que la seule exception réelle ou véritable de la regle de l'effet relatif du contrat c ;est la stipulation pour autrui ou le contrat en faveur d'un tiers. A voir (Beleiu, 2007, pp. 207-211)

[2] Suivant l'exemple de la majorité des législations étrangères [art. 1119, 1121, 1165 Code civil français; art. 112, 113 Code fédéral suisse des obligations; art. 1411, 1412, 1413 Code civil italien; art. 1121, 1165 Code civil belge; art. 328-335 Code civil allemand; art. 1444-1450 et 2449 Code civil de la Province Québec (Canada); art. 1978, 1981, 1982 Code civil de l'Etat Louisiana (USA)], le législateur roumain règlemente dans le nouveau Code civil, explicitement, dans le contenu de cinq articles, la stipulation pour un autre :: art. 1.284 Les effets - „(1) N'importe qui peut stipuler en son nom mais pour le bénéfice d'un tiers. (2) Par l'effet de la stipulation, le bénéficiaire acquiert le droit de demande directement à l'ordre d'exécuter la prestation."; art. 1.285 Les conditions concernant le tiers bénéficiaire – „Le bénéficiaire doit être déterminé, ou bien, du moins déterminables a la date de la conclusion de la stipulation et exister au moment l'ordre doit exécuter son obligation. Sinon, la stipulation profite au stipulant sans aggraver toutefois la tache de l'ordre. "; art. 1.286 Accepte de la stipulation – „(1) Si le tiers bénéficiaire n'accepte pas la stipulation, son droit est considéré n'avoir jamais existé (2) La stipulation peut être révoquée avant que l'accepte du bénéficiaire ne soit arrivé chez le stipulant ou l'ordre..."; art. 1.287 Révocation de la stipulation – „(1) Le stipulant est seul en droit de révoquer la stipulation, pendant que ses créditeurs ou légataires ne peuvent pas le faire. Le stipulant ne peut cependant pas révoquer la stipulation sans l'accord de l'ordre si le dernier a l'intérêt de l'exécuter. (2) Révoquer la stipulation produit des effets du moment où on arrive à l'ordre. Si un autre bénéficiaire n'a pas été nommé, la révocation en profite au stipulant ou aux légataires de celui-ci, sans aggraver tout de même la charge de l'ordre"; art. 1.288 Les moyens de défense de l'ordre – „L'ordre peut opposer au bénéficiaire seulement les défenses fondées sur le contrat qui contient la stipulation".

[3] L'action directe confère au créditeur un droit propre qui lui permet d'agir directement sont débiteur ce qui constitue dérogation du principe de la relativité des conventions. La créance suivie n'entrera pas dans le patrimoine du débiteur, mais directement dans le patrimoine du créditeur ce qui constitue dérogation du principe de l'égalité en droits des créditeurs non garantis. Pour applications de l'action directe admise par la doctrine et jurisprudence roumaine, applications de ce mécanisme dans la législation française, ainsi que les législations d'autre états, comme : suisse, italienne, luxembourgeois, canadienne (Québec), américaine, à voir (Circa, 2009, p. 240)

[4] Opinion doctrinaire sur le contrat collectif de travail est divisée en deux grands courants: a) une opinion considère que les accords collectifs de travail seraient apparents du principe *res inter alios acta*, parce que leurs effets se produisent sur le fondement de la loi, étant plutôt un acte du droit du travail. On considère que les salaries sont soumis a l'extension des effets grâce au consentement implicitement exprime a l'occasion de la conclusion des contrats individuels de travail (Boroi, 2008, p. 297; (Pop, 1998, p. 107; Stătescu & Bîrsan, 2008, p. 69; Jugastru, 2007, p. 60; Chelaru, 2007, p. 171; Lupan & Sabău-Pop, 2007, p. 254; Reghini, Diaconescu &Vasilescu, 2008 p. 566); b) dans autre opinion les contrats collectifs de travail sont des exceptions réelles du principe de la relativité, étant donné qu'ils produisent des effets envers les tiers qui acquerront dans le futur la qualité d'employés bien qu'ils n'aient pas participe a la conclusion du contrat collectof et n'y ont pas ete non plus representes par le syndicat (Ungureanu, 2007, p. 232; Deleanu, 2002, p. 253; Albu, 1994, p. 107; Ştefănescu, 2007, p. 132; Ţiclea, 2007, p. 303; Mureşan & Ciacli, 2000, p. 172).

[5] Le Code civil belge peut être consulté à: www.lexinter.net. Le code de Napoléon a été appliqué aussi dans le Grand Duché de Luxemburg. Le Code civil du Duché peut être consulte en forme électronique à : www.legilux.public.lu

Le Code civil italien[1] réglemente les effets du contrat dans art. 1372 - „Efficacia del contratto": „(1) Il contratto ha forza di legge tra le parti." (Le contrat a pouvoir de loi entre les parties.); „(2) Non può essere sciolto che per mutuo consenso o per cause ammesse dalla legge." (Il ne peut etre dissolu que par accord commun ou causes permises par loi.); „(3) Il contratto non produce effetto rispetto ai terzi che nei casi previsti dalla legge." (Le contrat ne produit d'effets par rapport aux tiers que dans les cas prévus par la loi).

Le Code civil espagnol[2] prévoit dans l'art. 1257: „(1) Los contratos sólo producen efecto entre las partes que los otorgan y sus herederos; salvo, en cuanto, a éstos, el caso en que los derechos y obligaciones que proceden del contrato no sean transmisibles, o por su naturaleza, o por pacto, o por disposición de la ley" (Le contrat produits des effets seulement entre les parties signataires et leur héritiers, exception faite de la situation où, en ce qui concerne ceux-ci les droits et obligations résultant du contrat, elles ne sont pas transmissibles par leur nature par le pacte ou par la disposition de la loi); „(2) Si el contrato contuviere alguna estipulación en favor de un tercero, éste podrà exigir su cumplimiento, siempre que hubiese hecho saber su aceptación al obligado antes de que haya sido aquélla revocada" (Au cas où le contrat contient une stipulation en faveur d'un tiers, il peut en demander l'exécution, à condition qu'il en eut communiqué l'accepte à celui obligé avant que celle-ci ne fût révoquée).

Le Code civil de la Province de Québec (Canada) réglemente les effets des contrats envers les tiers dans l'art. 1440: „Le contrat n'a d'effet qu'entre les parties contractantes; il n'en a point quant aux tiers, excepté dans les cas prévus par la loi".

Le Code d'obligations civiles et commerciales sénégalais[3] se rapporte dans l'art. 110 a la relativité du contrat et prévoit : „(1) Le contrat ne produit d'obligations pour les tiers que dans les cas prévus par la loi. (2) Cependant le contrat leur est opposable dans la mesure où il crée une situation juridique que les tiers ne peuvent méconnaître".

Le Code civil algérien règlemente la relativité des effets des contrats dans l'art. 108, 109, 113 de la manière suivante: l'art. 108 – „Sous réserve des règles relatives à la succession, le contrat produit effets entre les parties et leurs ayant cause, à titre universel, à moins qu'il ne résulte de la nature de l'affaire ou d'une disposition légale, que le contrat ne produit point d'effet à l'égard des ayants cause, à titre universel."; art. 109 – „Les obligations et droits personnels créés par des contrats relativement à une chose qui a été transmise ultérieurement à des ayants cause, à titre particulier, ne se transmettent à ces derniers, en même temps que la chose, que lorsqu'ils en sont des éléments essentiels, et que les ayants cause en ont eu connaissance lors de la transmission de cette chose."; art. 113 – „Le contrat n'oblige point les tiers, mais il peut faire naître des droits à leur profit".

En ce qui concerne l'aspect analysé, le Code civil de l'état de Louisiana (États Unis)[4] prévoit au Chapitre 8 – „Les Effets des obligations conventionnelles": art. 1983 – „Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law. Contracts must be performed in good faith" («Les contrats ont les effets de la loi pour les parties et peuvent être dissolus seulement par consentement des parties pour des motifs prévus

[1] Le Code civil italien peut être consulté à: www.jus.unitn.it.
[2] Le code civil espagnol peut être consulté à: http://noticias.juridicas.com
[3] Le Code d'obligations civiles et commerciales de la République de Sénégal peut être consulté à: www.senlex.com. Art. 96 règlemente les effets du contrat entre parties ayant la dénomination marginale de »Force obligatoire du contrat et disposant: „Le contrat légalement formé crée entre les parties un lien irrévocable".
[4] Code civil de l'état Louisiana (États Unis), ancienne colonie française a pour modèle le Code civil français et peut être consulté à: www.legis.state.la.us.

par la loi. Les contrats doivent être exécutés de bonne foi»); art. 1984 – „Rights and obligations arising from a contract are heritable and assignable unless the law, the terms of the contract or its nature preclude such effects." («Les droits et obligations dérivés d'un contrat sont transmissibles aux héritiers et transférables, exception faite de la situation où la loi, les termes du contrat, ou bien sa nature, excluent de tels effets»).; art. 1985 – „Contracts may produce effects for the third parties only when provided by law (Les contrats ne peuvent produire des effets pour les tiers que lorsque prévu par la loi).

Le Code civil allemande (BGB)[1] ne contient aucune disposition équivalente à l'art. 973 du Code Civil Roumain.

Dans la littérature de spécialité allemande (Wintgen, 2004, p. 34 *apud* Circa, 2009, pp. 29-31), on a argumenté judicieusement l'existence d'un principe lie a la relativité du rapport d'obligations qui peut être déduis de l'interprétation de l'art. 241 et art. 311 BGB.

Ainsi, l'art. 241 BGB intitulé „Obligations du rapport civil obligatoire" dispose de ce que: „(1) Kraft des Schuldverhältnisses ist der Gläubiger berechtigt, von dem Schuldner eine Leistung zu fordern. Die Leistung kann auch in einem Unterlassen bestehen" (En base du rapport civil des obligations le créditeur a droit à prétendre une prestation du débiteur. Cette prestation peut consister dans une omission); „(2) Das Schuldverhältnis kann nach seinem Inhalt jeden Teil zur Rücksicht auf die Rechte, Rechtsgüter und Interessen des anderen Teils verpflichten." (Le rapport civil d'obligations peut obliger, en fonction de son contenu, n'importe quelle des parties de respecter les droits, les biens et les intérêts de 'autre partie).

Le deuxième article – 311 BGB intitulé „Obligations nées du contrat ou bien des actes juridiques similaires" montre que : „(1) Zur Begründung eines Schuldverhältnisses durch Rechtsgeschäft sowie zur Änderung des Inhalts eines Schuldverhältnisses ist ein Vertrag zwischen den Beteiligten erforderlich, soweit nicht das Gesetz ein anderes vorschreibt" (Pour la naissance d'une obligation par un acte juridique comme aussi pour la modification du contenu d'une obligation, il est nécessaire d'avoir un contrat entre les parties, si la loi ne prevoit autrement; „(2) Ein Schuldverhältnis mit Pflichten nach § 241 Abs. 2 entsteht auch durch 1. die Aufnahme von Vertragsverhandlungen, 2. die Anbahnung eines Vertrags, bei welcher der eine Teil im Hinblick auf eine etwaige rechtsgeschäftliche Beziehung dem anderen Teil die Möglichkeit zur Einwirkung auf seine Rechte, Rechtsgüter und Interessen gewährt oder 3. ähnliche geschäftliche Kontakte" (Un rapport des obligations a des obligations dans le sens de l'art. 241 alinéa 2 prend naissance aussi par 1. démarrer les négociations en vue de la conclusion d'un contrat, 2. initier un contrat lorsque l'une des parties accorde a l'autre, en vue d'établir un possible rapport contractuel la possibilité d'intervenir sur ses droits, biens et intérêts ou bien si elle confie a celle-ci de tels droits, biens et intérêts, 3. autres contrats similaires); „(3) Ein Schuldverhältnis mit Pflichten nach § Abs. 2 kann auch zu Personen entstehen, die nicht selbst Vertragspartei werden sollen. 2Ein solches Schuldverhältnis entsteht insbesondere, wenn der Dritte in besonderem Maße Vertrauen für sich in Anspruch nimmt und dadurch die Vertragsverhandlungen oder den Vertragsschluss erheblich beeinflusst." (Un rapport aux obligations prévues par l'art. 241 alinéa 2 peut prendre naissance entre personnes qui ne sont pas elles-mêmes parties du contrat. Une telle obligation naît surtout lorsque le tiers influence considérablement les négociations ou la conclusion du contrat par ce qu'il revendique pour soi confidence dans une mesure spéciale).

A observer que le droit allemand fait la distinction entre actes créateurs d'obligations et actes de disposition, les derniers pouvant avoir comme objet le transfert, la modification ou l'extinction de

[1] Code civil allemand (BGB) peut être consulté en forme électronique à: www.gesetze-im-internet.de

certains droits. Dans de telles conditions, seulement les premiers actes peuvent être soumis au principe de la relativité. La protection des tiers est réalisée par le mécanisme de la nullité: les actes de disposition conclus sans pouvoir de la part du titulaire du droit sont frappés de nullité (*Nichtigkeit*), sans que la nullité ait besoin d'être constatée judiciairement, et l'acte qui modifie un rapport d'obligations n'est pas valable étant l'objet exclusif des parties. Le principe de la relativité des obligations suppose qu'une convention ne peut pas créer de liaisons entre parties et la relativité du rapport d'obligation signifie le fait qu'une obligation ne peut être liée qu'entre débiteur et créditeur[1].

Ni le Code d'obligations suisse[2] n'attaque *in terminis* le principe de la relativité des conventions, non plus. Tout de même, dans le chapitre III concernant les effets des obligations envers les tiers on règlemente la stipulation pour autrui (art. 112) et la promission de porte-fort (art. 111).

Le nouveau Code civil roumain reformule le principe dans une rédaction affirmative („produit des effets" au lieu de „n'a pas d'effets") dans l'art. 1.280: „Le contrat produit effets seulement entre parties, si par loi on ne prévoit autrement". A remarquer que le nouveau texte de loi maintient la limitation des effets obligatoires seulement envers les parties («seulement entre parties» au lieu de «n'ont effets qu'entre parties») et que donc on ne fait aucune référence exprès aux tiers, cependant du syntagme «si par loi il n'est pas autrement prévu» on pourrait déduire (par interprétation, malheureusement) que, dans certaines conditions, un contrat peut produire effets aussi envers les tiers. Dans la littérature de spécialité[3], on apprécie que, en utilisant cette formule «si par loi il n'est pas prévu autrement» le législateur a réalisé au fait aussi le passage vers la règlementation de la situation juridique des légataires universels et à titre universel (art. 1.282). En final, on doit mentionner que l'opposabilité des effets du contrat connaît, elle aussi, une règlementation exprès dans le Nouveau Code civil dans l'art. 1.281: „Le contrat est opposable aux tiers qui ne pourraient apporter atteinte aux droits et obligations nés du contrat. Les tiers peuvent se prévaloir des effets du contrat mais sans avoir droit à en demander l'exécution, exception faite des cas prévus par la loi".

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The Italian Civil Code.

[1] Dans ce sens, à voir (Circa, 2009, p. 31).

[2] Code des obligations suisse fait référence dans l'article 23, dans le chapitre concernant les obligations résultées du contrat au fait que: „le contrat n'oblige pas celle des parties qui, au moment de le conclure, était dans une erreur essentielle". Donc le contrat oblige les parties qui ne sont pas en erreur. Le code des obligations suisse peut être consulté en forme électronique à: www.admin.ch.

[3] La fonction a pris contour quant au principe de protection des parties envers une éventuelle immixtion des tiers dans leur sphère contractuelle, on a prévu exprès que les effets s'en étendent aussi envers les successeurs, pendant que la fonction de protection des tiers on la déduit par interprétation. Voir (Circa, 2009, p. 78)

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THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
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New Challenges in the Narcotics World

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Abstract: The consumption of narcotics is one of the problems the international world is confronted with nowadays; its direct or indirect effects lead to the conclusion that it represents a worrying phenomenon meant to be taken into account by the international programs of co-operation. In contrast with the mature population, the younger population is much more receptive to the new, much more attracted by new experiments and, consequently, by risks. The narcotics flagellum is one of the most complex, profound and dramatic phenomena met with in the contemporary world. Narcotization is the morbid habit of repeatedly taking and using ever higher doses of more or less toxic substances able to generate a psychological and physical addiction to them. Unhappily due to the lack of information, people think that the illegal substances only – heroine, marijuana, cocaine, etc. – are considered drugs. Not long ago there appeared the so-called "mixes of ethno-botanical plants" that are perfectly legal, and many consumers have replaced narcotics - as marijuana, for example - with plant mixes. According to explanations given by the Ethno-botanical Explanatory Dictionary, ethno-biology is a branch that studies the mutual relationship between man and plant. In Romania, ethno-botanical plants are sold under the generic names of "aroma therapeutic" or "ethno-botanical" plants. The numerous researches meant to decode the molecular and biochemical structure of these herbs, the researchers found that consumers are described as facing hallucinogenic effects caused by some synthetic substances - cannabinoids - added by manufacturers.

Keywords: drug; illicit; legal high; psychoactive substances; hallucinogenic plants

1. Introduction

The last three years have confronted our country with new types of narcotics which are nothing but substances obtained from plants growing on various fields of the planet or substances considered to be legally obtained. The number of consumers is rapidly increasing either because of curiosity or because of addiction, as these substances have replaced the so-called "classic narcotics." The advantage is that legal, as they appear to be, they can be bought directly from the shops of destination at available prices for everybody to be able to afford. These shops make advantageous offers, attracting the consumers with discounts, fidelity cards, etc.

In late 2008, several cannabinoids were detected in herbal smoking mixtures or so-called incense/room odorisers. Typical of these were Spice Gold, Spice Silver and Yucatan Fire, but many other products later appeared. They do not contain tobacco or cannabis but when smoked, produce effects similar to those of cannabis. These products are typically sold via the Internet and in 'head shops'. The following countries control 'Spice' and/or other synthetic cannabinoids: Denmark, Germany, Estonia, France, Ireland, Italy, Latvia, Lithuania, Luxembourg, Austria, Poland, Romania, Sweden and UK. In Poland, JWH-018 and some of the claimed constituents of 'Spice' are controlled substances. In Germany, a

fast-track regulation controls JWH-018 and CP 47,497. In Austria, Estonia and France, JWH-018, HU-210, and CP 47,497 are scheduled drugs; in addition to those, in Sweden and Lithuania JWH-073 is also classified as a narcotic. Luxembourg seems to have adopted an analogue approach by referring to 'synthetic agonists of cannabinoid receptors'. The UK has adopted generic definitions and is expected to introduce control measures for a wide range of synthetic cannabinoids. Other Member Sates are also considering control measures.[1]

Profiting by the fact that in Romania these substances are not considered to be illicit, certain companies or natural persons import and commercialize them especially by Internet obtaining comfortable profits (Tone, 2009, p. 195). Here are but a few examples of such substances: Party Snuff Powder: Special Gold New Formula Party Snuff Powder, Magic Kristal Party Snuff Powder, Pure By Magic Party Snuff Powder, Frenzy, Crankd, Special gold 2011, Silver, Diamond Crystal, Nos, Blast; Herbal Smoke Blends[2]: DJ, Bonzai Winter Boost, Maya, Bonzai Summer Boost, WWW:, Boom, Remix, Ninja, Katana, Diesel, Monkees, OHg, M1, M6, Rasta.

Although the shops commercializing ethnobotanical plants have been closed down by authorities, the youth in search for this type of narcotics have re-organized their quests to products having the same effect and which can be bought from pharmacies. Such a so-called "legal drug" is Tantum Rosa, the vaginal granulated solution; pharmacists/ druggists say that this product is more and more requested by the youth.

These new products envisaged by hedonistic use may belong to so-called *Unconventional intoxicants:* pharmaceutical/parapharmaceutical benign remedies, common drugs (*Gripex* – contains paracetamol, dextromethorphan, pseudoephedrine, or *Coldrex* – contains paracetamol, promethazine, dextromethorphan), nutritional supplements, exotic aromas, fertilizers or spices (re-routed from their indications) – smoked, ingested, infused, *bong* (Gorun & Dermengiu, 2010, p. 272).

The police and the prosecutors from the Organized Crime Department have discovered a "route of the ethnobotanical/ spice plants:" [3] the forbidden substances left China as "anticorrosion agents", "polymers", "acrylic acid" or "absorbing polymers" to reach Spain and Scotland, and finally to arrive in a shop from the capital of Romania and from where they were distributed to the spice-shops all over the country.

2. Paper Content

The reasons why a young man starts taking drugs are various and multiple. Some are doing it out of curiosity or out of the wish to test a new product, some simply boast on it, some other because they on the brim of despair.

The worrisome aspect is that once - no matter how it happened - they started to consume drugs or spice there is no return from it. The ones who become spice-addicts out of the wish to feel a new experience are generally the so-called "ready-money" children. The temptation increases

[1] EMCDDA (2009), *Synthetic cannabinoids and 'Spice',* http://www.emcdda.europa.eu/ publications/drug-profiles/synthetic-cannabinoids, March 12, 2011.

[2] The label mentions: Product obtained from plants and natural extracts from rare plants long-known for their effects. Ingredients: potpourri of dried leaves, extracts from aromatic flowers and exotic fruits. This product is a car perfumed deodorant and is not inflaming; do not ingest, avoid the contact with the skin, do not let it at the reach of the children, sale to under-age persons is forbidden. Source: www.weed-shop.eu; www.piata.ro.

[3] http://stirileprotv.ro/stiri/actualitate/razie-de-cosmar-pentru-vanzatorii-de-vise-din-capitala-si-galati.html, author: Pro TV, April 12, 2011

proportionally with the fortune of the parents. On the other hand they believe that spice/ narcotics consumption is a "fashion" they have to submit to. Yet, the drugs/ spice consumption is also spread among those who have less or no money at all. The temptations are right on the way to school: the "dream-creating-shops."

Because thousands of young people stuffed the hospitals as a consequence of their drugs/spice/ethnobotanical consumption the Government intends to ponder upon the seriousness of the situation and analyze the possibility of changing the legislation so as these spices should be interdicted throughout Romania. Representatives of Ministry of Agriculture, Health, Justice, Administration and Interior, as well as the Anti-drugs Non-Governmental Organization in Romania gathered together in order to discuss about a draft of measures meant to interdict the commercialization and consumption of psychotropic and psychoactive substances on the Romanian territory.

A report issued by the Anti-drug and Human Rights International Centre emphasizes on the aspect regarding the dangerous increase and extension of the spice consumption phenomenon among the young people of Romania - a EU country occupying the fourth place in the top of consumption, after Great Britain, Germany and Holland. The report also underlines that the budget allocated for the programs of preventing drugs consumption - 4.5 million euro - is the lowest in Europe.

The legislation concerning the "dream-creating-shops" has become more restrictive in the latest period of time yet their activity is going on well.

One of the measures was taken last year in an Emergency Ordinance No 6/2010[1] for the modification and completion of Law No 143/2000 on preventing and fighting against trafficking and illicit consumption of narcotics and for completing Law No 339/2005 regarding the juridical regime of the plants, substances and stupefacient and psychotropic products, ordinance that practically suspended the activity of those so-called "dream-creating-shops."

The Government of Romania has adopted this Emergency Ordinance because of the danger generated by the consumption of certain plants and substances for the public health because of the intoxications they cause and because the risk of abuses. In issuing this draft the Government considered the visible increasing number of individuals who go to hospitals after having consumed such plants and substances and because the number of spice shops commercializing these plants and substances is alarmingly higher. The Ordinance has also taken into account the fact that any delay imposed by the legislative stages to be passed could endanger the health, if not the life of a larger number of individuals - especially young people - as well as the fact that these elements is practically in the zone of the general interest of the public. Under such circumstances it is about an emergent and extraordinary situation whose regulation cannot wait to be solved any more.

27 substances and 9 spice/ethnobotanical plants generating a hallucinogenic effect are considered by the norm to be drugs and can no longer be commercialized as they have negative effects on the human brain, produce serious head aches and panic attacks. All in all the law prohibits 36 ethnobotanical substances. The tables in the Annexes referring to Law No. 143/2000 were completed with the following plants and substances under national control:

[1] Published in the Official Monitor No 100 of February 2010.

Table I

"1. Ibotenic acid
2. Amanita muscaria (L:Fr) Lam
3. Amanita pantherina
4. Amide of the lysergic acid (LSD)
5. All species in the Argyreia (nervosa) group
6. BZP (benzylpiperasine)
7. 2.5-Dimethoxy-4-*chloroamphetamine* (*DOC*) = 1-(4-chlor-2.5- dimethoxy -phenyl) propane-2-amine
8. 2.5-Dimethoxy-4-iodoamphetamine) (DOI) = 1-(2.5-dimethoxy-4- iodophenyl) -propane-2- amine
9. CPP (chlorophenylpiperazine)
10. CP 47,497 = 2-(3-hydroxycyclohexil)- 5-(2-cycloheximide 2-il) phenol
11. CP 47.497-C6 = 2-(3- hydroxycyclohexil)-5-(2-methylheptane- 2-il) phenol
12. CP 47.497-C8= 2-(3- hydroxycyclohexil)-5-(2-methylnonan- 2-il) phenol
13. CP 47.497-C9= 2-(3- hydroxycyclohexil)-5-(2- methylnonan - 2-il) phenol
14. *Fluorometcatinone* (flefedrone) = 1-(fluorophenyl)-2- (methylamine) propane-1-ona
15. *Indanylamphetamine*
16. JWH-018 = Naphthalene -1-il-(1- *pentylindol* -3-il) *methanone*
17. 4 - *methylmethcathinone* (*Mephedrona*) = 1-(4-methylphenyl)-2- *methylaminopropane* -1-ona
18. 4-*metoxi-metcatinona* (metedrone) = 1-(4-metoxiphenyl)-2- (methylamine) propane-1-ona
19. Muscimol
20. Nymphaea caerulea Sav.
21. Turbina corymbosa (L.) Raf., Sin. Rivea corymbosa (L.) Hallier f.
22. All species from the Psilocybe genus
24. TFMPP (*Trifluoromethylphenylpiperazine*)
25. beta-keto-MDMA (methylone) = 2-methylamine-1-(3,4- *methylendioxiphenyl*) propane-1-ona
26. beta-keto-MBDB (butylone) = 1-(1.3- *benzodioxol* -5-il)-2- (methylamine) butane-1-ona."

Table II:

"1. Ibogaine
2. Ketamine
3. Mitragyna speciosa Korth (Kratom)
4. 7- *hydroxi-mitragynine*
5. *Mitragynine*
6. Salvia divinorum Epling & Játiva
7. Salvinorin A-F
8. Tabernanthe iboga (L.) Nutt."

Table III:

"1. Bromo-dragonfly = 1-(8- *Bromo-benzodifuran* -4-il)-2- aminopropane
2. *Gamma buthyrolactone* (GBL) = *Dihydrofuran* -2(3H)-ona
3. Nitrite of amyl"

Nevertheless the traders bring newer substances which are not included in the list. Besides, the owners of the "utopian pharmacy"/ "dream-creating-shops" have profited by the fact that no state authority has ever controlled the real composition of such a packet; they resumed their control to whatever was

written on the label. Consequently many of the drugs were re-entered the trade circuit under the name of plant fertilizers or rooms deodorants.

In certain situation the very name of the hallucinogen was kept - as for instance in the Special Gold case - or variants of the same brand have appeared - as in the Special Cox case.[1]

In June 2010 the list of prohibited ethobotanical drugs was completed, at the proposal of the Ministry of Health, with eight more substances identified by experts as having psychoactive effects. Consequently, Decision No 575 of June 16, 2010[2] passed by the Government of Romania prohibited the following plants and substances which were under the state control:

1. 2C-C=4-chloro-2.5-dimetoxi - *phenethylamine*
2. Ethcathinone =(RS)-2-ethylamine-1-phenyl-propane-1-ona
3. JWH 250=2-(2-metoxiphenyl)-1-(1- *pentylindol* -3-il) *ethanone*
4. JWH-073= naphtalene -1-il-(1- *buthylindol* -3-il) *methanone*
5. *Methylenedioxypyrovalerone* (MDPV)
6. *Methylbenzylpiperazine* (MBZP)
7. N,N-dialil-5- *metoxytriptamine* (5-MEO-DALT)
8. Dimetocaine (larocaine)=(3- diethylamine -2.2- *Diethylpropion*)-4-aminobenzoate

The ethnobotanical spices have not disappeared from the consumption market in spite of the Ordinance and of the Decree by which the Government prohibited a lot of 44 plants and hallucinogenic substances; the owners of the "Utopian Pharmacy" continued to commercialize in shops, on-line shops or by announcements newer and newer herbs and substances of this type.

Euphoria and Generation 2012 are but two of the new products of the ethnobotanic range the consumers can buy by announcement and by special sites addressing them. Generation 2012 call them "flower fertilizer." Those who have already tested them say that it is about a new powder that produces a state similar to that of the shower salts - already prohibited by the Emergency Ordinance. Soon after the Generation 2012 appeared, the announcements of the sites invited to newer and "stronger" powders. Powder Report is one of these sites. The consumers keep in touch with the dealers by means of socialization nets as Facebook and Twitter. On other advertising sites for the medicinal plants there are tens of announcements commercializing the products of Generation 2012, Stone Powder and Magic Powder. Among these announcements there are some that sell bulk Magic Crystal or shower salts; in the case of the last announcement the trader offers original products, with a hologram, quality certificate and invoice. Another announcement, posted by a "unique importer" offers the spice consumers a large range of "legal drugs' among which Chocolate, Afgan Solid Herb, Glower Power 69, Bonzai, Jamaican Gold and Snowblow. In the same category of "fertilizers" the Internet offers products from the branch of ethnobotanic plants: Spice Green, Purple, Stunk and Wild.[3]

In April last the Senate adopted a legislative initiative that prohibits the spices/ ethnobotanical plants. Consequently any type of plants, substances and psychotropic compounds - irrespective of the destination of the substance or aim of the activity - is prohibited, inclusively in medical units or research. The adoption of such a legislative initiative was necessary for a political alarm to be given with the aim to stop the consumption of hallucinogenic substances which causes daily dramas; yet, there was a contradictory opinion according to which the legislative text became futile and created confusion.

[1] The Utopian Pharmacy sell prohibited drugs under inoffensive names Source: Papers.com, September 21, 2010
[2] Published in the Official Monitor No 509 of July, 2010.
[3] Source: NewsIn, April 13, 2010.

3. Conclusions

In the case of Romania, the phenomenon of spice consumption is so ample that the simple shutting down of the shops will not be a guarantee that the so-called legal drugs stops.

The traders are very inventive and will - for sure - find new means by which to commercialize their spices. The on-line trade of the psychotropic substances shall be among the legislative proposals and, of course, great efforts are necessary to be made as to really stop the on-line trading of such products.

The Ministry of Administration and Interior, the Ministry of Health, the Ministry of Public Finances, the Ministry of Agriculture, the Sanitary Veterinary Administration, the National Authority for the Protection of the Consumer and the Non-Governmental Organizations shall cooperate and program bilateral or multilateral actions as to fight against this phenomenon. Although it is hard to believe that this phenomenon will be eradicated from the very start, but anyway, it shall be monitored and kept under control.

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REALITIES AND PERSPECTIVES

"Law in the Books" and "Law in the Actions"

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Abstract: Normative order's notion does not pretend to develop some kind of a rigorous science of perfect understanding of human and social processes, nor does it claim to provide the final truth of normative processes at all levels. What I want to argue by way of the above brief account of gap in the laws and their implementation is that the capability of law to control behavior is highly circumscribed. Law as an instrument of social reform has a limited utility if at all.

Keywords: competence; law; social reform; obligation

"The idea of law, in spite of everything, seems still to be stronger than any ideology of power."

Hans Kelsen

Law in the books is nothing else than the single positive law. Law in the books or single positive law is an established **general** rules or acts, by which have been defined the competence of legislative, executive and judicial bodies. Such general rules or acts usually set forth in constitutions or other basic general normative acts. Law in the actions is nothing else than the one part of public normative order (other part is a private normative order). Law in the actions or public normative order is an established **concrete** rules or acts, by which competent legislative, executive and judicial bodies are regulating individual public and/or private relations among public and/or private persons. My position concerning single positive law concerning state law is partially based on the H. Kelen's pure theory of law; partially, because - individual normative acts of public bodies and individual normative acts of private persons are ***"seinregels",*** but not ***"solenregels",*** because ***"solenregels"*** connected with rules of positive law, but not rules of normative order. Hierarchy of state's bodies reflects general legal rules of organization of state's power. Accordingly, hierarchy of state's bodies is a reflection of hierarchy of sources of state's law.

Law in the books i.e. single positive law (public law and private law) is traditionally investigated and explored more broadly and deeper than law in the actions - normative acts of public bodies. On the level of positive law ***"sein"*** and ***"solen"*** are not contradicted each other, they coexisted **logically** in the framework of two parts of structure of each legal rule: hypothesis and disposition. On the level of normative order ***"sein"*** and ***"solen"*** are not contradicted each other, they coexist **empirically** in the framework of two parts of structure of each normative fact: fact and rule. (For example, treaty as

normative fact consists of two parts: a fact of conclusion of treaty and mutual rights and obligations between participants of treaty). In other words, normative order embraces factually settled order (practice) of application of general legal rules by individual public bodies (precedent in broad sense) and factually settled order (practice) of application of mutual rights and obligations by private persons. On the level of normative order ***"sein"*** and ***"solen"*** coexistence not logically but factually and they are indivisible.

More over, all societies have different normative space, in which positive law does not exist in isolation, and more over is not necessarily the most powerful element thereof. The state has no monopoly of lawful power within a given country, except criminal law and administrative law, because the normative order does not have discrete boundaries. The normative order is dynamic rather than static, and social relations in each normative order are extremely complex.

"Law in the action" expresses one part of normative order, which is only connected with the official normative acts of public bodies. By normative acts of public bodies mutual rights and obligations have distributed officially (public order).

Other, comparably independent part of normative order is unofficial normative acts of private persons (private order). By normative acts of private bodies mutual rights and obligations are distributed unofficially. Common for both acts is that both are settled mutual rights and obligations of participants of relations.

Normative order (public normative acts and private normative acts) includes speech acts of public bodies and private persons too. What I talked about normative acts of private persons (normative facts) concerning speech acts in section III I repeat about normative acts of public bodies (legal normative acts). But as far as I would like to consider both together concerning speech acts, I have decided to analyze the problem more broadly.

Speech act theory will forever be associated with the great **John L. Austin.** One of Austin's core insights is reflected in the title of his William James lectures, delivered at Harvard in 1955, "**How to Do Things with Words".** When we use language, we usually don't say: what the world **is** like; when we use language: we **do** things. We command, request, apologize, contract, convey, and admonish. Speech act theory focuses on the ways in which oral language used for the performance of actions.

Speech act theory begins with the idea that language can be used to perform actions. Here are the following forms of speech acts:

Constants: affirming, alleging, announcing, answering, attributing, claiming, classifying, concurring, confirming, conjecturing, denying, disagreeing, disclosing, disputing, identifying, informing, insisting, predicting, ranking, reporting, stating, stipulating.

Directives: advising, admonishing, asking, begging, dismissing, excusing, forbidding, instructing, ordering, permitting, requesting, requiring, suggesting, urging, warning.

Commissions: agreeing, guaranteeing, inviting, offering, promising, swearing, and volunteering.

Acknowledgments: apologizing, condoling, congratulating, greeting, thanking, accepting.

All above mentioned speech acts are individual normative acts, which may have legal or non-legal contexts.

Legal theorists are interested in speech acts theory for a variety of reasons, but one of the most important is that speech act theory helps to explain the way that the law uses language. Constitution,

Statutes and other normative acts aren't like "the cat is on the mat." That is, a statute does not tell us how the world is in the same way that a declaratory sentence does. Legal language is full of speech acts.

Reinach maintains that such truths are not merely necessary and universal, but also informative, thus that they are examples of truths that are both a priori and synthetic. Adolph Reinach mentions many social acts in his treatise on "The A Priori Foundations of the Civil Law" (1913): commanding, requesting, warning, questioning and answering, informing, enacting, revoking, transferring, granting, and waiving of claims, but he devotes the most attention to the act of promising. Drawing on the theory of essences or intrinsically intelligible structures referred to above, Reinach offers the following examples of a priori truths about what he sees as the intrinsically intelligible structure instantiated through the performance of a promising act:

- through promising one incurs an obligation;
- by receiving a promise one has a claim to what was promised;
- such claims are extinguished when the promise is fulfilled;
- such claims may also be extinguished if the claimholder waives the claim;
- promising is subject to a range of variations or modifications, including conditional promising, promising on behalf of or as a representative of someone else, promising to a group, promising by a group, and so forth.

I am sure that one of the most fundamental distinctions in legal theory is the distinction between "positive law theory" and "normative order theory." *The core idea* of the distinction between positive law theory and normative order theory is simple: positive law theory seeks to explain what the law **is,** in other words, **what the law speaks**, whereas normative order theory tell us what the positive law **ought to be speak,** in other words**, what the law should be speak based on the practice of "things" but not on the "words".**

A bridge between **what the law speak and what the law should be speak** *lies through the normative order*. Investigation of normative order gives us an opportunity to assess how positive law (*sollen*) implemented really in legal order (*sein*). In the process of investigation of normative order arises an idea of justice, in other words, an idea *what the law should be speaking***.** Reconcile H. Kelsens' and G. Naneishvili's contradictory theories, I have suggested a new "Spirally and cyclically developing theory of interaction and mutual-transition of Positive Law and Normative Order". Based on human rights permanent and cyclical interaction between positive law and normative order and permanent and cyclical inter-transition of positive law and normative order at global and local levels has a trend to comprehend permanently an **Idea of Justice.** The aim and goal of such interaction and inter-transition is to achieve sustainable development of Humankind based on the Universal Human Rights.

Instead of "**How to Do Things with Words",** *I suggest the formula:* "**How to Do Words with Things**" in the sense of **Giant Goethe:** ***Im Aufang war die Tat",*** because ***"New things produce new words",*** which means that in normative space new facts produce new mutual rights and obligations. Human beings do things without words, the things do words, the words do new things, new things do the new words, the new words do new things and etc. Like this the entity of new facts and new mutual rights and obligations create new normative space, which causes necessity to establish new positive law and etc. It is not surprising that it has been said that "what a judge does is more important than what he says he does". (Dickenson, 1976, p. 53)

Of course, on the one side, speech act is one of the forms of human being's activity. Through speech act human being's activity can be transmitted from one position to another, or its normative state can

be changed, or the volume of its individual rights and obligation can be broaden or get narrow, but, on the other side, in any case, human being more silently acts than speaks. Related to the strictly normative space, speech act is one of the forms of legal act, but in any case, public body more silently acts than speaks. In whole, speech acts are one of the forms of normative order, but in any case, public bodies and private persons more silently acts than speaks.

Permanent and cyclical interaction between things and words and permanent and cyclical inter-transition of things and words at global, regional, national and local levels has a trend to comprehend a sense of existence of Humankind based on the Universal Human Rights. The aim and goal of such interaction and inter-transition is to achieve sustainable development of Humankind.

The positive law and normative order in civilized countries are not strictly contradicted each other, they exist in parallel regimes, because they are entirely different levels of life of the nation state and civil society in whole. Functional asymmetry between them is normal process and that process indicates on the perspective of evolutionary development of civil society in whole. Particularly, positive law is unempirical space of life of civil society, while normative order is empirical space of life of the civil society. Exposition of contradiction between positive law and normative order is possible only **theoretically** in the process of exploration of their dynamics, using comparative and other methods. Moreover, individual public normative acts and individual private normative acts coexist and interact in complex ways. Sometimes they also compete or conflict, sometimes they sustain or reinforce each other and often they influence each other through interaction, imposition and transplantation. Often such influence is reciprocal. In this respect, I forced to set forth in large an extract from the work of famous thinker – Bruce Ackerman, because his position brilliantly reflects reality concerning interaction between positive law and normative order, and individual public normative acts and individual private normative acts from the point of view of human rights. Let us listen intently to author: "Rights are not the kinds of things that grow on trees – to be plucked, when ripe, by an invisible hand. The only context in which a claim of right has a point is one where you anticipate the possibility of conversation with some potential competitor. Not that this conversation always in fact arises – brute force also remains a potent way of resolving disputes Rights talk presupposes only the *conceptual* possibility of an alternative way of regulating the struggle for power – one where claims to scarce resources are established through a patterned cultural activity in which the question of legitimacy is countered by an effort at justification. …While it is impossible to analyze every concrete institution that regulates the struggle for power, we must resist the temptation of grossly simplified account. This is, perhaps, the most common mistake made by partisans of the liberal tradition. Time and again, these people speak as if the only significant power in society comes out of the smoking typewriter of government bureaucrats. While they are tireless of their efforts to constrain this power by exacting standards of neutrality, they often react with shocked surprise at the very idea of subjecting the powers of "private" citizens to an identical scrutiny. Yet, first of all, we live in a world in which the powers of government are routinely called upon to enforce (as well as define) all of these "private" entitlements. Without this reinforcement, there is no reason to think that those presently advantaged by the distribution of "private" rights would remain so. …While the past century has not been rich in normative liberal theory, there has been a superabundance of descriptive accounts and positive theories in economics, politics, psychology, child development, and many other areas of obvious normative significance. This overwhelming literature poses serious problems for liberal political philosophy. …Thus, if judges where unable to predict future conduct accurately or if they selectively invoked the risk of future harm to suppress people if they considered "deviant", then the dangers of illiberal abuse involved in preventive restrictions might well outweigh Endangered's right

to physical security. …The problem – relating ideal to reality – serves as a critical test for any political philosophy. On the one hand, a theory that cannot serve as a practical guide is merely utopian fantasy, an inferior form of fiction. On the other hand, a book that offers a detailed action program is merely a symbol of theorist's power lust, an inferior form of autobiography". (Ackerman, 1980, pp. 5, 18-19, 65, 84, 231)

This essay suggests that sharp distinctions between general and particular jurisprudence have a limited value at levels, including positive laws of Romano-Germanic and Anglo-Americans countries, because all of them represent the positive laws of appropriate countries. More over, as justly underlines Twining: "Globalization brings to the fore a wide range of issues as transnational, international, and global levels and is rapidly changing the significance of national boundaries." (Twining, 2000, p. 47)

Controversially, this essay suggests that sharp distinctions between general and particular jurisprudence on the one side, and normative legal and non-legal jurisprudence on the other side, have no limited value at all levels, including normative orders of Romano-Germanic and Anglo-Americans countries, because all of them represent diversity of normative orders, more over, contradiction between legal monism and normative pluralism, between a single positive law and plural normative orders at the internal, regional and global levels.

In this respect, Dworkin's agenda for legal philosophy really support our theory of normative order, because his main interest is correct and arguable adjudication in hard cases. He confines his focus to question: what constitutes a valid and cogent argument on a question of law in a hard case? His answer is much wider than a theory of common law adjudication for at least three reasons. First, within any legal systems judges are not only actors involved in interpretation. Officials, good citizens, an experts are typically concerned with the best interpretation and not just to second-guess judges. Secondly, concepts like "judge" and "court" are quite culturally specific. Thirdly, as Dworkin has acknowledged, his ideas about interpretation and argumentation could possibly apply in societies that have no third party adjudication. Such position belongs to "Law in Action" (normative order), than to "Law in the Books" (positive law), because litigation, lawyers, judges, courts are historically institutionalized at the level of normative order, which is connected with the established practice of legal acts of public bodies. Dworkin draws a distinction between "the very detailed and concrete legal theories lawyers and judges construct for a particular jurisdiction and the abstract conceptions of law that philosophers build, which are not so confined." Dworkin claims that his best theory of law describes legal practice as well as prescribing best practice And this is correct, because for me the established practice (precedent) of normative acts of public bodies is not the part of public law, but the public normative order.

In whole, I agree with Dvorkin in above mentioned directions, but answer is not imperfect on the question: What constitutes a valid and cogent argument on a question of law in a hard case? A valid and cogent argument on a question of law in a hard case should be issued from strong criterion. Without such criterion any answer will be very discussable, and sometimes curios. For me, such criterion is the human rights conventions and established practice (precedents) of human rights courts at the regional and international levels.

Therefore:

I. State Law or Positive Law is the summary of impersonal and abstract legal acts, by which have been generally and hypothetically regulated potential economic, social, cultural, civil and political relations in the country among public bodies and/or private persons through the recognition and distribution

mutual rights and obligations, which in a case of their violations are guaranteed by the possible application of legal force by the just judiciary. (Savaneli, 2004, p. 13)

II. The Normative Order is 1) the established and stabled order or practice of realization of abstract legal acts by public bodies that particularly and concretely regulate real interpersonal relations through the official distribution mutual rights and obligations among the individual participants of normative relations and their interaction; and 2) the established and stabled order or practice of realization of free individual wills of private persons that particularly and concretely regulate real interpersonal relations through the unofficial distribution and realization of mutual rights and obligation among the individual participants of normative relations, and 3) the established and stabled order or practice of realization of abstract legal acts by the just judiciary through the application of legal force that particularly and concretely regulate real interpersonal relations among the individual participants of normative relations in a case of violations of mutual rights and obligations. (Savaneli, 1981, pp. 22, 41)

In legal space, state of positive law does not directly influenced on state of legal order i.e. on the state of established legal practice of public bodies. Analyzing human rights records of such authoritative and competent organizations as are UN agencies, Amnesty international, Human Rights Watch, Charles Humana, Freedom House, Transparency International and numerous of other bodies concerning observation of universal human rights law by different nation states and regimes, directly underlines distinction (sometimes huge distinction) between "Law in the Books" and "Law in the Actions", i.e. generally between Single Positive Law and Plural Normative Order.

Necessity of eradication of contradiction between positive law and normative order arises when "anti-entropyan" (self-regulatory and/or self-governing) autonomous mechanisms exhaust their means and resources, and level of disorder in normative order reaches a critical stage. Necessity of eradication of contradiction between individual acts of public bodies and individual acts of private persons inside the normative order arises when "anti-entropyan" (self-regulatory and/or self-governing) autonomous mechanisms exhaust their means and resources, and level of disorder in normative order reaches a critical stage.

When entropy in any space of normative order reaches the stage, which is threatened the vital life of civil society, is appeared an idea of legal reconstruction of appropriate space of positive law. More clearly, when in the process reaches evident theoretical contradiction between positive law (ought to be) and normative order (to be), and between individual acts of public bodies and individual acts of private persons inside normative orders, which indicates that positive law inadequately and unjustly regulates relations between natural and/or legal persons, any legislator must began the process of thoughtfully investigation and exploration of normative order for the elaboration of new positive law which adequately and justly resolved such contradiction between positive law (ought to be) and normative order (to be) generally, and between individual acts of public bodies and individual acts of private persons inside legal orders particularly. In other words, the aim and goal of such investigation and exploration is to discover the normative disorders inside normative orders, and than elaboration of new positive laws for eradication of normative disorders. Achievement of such aim and goal is the main function of any legislator on the local, internal, regional or global levels.

The purpose of investigation and exploration of normative order i.e. investigation and exploration of individual acts of public bodies (public normative order) and individual acts of private persons (private normative order) are to decrease entropy through the improvement of appropriate fields of positive law. First of all, it means generalization of normative practice of normative acts of public bodies in the

process of distribution of mutual rights and obligation among participants of normative relations and generalization of normative practice of private persons in the process of distribution of mutual rights and obligation by them, which first of all is the obligation not sociologists but professional jurists with the sociological bias. After that, adequate and just resolution of contradiction between positive law (*ought to be*) and normative order (*to be*) normative system of the country in whole, and between individual normative acts public bodies and individual acts of private persons inside the normative order through the creation of new positive law, using P. Ricoeur's general model, generally consists of three stages: pre-figuration (anticipation), con-figuration (formalization) and re-figuration (reorganization). (Ricoeur, 1983, p. 59) Particularly, the process of thoughtfully investigation of normative order for the elaboration of new positive law should be based on the normative pyramid of reasoning.

With a view to explain of process of mutual transition, spiral and evolutionary development of single positive law and plural normative order related to the new comparative normative order study in context of global conflicts resolution it could be used Prof. Dr. L. Djokhadze's impressive model of stylistic-conceptual system in her very important monograph "Literary Text as a Stylistic-Conceptual System" (2008), which closely converged with my position in my monograph "Normative Order and Judicial Practice" (1981). L. Djokhadze's position is following: "In normative pyramid of reasoning the core sensual variants concentrate in the center and move from the bottom-up to the top while all the marginal ones after checking and filtering remain on the lower levels or strata of the model to form background knowledge to the effect to the cognitive normative concepts. Every previous phase is a preparatory stage to proceed on the follow-up phase until finally the investigator achieves hierarchically top phase to elicit the conceptual information. The process of making predictions includes a certain adaptation. The degree of adaptation depends on the amount of frustrated expectations or justified predictabilities. So that in case of regular goal-oriented movement of above mentioned methods – adaptation the investigator may benefit, elucidating the maximum information at expense of minimum time and effort. Simultaneously moving up-ward to the top of cognitive-normative pyramid there is top-down sensor checking process as well, which sets up loose associations condensed in our concept. It offers the knowledge and experience of all the previous phases. Otherwise this self-regulated system shows how to achieve the non-finalized decisions made in every phase. Any element that occurs in this system has its own normative structure. Drawing attention to the most important one, the investigator reluctantly receives information about other parameters i.e. we observe constant changing process of analysis and synthesis. To the end, the cognitive normative concepts assist us the cognize the world, both visible and/or invisible, organizing the surrounding chaos of normative disorder into the order of orders".[1]

The process of permanent taking off a contradiction between individual normative acts of public bodies and/or individual normative acts of private persons inside legal orders, and the process of taking off a contradiction between positive law and/or normative order in the frameworks of their permanent inter-transition creates a spiral, sustainable and evolutionary tendency through which any legislator comprehend a sense of law. In philosophical terms: mutual transition, spiral and evolutionary development of positive law and normative order based on the "principle of causality through freedom", but not "principle of causality of the nature". ***The aim and goal of such mutual transition, spiral and evolutionary development of positive law and normative order is to achieve the sustainable development of humankind.***

[1] L. Djokhadze, 2008, Literary Text as a Stylistic-Conceptual System", Summary in English, ed. "Khirony", Tbilisi, p. 41, in Georgian. See also (Savaneli, 1981).

Therefore, normative order is a system of normative orders ("order of orders" using great Rustaveli's term – see below). Normative orders interact to each other in the frameworks of normative order. Normative order and normative orders interact like interact of whole and part, but not like general and single. More precisely, the normative order of each country is a gamma of normative orders of individuals and/or groups bound by mutual rights and obligations. Developing A. Reinach's and G. Naneishvili's theories, I underline that the bearers of mutual rights and obligations are related to each other psychologically or mentally but mutual rights and obligations are themselves related **- logically**. Mutual rights and obligations of individuals and groups are neither psychological entities nor mental. Mutual rights and obligations are exclusively normative entities like norms of positive law. Moreover "they are always prior to the positive law." (Naneishvili, 1930, p. 58)

Different levels of normative order generally are not neatly nested in hierarchies, nor are they impervious, nor are they static. They interact in complex ways. Moreover, to understand the normative order, the study of norms is almost never enough. One also has to take account of values, facts, meanings, processes, structures, power relations, personnel, and technologies.

Therefore single positive law (*"solen")* and normative order (*"sein")* are different space of life of Humankind. Single positive law is a summary of impersonal rules, which generally regulates potential economic, social, cultural, civil and political relations in the country through distribution of mutual rights and obligations among the possible participants of these relations. Plural normative order is a summary of personal rules, which individually regulates real economic, social, cultural, civil and political relations in the country through distribution of mutual rights and obligations by the participants of these relations.

At the international level we have a single state (positive) law – international (public and private) law and plural normative order which includes public normative acts of sovereign states and their bodies (official normative order), and private normative acts of sovereign persons and their unions (non-official normative order).

At the regional level we have a single state (positive) law, for example, EU (public and private) law and plural normative order, which include public normative acts of EU member states and their united bodies (official normative order), and private normative acts of sovereign persons and their unions in EU space (non-official normative order).

At all, international and regional (including internal) levels, the normative order censors how positive law favors to the observation human rights and freedoms by public bodies and private persons.

Using great J. Bentham's term on **"Censorial Jurisprudence"** concerning my theory I put in this term the following sense. "Censorial Jurisprudence" should explore the positive law from the point of its conformity to the *jus cogens* principles of law and international law. "Censorial Jurisprudence" should at all levels explore the conformity of positive law and normative order from the point of justice. "Censorial Jurisprudence" should explore at all levels any contradiction between positive law and normative order from the point of their conformity to the principles enshrined in International Bill of Human Rights.

Conclusions

Comparative jurisprudence is a comparison of existing systems of Positive Laws of different nation countries. Comparative jurisprudence is a comparison of existing systems of Normative Orders of different nation countries. Comparative jurisprudence is a comparison of existing systems of Positive Laws and Normative Orders of inside of nation countries. Comparative jurisprudence is a comparison of existing systems of Positive Laws and Normative Orders of outside of nation countries. Comparative jurisprudence is a scientific investigation of harmonization, mutual transition, spiral and evolutionary development of single Positive Law and Plural Normative Order.

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The Idea of Absolute in a World of Law

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Abstract: The approach the author has the feature of an essay and he starts from the idea that the meaning of the absolute is found necessarily within the relative borders, to which it appears as a human representation of disappointment and unconditional model. Based on this premise, it shows that, for the world of law, it should be counted not only on the established model, but also on the practical, legal-formal constitution of the model, able to support more effectively the compliance and the enforcement of the legal norms.

Keywords: absolute; the normative model; axiology; legal values; legal pragmatics

Ce qui définit l'homme, c'est son aspiration à poser à la base de tout ce qui est, un fondement/principe, susceptible d'assumer, dans l'ordre social, l'aspect de la valeur signifiante et de l'idéal. Mais à notre époque postmoderniste, hantée par l'esprit relativiste, nous acquérons la ferme conviction, par nos observations et grâce à une expérience intellectuelle élémentaire, que tout ce qui se trouve sous le signe de l'absolu, en tant que base/principe du monde tout entier et, à plus forte raison, des êtres humains que l'on souhaite accomplis et définitifs, s'acharne à rester, en réalité, sous le signe de l'acte de circonstancier. Ceci réside en la manifestation directe de ce qui est loi objective, régularité et permanence, en un mot, exprimant plus que tout cela: *l'absolu*. Pour le monde humain, l'absolu revêt la forme de l'idéal, des valeurs accomplies, ainsi que de la plénitude du sentiment existentiel résulté de leur addition.

La soif d'absolu, jamais assouvie et revêtant des aspects infiniment divers, a donné la mesure des efforts humains créatifs, restés toutefois sous la pression du donné, de l'immédiat et des limites propres à l'homme. Le sens de l'absolu ne s'institue que sur le plan du relatif qui, une fois parvenu grâce à l'homme, à la conscience de la limitation, dépasse pourtant provisoirement et partiellement, sa condition. Bien que l'absolu apparaisse comme projection idéale de la perfection et de la permanence, son ontologie, au sens qu'elle peut recevoir, relève quand même de la réalité définitoirement muable. Nous n'avons pas pour autant en vue ici le sens de ce que pourrait être l'absolu du donné, du monde neutral, pris en soi, surpris par les sciences positives, mais de l'absolu proprement dit, né dans le monde du donné humain, subsistant par *la signification humaine* attribuée au monde et à la place de l'être humain dans le monde. De toute évidence, l'on ne saurait construire une ontologie de l'absolu dans l'ordre humain au-delà de la réalité imparfaite de l'humain, par rapport auquel le seul absolu, pris comme aspiration à l'achèvement, acquiert un sens axiologique et devient idéal assumé individuellement ou collectivement.

La question de l'absolu, si l'on peut dire, se retrouve, à l'évidence, sur le terrain du droit aussi, des valeurs que ce dernier promeut autant impérativement que pratiquement et relationnellement. La littérature juridique insiste, entre autres, sur l'un des aspects les plus éloquents, visant le présumé caractère absolu des droits subjectifs fondamentaux. L'interprétation de leur nature pourrait balancer, comme on peut le remarquer, entre l'idée qu'un droit subjectif fondamental nu peut être absolu aussi (puisqu'il est grevé par des limitations) et l'idée que, en étant absolu, il ne devrait connaître aucune limitation (parce que la fondamentalité des droits subjectifs à ce statut est déduite de leur caractère

absolu et non pas inversement). Nous admettrons, avec les nuances nécessaires, que les droits en question, comme le droit à la vie, à la dignité, à la propriété, sont néanmoins absolus, malgré les inévitables limitations d'intérêt général, auxquelles leur exercice se confronte. Il est vrai, il est quelque chose d'absolu parce qu'il est totalement indépendant des circonstances et se manifeste comme parfait pour soi, comme « accompli ». Et pourtant, ces exigences restent-elles valables pour apprécier les droits subjectifs fondamentaux comme étant absolus?

Il y a une ontologie, mais une axiologie aussi, ainsi qu'une pragmatique de la normativité juridique. Par rapport auxquels de ces plans, les droits subjectifs fondamentaux sont-ils ou non absolus? Ou à quel égard conservent-ils ou s'ils conservent cet attribut pour chacun des plans en question?

Pour tout ce qui se situe dans la sphère du *noos*, de la création et de la spiritualité socio-humaine, l'ontologie de l'absolu est en fait, une onto-axiologie puisqu'elle se tient sous le signe de la signification axiologique de tout ce que l'homme atteint, crée ou à quoi il aspire. Sous l'horizon juridique, les droits subjectifs fondamentaux incarnent, expriment et véhiculent par des moyens technico-formels adéquats des valeurs vitales et, par là-même, présumés intangibles dans leur teneur. Ce sont les valeurs qui sont le fondement absolu des droits, et non pas la création volontariste du législateur ; ce dernier leur confère une forme juridique adéquate afin de les rendre applicables. Mais les valeurs se revendiquent – non pas nécessairement temporellement, au sens d'un commencement, mais processuellement, comme accomplissement et reconfiguration permanente – de la vision et des idéaux d'humanité configurés dans le droit naturel, se trouvant lui-même en un continuel remodelage axiologique dans le champ du devenir historique. Voilà, par exemple, le droit à la vie. C'est un fait palpable que la vie en soi est quelque chose de relatif ; elle devient valeur par la signification relative qu'elle reçoit de la société et par laquelle elle est projetée dans le tableau des valeurs, produit de la conscience sociale. Dans le champ du droit positif, la vie comme valeur devient droit à la vie par l'intermédiaire valorisant du droit naturel, lui-même composante organique du *noos* de la communauté. Considéré comme principe du droit naturel, le droit à la vie, pour nous référer juste à ce dernier, a une valeur absolue; considéré comme une composante des normes du droit positif, comme institution juridique, il relationne, se circonstancie par rapport aux humains et aux circonstances. Mais non pas pour se relativiser axiologiquement jusqu'à la condition du rien/néant. A la limite, même la condamnation à mort de quiconque n'opère pas dans le mépris de la vie du coupable, malgré cette apparence qu'elle comporte plus d'une fois; elle apparaît comme sanction absolue, parce qu'elle défend une valeur absolue – la vie de la communauté et de ses membres – au prix, sur mesure, de l'annulation du droit à la vie de quelqu'un, donc du fondement – y compris juridique – de sa vie, restée ainsi en dehors de la légitimité.

L'intangibilité des valeurs et du modèle à suivre, déduit d'elles, considérée comme critère du caractère absolu des droits, s'avère pourtant opérer à chaque fois, historiquement et concrètement. L'absolu ne réside pas ici en quelque chose de transcendant, d'anhistorique et d'abstrait; son ontologie est d'ordre immanent aux structures génératives du mental social. L'absolu – c'est répéter une chose élémentaire - se situe seulement entre les frontières du relatif, de la réalité historique et de la condition humaine concrète, en tant que représentation humaine de leur dé-limitation et modèle – idéalisé – à suivre. Dans la conception axiologique précisée, les droits subjectifs fondamentaux aspirent au régime absolu. Quant aux limitations par l'effet de la loi, celles-ci préviennent l'exercice abusif des droits, ne conteste leur légitimité dans l'absolu, à savoir en ce qui, en dernière analyse, leur valeur exprime incontestablement et parfaitement comme modèle. Mais réaliser un droit, signifie le placer sous l'incidence de la situation. Nous apprécions, conséquemment, que sur le plan pragmatique de la réalisation des droits subjectifs fondamentaux, les circonstancier inévitablement (y compris les limitations fixées par la loi dans le but de les réaliser!) n'équivaut pas à relativiser les droits. Le caractère absolu des droits subjectifs fondamentaux ne relève pas de leur non conditionnement présupposé, mais du modèle normatif impératif qu'ils proposent; leur support axiologique est conféré par l'escomptée perfection du modèle axiologique, telle qu'elle est représentée historiquement à une époque ou autre, non pas du non conditionnement, illusoirement prétendu, du modèle en soi. Le modèle est le produit idéalisé du mental social, de classe, de groupe, engagé dans l'existence concrète, tentée à s'auto-dépasser. Comme on l'a dit, l'absolu n'a, sous rapport logico-conceptuel et

axiologique, ni degrés ni frontières. Mais dans le flux de la vie diurne, l'individu et la collectivité forgent, avec efforts, juste des brins d'absolu, d'élévation spirituelle, alors que l'absolu, considéré comme accomplissement er représentation inconditionnelle de celui-ci, demeure une projection idéalisante. Il nous faut cependant avoir en vue non seulement le modèle constitué, mais la constitution du modèle aussi, de même que sa réalisation directe, bien que d'une manière inhérente, partielle, dans le champ du respect et de l'application des normes juridiques. Dans cette perspective, la disjonction entre relatif et absolu ne doit pas être hypostasiée. Ainsi, l'on ne remet nullement en question le fondement théorique des droits subjectifs fondamentaux, lequel reste intangible dans sa légitimité ; mais ce ne sont que les limitations qui rendent possible la viabilisation des droits et la rationalisation pratique de leur exercice constructif. Si bien pesées dans l'Etat de droit, ce sont elles, les limitations, qui assurent la forme juridique nécessaire au droit subjectif fondamental comme droit absolu. Sur cette base, l'attribut d'absolu s'exprime par celui de fondamental, s'accréditant juridiquement grâce à lui. Sur le plan pragmatique, de la réalisation des droits subjectifs fondamentaux, nous pourrions dire – en forçant les choses? – qu'un droit subjectif, en tant que fondamental, est par là-même - à savoir par son régime juridique, également absolu. Ce qui est fondamental est, de cet angle, absolu. Le fondamental accapare tautologiquement l'absolu; c'est la manifestation pragmatique fondatrice, technico-formelle, de l'absolu.

A considérer autrement les choses, il opère ici un passage de la Philosophie du droit à sa Science ; cette dernière est obligée de transférer des contenus philosophico-conceptuels, valorisants et d'engagement attitudinal, en des termes notionnels, à fonction constative, mais aussi valorisante, par lesquels s'exprime proprement la Science du droit en tant que science sociale. De toute façon, l'admission du conditionnement des droits subjectifs fondamentaux n'est pas une simple rhétorique juridique parce qu'ils ne contestent pas leur substrat valorique absolu. En ce qui concerne le droit – absolu – à la vie, la descente dans le concret conditionnant et, par conséquent, son approche strictement technique peut et même doit prévaloir lorsque sa protection effective est remise en question. La prévalence de l'aspect technico-juridique est de nature fonctionnelle, non pas valorique, et opère justement par les limitations constructives de l'exercice du droit à la vie – dans le but d'assurer la prééminence valorique, donc de sa nature absolue.

La relativisation valorique des droits subjectifs fondamentaux, des droits et libertés en général, accusée avec des arguments par certains penseurs, peut concerner l'idéologisation et la politisation de la problématique en cause, n'est pas l'acte de circonstancier si nécessaire à leur application. Ce n'est que par les conditionnements de la situation que l'opposabilité *erga omnes* des droits subjectifs fondamentaux devient opérante. Une réciprocité de l'engagement humain s'institue ainsi, où mon droit génère l'obligation pour tous de l'observer, conditionnée par mon obligation de respecter les autres. De la sorte, *erga omnes* n'est pas une opposabilité limitée par la quantité ; elle engage une obligation de nature valorique, à vocation absolue, objectivée dans les inter-conditionnements de la situation, des relations interindividuelles infinies. Par le travail du droit, l'absolu reçoit l'empreinte de la validité générale de la norme et de son assomption consciente. Il s'avère, dans ce cadre aussi, le rôle inhérent des limitations constructives, d'ordre technico-juridique, appelés à assurer la voie royale vers le peu d'absolu des valeurs humaines, retrouvées d'abondance dans le champ du droit positif considéré comme une forme impérative de la liberté !

« La question de l'absolu » dans le monde de la juridicité (les guillemets marquent dans ce cas la conscience des limites de compréhension conceptuelle de l'absolu dans le droit, considéré comme un horizon infini et peut-être ineffable de connaissance et valorisation, dévoile par là-même une autre facette. L'on a pu constater, par la voix autorisée de certains penseurs, que le droit positif tend à substituer à l'idée de *Bien* celle de justice légale. C'est un signe propre au modernisme qu'on est en train de traverser, de glissement vers le relativisme. En effet, dans la situation où les valeurs « fortes », d'un contour définitoire, comme le Bien avec ses hypostases majeures, tendent à être remplacées par celles « grises », de mélange, le monde de la normativité juridique perd progressivement la liaison organique avec le support métaphysique de Vérité et Justice, projetés dans l'absolu. Au lieu de modéliser normativement les circonstances et les intérêts fluents en fonction des valeurs admises comme repères stables, le droit s'adapte, se moule sur les premières comme un pastiche de jeu second.

Peut-on dire encore aujourd'hui, avec une classique fermeté, que la justice doit être réalisée, même si le monde risquait de disparaître ? D'une valeur absolue, l'idéal de justice est devenu justice légale entretemps. Afin que le monde ne disparaisse, on taille la justice d'après le patron de la loi ; la justice réside dans la loi, et non pas la loi dans la justice. Mais la loi est une mesure par trop humaine, elle peut abandonner toute trace d'absolu, en cherchant son fondement dans la conjoncture devenue principe légal. Evidemment, l'esprit de notre époque ne peut plus s'illusionner de la volonté des dieux, de Dieu ou de la raison universelle en tant que mesure transcendante de la justice humaine. Mais l'absolu ne se réduit pas à l'aire du transcendant. La spiritualité a édifié, plus près de nous, héroïquement, des supports immanents d'absolu, considérés comme fondements des valeurs humaines. Mais ils entrent de nos jours dans la pénombre, passent sur un plan second, s'efféminent jusqu'à l'évanescence. C'est ainsi qu'est né déjà un monde du relatif et du relativisme, suffisant à lui-même sous un horizon de l'équilibre non problématisant, ouvert plutôt sur l'horizontale de l'existence humaine. Cette dernière est abandonnée par degrés par l'aspiration de se rapporter aux valeurs « fortes », rivant de plus en plus rarement ses yeux sur le ciel de l'absolu, ne fût-ce que celui blagien (de Lucian Blaga) des étoiles du puits de l'auto-connaissance. Aveuglée par la fausse lumière de l'idéologisation des droits de l'homme, notre vie se démocratise formellement et d'une manière niveleuse, sans pour autant créer avec la même vigueur des chances égales de succès à l'aristocratie de l'esprit. Et le droit positif est positif au sens le plus sage du mot, au-delà de ce que son concept nous communique spécialement. Il se laisse soutenu par une socialité et une politique sociale des conjonctures, en embrassant toujours plus de conjonctures normatives, nées de pertractations et compromis entre les forces politiques intéressées par des améliorations à brève échéance. Au-delà de la morale, le droit était l'instrument de la force totalitaire ; en-deçà de la morale, le droit, bien qu'il n'invente pas de faux idéaux, donne pourtant, en l'absence des valeurs « fortes », dans une autre impasse : il ne voit plus les étoiles guides. Du reste, le navire du monde ne navigue plus vers la rive espérée ; à bout de rêves, il vogue vers Nulle Part, en un mouvement répété encore et encore, qui l'élimine de l'histoire…

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The Legal Contest at the Execution of an executory Title Emitted by a Public Authority

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Abstract: The public authority, naturally, acting in regime of a public power for the redressing of the public and legal interests, emits administrative acts as well as administrative jurisdictional documents. Under certain circumstances these acts may wrong the legal rights or interests of anyone. The law of the administrative disputed claims office offers the legal background for solving the litigations where one of the sides is the public authority, and thus, resulting a large area of applicability of whatever(legal) stedy that aims this law. The purpose of elaborating this work is to increase the interest of the jurists to know and apply at the same time the law of the administrative disputed claims office. The achievement of these objectives is important for both the elimination of the power excess and for the unitarian practice of the legal instances. At the same time, the realization of the State of Law implies the observance of the citizenz rights and liberties by the public authority. Starting from an authentic species, the author of this work pleads for the claimant and uses as research methods the observation, the problematization, the investigation, the debate and it proposes to answer the following questions: 1. Does the Law Court-the civil section- have the material competence to judge the legal contest at the execution of an executory title emitted by a public authoriry? 2. In what conditions is put into execution the executory title emitted by a public authority? According to the author, the present species can be looked upon as a distinct case investigation especially in the universitary field department.

Keywords: public authority; administrative disputed claims office; executory title; material competence

1 Introduction

Conformément au rapport de 2009, visant l'activité de la Cour des Droits de l'Homme, la Roumanie se place la deuxième parmi les États signataires de la Convention Européenne des Droits de l'Homme, dans une classification réalisée en fonction de la valeur totale des remboursements dûs après les procès perdus à CEDO, l'État roumain, étant obligé en 2009 de payer presque 12 millions d'euros, a été dépassé à ce sujet seulement par la République de la Moldavie. Après la Moldavie et la Roumanie, les plus grandes créances dûes après les condamnations à CEDO, en 2009, appartiennent à la Russie, à la Turquie, à l'Italie, au Portugal, à la Grèce et à la Bulgarie (source : e-Juridic.ro du 16 avril 2010).

Dans ce contexte, dans la procédure judiciaire on constate qu'on juge des contestations d'exécution des titres exécutoires émis par une autorité publique au tribunal civil, sous le prétexte que c'est un tribunal d'exécution – par l'autorité publique désignant toute organisation capable à offrir des services publics, ayant le statut de pouvoir public.

Selon nous, on révèle ainsi la compétence matérielle des tribunaux et la loi du contentieux administratif, soit volontairement, soit par la négligeance des parties impliquées dans le différend.

En outre, certains titres d'exécution délivrés par une autorité publique n'ont pas de motif légitime, le débiteur est dommagé de son droit de pouvoir vérifier tout d'abord la vérité de la créance étant sanctionné et panalisé avant que le litige soit résolu.

On se propose de trouver des réponses juridiquement argumentées aux questions formulées dans le résumé de cet ouvrage à l'espoir que des spécialistes et des praticiens du domaine y trouveront de l'intérêt à propos des problèmes traités.

2 Le tribunal civil, a-t-il la compétence matérielle de juger la contestation d'exécution d'un titre exécutoire émis par une autorité publique ?

On relève le problème de définir la notion d'"autorité publique", conformément à la loi n^{o} 554 / 2004 relative au contentieux administratif – avec les notifications ultérieures.

Ainsi, les dispositions de l'article 2, alinéa (1), lettre (b) montre-t-il la signification de cette notion :

(b) on désigne par **l'autorité publique** *toute organisation d'État administrative et territoriale qui exerce ses droits dans le système de la puissance publique pour satisfaire un intérêt public légitime ; les huissiers de justice privés, sous l'effet de la loi actuelle, sont assimilés aux autorités publiques , obtenant le droit d'exercice public ou étant autorisés à accomplir un service public en qualité de puissance publique*.

De même, on remarque que les huissiers de justice privés obtenant le droit d'exercice public ou étant autorisés à accomplir un service public sont assimilés aux autorités publiques.

Pour mieux comprendre quels huissiers de justice pourraient être assimilés aux autorités publiques, conformément à la loi, on dévoilera les aspects d'une **affaire** dont le débiteur est une Maison Départementale d'Assurance Maladie (CJAS), institution trouvée sous la direction de la Maison Nationale d'Assurance Maladie (CNAS). L'affaire en question présente des aspects liés à la procédure judiciaire de délivrance du titre exécutoire par CJAS, conformément aux dispositions de la Loi 95 / 2006 visant la réforme de la santé. Dans l'affaire mentionnée on a sollicité l'annulation d'un titre exécutoire émis par CJAS qui a pour objet le paiement d'un prix équivalent à la période 2003-2008, correspondant aux frais supplémentaires d'assurance maladie.

Le débiteur, un retraité, a invoqué le manque de motif légitime à la délivrance du titre exécutoire, en qualité de personne physique autorisée à dérouler des activités indépendantes soumises au paiement de l'impôt sur le revenu, ayant un revenu de sa pension jusqu'à la limite soumise à l'impôt sur le revenu, c'est-à-dire inférieur à la somme de 1000 RON.

CJAS a soutenu que le litige devait être jugé par un tribunal civil compétent ayant la qualité d'instance exécutoire, contrairement au créancier qui cherchait à déférer l'affaire au tribunal ou à la cour d'appel, les instances de contentieux administratif et fiscal ; la créance étant supérieure à la somme de 50 lei RON, la cour d'appel devrait être compétente – à voir l'article 10 de la Loi 554 / 2004. On a décidé de mettre sous séquestre la pension du débiteur, la créance étant récupérée avant la résolution du différend. CJAS a gagné sur le fond du droit et à l'appel.

Selon nous, le tribunal a commis une erreur judiciaire tant à la compétence matérielle du tribunal civil qui avait jugé le différend qu'au motif légitime du titre exécutoire et on présente ci-dessous les justifications qui s'imposent.

Conformément à l'État, CNAS, par l'Ordre n° 222 du 4 novembre 2005, avec les modifications ultérieures, cette organisation est une institution publique, y compris CJAS, représentant sa filière dans le territoire (article 2 du même statut). L'article 1 du statut prévoit : *La Maison Nationale d'Assurance Maladie, appelé aussi CNAS, est une institution publique autonome d'intérêt national, à personnalité juridique, qui contrôle et gère le système d'assurances sociales de santé en Roumanie en vue d'appliquer les politiques et les programmes du Gouvernement dans le domaine de santé*.

CJAS déroule une activité d'administration juridique spéciale, ainsi définie dans l'article 2, alinéa (1), lettre (e) de la Loi 554 / 2004 : e) **administration juridique spéciale** – *l'activité déroulée par une autorité administrative qui a, conformément à la loi organique en domaine, la compétence de résoudre un conflit concernant un acte administratif selon une procédure basée sur les principes de la contradiction, de la sauvegarde du droit à la défense et de l'indépendance de l'activité administrative et juridictionnelle*.

Le titre exécutoire émis par CJAS est, conformément à l'article 2, alinéa (1), lettre (c), un acte administratif, on cite : c) **acte administratif** – *l'acte unilatéral à caractère individuel ou normatif émis par une autorité publique en qualité de puissance publique, mettant en oeuvre l'exécution de la loi ou l'exécution effective de la loi, qui émerge, modifie ou dissolve les rapports judiciaires ; on assimile aux actes administratifs, au sens de la présente loi, même les contrats conclus par les autorités publiques qui ont pour objet la mise en valeur des biens de propriété publique, l'exécution des travaux d'intérêt public, l'emploi des services publics, les acquisitions publiques ; par des lois spéciales on peut prévoir d'autres catégories de contrats administratifs soumis à la compétence des tribunaux de contentieux administratif*.

Dans la deuxième partie de cet article on précise le fait qu'on assimile aux actes administratifs des contrats conclus par les autorités publiques qui ont pour objet les services publics. CJAS offre des services sanitaires (à voir le statut CNAS, article 5, alinéa (1), position 25 : *elle conclut et déroule des contrats d'acquisitions publiques pour des médicaments et des matériaux sanitaires propres à la réalisation des programmes de santé, tels des contrats de prestation des services médicaux*, etc.). On a établi que CNAS et CJAS représentent des autorités publiques, capables donc à utiliser la procédure judiciaire (le principe de la compétence d'un huissier de justice à utiliser la procédure) devant les tribunaux de contentieux administratif. Les arguments juridiques présentés ci-dessus doivent être corrélés aux dispositions de l'article 10, alinéa (1) de la Loi 554 / 2004 relative au contentieux administratif – avec les modifications ultérieures, en vue de déterminer le tribunal compétent à juger la contestation d'exécution d'un titre exécutoire émis par une autorité publique.

Cet article prévoit : article 10, alinéa (1) – "***les différends*** *concernant les actes administratifs émis ou conclus par les autorités publiques locales ou départementales, ainsi que ceux concernant les taxes et les impôts,* ***les contributions****, des dettes douanières ou d'autres indemnités similaires jusqu'à la somme de 500 000 lei* ***sont résolus sur le fond du droit par les tribunaux administratifs et fiscaux*** *et ceux concernant les actes administratifs émis ou conclus par les autorités publiques centrales ou qui visent les taxes et les impôts, des contributions, des dettes douanières et d'autres indemnités similaires, supérieures à la somme de 500 000 lei* ***sont conclus sur le fond du droit par les instances de contentieux administratif et fiscal des cours d'appel****, si la loi organique spéciale ne prévoit autrement*" (500 000 lei – 50 lei ron).

De même, l'article 400, alinéa (2), du Code de procédure civile, qui vise la contestation d'exécution, renvoie aux instances de tribunal, et CJAS est une organisation à personnalité juridique, comme on l'a démontré ci-dessous. Ainsi, l'article 400, alinéa (2), le Code de procédure civile dit :

"*La Contestation concernant la compréhension de la notion, de l'extension ou de l'application du titre exécutoire est tranchée par le tribunal qui a prononcé la décision exécutoire. Si une telle contestation vise un titre exécutoire qui n'est pas émis par une instance de tribunal compétente à le conclure, alors elle appartient au tribunal d'exécution*".

Par conséquent, l'expression "**qui n'est pas émis par une instance de tribunal**" on constate l'exclusion des titres exécutoires émis par des instances de tribunal de la compétence du tribunal d'exécution.

Des règlements du droit cités on révèle que les tribunaux et les cours d'appel, les instances de contencieux administratif et fiscal sont compétents à juger les contestations d'exécution des titres exécutoires émis par une autorité publique.

3 Dans quelles conditions s'applique le titre exécutoire émis par une autorité publique ?

Dans ce chapitre il faut éclaircir les aspects visant le tribunal d'exécution dans le contencieux administratif et les conditions auxquelles la créance imposée dans le titre exécutoire doit se soumettre.

Le tribunal d'exécution, en vertu de l'article 2, alinéa (1), lettre (ţ) de la Loi n^{o} 554 / 2004 visant le contentieux administratif –avec des modifications ultérieures, ***est le tribunal qui a conclu le fond du différend de contentieux administratif***, sous-entendu que le fond du différend s'achève au tribunal ou à la cour d'appel, les instances de contentieux administratif et fiscal, comme on a démontré dans le chapitre 1 de cet ouvrage. Dans la procédure judiciaire, il est essentiel de connaître **la dichotomie du tribunal d'exécution**, y inclus le tribunal civil et le tribunal et la cour d'appel – les instances de contentieux administratif, tels les instances de fond. Le tribunal qui jugera la contestation d'exécution doit constater si la créance en question, qui fait l'objet du titre exécutoire est soumise aux conditions demandées par l'article 379 du Code de procédure civile. Ces conditions se réfèrent tant au débiteur qu'à la créance en soi. Ainsi, dans l'article 379, alinéa (1) on prévoit *qu'aucune poursuite d'exécution forcée sur des biens mobiles ou immobiles ne pourra se produire à l'exception d'**une créance certe, liquide et exigible***. Pour qu'elle soit certe, la créance doit *être admise par le débiteur et reconnue par lui* – l'article 379, alinéa (3). Dans la présente affaire, la créance n'était pas certe, car les décisions de cet article n'étaient pas respectées.

Le critère qui fait référence à la créance liquide est respecté, si son pourcentage est calculé même s'il est contesté, tel qu'il est prévu dans l'alinéa (4) du même article. Quant à l'exigibilité de la créance, au sens d'une exécution immédiate, c'est le droit de l'autorité publique de demander l'exécution, mais, toutefois, le débiteur a le droit de contester le titre exécutoire, toute exècution étant élevée juasqu'à la résolution de la cause, conformément à la loi ; le motif légitime de l'exécution étant soutenu par les parties du différend au cadre des débats de procédure judiciaire.

4 La procédure judiciaire non-unitaire

Il est important de souligner **les conclusions du Conseil Supérieur de Magistrature** inscrites dans le **Procès-verbal du premier juillet 2009**, formulé lors d'un entretien entre les membres de la Commission "L'unification des procédures judiciaires" formée du président de l'Instance du contentieux administratif et fiscal et de l'Instance commerciale de la Haute Cour de Cassation et de Justice, des présidents des instances de contentieux administratif et fiscal et des instances commerciales des cours d'appel. L'entretien a eu lieu pour mettre en question les problèmes de procédure judiciaire non-unitaire dans le droit du contentieux administratif et fiscal et le droit commercial, signalés par les cours d'appel tout au long du premier trimestre de l'année 2009.

À la fin de l'analyse d'une affaire similaire à celle présentée dans notre ouvrage, par la commission mentionnée sous l'aspect de cet objet , la Commission CSM a conclu que le tribunal compétent était l'instance du contentieux administratif et fiscal, tout comme le tribunal ou la cour d'appel (en fonction du montant) et la loi gouvernante est la Loi 554 / 2006, la loi du contentieux administratif. On cite du procès-verbal CSM : En vue de soutenir cette opinion, on a précisé les suivants : conformément aux prévisions de l'article 10, alinéa 1 de la Loi n^{o} 554 / 2004, "*les différends concernant les actes administratifs émis ou conclus par les autorités publiques locales et départementales, ou ceux qui visent les taxes et les impôts, les contributions, les dettes douanières ou des indemnités similaires inférieures à 500 000 lei sont résolus sur le fond du droit par les instances du contentieux administratif et fiscal, et ceux concernant les actes administratifs émis ou conclus par les autorités publiques centrales, ou ceux qui visent les taxes et les impôts, les contributions, les dettes douanières ou des indemnités similaires supérieures à 500 000 lei sont résolus sur le fond du droit par les instances du contentieux administratif et fiscal des cours d'appel, si par la loi organique spéciale on ne le prévoit pas autrement*". À ce qu'on peut observer à la simple lecture du texte, **l'huissier de justice n'a pas fait la distinction entre les taxes dûes au budget d'État et les taxes dûes aux services publiques et offertes directement par l'État ou par l'intermède de certaines organisations, autorités publiques ou d'autres instances.**

Par conséquent, ce qui intéresse est que le différend se rapporte aux taxes établies par la loi pour le recouvrement des frais (totales ou partielles), pour la prestation d'un service publique. Contrairement aux faits prouvés, l'Instance VI Commerciale du Tribunal Bucarest a montré qu'elle maintenait les arguments invoqués dans les décisions antérieures par lesquelles **on disposait la cassation des sentences du tribunal et la remise de la cause pour une résolution compétente à l'instance du contentieux administratif et fiscal**".

Toutefois, le problème de l'affaire présentée n'est pas représenté seulement par la compétence matérielle du tribunal mais aussi par le motif légitime d'application du titre exécutoire qui entre sous l'incidence de la Loi n^{o} 95 / 2006 visant la réforme de santé, y inclus des dispositions de l'article 213, alinéa (1), lettre (h) qui prévoit : (1) *Les catégories qui bénéficient d'assurance sans payer la contribution sont les suivantes* : (h) *les retraités, pour les revenus des pensions jusqu'à la limite imposée par l'impôt sur le revenu*. Le débiteur a le revenu de la pension inférieur à la somme de 1000 lei qui représente la limite soumise à l'impôt sur le revenu - conformément à l'article 69, du Code fiscal – et, par conséquent, il bénéficie d'assurance sans payer des contributions.

Dans la Loi 95 / 2006 il n'y a pas de règlements visant la contribution aux assurances maladie des personnes qui réalisent en même temps des revenus des pensions jusqu'à la limite soumise à l'impôt sur le revenu et des activités indépendantes soumises à l'impôt sur le revenu – cet aspect constitue la clé de l'affaire.

En ce sens, on envisage encore un argument qui renforce le manque de motif légitime visant l'obligation au paiement du débiteur pour la période 2003-juin 2008 : ainsi, seulement à la date du premier juillet 2008 est entré en vigueur l'O.U.G. 93 / 2008 qui a modifié partiellement l'article 257 de la loi 95 / 2006 relatif la réforme de la santé au sens d'obliger au paiement de la contribution des assurances maladie les personnes qui ont exactement le statut du débiteur, c'est-à-dire le revenu de la pension inférieur à la somme de 1000 lei et déroule aussi des activités indépendantes. À ce qu'on voit, le titre exécutoire, visant cette affaire, est antérieur à cette ordonnance et le nouvel acte normatif ne s'applique pas de manière rétroactive.

5 Conclusions

Le jugement de la contestation d'exécution d'un titre exécutoire émis par une autorité publique est de la compétence des tribunaux et des cours d'appel, les instances du contentieux administratif et fiscal. L'autorité publique part de la prémisse que le titre exécutoire est seulement exigible, ne tenant pas compte que la créance en question doit être certe. Cette manifestation de l'autorité publique constitue un excès de pouvoir, tel qu'il est défini dans la Loi 554 / 2004 dans l'article 2, alinéa (1), lettre (n) : ***l'excès de pouvoir*** *– l'exercice du droit d'appréciation des autorités publiques par le dépassement des limites de la compétence prévue dans la loi ou par la violation des droits et des libertés des citoyens*.

Le débiteur a le droit à la défense et à un procès équitable achevé dans un délai raisonnable (à voir la *Constitution de la Roumanie*, les articles 21 et 24, La *Convention Européenne des Droits de l'Homme*, l'article 6). Dans l'affaire traitée dans le présent ouvrage on constate que la mise en exécution du titre exécutoire s'est réalisée par l'application du séquestre par l'autorité publique sur le revenu de la pension du débiteur avant la clôture du dossier. De même, la requête de suspension de l'exécution a été éludée, la défense du débiteur devanant formelle tout au long du procès.

Pour le débiteur dommagé il y a deux possibilités d'attaquer la décision irrévocable : la contestation d'annulation ou la Cour Européenne des Droits de l'Homme.

La dignité d'un pays est importante dans les relations internationales, y compris à CEDO, et on la gagne par le respect dû aux droits de ses citoyens.

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THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

New Institutions and Institutions that Have Suffered Some Changes in the New Code of Criminal Procedure (General Part)

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Abstract: Although the new code of criminal procedure has not yet entered into force (and it the date when this will happen has not been set), we have found it necessary to examine the contents of the new law and to express our point of view on the novelty that it proposes, but also in relation to certain amendments to existing texts, which are to be found in the law adopted by the Parliament on 15 July 2010.

Keywords: judge of rights and freedoms; judge of preliminary chamber; suspect; undercover investigator

We will examine the text of the new Code of Criminal Procedure, the order of articles as follows:

1. In article 3 of the new code, the separation of judicial functions is provided for, except that they are not three, as now, but four, two of which have a new name and refer to the duties belonging to **the judge of rights and freedoms** and to **the judge of preliminary chamber**, two emerging institutions.

Under the new regulations, the designated magistrate is required to rule on acts and measures that restrict fundamental rights and freedoms of individuals, such as, for example, the use, maintenance or extension of preventive measures, but also the legality of sending to court, ordered by the prosecutor.

2. In terms of participants to criminal proceedings, the new code, when referring to the judiciary, states, - in art. 30 – that besides those currently present (criminal investigation officers, prosecutor and courts), the judge the rights and freedoms and that of preliminary chamber. They have distinct responsibilities, stipulated under articles 53 and 54 of the new document. It should be mentioned that, while the former magistrate has jurisdiction to hear requests, proposals, complaints and appeals arising in the prosecution phase, the latter acts in court, after the prosecutor had ordered the prosecution of a person, verifying the legality of such measures, but also dealing with complaints against solutions not to prosecute.

3. As regards the prosecutor's jurisdiction, it can be noted the provision contained in article 56 par. 4 and 5 of the new CCP, which shows that military prosecutors are involved in separate sections in other offices. Currently there is only one military section belonging to the Prosecutor's Office by the High Court of Cassation and Justice.

4. The competence of the Special Criminal Investigation officers was amended, too (art. 57 of the new CCP), not only in terms of formulating the new text, so that they remained competent to investigate, but mainly when it refers to crimes committed by the military. But these special organisms have, under the new provision, the power to conduct investigations for crimes of corruption and of service, committed by civilian Navy seafarers. In this way, the port captains have been removed from the

category of special investigators (see the current regulation, which is covered by art. 208 par.1 letter e of the new CCP).

5. A new, necessary, and especially useful provision is that under art.101 par. 2 of the new CCP, text from whose content results that no listening techniques or methods that affect a person's ability to remember and report knowingly and voluntarily the facts which constitute the object proof can be used, even where that person consents thereto. Thus, any evidence obtained through torture or derived from such methods is explicitly excluded (see provisions of art. 102 of the new CCP).

6. In art. 117 par. 1 letters a and b of the new CCP, the people who are not obliged to give evidence are explicitly specified: the spouse, the ascendants and descendants in direct line, the brothers and sisters of the suspect or accused, and also those who acted as their spouse, unlike the current text (article 80 par. 1) stating only that: the spouse and the close relatives of the accused (term which no longer exists, being replaced by that of the suspect) or of the defendant are not obliged to give evidence.

Article 118 of the new Code of Criminal Procedure provides a necessary thing, although I believe that there are very few cases where the judiciary has made use of the absence of this provision. The current text states that a witness' statement cannot be used during a trial held against him, because, consequently, such a way of looking at things could mean, possibly, a recognition of guilt, for example in a case in which that person would be considered a suspect or defendant.

7. In Section 5 of the new code, which relates to the protection of witnesses, a series of provisions were shown. They aimed particularly at threatened witnesses, people who are consistently and effectively protected, both during the prosecution (art. 126 of the new CCP) and during the trial stage (art. 128 of the new CCP). In the first stage of the trial, the protective measures are ordered by the prosecutor, by reasoned order, while in the second stage they are ordered by the court competent to hear the case on the merits, by motivated conclusion, decision which is not subject to any appeal review.

8. We find a new institution in chapter III of the new Cod of Criminal Procedure, art. 131-137. This chapter refers to identifying persons and objects, wherever this is necessary in order to clarify the circumstances of the case. Analyzing the content of these texts, it results that these measures are disposed by the prosecutor during the prosecution and by the competent court during the trial stage, according to a developed procedure, which is meant not to lead to unfortunate mistakes or errors. By specific methods, one may proceed in order to identify voices, sounds or other items subject to sensory perception (art. 136 of the new CCP).

9. Regarding the chapter relating to special surveillance or research techniques, the number of institutions has increased in the new code of criminal procedure, to the extent of the diversification of 'methods' used by those who argue the law today.

Thus, in art.138 of the new CCP, there are listed no fewer than 11 such 'techniques', some of them existing in the current legislation, such as: interception of communications and access to a computer system, video surveillance, audio or by taking photographs, using undercover investigators and supervised delivery, others - like getting the list of phone calls, detention, surrender or postal searches, as well as controlled delivery or the finding of a crime of corruption or the conclusion of a convention, all of them having a new or more complete name, but, which, one way or another, have been used and are still used today. In terms of specific regulations to use these 'techniques', there are not new provisions, which require an analysis of the texts of the new code of criminal procedure. However, we should mention this clearly: the authorization to use the techniques set out in the code is ordered by the judge of rights and freedoms, an institution which, as we stated earlier, is entirely new.

10. It should be noted, however, an extremely important thing for the criminal proceedings, in the light of the new code provisions, namely that in respect of the undercover investigators, who are more and more used by the judiciary, they cannot be punished for criminal activities for which they have been

authorized (article 148, paragraph 6), and in terms of corruption or of concluding illegal agreements, challenge is not punishable. (article 150 paragraph 3 of the new CCP).

11. Among the 'techniques' that appear in the Code of Criminal Procedure, we could mention controlled delivery, which is authorized by the prosecutor supervising or conducting the criminal investigation, only under certain conditions specifically required under the art.151 of the new CCP. They are effected by the magistrate, who "establishes, coordinates and controls the implementation of controlled delivery", as it results from par. 6 under the same text. And here is a very important statement, namely: the implementation of controlled delivery is not a crime (article 151 paragraph 7 of the new CCP).

12. It is also worth outlining the express provisions regarding the lack of punishment of those who, for the discovery of offenders and offenses, have a certain conduct, not always legally, because, by inserting them, the possibility to invoke that the illegality was committed by 'representatives of judicial authorities' is removed, especially during the prosecution, to defend persons who have violated criminal law. This also applies to cases which were related to crimes of giving and taking bribes (if it was a challenge or not, what was the moment when the offense was committed, the lack of action, if there is an exemption from criminal liability, etc.). Identifying the subscriber, the owner or the user of a telecommunications system and obtaining the list of telephone calls is performed by competent bodies of law at the request of the prosecutor, who is obliged to seek prior approval from the judge of rights and freedoms, provisions contained in article 152, and 153, respectively, of the new code. Another novelty, also generated by the evolution of technology, refers to computer searches and access to a computer system, text which is covered by the article 168 of the new CCP. We need to remember that the provision of approval is given by the judge of rights and freedoms, at the reasoned request of the prosecutor who supervises or conducts the prosecution. Another special 'technique' special, as is stated in art. 196 of the new CCP, refers to photographing and fingerprinting the suspect, the defendant or other persons, activities authorized by the prosecution and that can be achieved even without the consent of the persons concerned.

13. Without including new provisions, essential for the proper conduct of criminal proceedings, and for the institution of compulsory medical treatment and that of article 247 et seq. of the new CCP on temporary medical hospitalization, the texts under art. 245 and the subsequent ones of the new CCP require that the provision be ordered by the judge of rights and freedoms or by the judge of preliminary chamber, where appropriate, instead of the judge referred to in article 161 and 162 of the current code.

14. These are but a few of the main novelties that are to be found in the Code of Criminal Procedure. They are likely to lead to activities of a higher level of quality in terms of efficiency, both in the first stage of the trial and in the second one. In addition, should not forget that, throughout the year 2010, the Law no. 202 on 'Little Reform' was also adopted by the Parliament, which has already been applied, in particular to the courts.

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The Right, the Liberty and Democracy

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Abstract: I have asked myself many times, next to other colleague professors from the law or administrative sciences faculties if it is sufficient for students, in the profession they have chosen, to know only the matters of practical immediate use as some officials vested with the destiny of the high education allege. The answer I am trying to argue in this intervention is NO. It is not enough. For example the legal bone structure of the conception regarding the modern democracy finds its fundament in the social contract which is the meta-juridical principle, philosophically, so to speak. Apart from this permanent appeal to philosophy in general, I personally had a permanent concern studying the administrative phenomenon to underline the intrinsic link between juridical and political. I am trying also through this summary intervention to provoke the preferment of a critical spirit, much absent from our academic environment, which could question the too neat roads of the science of the current law and the creation of an intellectual emulation so necessary for the ones who research the legal phenomenon as well as the administrative one. Without philosophy, any research of law or of the administrative phenomenon is lacked of grounds. Or, without fundaments any intellectual attempt is destined to superficiality and, finally, to failure.

Keywords: democracy; liberty; administrative phenomenon

Je me suis demandé plus d'une fois, avec mes Collègues des facultés de Droit ou de Sciences administratives, s'il est suffisant, pour les étudiants, dans le cadre de leur profession, de connaître seulement les disciplines d'utilité pratique immédiate, selon l'opinion de certains officiels investis des destinées de l'enseignement supérieur roumain. C'est une question justifiée, parce qu'elle tire son origine du besoin intellectuel de regarder au-delà de l'horizon strictement professionnel, pratique et immédiat. En d'autres mots, l'intellectuel, qui se fait une profession de l'application du droit, soit dans les structures des autorités judiciaires soit dans celles de l'administration publique, ressent le besoin aigu de porter son attention sur les fondements. Or, parler des fondements signifie interroger les bien-fondés profonds du domaine étudié et puis l'appliquer dans la vie de tous les jours. Autrement, comment fonder un discours sur un domaine dont on ignore les ressorts profonds d'où il tire son essence ? J'entends par là que tout cours magistral devrait s'originer dans les principes fondateurs du Droit en général, et non seulement une branche ou autre.

Par l'affirmation de ces choses-là, nous voilà dans le domaine de la philosophie, car qu'est-ce que la philosophie sinon une science des principes ? A partir de la nécessité de la philosophie, l'on peut dire que toute démarche juridique se fonde, en, y allant aux fondements, métajuridiques. Ce qui fait que, par exemple, l'ossature juridique de la conception concernant la démocratie moderne trouve son bien-fondé dans le contrat social qui est un principe métajuridique. Autrement dit, philosophique.

En plus de cet appel permanent à la philosophie en général, j'ai toujours pris soin, pour ma part, en étudiant le phénomène administratif, de souligner le rapport intrinsèque entre le juridique et le

politique. Les deux domaines appartiennent au domaine universel de la morale selon la conception d'Aristote et de Kant, qui ont englobé le politique et le juridique dans la vaste sphère de la morale. On sait qu'Aristote considère ces domaines comme des parts de la morale, aussi ont-ils été inclus dans un traité de morale tel que l'Ethique à Nicomaque. Kant, à son tour, traite du droit comme d'une part de la Métaphysique des mœurs.

La relation entre philosophie, politique, droit et morale doit toujours être mise en évidence comme une relation chargée de significations surtout pour le présent vécu, où un positivisme exacerbé a tenté désespérément de les séparer.

J'essaie par cette sommaire intervention de provoquer la promotion d'un esprit critique, absent pour une large part de notre milieu académique, qui remette en question les chemins trop battus de la science du droit actuel et la création d'une émulation intellectuelle particulièrement nécessaire pour ceux qui s'occupent de la recherche tant du phénomène juridique que de celui administratif. En l'absence de la philosophie, toute recherche du droit ou du phénomène administratif manque de fondement. Or, sans bien-fondé, toute tentative intellectuelle est vouée à la superficialité et, finalement, à l'échec.

Par malheur, comme nous l'avons soutenu tant de fois, l'enseignement juridique et administratif, mises à part certaines exceptions mentionnées dans mes ouvrages, n'accorde pas une attention suffisante à la philosophie du droit, de même que les philosophes ne se penchent pas suffisamment sur ce domaine. (Alexandru, 2010) Les deux camps font preuve d'une inexplicable réticence, car on oublie que, par le passé, il n'y a eu aucun philosophe ou juriste qui ne médite profondément sur le thème étudié, en imprimant à chaque fois l'orientation humaniste qui a dominé des siècles durant la science du droit.

La question soulevée concernait la personne qui du philosophe ou du spécialiste en droit, devrait s'occuper d'une philosophie régionale comme la philosophie du droit? Mais le fait même de poser cette question, équivaut à décliner sa responsabilité. Dans ce cas, ni l'un ni l'autre ne s'engage dans une telle démarche. La question souffre elle-même, apparemment, d'une certaine ambiguïté, parce que peu importe qui fait de la philosophie, si on le fait comme il faut. L'exemple le plus éloquent dans ce sens, sont les livres que j'ai cités appartenant à des juristes ayant une remarquable ouverture à la philosophie. L'on peut se demander si l'on peut parler d'un juriste au sens authentique du mot en l'absence de cette ouverture aux principes qui fondent le droit, sans méditer, plus ou moins, sur son bien-fondé métajuridique.

Réaliser cela, signifie philosopher sur le concept de bien-fondé. La simple question concernant ce bien-fondé équivaut à passer outre le donné immédiat et considérer le fondement. Nous espérons pouvoir réaliser la même chose en nous arrêtant, autant que possible, sur la conception de Hans Kelsen concernant la démocratie et le droit, mais aussi la liberté et la politique.

La démocratie et l'histoire pure du droit

Si Hans Kelsen est considéré comme l'un des plus célèbres philosophes du droit du XX –e siècle, sa contribution en ce qui concerne la théorie politique reste, dans l'opinion de certains auteurs, assez peu appréciée soit par les juristes, philosophes ou politologues, bien qu'elle soit, en même temps, extrêmement originale et contraire à des préjugés, très intimement liée à sa conception du droit. (Raynaud, 2004) Afin de comprendre l'importance de l'œuvre fondamentale de Hans Kelsen, il faut commencer par se débarrasser des préjugés, qui, même aujourd'hui, atteignent « au positivisme juridique » en général et le positivisme kelsien en particulier.

Le premier préjugé provient du courant traditionnel opposé au « positivisme juridique », à savoir le « droit naturel » - qui prétend voir une contradiction entre l'orientation implicitement normative, qui serait celle de l'ouverture sur « la démocratie » et « la neutralité » proclamée par « la théorie pure du droit ». (Kelsen, 1962) Il est dit, d'une part, que le refus du droit naturel entraînerait quelque chose comme un « nihilisme » interdisant toute critique juridique des lois ou des normes juridiques évidemment injustes et, d'autre part, que la théorie kelsienne de la démocratie manifesterait l'adhésion « naïve » de son auteur à des valeurs auxquelles il serait prohibé d'avoir recours, selon sa théorie du droit.

Le second préjugé s'origine dans le marxisme et on le retrouve de nos jours chez certains sociologues dont le plus célèbre est, sans doute, Pierre Bourdieu, qui interprète « la théorie pure du droit » comme une entreprise « idéaliste » fondée sur l'oubli et l'ignorance des conditions de production du droit. Il soutient aussi que la théorie concernant la démocratie, présentée dans « la Démocratie » de Hans Kelsen est, sans doute, le couple naturel de la théorie du droit, car elle a l'air de défendre le caractère démocratique des institutions politiques ou des normes juridiques comme le parlementarisme, la liberté de la presse ou le suffrage universel dont « la sociologie critique » dévoile le caractère fondamentalement illusoire et qui, en outre, affirme ouvertement son option pour la démocratie « formelle ». (Raynaud, 2004, pp. 108 – 115) Néanmoins, une lecture attentive de Kelsen démontre, sans nous demander un trop grand effort, la vanité de ces critiques ; d'abord, comme l'a montré si bien Michel Troper, (Troper, 1988) la thèse centrale, fondamentale du livre « La Démocratie », l'opinion de Kelsen concernant le régime démocratique, est finalement dévoilé, à savoir le scepticisme ; thèse qui consonne évidemment avec le refus « positiviste » de « fonder » le droit et le choix d'une théorie purement descriptive. En outre, la doctrine de Kelsen suppose elle-même une critique assez profonde de certains postulats du libéralisme, ce qui est dû, selon nous, aux convictions démocratiques et socialisante de l'auteur, dont la théorie est en fait trop réaliste, bien que, souvent, cela n'ait pas toujours été bien saisi.

A mon avis, il conviendrait de partir de la confrontation entre la théorie politique de Kelsen et sa théorie du droit, avant d'examiner les conséquences, de sa conception de la démocratie.

En analysant le concept historique, il est à observer que « La Démocratie » est un livre engagé de toute évidence, écrit au début de la période de crise ouverte par la Première Guerre Mondiale qui a conduit, d'une part, à la révolution russe, d'autre part, au fascisme italien. Lorsque, dans la période qui précède la Première Guerre Mondiale, la bourgeoisie et le prolétariat paraissaient se concilier sur la forme démocratique de l'Etat, la démocratie a été abandonnée par les deux parties. D'une part, la guerre a déclenché une révolution sociale qui a conduit « le mouvement des masses » socialistes, jusqu'à ce moment-là sociales-démocrates », à la division, le segment le plus radical et actif du mouvement renonçant, en fait, à la moitié démocratique de son héritage et, d'autre part, la bourgeoisie elle-même a adopté, comme réaction, une attitude antidémocratique qui « trouve son expression en même temps théorique et pratique dans le fascisme italien ». Le livre de Kelsen peut ainsi être lu comme le plaidoyer d'un social-démocrate en faveur d'un retour aux mœurs civilisées d'avant la guerre, comme une critique des prétentions des bolchéviques et des fascistes de dépasser la démocratie et donc comme une réponse à ses critiques de plus en plus radicales, mais ce livre engagé, sur « la nature » et « la valeur » de la démocratie, est également, à sa manière, une œuvre « scientifique » sur les rapports entre les concepts de la démocratie et, de la liberté qu'elle décrit d'une manière qui est, comme le dit Michel Troper, « susceptible d'être vraie ou fausse », ce qui montre bien l'accord profond entre les thèses politiques de Kelsen et sa théorie ou métathéorie du droit. (Troper, 1988, p. 13) Inversement, on peut montrer que « La théorie pure du droit » n'est pas dépourvue d'intentions polémiques qui, sans

affecter nécessairement la neutralité scientifique, ne sont pas elles-mêmes absolument indépendantes des options politiques de l'auteur, comme on peut le voir dans la manière dont il repense les questions classiques, comme celle du dualisme du droit public et du droit privé ou même dans la célèbre et parfois mal comprise identification entre « droit » et « Etat », laquelle confère originalité à Kelsen parmi les positivistes. Que signifie, au fond, que l'Etat est identique au droit, sinon dire que le droit est produit par l'Etat ?

Cette thèse doit être considérée d'abord comme une critique des théories allemandes d'autolimitation ou d'auto-obligation de l'Etat qui, tout en faisant du droit un produit de l'activité originaire de l'Etat, revêtaient une certaine fonction apologétique, qui est présente jusque dans les grandes théories de l'Etat de droit. Dans la doctrine de l'autolimitation, l'Etat ne se soumet au droit que par un effet de sa volonté souveraine, et le droit apparaît ainsi comme une faveur que l'Etat, finalement les gouvernants, octroie aux sujets, ce qui est un moyen de réaffirmation de la sacralité de l'Etat.

Dans une autre perspective, au contraire, l'identification entre droit et Etat produit une désacralisation du pouvoir étatique, qui n'est rien d'autre que l'appareil de contrainte nécessaire à l'effectivité du droit, et qui ne peut, un tant que tel, revendiquer une valeur morale. « Cette dissolution du dualisme Etat-droit, fondée sur une analyse de critique méthodologique, signifie en même temps, l'anéantissement radicale et absolue d'une des plus efficaces idéologies de légitimité. Ceci explique, en même temps, la résistance passionnée que la doctrine traditionnelle du droit et de l'Etat oppose à la thèse de l'identité de l'Etat et du droit, que nous a value la théorie pure du droit ». (Kelsen, 1962, p. 419)

Il en résulte que La Théorie pure du droit représente une théorie du droit opposée à la sacralité du pouvoir de l'Etat, mais qui reste fidèle au programme positiviste, qu'elle a interprétée comme un programme « anti-idéologique ». (Kelsen, 1962, p. 417)

Liberté et démocratie

L'ouvrage « La Démocratie » ouvre sur une analyse de la liberté – elle-même rattachée à l'égalité – en tant que racines de la démocratie et finit sur le scepticisme de ces valeurs considérées comme fondamentales et absolues de cette philosophie de la démocratie et, par voie de conséquence de l'option, qui est, quand même, sans aucun doute, celle du régime démocratique. L'on peut donc observer que, si, d'une part, la conclusion de Kelsen nous ramène au scepticisme inhérent du positivisme juridique, d'autre part, ses prémisses s'expriment dans un langage qui apparaît comme naturaliste. Kelsen constate que les deux « postulats de notre jugement pratique » qui se trouvent « à la racine de l'idée démocratique » expriment deux « instincts fondamentaux » de l'existence sociale. Le premier de ces instincts est la réaction contre la contrainte sociale, qui exprime clairement une protestation de la nature : « la nature est celle qui, dans la revendication de la liberté, se révolte contre la société » (Raynaud, 2004, p. 2) ; le second n'est pas moins naturel : il découle du « sentiment inné que l'individu comporte de par sa propre valeur », qui le conduit à refuser la domination de ses pareils. La synthèse de ces deux idées nez se fait pas dans l'anarchie, mais dans la démocratie, qui est, dans le fond, ce qu'une vieille tradition appelle « république » et à laquelle Kelsen confère successivement deux justifications, distincts mais complémentaires, que nous pouvons rattacher, la première à Cicéron, la seconde à Jean-Jacques Rousseau. Kelsen reprend à Cicéron ce que les théories complémentaires du « républicanisme » appellent « la liberté en tant que non-domination ». (Petit, 2004) La liberté n'est possible que si nous ne sommes dominés par le pouvoir autrui, ce qui suppose en même temps, l'égalité et l'existence d'un pouvoir à même de les garantir. Mais Kelsen entend aussi que si l'ron admet la priorité naturelle de la liberté, cette absence de domination ne peut être qu'une

transposition des corps politiques ou de la société d'aspiration instinctive, de ne prêter foi qu'à soi-même. Il dit : « S'il faut qu'une société existe, et surtout un Etat, il faut qu'il y ait une réglementation obligatoire des rapports entre les humains, un pouvoir. Mais s'il s'agit d'être commandés, raison de plus de ne vouloir être que nous-mêmes. La liberté naturelle se transforme sociale et politique. Politiquement, n'est libre que celui qui est sujet, sans l'ombre d'un doute, juste à sa propre volonté et non pas à une volonté étrangère ». (Kelsen, 1962, p. 2) Ainsi donc, Kelsen reconfirme l'essentiel de la conception de Rousseau du contrat social. Pour lui aussi, le problème résidait à « trouver une forme d'association qui défende et protège, par toute la force commune, la personne et les biens de chaque associé et par quoi, chacun, se réunissant aux autres, n'obéit qu'à lui-même et reste tout aussi libre qu'avant ». (Rousseau, 1762, p. 4) Kelsen décrit la formation de la liberté sociale comme un processus quasi-dialectique, où la liberté « naturelle » est rattachée à « la légalité sociale », mais où cette dernière engendre une nouvelle forme de liberté sociale ou politique[1]. Il est tout aussi important d'observer est que l'analyse de la liberté finit apparemment par une inversion complète de son sens, lorsqu'on passe du sujet ou de l'individu isolé au citoyen, « le mot d'ordre n'est plus l'individu libre, mais « l'Etat libre », ce qui paraît justifier l'affirmation de « la plus éminente analyse de la démocratie », selon laquelle « le citoyen n'est libre que par la volonté générale et que, par la suite, sous l'effet de la contrainte, celui-là est forcé à être libre ». (Kelsen, 1962, p. 12)

Scepticisme et démocratie

Si Kelsen défend la démocratie par des arguments assez proches de ceux invoqués par Rousseau en faveur de souveraineté populaire, ce dernier reste totalement étranger à l'idée que, le peuple serait plus capable que d'autres autorités d'atteindre à la vérité ou « quel est l'ordre étatique vraiment juste » (Kelsen, 1962, p. 109) et considère a contrario que le vrai « fondement » de la démocratie consiste en un « scepticisme » qui ne porte pas seulement sur les exigences méthodologiques de la science, à la forme mai au contenu. En démontrant que la démocratie est essentiellement une *forme*, Kelsen doit en effet admettre qu'arrêter son choix sur la démocratie contre l'autocratie, n'offre en soi aucune solution au problème du *contenu* d'ordre étatique, et il va jusqu'à dire qu'il est plus vraisemblable de reconnaître aux individus éminents la capacité de connaître la vérité ou le droit, que d'attribuer « à l'immense nombre de ceux qui composent la masse anonyme, à Monsieur Tout le Monde ». (Kelsen, 1962, p. 109) Loin de la qualifier comme une objection décisive contre la démocratie et sans la considérer une utopie, au contraire, en répétant l'argument, Kelsen fait du relativisme et du scepticisme le véritable fondement de la culture démocratique.

Si le début de « La Démocratie » évoque irrésistiblement la doctrine de Rousseau, le dernier chapitre peut renvoyer à celle d'un autre philosophe qui a défendu aussi l'idée d'une égalité fondamentale des gens, décelant dans la prétention de détenir la vérité, le masque d'une revendication d'autorité politique des gens – mais qui ne passe pas pour théoricien de la démocratie puisque, au contraire, il est le plus important philosophe de l'absolutisme classique.

Le scepticisme n'est pourtant pas le dernier mot du livre de Kelsen, lequel se clôt par la reconnaissance du caractère tragique de la démocratie. « La Démocratie » se termine sur une paraphrase troublante de l'Evangile selon St Jean (chap. 18.), qui fait de la rencontre entre Jésus et Pilat « le symbole, un tragique symbole – du relativisme ». (Raynaud, 2004, p. IV) Ou, dans l'interprétation de Kelsen, Pilat est celui qui incarne le principe démocratique là où Jésus émet une

[1] Kelsen réduit l'antithèse de la nature et de la société à l'opposition entre deux « ordres de vues » mais, en même temps, sa succession : liberté naturelle/contrainte sociale/contrainte légale, sous la liberté politique, est très proche de la conception de Rousseau. (Kelsen, 1962, pp. 2 – 3)

prétention « absolutiste » d'incarner la vérité. Pilat se demande, dans le fond : « Qu'est-ce que la vérité ?» et « parce qu'il ignore la signification de la vérité et, en tant que Romain, il est habitué à penser démocratiquement, il le confie au jugement du peuple et provoque un plébiscite » - lequel tourne contre Jésus et mène au salut plutôt du bandit Barrabas. Cet exemple, dit Kelsen, est un bon argument contre la démocratie, mais cet argument ne serait vraiment décisif que si les critiques du scepticisme démocratique pouvaient « être aussi sûrs et certains de leur vérité, que l'était le fils de Dieu ». (Kelsen, 1962, p. 115) On peut donc dire que la théorie kelsienne dee la démocratie interdit toute critique des décisions démocratiques – de même que l'on peut dire que « le positivisme » empêcherait la critique des lois injustes. Nous pensons que, de même que pour le positiviste, la critique des lois injustes peut être faite d'un point de vue politique ou moral même lorsque ces lois sont valides d'un point de vue juridique, de même, pour un démocrate kelsien, la politique effective des démocraties peut conduire à des erreurs ou à de graves injustices sans que rien ne garantisse que ces erreurs seront corrigées par la seule force des procédures démocratiques. Le citoyen dont la conscience se révolte est celui qui doit voir jusqu'à quel point la lutte contre l'injustice autorise la sortie de la légalité ou la mise en cause de l'accord des citoyens, mais rien ne nous dit qu'il existe toujours un devoir moral de se soumettre à la majorité – ni que la paix soit toujours le premier Bien. La démocratie typiquement moderne conçue par Kelsen avait retrouvé ainsi l'une des thèses fondamentales qui sous-tendent l'expérience de la démocratie grecque : la démocratie est, par excellence, un régime tragique, et la vertu la plus nécessaire devant la tragédie est la *prudence*. (apud Raynaud, 2004, p. IV)

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THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

Present and Future in the Internal Security Strategy of the European Union

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Abstract: Security Strategy of the European Union may be subject to scientific research and can be conducted by specialists from academia (lawyers, criminologists, sociologists) and operational units, able to critically analyze the realities of national security field, to identify causes of the existing disruptions, to expand areas where there is new threat to internal security of Member States and the European community. This article considers the strengths and weaknesses of national security strategy of the European Union and how that can translate inti the National Strategy.

Keywords: European Security Strategy; European Government; the Treaty of Lisbon; the EU economic space

The construction, development and consolidation of the European Union were three fundamental stages, which unrolled during 60 years, each time frame being marked by the actions of influent political personalities. On May, 9th, 1950, Robert Schuman, the French ministry of external affairs, launched the project develloped by Jean Monet, ment to realize a union of coal and steel between France and Germany.

In April 1951, in Paris, the CECO Treaty is signed (The European Community of Coal and Steel), to which France, Belgium, Germany, Luxemburg, the Lower Countries and Italy are part. In March 1957 the six states sign the Rome treaties, which make up the CEE (the European Economic Community) or the „common market" and EURATOM (the European Atomic Energy Community), treaties that were enforced on the 1st of January, 1958. Therefore, the period 1950 – 1957 was dominated by the **political component** of the complex birth process of the European Union, followed by an **economic component**, essential for the development of basic concepts.

In 1968 customs taxes for industrial products were eradicated and they set a common external tarrif, thus uniting the customs of the six founding states.Five years later (January 1973) there takes place the first expansion of the Community: Denmark, Ireland and the United Kingdon adhered, followed by Greece in 1981, Spain and Portugal in 1986. In November 1989 the bBerlin wall falls, generating the unification of Germany.

An important moment for the history of the European Union is the enactment in November 1993 of the Treaty for the European Union, signed at Maastricht, defining the creation projects of the future

unique currency, of an external and security politics, as well as of consolidation of the cooperation in the field of justice and internal affairs.

The most important role in this vast and complex activity of consolidating the edifice of the European Union was played by two grand political figures of the times: **Francois Mitterand** – the French President and **Helmuth Kohl** – the German Chancellor. The two, characterized by tenacity, sobriety and unlimited trying, did not show the cheap charisma of some who, by populist gestures, proclaim themselves European Liders.

The two did not have anything from Sarkozy or Berlusconi; they used to impress by their own grandore, focused on reaching the fundamental objectives of the European Union. This is how the expansion of the European Union was possible in January 1995, by adherring of Austria, Finland and Sweden. In May 1999 the Amsterdam Treaty is signed, in which there are provided measures ment to reform the communitary institutions, stop the European influence in the world.

Two years later, in December 2001, the European Council in Laeken takes over a declaration regarding the future of the European Union, with respect to naming a Convetion that will write the European Constitution. On January 1st, 2002 the European currency (EURO) is issued, adopted by the 12 member states.

In February 2003 the Nise Treaty is signed, preparing the European Union for the adherring of 10 new states in the next year. At the same time, the Charta of fundamental rights and liberties of man is adopted. In May 2004 ten other states adherred to the European Union: the Czeck Republic, Ciprus, Estonia, Letonia, Lithuania, Malta, Poland, Slovakia, Slovenia and Hungary. In October 2004 the chiefs of states and governments of the member states signed the Treaty for a Constitution of the European Union. In the summer of 2005, France and Holland (The Lower Countries) reject, by referendum, the project of the Constitution.

The month of January 2007 marks the adherring of Bulgaria and Romania to the European Union, the number of the member states reaching 27. On December 1st the Lisbon Treaty is taken up, as well as the new Constitution of the European Union.

The juridical European research is preoccupied by the governing model and the institutional architecture of the European Union, as it is configured by the Lisbon Treaty, and deeply influenced, functionally speaking, by the new reality of the European space.

We witness a reality in which there are amplified the query, the decision making of some countries, not understanding the economic and social events produced, the action rout of institutions and individuals. Everything seems to be taken over by crisis, whose causes are still unknown, though its results are perfectly visible in all member states.

On June 1st, 2010, the European Union records a sad record: over 25 million unemployed people, to which we can add almost 5 million European citizens moving from one country to another hoping to find a place to work. Data regarding the demografic structure of the member states of the European Union and their evolution for the next 2 or 3 decades are depressing: the number of retired people is rasing and there is a dramatic decrease of the active work force, capable of invigorating the revenue necessary fot the survival of peoples.

Member states of the European Union are more and more dependant on the energy sources (natural gas and petrol) and mineral resources vital for the high technologies provoked by the fanion states (Germany, France, The United Kingdom, Italy and Holland). The European bank system signals weak

signs and lack of inspiration in the face of an American offensive and of states with an emerging economy: China, Brasil, India, Russia, South Africa - whose philosophy is hard to digest by the European conservatorism, in itself hard to define and understand by the elite stuck into over-realistic projects and programs contradicted by the real challenges of the future.

There are great differences in the opinions of member states regarding the model of governing that can guarantee stability and progress. The European Union is more like a **ReUnion** of member states, an orchestra with 27 intruments, where averyone is playing a partiture different than that of the other, because the conductor does not really exist.

Of the 27, 16 wear a badge of the EURO and is trying to tune their instrument how they can better, waiting for a conductor to have the courage of changing the fashion. A first candidature was announced by the French leader Nicolas Szarkozy, on June 1st, 2010. According to *Le Monde*, the Frech president „brings back on first lines his whish to create a cheaf of states and governments from the EURO area forum, with one secretariat, a real governmet for Europe." The same newspaper reminded that Germany, the most powerful European economy, already rejected similar proposals regarding the creation of a formal entity, ment to coordinate the economic governing of the euro area.

The word *government* leaves us with the impression of a supra-state authority, dictating the economic politics by the unification of the monetary, fiscal and social policies under the form of decisions, mandatory for member states of the Euro Club. If regarding the monetary politics there are decisions already taken at the central level of the Monetary Union, the situation is opposed, almost impossible to solve as far as the fiscal and social systems of the 16 states are concerned, deeply influenced by the political programs of the dominating parties of the nations concerned.

There are huge differences amongst the ideologies promovated today within the member states of the European Union: current political left and right have almost nothing in common with the values from 10 or 20 years ago. The coloured politics, where vigourless and inert concepts of the EU are mingled, fade and kneel in front of programs irrespective of our current ideals. The paradox of the current situation is the fact that the government politics are dictated by the many multinational corporations whose objectives are too far away from the whishes of the people. Between the citizen and the government there is the corporate system which, without caring about the interests of people, influences directly the governmental politics. The corporates are those who buy the votes of the electors, they fake the results of the elections and impose the governmental formulas that assure the success of their business.

Moreover, in all states there functions the „**rotative door system**"; this is a system patented by the USA and taken over by the European states, in which the government takes over the most representative corporate characters in the world of business, names ministers, states secretaries, councillors, etc. These persons serve the interests of those who sent them into governments, assuring them successful businesses (public contracts, customs tax exempts and fiscal facilities, uzurping justice and law enforcement authorities). After the contaminated governments have left, the undersigned characters come back to the corporations areal, on well paid positions, assuring by their network of relations the continuation of own business prosperity.

Such important examples are in all states: **in Italy**, *Berlusconi* came into power from the area of "*big business*" through the rotative door. He temporarily left the government and came back in business, for him to come back as Prime minister of an Italy shook by scandals.

In France, *Nicolas Sarkozy* was powered and mantained in the political area by the big barrons of the French corporations (for details: magazine „Lumea" – (The world), no. 8 / 2009, article „Sarcozy's Secrets", pages 58 to 67).

In Romania, the most important political figures (reference years 2008 - 2010) were taken over thorough the rotative door by the business medium (*Berceanu, Videanu, Udrea, Vlădescu, Pogea, Tăriceanu, Ionuţ Popescu, Oprea, Plăcintă, Ridzi* etc), when leaving the functions they had occupied before that.

In Germany, the ex-chancellor *Gerhard Schorder* was taken over from the high political function by the world of business in the giant Gazprom, whom he served impeccably in the period of his ministeriate.

In England, the ex-Prime minister *Tony Blair*, sustained by the big corporate finance for occupying his political dignity, was saved by the rotative door, nowadays being the representative of those companies who unroll impressive international businesses.

Robert Skidelsky, member of the Chamber of Lords, an economy professor at the Warwich University in Great Britain, was recently saying (2010) that „*the political elite perceives the EU like a pole in a multipolar world. But what is Europe? It is less than a federation, more than a confederation, with no gravity center or strictly limited borders. Without an internal coherence or an external configuration, Europe is a little bit more than a geografic expression*."

The European political elite is trying to understand if and why do the, *Chinese capitalism*' and ‚*American socialism*' exist, but refuses to define what type of society it is buiding today in Europe and what are the real threats to the security of the EU.

The European political elite supports the direct aggressive offensive of the Russian mafia to the economic scenery of the most powerful European states, but more likely in its esssential components of economies such as Romana, Bulgaria, the Czeck republic, Hungary, Slovacia, etc. Russia is developing nowadays a partnership with the EU (each year there takes place the Russia – EU summit), but the most profitable contacts are the bilaterall ones: with France and Germany.

In these circumstances, the **Internal Security Strategy of the European Union** is a document with a crucial importance, which needs to be analised in the integrating context of cruel realities which need to be understood by every state, but in the context of future threats and challenges, too.

In other words, the Strategy needs permanent reconfigurating and reshaping, taking into consideration the conclusions and opinions formulated by prestigious analysis and diagnosis organisms, as well as personalities with a recognized competence in the matter of setting the characteristics of the world we live in.

In the book „The World in 2010 – a schetch of the global future presented by the National Information Council of the USA", (Cartier Publishing House, 2008) the following ideas are presented as „*new challenges for governing*":

• despite the fact that the **nation-state** will go on being a dominant of the global order, the economic and globalization dissimination of technologies, especially that of information, will generate tesnions grave enough between governments. The capacity to governs will get even more complicated;

• **the institutional system at an international and regional levels** is going through a difficult stage, being overwhelmed by the manifestation and effects of global problems: those of organizaed crime, terrorism and mass destruction arms proliferation. We face a system created decades ago (UNO, MIF,

World Bank, OSCE, the European Union, the Council of Europe, etc) which risks to become obsolete unless they adapt to the deep changes taking place in the global system;

• by the year 2020 there is prospect of extiction of the fear of insecurity, generated by the huge economic, cultural and political convulsions. Weak governments, economies left behind, religious extremism and the increase in the number of youngsters will create the perfect conditions for internal conflicts within certain states or regions;

• as far as **international terrorism** is concerned, it is possible that by the year 2020, Al-Quaeda be replaced by other Islamic extremist groups, which can merge with local seppratist movements. Terrorists can obtain biologic agents or, less probably, nuclear devices, each of them capable of producing mass dezasters. Bioterrorism can be the instrument at hand to small groups, better informed and well organized. There are taken into consideration the cybernetic terrorist atacks, which can generate the blocking of information networks and grave fizical damages to informatics systems;

• **the economic turmoil** can get disseminated and can affect some international relations. In the opinion of some specialists, there can take place some sudden switches of capital movements, and the international financial mechanisms will not be able to anticipate and, obviously, find a remedy for severe crisis and huge social raptures;

• nations will deal with serious challenges for the field of suveillance, control and **sensitive techgnologies interdiction**. Nation-states will not be able to keep control over these technologies which will be able to generate tensions created by the competition for acces to the recent descoveries: research in the field of stem cells, the DNA signature, genetic vaccines, the genes replacement therapy;

• the change of geostrategic frames will shape the **organized crime activity** at a global level for the next 15 years. Organized crime will prosper in states rich in resources going through important political and economical transformations, such as China, India, Brasil, Nigeria. Some sindicates of organized crime will make up large alliances, trying to corrupt leaders from the unstable states, fragile from an economical point of view and declining, to force themselves into banks and companies with problems, use the informatics technologies and cooperate with insurgent in order to control important geografic areas. Organized crime prospers in countries where governments are weak, vulnerable to corruption, incapable of applying the law equally;

• The raltionship between terrorists and organized crime will go on existing especially in the field of business, meaning that terrorist will call upon the criminal groups to obtain fale documents, smuggled arms, or assistence for clandestine travellers.

In another book, the „Challenges of the future" (Polirom Publishing House, 2010) James Canton formulates the following global prognosis:

- one of the most important business opportunities in the world will be the operation of remaking the national ballance, states and companies investments reaching hundreds of billions of dollars ;
- numerous organizations (including criminal) will make fortunes out of fields such as waste management, climate control, meteorological, materials and regenerable materials;
- among the **factors that will have an influence over globalization** there are the energy prices and availability of energetic resources; tendencies of terrorism and organized crime; ethnic conflicts among nations and between nations; respecting law reign and human rights; mass

destruction arms proliferation; the degrading of environment;

- **the five wars of globalization** will be terrorism, organized crime, drug trafficking, forgery and powerty;
- **barriers in the way of globalization** will be the high unemployment rate, global terrorism, commerce barriers, local stagnating economies, threats to energy and climate, autoritarianism, not respecting the state of right, controlled media, wars, a weak education and health levels, anticonsummers politics;
- **poverty** generates and amplifies conflicts, criminality and terrorism. In the analysis of this ecuation, one has to have in mind the following:
- half of the globe population lives on less than 2 dollars per day; over 1 billion people suffer from malnutrition;
- in poor countries, Muslim radical organizations offer schooling, food and free medical assistance in the exchange for training future terrorists;
- organized crime, drug trafficking and terrorist networks exploit the poor war zones in Columbia, Somalia, Ceceny, Bosnia;
- terrorist networks recruit their members from the poor population of nations such as Malaysia, Irak, Indonezia, Pakistan, Afganistan
- **the seven tendencies of the security of the future are:**
- the risk for **bioterrorism** is high. Arms are invizible, silent, easy to transport, difficult to detect and capable of being fast spread among civilian population;
- dirty bombs: nuclear devices used against civil population;
- ciber terrorist attacks speculating the integrate connections between essential services, commerce, finance, communications, food supplies, transportation, energy and health;
- organized crime will become more and more sofisticated, more dangerous, more dependant on high level technology and more profitable;
- the identity of civil and natural persons will be an extremely valuable merchandise, which will be easily accesible for buying and selling;
- the future will be dominated by video surveillance, controlled data bases, satellites and biometric systems;
- the inssurance of personal safety market will evolve.
- **the seven methods used for identity theft**:
- **auto piracy**. Hackers create the virtual wireless networks that people use to connet to the Internet while driving. Then they use those networks to steal personal information;
- **phising bank systems**. Hackers make duplicates of bank systems for accessing banking information of persons and corporations;
- **creating PCDs (digitally constructed personalities)**, used by the hackers to be taken for account holders, in order to get access to funds in those accounts;
- **donating identity documents**. Hackers make digital clones of real persons using stolen

identities and manage global business, open accounts, transfer funds, make tranzactions, obtain loans, disappear with the stolen money;

- **destruction of data** of persons or corporations and making new data bases in order to create new identities used in criminal activities;
- using **high technlogies** by criminals who create secret bank portals, or for stock exchange and networks of currency transactions and use in big fraudulose businesses, without being caught;
- **usign nanobots** with nanoantennas in spying anyone for ultrasecret data and information.

Identity theft is the most spread crime in the USA (annualy, almost 10 billion victims) and developed European states.

The resources that those who steal identities exploit are: medical charts, vehicle and maritime transport registration numbers, file piracy, credit history, social security numbers, identity documents and domicile documents, personal information, data regarding property transfers, professional diplomas, online hospitalized patients medical charts, registered voting data, online medical receipts, listening phonecalls via Internet with miniature devices, financial information on persons and companies.

Another major threat is piracy (it is estimated that more than 15% from the brand products will be forged, at a quality higher than the original one). Piracy fuels the organized crime sindicates, drug traffickers and terrorists. Piracy has become a capital source for the world of organized crime.

The Internal Security Strategy is building and rebuilding permanently considering the results of solid research activities on the European legislation of member states, as well as on the institutions and structures invested with attributions in law enforcement, and on procedures and actual actions used for applying strategic objectives.

The scientific research can be realized by specialists in the academic environment (jurists, criminologists, sociologists) and in the medium of operative institutions, capable of critically analising the realities of the internal security strategy environment, identifying the causes of existing malfunctions, extending the fields in which new treats to the internal security of the EU and member states move.

By points, the scientific research has to take place this way:

At a legislative level, studies will be oriented in order to:

- elaborate the normative documents projects covering the aspects unregulated regarding the incrimination as offences of deeds which imply a social danger level (terrorism, drug trafficking, informatics, trafficking in human beings, money laundering, organized criminality);
- cutting off from legislation overdue regulations;
- coding the specific regulations of the Internal Security Strategy, by including in the Crimial Code the crimes mentioned in special laws with criminal regulations (money laundering, informatics, corruption, etc);
- harmonizing the legislation in member states with that of the EU;
- bettering the drafting of normative documents.

At the level of **specialized institutions and structures**, for enforcing the Internal Security Strategy, the reasearch will focus on:

- revising their internal organization system, by eliminating the useless components, deeply bureaucratic and grand consumers of human resources and material spending. The thorough study of similar isntitutions in other states can offer eficient solutions in the matter;
- building up new specialized compartments, corresponding to the structures existing in other members states;
- defining with a maximum precision, precisely, the atributions and competence of institutions and specialized structures in the fields shown in the Strategy;
- As far as the procedures for enforcing legislation is concerned, the scientific research has to be concerned with:
- making up propsals for modernising the criminal and adminsitrative procedures, by inserting clear dispositions regarding the probatory system and the procedure of designing the precursor documents for beginning the criminal investigation;
- bettering the strategic analisys capacity, of gathering and treating the information;
- revising the cooperation procedures and methods between the components of the law enforcement „chain";
- harmonising the cooperation procedures between the national and European structures;
- integrating the national procedures within the European juridical frame regarding the electronic evidence;
- identifying new procedures with respect to common investigation instruments, techiques and interrogation in complex cases;
- identifying new horizons of developing research in the field of criminalistic techniques and investigation methods of IT crimes;
- defining the victim identification procedures and protection.

The fields viewed by the Internal Security Stratgey of the EU are so complex and dinamic that a successful enforcing can only be made without the help of information services, which, traditionally, are not included in the category of law enforcement. In such a situation, the problem refers to the necessity and possibility of articulating the actions of intelligence services in every member state in the national law enforcement structures. The information services in every member state are focused on assuring the national security of each state, and their disponibility to exchange intelligence is reduced. It is hard to believe that we will have a European Intelligence Agency that will dedicate itself to the internal and external security of the European Union.

The actual crisis situation that the EU has been facing for two years, lately becoming amplified in Greece, Romania, Spain, Portugal, Italy, proves us clearly that the EU institutions cannot and will not involve in the solving of problems. Every state has to do it for itself, not to ask for help from the EU, nor the MIF. Every state uses its intelligence services to the interest of its own national security, with the interest of knowing the weaknesses of other states and exploit them to their interest; French secret service have gathered intelligence about the sudden brake down of the US dollar. The information was only used by France, financial institutions getting huge profit. The information was not shared to the

other member states. In such a situation, the intelligence gathering activity ment to prevent and repress criminality in all fields of the Security Strategy has to be organized and unrolled by the law enforcement structures.

From this point of view, every member state adopted its own model, conformable with its internal legislation. The intelligence component of the law enforcement structures in assimilated to the police structures in all member states (police, border police, customs, financial guard, fiscal authority, the gendarmerie, carabinieri, civil guard, etc). Moreover, in every state there functions the National Intelligence Community, articulated on an own protection strategy of the national security.

Richard Aldrich states that „*the secret services find it hard to exchange intelligence at a transborder level in a rhitm that is comparable to the activities of their foes. This is due to the fact that secret services do not like to share intelligence, other than bilaterrally. There are lots of reasons to the support of this practice, including source protection*."

Essential to the revising of the conception of cooperation between the information service on the one hand and the structures of law enforcement, on the other, is the true conception according to which information related to many of the problems of globalization are not necessarily secret.

The economic-financial criminality, monely laundering, illegal drug trafficking, trafficking in human beings, tarfficking in arms, organized crime in the field of IT or payment methods, these are fields that can be discussed more openly, information on these appearing dayly in press. It is said that some journalists are excellent information officers, with an essential luggage of knowledge and aptitudes, capable of infiltrating in apparently inaccessible areas.

The paradox is that the intelligence structures do not use this big reservoire of information, one of the explantion being that bureaucracy is suffocating, and the performance of the intelligence officers cannot be counted by the effect, result, of their final operations. It is appropriate to say that intelligence services are unidirectional: terrorism, with all its forms, is the fundamental target, the most important threat for these services. The rest of the threats does not matter any more, them being in the category of „normal". Only, if organized crime finances terrorist groups, intelligence services are only interested in this kind of activity iff the false money are used in connection to these.

The logical question formulated by people who are not part of the academic medium refers to one simple thing: what information did the great power intelligence services have, devastated by the financial crisis, regarding this ravishing phenomenon which continues to prolong its effects years after the declick? What information existed about the clash of America after 2001? What information did the secret service have in all EU member states about the real configuration of the great powers about the fraudulos powers which actually unrolled in all European countries between 2000 and 2010?

What is the intelligence potential the great banks have regarding the capital market, in investment funds and speculation funds, potential that will understand the big fraudulose schemes applied to the capitalist economy? In these situations, the problem is not the „*admittance*", but the „*misunderstanding*". A lot of intelligence services receive, collect and receive information they do not understand, due to the simple fact that they do not view the system they exist in and due to the fact that, many times, they receive information vital for a field, that they do not send to those who have the capacity of understading properly.

There is adifference of philosophy between the secret service and the *investigative-operative-intelligence components* of the law enforcement structures. The secret service claim a statute by far superior to the other: they claim to belong to a higher world, that they are suppliers of data,

information and analysis exclusive for presidential peaks and government officials. In other words, they do not step down to the cases of petty crime, which come to the competence of police and dayly routine. Sick with secrecy and, *compartmentcy*', lacking immagination and creativity, the secret service enjoy the command and need of the internal political figures, as well as to one or the other of the masters of the world (the USA, Russia, China).

Pumping up such an attitude, often mingled with disregard and shown superiority, was favoured by the favourable access to information coming from technical sources, considered infailible, that they were not able to value with visible results.

Our secret services are suffering also from the desease of inherent superiority (obviously false) compared to the other components of national security.

The big problem of the system is that of transforming the information into evidence.

Then there is the rush for information: hte leader is asking for information, irrespective of where they come from, unimportant if they are credible or not.

The leaders of intelligence services invent, on order, targets that they need to have the file of (mere, unimportant papers). We have to admit the fact that the Secret Intelligence Service are too much subordinate to the political, respectively to the chief of state or government (respective of the constitutional regime of states), with a weak disponibility of cooperating with law enforcement authorities.

In all, or almost all, Occidental states, a person, a group of persons, a corporation or criminal entity is/are surveilled simultaneously by all (2-3-4) intelligence services of that particular state, without one knowing exactly what the other service is doing.

Starting with December 2003, *Markus Ederer*, deputy director of the Analysis Department of the German Intelligence, BND, was saying openly: „*the EU member states have identified the main threats to the Security Strategy of the EU: international terrorism, mass destruction arms, destabilized states, regional conflicts and organized crime".* He adds that *„this analysis of the threats which assign transborder challenges and asimetric threats means that the intelligence services modernize and radically change the operating way*".

Untill this change takes place, there is a long way ahead.

The difficulty of modernizing and changing the answer given by authorities in the face of future challenges is due to the insufficient receptivity of authorities faced with the prognosis formulated by specialists and analists.

To those mentioned before we add *Jacques Attali*, already famous as a futurist, who, in his book „Short History of Future" (Polirom, 2007) sets up some fundamental ideas that the future will be built on:

- in the next two decades, the EU will not be more than a simple common space including the 27 membre states, some other states from the Ex-Jugoslavia, and, probably, Turkey and Moldavia;
- the EU will consolidate with great effort its political, social and military integrated institutions, continuing to have serious problems in modernizing the tertiary studies system, revigorate innovation and scientific research, as well as implementing the some integrated politics into the matter of immigration.
- the EU economy is in decline: the competition is declining, the dinamism is slowing down, the

population is growing old. Dominant will be the insurance and entertainment industries. The insurance companies and those covering financial markets risk will set up private security services, whose foremost duty will be that of plant, consumers and employees surveillance. These companies will spend important amounts on modelling the public opinion and on fidelizing clients: they have to respect certain norms, buy surveillance products. The entertainment industries (turism, cinema, TV, music, sport, live shows, games) are and will become the first industries with respect to the time of consuming programs and services they offer. These two industries (insurance and entertaining) generate mantain illegal activities: the racketeering is the criminal shape of insurance; the sex commerce and drugs are the criminal forms of entertaining.

• banks and financial institutions will allot themselves with potential world and European companies that will adopt and impose rules applicable in all states. At present, the Bank for International Regulations in Basel – Switzerland has the mission of convoking monthly the presidents of all central banks in the world, to different training courses regarding the application of control rules with respect to the origins of capital, in order to fight more efficiently the pirat economies.

In every society there is a criminal organization functioning, of mafiot type, with gangs of mobsters and terrorist groups which are migled within the social layers and with a sole purpose of influencing and weakening state authority.We will face the existence of ruined states, in which corruption ends up neutralizing the action of law enforcement structures.

In the construction and reconstruction of security strategies, both at the level of the EU, and that of every state, we have to notice permanently, deeply, the phenomena that take place in our society.

According to *Fareed Zakaria* („The future of Freedom", 2009): „*what is really new and distinct in the nowadays capitalism, is not the fact that it is global, informational or technological, but the fact that it is democratic. The democratization of capitalism generatde profound changes in the social structure of nations: the economic power, detained for centuries by small groups of business people, moved downwards, to the basis*".

One of the fundamental characteristics of modern society is the democratization of violence, meaning that the state is no longer the sole user of legitimate force in the society. Governments are the target of terrorists, but state authority is weakened by the powerful positions of capital markets, private companies, transnational corporations, local governments, nongovernmental organizations, organized crime structures. The most obvious evidence of states is found in the aggressive forms of drug trafficking, free movement of persons, capitals and arms in the whole world.

What we are discussing is the capacity of states and institutions of the EU to conceive and apply substance reforms, granting a real security of them, on every component: economic, financial, societal, military, ecologic.

It is worth reflecting on the thouhts written by *Andrei Plesu* in the article „***European Union and Rapture***", published in the *Adevarul* newspapaer, on May 26th, 2010: „in the May 17th number, *Der Spiegel* publishes an essay of the Dutch writer Leon de Winter, entitled *Plead for the unmaking of the euro currency*. Two weaks before, the same magazine had on the first page a terrifying formula: *Euroland burning. A continent on its way to bankruftcy*. Until some time ago, Europe was living the deaf conflict of the countries not yet members of the Union (marked by the feeling of exclusion) and member states. Now we are dealing with a more and more vocal intra-European conflict: the indulgence of new members vs. the exasperated arrogance of old members. Between the est and the west there was a new scindation: the economic efficiency. But there comes at the horizon the rapture

between the north and the south. The ex-Spanish Prime Minister, Jose Măria Aznar, was soon crying for the fact that the countries of the European septentrion are dictating economical-financial solutions to the meridionals. Spain and Greece have to conform themselves to some external indications, not necessary in accordance with their real data, and not necessary productive. In his turn, the German tax payer, does not understand why he has to take money out of his pocket to finance the 14 anual salaries of the Greeks, the bonus for punctuality when coming to work, or the early retirement for the thank of a free time bonus at certain convenient ages. The traditional European nucleus has of course, reasons to be bored of the problems created by the more boeme countries, but that does not mean that he always holds the infailible recepy of reform and progress.

Joseph Stiglitz, laureate of the Nobel price for economy, thinks that the austerity measures anticipated by the EU as a therapy for the crisis are not only inefficient, but directly dangerous. What is there to be done? Will we end up, sooner or later, to give up on the unique currency? (despite the optimistic evaluation, though not very convincing, of the permanent president of the EU Council, Mr. Herman Van Rompuy). Will we come back to the more realistic, more functional regulations of the Common Market? Do we have to ask ourselves if the idea of the United Europe happens to be a utopic one? Or was it - just like communism – badly put into practice? What is certain, is that the danger of unification goes a long way of dissolution at present.

The rational marriage seems to be followed by a passinal divorce. Under the thin layer of the common house, threatening cracks are foreseen. If we had enough time we should ask again, maturely, about the fundamentals. What is it that unites us, in fact? Do we really have common grounds? Are we all living by the same stylistic matrix? Is Europe more than a geografic unity? The answer to these questions had in fact to forestand the technicalities of the grand administrative, economic, and political programme of integration. Unfortunately, experts do not have time to make philosophy, they do not cover themselves into romantic-speculative layers. They are practical people, determined and action-driven. And if sometimes they say big words or sublime frases, it is just for the sake of discourse seasoning with ornamental sweet talking. In Romania, things are at least, clearer: it seems that we do not have technocrats, or philosofers. And if we do, we keep them safe. Just in case. But this opportunity never comes."

In our opinion, the Internal Security Strategy of Romania has to be modernized and adapted to the actual context of our country within the European Union.

Romania is nowadays a ruined state, a stranded state, a captive state (this means a state in which the political clientelle captures all the public funds, makes justice inopperative and neutralizes the action of law enforcement organs.)

Organs who were meant to fight organized criminality (fraud, smuggling, drug trafficking, embezzlement, financial fraud, theft and aggression of public funds) they all stand in a state of unreal waiting, in a state of levitation, in a state of total lack of intervention. All these organs are politized and corrupt, are kneeled by the political power and organized crime. They got ‚*deprofessionalized*' and are at the command of political and organized criminality. The police, Financial Guard, the customs, the Finance Agency and some other institutions find out from the TV that „*smuggling is a crime by which organized crime is mantained*." This TV announcement represents the biggest offence brought to public institutions. Is it now that those who made this announcement learnt that smuggling actions are crimes? Is it now that government officials find that fraud is a phenomenon visible at all pace?

The solution is a simple one: putting all law enforcement agencies behind the political and making them professional. It is only this way that these institutions can integrate in the complex action of national security, in its essential components: economic security and financial security.

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THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

Present Legislative and Practical Aspects in the Field of Fighting Tax Evasion

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Abstract: Tax evasion and the unauthorized actions committed in the VAT field have a significant effect over the tax incomes of Romania and disturb the economic activity producing important damages to the state budget. The present article underlines some of the last moment legislative modifications adopted by Romania in order to decrease tax evasion and to enhance the collections for the consolidated state budget.

Keywords: tax evasion; contraband; taxes; excises; crimes

In the present framework, when the global crises is deeply felt by the Romanian people, the problem of taxation and collecting taxes and fees is very important for the state, because it represents the most important available modality to collect funds absolutely necessary in order to supply the basic services, meaning the essential obligations and the consideration for "the social agreement" by which the citizens "pay" the state apparatus by taxes, decide regarding the administrators by the usual vote and expect to obtain a maximum value for the amounts paid, as public services supplied in exchange for their contributions. In this framework, tax evasion represents a direct and dangerous threat for the stability and predictability of the "social agreement". Where necessary, the state apparatus has the implicit obligation to identify and constrain bad payers to pay their contribution for the proper function of the public services.

Taxation represents the citizens' contribution for the development and durability of the state budget, from which the administration grants funds for public investments and different services, varying from infrastructure to the sanitary system or the police. These contributions can be collected directly or indirectly, depending on the strict regulations regarding the state's public finances. While the states usually maintain a full control over direct taxation (as the income tax and the companies' tax along with the provisions regarding the avoidance or elimination of double taxation), the supranational organizations seem to focus more on indirect taxation, avoiding an obvious intrusion into the taxpayers' routine. This theory is present also in the UE case where the acquis from the taxation field covers especially the indirect taxes, as well as VAT and excises. The Value Added Tax (VAT) was introduced in the European Community in 1970 through a series of Directives. The purpose was to replace some of the old production and consume taxes and the allocation of a percentage from the

VAT incomes (calculated on an integrated base) in order to finance the community budget, facilitating the path towards harmonization, between the Member States, of regulations regarding VAT. The sixth Directive regarding VAT[1] provided a common base for financing the community, applying the tax for the same transactions in all the Member States and at the same time introducing an integrated calculation base. The Directive comprises VAT definitions and principals related to the application of a general non-cumulative consume tax, collected for all the production and distribution stages. Therefore, the VAT regulations imply an equal treatment for inland and export merchandises and services and a neutral relation tax- price. In the excises' scope, the aquis comprises harmonized regulations regarding petrol products, tobacco products and alcohol beverages. The aquis provisions establish the fee that must be collected and the minimum price for each group of products. The merchandises are chargeable when they are manufactured within the Community or if they are imported from a third country; but the fee are paid only by the Member State in which the goods are consumed, with the prices established for that state. One of the most important clauses relates to the warehouse tax, allowing merchandises to be stored without paying the warehouse fee. As a result of increasing the harmonization between the Member States regarding merchandises liable to excises, the introduction of the sole market resulted in the cancellation, on January 1, 1993, of all tax verifications at the internal borders of the Community.

Since 2007, the European Commission acknowledged the fact that the total value of tax evasion and VAT frauds, at the European Community level, is difficult to assess, because many member states do not collect or publish data in this regard[2], and that a strong political impulse is necessary in order to accomplish substantial improvements in the field of fighting economical- financial evasions. In the special report no. 8 from 2007, the European Accounts Court estimated that the value of the VAT evasions could exceed the total annual budget volume of the community[3], and for this reason our country introduced with enforcement on July 2010, 2010, legislative modifications in order to limit the consequences of the complex social- economical phenomenon represented by tax evasion.

Tax evasion, but most of all the unauthorized actions committed in the field of VAT frauds, have a significant effect on the tax incomes of Romania and disturb the economical activity within the internal market by creating unjustified fluxes of goods and by introducing on the internal market of unjustified low price goods.

The legislative modifications introduced by the Government Emergency Ordinance regarding some measures to fight tax evasion. By OUG no.54/2010, for the efficiency of fighting tax evasion and contraband[4], the following were modified and completed: Law no. 571/2003 regarding Tax code, O.G. 92/2003 regarding tax procedure code, Law no. 241/2005 for the prevention and fighting tax evasion, Law no. 508/2004, regarding the establishment, organization and function within the Public Ministry, of DIICOT, Law no. 39/2003 regarding the prevention and fighting organized crime; OUG 104/2002 regarding the customs regime of merchandises traded with duty free regime, Law 86/2006 regarding the Romanian Customs Code, HG 707/2006for the approval of the application regulation of Customs

[1] The Council's Directive 77/388/CEE, from May 17, 1977, for the harmonization of Member State's legislation regarding the turnover tax – the common system of value added tax and the common taxation base, published in, JO L 145 from 13.06.1977, last time modified by Directive 2002/38/CE

[2] The European Parliament's Resolution from December 4, 2008 regarding the special report no.8/2007 of the European Accounts Court regarding the administrative cooperation in the VAT field published in JO C 21 from28.01.2010

[3] The quantification of VAT evasion, Special report no.8/2007 of the European Accounts Court regarding the administrative cooperation in the VAT field published in JO C 20 from 25.01.2008

[4] Published in the Official Monitor of Romania no. 421 from June 23, 2010

Code, Law 31/1990 regarding commercial companies, Law nr. 26/1990 regarding the Trade Registry, OUG 195/2002 regarding circulation on public roads and Law no. 290/2004 regarding criminal record.

The main modifications of the legislation framework of fighting tax evasion consist in:

Expanding the competences of the criminal pursuit bodies in order to ascertain crimes in the tax and customs field and creating the possibility for observing crimes in action and to efficiently administrate the evidence.

Therefore, art. 233^1 was introduced in the Tax procedure Code, with the following content:

„Art.233^1 Collaboration with the criminal pursuit bodies

(1) In case there are data or grounded evidences regarding the preparation or accomplishment of crimes targeting the goods provided in art.135 paragraph. (4) from Law no. 571/2003 regarding the Tax code or the goods from the excise application scope, the criminal pursuit bodies can perform ascertainment activities, research and evidences' conservation.

(2) In the situation mentioned in paragraph (1) the criminal pursuit bodies will immediately request from the verification bodies within the National Tax Administration Agency, to perform tax verifications according to the established objectives.

(3) At the criminal pursuit bodies' request, when there is a danger for the evidences to disappear or for a situation to change and there is necessary to immediately clarify some facts or circumstances of the cause, the assigned personnel of the National Tax Administration Agency will perform the tax verifications.

(4) In justified cases, after beginning the criminal pursuit, with the prosecutor's approval, the National Tax Administration Agency can be requested to perform tax verifications, according to the established objectives.

(5) The result of the verifications provided in paragraphs (2) – (4) is registered in minutes, representing evidences. The minutes do not represent debentures, according to art. 110."

At the same time, art. 2 paragraph (1) letter. g from Law nr. 241/2005 for the prevention and fighting tax evasion was modified with the purpose of assigning the capacity of competent bodies and criminal prosecution bodies of the judicial police. .Therefore, it is provided that: „g) competent bodies –bodies with financial, tax and customs verification attributions according to the law, as well as criminal investigation bodies of the judicial police".

The incrimination, as crimes, of tax evasion actions, previously considered contraventions. Therefore, the following are considered crimes:

- the unauthorized possession of excisable products without being properly labeled or with improper labels ; Article 296^1 paragraph (1), letter. l from the Tax code:

„l) the possession, by any individual, outside the fiscal warehouse or trading on the Romanian territory of excisable products submitted to marking, according to title VII from the Tax code, without being labeled or improperly labeled or with false labels over the limit of 10.000 cigarettes, 400 cigars of 3 grams, 200 cigars larger than 3 grams, over 1 kg tobacco, spirituous beverages over 200 liters, intermediary alcohol beverages over 300 liters."

- The installation of means to subtract alcohol and fuels from the production installations; Article 296^1 paragraph (1), letter m from the Tax code:

„m) Using mobile pipes, elastic hoses or other tubes of this sort, using non-calibrated reservoirs as well as placing in front of counters, channels or faucets by which one can extract quantities of alcohol or non-countered oils".

- The unauthorized possession of stamps, banderoles and standard forms with special regime; Article 7 from Law no. 241/2005:

„art.7.- (1) It is considered crime and punished with prison from 2 to 7 years and the prevention of certain rights, the possession or unauthorized circulation of stamps, banderoles and standard forms used in the tax field with special regime.

(2) It is considered crime and punished with prison from 3 to 12 years and the prevention of certain rights, printing, holding or the intentioned circulation of false stamps, banderoles and standard forms used in the tax field with special regime.

It is considered a crime the unjustified refusal of an individual to present to the competent bodies, the legal documents and patrimony goods, with the purpose of preventing financial verifications, tax or customs verifications, within maximum 15 days from the notification.

Article 4 from Law no. 241/2005:

„Art. 4 – It is considered a crime and is punished with prison from 6 months to 3 years or with fine, the unjustified refusal of an individual to present to the competent bodies, the legal documents and patrimony goods, with the purpose of preventing financial verifications, tax or customs verifications, within maximum 15 days from the notification".

By this regulation, it is provided the integrity of evidences, prevention of destructive actions, hiding or perfecting false documents as well as the improvement of the state bodies' authority. In the previous regulation, there was necessary to fulfill three times the notification procedure for this refusal to be considered a crime.

Establishing standards for the registration and removal from the evidences, of the taxable entities performing intra-community commercial operations, especially intra-community acquisition of goods, in order to fight tax evasion in the VAT field for the acquisitions of: cereals, technical plants and oleaginous products, vegetables and fruits, flowers, meat and products from meat, fish, fish products, sea fruits, milk, dairy products, eggs, sugar, raw sugar and sugar beet, flour, bread and bakery products and construction materials. Therefore, by the modification of Law no. 571/2003 regarding the Tax code, was established that during July 01, 2010 – December 31, 2010, the generating fact and the fee's exigibility are applied when these goods enter the Romanian territory, resulting from intra-community acquisitions, including for the acquisitions performed within a triangular operation, the VAT taxation base being determined by using certain minimum values established for these products.

The fee for these acquisitions will be paid at the tax authorities located on the tax verification points, based on the special VAT statement for intra-community goods acquisitions until the fee exigibility is applied, except for the taxable entities framed in the low evasion risk category who are obliged to provide guarantees with the value of the owed fee. The access paths, tax verification points where these goods will be presented and the competent tax authorities are established by the order of the Public Finances minister upon the proposal from the chairman of the National Tax Administration Agency.

At the same time, by this normative act, it is established and organized within the National Tax Administration Agency, starting with July 01, 2010, „The Intra-Community Operators Registry"

comprising all the taxable entities and legal entities non-taxable, performing intra-community operations. These individuals have the obligation, under the sanction provided by art. 219^2, paragraph (1) letter. a) providing a fine from 1.000 lei to 5.000 lei, to be registered in the Intra-Community Operators Registry, when the registration is requested, for VAT purposes if they intent to perform one or more intra-community operations or before performing the respective operations, in the case of individuals registered for VAT purposes. The taxable entities and the non-taxable legal entities have the obligation to submit to the competent tax authority, in order to be registered within the Intra-community operators registry, a registration request accompanied by the criminal record of the associates and administrators, as well as other evidencing documents, and afterwards the tax authority will analyze and decide upon the motivated approval or rejection of the request for registration within the Registry. The normative act establishes the fact that taxable entities having as associate or administrator an individual against who the criminal action was initiated and who has crimes registered in the criminal record, regarding any operation, cannot be registered in the Registry, ad the tax authority will cancel ex officio the taxable entities in this situation, the taxable entities and the non-taxable legal entities registered in the inactive taxpayers' list and also the taxable entities who are temporary inactive, registered in the Trade Registry.

By the completion brought to the Government Ordinance no. 92/2003 regarding the Tax procedure code with article no. 219^2, sanctions and contraventions are established and also sanctions to the "Intra-community operators registry" regime, which are asserted and sanctioned by the tax authorities. Therefore, it is sanctioned with fine from 50.000 lei to 10.000 lei, and confiscation of the merchandise and incomes obtained from selling the merchandise, as well as the transportation means used for the transportation of goods, in the following situations:

- performing intra-community acquisitions of goods which are framed in the category of goods provided in art. 135 paragraph (4) from Law no. 571/2003, with further modifications and completions, by submitting a special VAT statement for intra-community goods acquisitions comprising false or incomplete data which can determine the nonpayment of the value added tax or the decrease of the amounts due according to the law, if the action was not committed as to represent a crime;

- performing intra-community acquisitions of goods provided in art. 135 paragraph (4) from Law no.571/2003, with further modifications and completions, with the breach of the provisions of art.156^3 paragraph (8) and art. 157 paragraph (2^1) from Law no.571/2003, with further modifications and completions, if the action was not committed as to represent a crime. The individuals who committed one of the abovementioned actions will be canceled from the Intra-community operators registry ex officio by the competent tax authority.

The few abovementioned aspects were based on strategic reasons and were suggested for implementation following the intent to collect as much as possible from the fees and taxes owed to the Romanian state budget. Fighting this phenomenon, which is currently generating significant budgetary losses, with deep implications at the social and economical level, represents a constant concern for Romania, member state of EU; who must systematically and efficiently introduce immediate measures in order to avoid and limit tax evasion. Therefore, it has been taken into consideration the fact that in certain areas, the objectives of the adopted measures at the community level, in order to fight tax evasion related to VAT cannot be reached, with the purpose of immediate decrease of the phenomenon, imposing the medium term adoption of a package of measures in the VAT field, targeting the transactions with certain categories of goods with high risk of tax evasion, respectively: cereals, technical plats, vegetables, fruits, meat, sugar, flour, bread and bakery products.

Practically, the measures had to be introduced because it was observed that during January 2007-March 2010, the tax inspection bodies established tax obligations with the total value of 1.293.029.095 lei (supplementary debits and accessories), after the tax inspections performed at legal entities taxpayers who exercised commercial activities in the field of cereals, technical plants, vegetables, fruits, meat and sugar. It is very important to mention that a significant share within the total tax obligations is held by the value added tax, amounting 776.933.592 lei. The main modalities to commit crimes leading to enormous prejudices to the state consolidate budget, in the field, are the following:

- using new established companies, apparently with normal function until the maturity date of the tax obligations (one- three months), companies that cannot be afterwards identified at the registered office or at the working points, becoming " phantom" companies, making difficult to identify the real beneficiaries of the respective transactions, companies with the highest volume of tax obligations registered;

- writing on the transportation documents false beneficiaries (not registered within the Trade Registry) based on the fact that it will be impossible to verify, during the transit through the border points, the real recipient or some beneficiaries who do not recognize the transaction (stolen tax identification code);

- The transportation documents are intentionally improperly filled so as to prevent the identification of the real beneficiaries.

Although the variety of traded merchandises is high, these evasion procedures were mainly focused on the sector in which the rotation speed of the resulted amounts is significant, and the collection of the merchandises' counter-value is performed close to or at delivery: cereals, technical plants, vegetables, fruits, meat and sugar.

Regarding excisable products, the problems identified were exclusively related to their storage in an excise duty suspension regime, this fact leading a delay in payment the excises to the state budget. Also the authorization conditions for economic operators functioning as warehouses for the production of excisable products, as well as issuing authorizations without specifying the availability deadline resulted in the registration of an increased number of bonded warehouses including storage, this situation not allowing an efficient observation, this fact leading to increased tax evasion with these products. Eloquent in this purpose are the statistic data of the Customs Authority who in 2009, following surveillance and control operations, identified 6087 breaches 9of the customs and tax legislation in the excises field, almost double from 2008, applied fines in the total amount of 34.142.682 lei and confiscated goods in the value of 915.811.884 lei. Also frauds involving authorized warehouse owners were observed in the field of energy products amounting hundreds of millions lei, and in the alcohol field, tens of millions lei. It was observed that the warranty system for the products held in bonded warehouses is not enough because it does not cover the excise owed in case the economic operator do not pay. In addition, the warranty is submitted only for the excise payment and the business operators established a practice due to which they register other debts to the general consolidated state budget for which the warranty cannot be executed. Frauds were discovered with beverages obtained by mixing ethylic alcohol by distillation with fermented beverages or wines, obtaining in this case products listed in the intermediary group of products for which it is difficult to observe if the fabrication formula was respected in the proportion established at authorization, for this reason the excise level for this category of products was necessary to be increased.

Regarding contraband and other illegalities in the competence of the customs bodies, in the year 2009, 2923 frauds and irregularities were discovered, by further verification of the customs evidences,

commercial and financial- accounting evidences at the registered office of the business operators, or by the verification of customs statements registered in the evidences of the customs offices and the county departments for excises and customs operations, after their performance, additional differences were observed in the customs rights and other taxes and fees, including the related duties owed to the state budget, and contraventions were applied and merchandises were confiscated in the total amount of 263.012.793 lei. Also last year, in the database of the customs authority regarding cigarettes captures, 874 transportation vehicles were involved, 194 legal entities are being sanctioned and 1.196 physical entities being involved.

Another important aspect which determined the legislative modification presented in this article was related to the fact that the Romanian authorities observed that a significant quantity of the products, involved in the illicit traffic during 2009, came from stores authorized to trade merchandises in the duty-free regime. Therefore, after the verifications performed last year on private business operators exercising the activity of trading duty-free products, resulted that : 93% from the cigarettes acquisition receipts were false and over 40% from the cigarettes confiscations were in duty-free stores, this leading to prejudices to the consolidated state budget. Analyzing from a strategic point of view, it was observed that the contribution of duty-free business operators to the state budget is insignificant, because they register losses or insignificant profits and the function of duty-free stores has no economic justification, because some companies declare accounting losses (between 7 and 82 millions lei) having as consequence the nonpayment of the annual profit tax. Also, following the verifications performed by the tax authorities, was observed a decrease of the volume of cigarettes sold by stores trading duty-free merchandises within the period of time in which the activity was monitored by the commissaries of the Financial Guard and the employees of the National Customs Authority, and the fact that the duty-free stores activity is almost entirely dedicated to the presumptive trade of cigarettes to individuals traveling to Ukraine, Moldova and Serbia, countries in which the cigarettes' price is lower than the price legally practiced in Romania, respectively 0,4 – 0,8 euro/pack in comparison to 1,2 – 1,7 euro/pack. In conclusion, the duty-free stores' activity is an important source for the black market of cigarettes, generating contraband on the terrestrial frontier, at the border with Ukraine and Moldova as well as in the Constanta harbor.

In conclusion, we can assert that in order to exercise its suzerainty, the state needs resources, for this reason being the holder of the public property right and the one that manages the general consolidated budget resources and if they are missing, the suzerainty would be severely compromised, meaning that this notion would be an institution without substance. The measures suggested by the presented normative act have the purpose to improve the discipline of private business operators, who are functioning in the regulated areas but also for a better collection of incomes to the state consolidated budget. In this moment the entire Romanian society is interested to outrun the global crises and to progress in order to reach the level required by the European Union regarding the economic, social and political level and this can be accomplished only by its own efforts.

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THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Trends in the Activities of Public Notaries. About the Council of the European Union Notaries (CNUE)

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Abstract: U Notaries Council is an official representative body of the notarial profession nearby by the EU institutions. As a spokesman for the profession, she has the power of negotiation and decision for all notaries in the European Union. C.N.U.E. notaries regroups all Member States who know this institution: Germany, Austria, Belgium, Spain, Estonia, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Czech Republic, Slovakia and Slovenia. CNUE decided to undertake the construction of European law. That is why it aims to promote the function of the notary and his active contribution in the whole decision making process of European institutions in connection with matters of interest to the citizen's legal life, access to justice and plus consumer protection. CNUE is assigning their work in particular through dialogue and permanent understanding with European court.

Keywords: EU Notaries Council; notarial profession; European law

Belief that what keeps the Europe united is to integrate the economies in the internal market of almost half a billion consumers, has not always been stated, but always conscious of public opinion and European makers.

EU Notaries Council is an official representative body of the notarial profession nearby the E.U. institutions. As a spokesman for the profession, she has the power of negotiation and decision for all notaries in the European Union.

C.N.U.E. notaries regroups all Member States who know this institution: Germany, Austria, Belgium, Spain, Estonia, France, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Czech Republic, Slovakia and Slovenia.

European notaries are represented in the CNUE by the presidents of national organizations of notary. C.N.U.E. is placed under the authority of a President, CNUE spokesman, who exercise functions for a period of one to two years. CNUE was structured in 1993, upon completion of the single market, it has a permanent office located in the heart of Europe, Brussels (ASBL – it is a non-profit association - Belgian law).

CNUE decided to undertake the construction of European law. That is why it aims to promote the function of the notary and his active contribution in the whole decision making process of European institutions in connection with the matters of legal interest to the citizen's life, access to justice and plus consumer protection. CNUE assigned their work in particular through dialogue and permanent

understanding with European courts. His ambition is to help establish a common legal space in Europe and the correct application of national and community law.

In addition, she continually inform members about developments in EU law and all the initiatives taken by various EU institutions, she assists in training of notaries in Community law.

EU Notaries Council consists of the following courts:

General assembly
Consisting of the presidents of notaries member of
Political making decision body of C.N.U.E.
Adopting politic and legal decisions in the attention of European institutions

President
representation, organisation and initiative missions

Executive Council
consisting of C.N.U.E President and two vice-presidents and two counsellors
It is constantly involved in various key files
When Community topical urgency requires, take CNUE orientation measures

Working Groups
Normally formed from a delegate from each notary member.
Study in depth of European projects and initiatives that have particular interest to the notarial profession.
Issued opinions in particular in the attention of Presidents.

Reporter / ad hoc committee
May be imposed for certain precise and urgent projects

Standing Bureau
responsible for daily CNUE managing, under the authority of a directory.

The notary is responsible for drawing up agreements and to advise private parties, while being obliged to impartiality with regard to each of them. Editor of authentic documents, the notary is responsible for both the legality and the advice it gives. He must inform the parties on the implications and consequences of the obligations that subscribe. The notary can empower the decision documents that he drafted. The act can then be directly entered in public records or made in breach of obligations by one party, without prior recourse to a judge.

The notary is also a conciliator who, in all fairness and in strict respect of the law, shall bring the parties to find a balance in their mutual interest in the contract. To see a notary is a simple, egalitarian and less onerous mean for all citizens to access the Law generally.

Closer to citizens, there are about 35,000 notaries, spread geographically across the whole of the 19 Member States who are always in the service of citizens, and that even in the most withdrawn areas of

the national territory. Each can therefore easily use the services of a notary, without any formality or prior procedure.

The state subordinated the notary profession and exercising of its activities to adapted legislation, this ensures the competence and availability of the notary, as well as the quality and accessibility of service performed. The notary plays an important role in the legal life of a State; it constitutes one of the three pillars of the legal system (judges, notaries, lawyers). State delegates to the notary a plot of authority and public powers to perform a public service mission: indeed, notary advice in an impartial way the parties when drafting a contract. In addition, he can draw up the contract in authentic form, thus giving the same probative and binding force as that of a decision. The authentic notary act is required to move effectively in contemporary Europe, in the direct interest of the citizens[1]. That why it is said the notary is the magistrate of good-understanding or that he exercised trial justice.

Moreover, the notary is a public officer exercising his functions in a liberal profession. Duality of notarial function status was intended by the legislator. Indeed, the State did not want to make an official notary. He left to the citizen the freedom to choose the notary, as it had also wanted that the public officer to be responsible for his acts. Equality of citizens in front of the justice, if preventive, reliable report that unites the notary and his client and the best protection of the latter claimed that duality.

C.N.U.E. continually examines the needs and expectations of citizens and companies in order to precisely define its priorities and commitments in order to build a Europe of law to ensure legal certainty for citizens and companies.

In Europe, the power assigned to the notary to give authenticity to the totality of content of a document allows the creation of a legal instrument specifically effective and safe. Authentic Act allows a non-contentious jurisdiction and preventive of conflict. He brings the best security and the best protection to the citizen in his private life and companies documents in their instruments relating to their activities. It is therefore an indispensable tool for legal security of familial property and business society. In addition, the authentic act is a modern instrument of European area of freedom, security and justice, because it reconciles freedom-based on economic efficiency, security - an essential component of social harmony - and preventive justice - which meet consumer needs and demands of contractual relations.

That is why C.N.U.E. is committed so that the received authentic act in a state shall have the same force in all European countries*, i.e.* one that binds the public authority acts issued under the seal of the State.

C.N.U.E. creates an European network of wills registers so, in January 2001, CNUE decided that they will be interconnected wills existing files, so that at the European level, to identify and locate the best time last will made by a European citizen. This line is now already successfully achieved between Belgian and French wills files.

C.N.U.E. shall facilitate cross-border transactions. In 1995 C.N.U.E. adopted a common code of ethics applicable to all European notaries, which sets standards of conduct among notaries in order to promote their cooperation in the European Union. This Code of Ethics was completed in March 2000 and in November 2002 to better meet the challenge of the fight against cross border crime and to create and use new technologies.

In terms of new technologies, C.N.U.E. sent in 2001 to the Member States proposals regarding the use of electronics in notarial work. They aim to define guidelines for use of electronic signatures by

notaries, in accordance with the highest security requirements, and implement electronic exchanges to accelerate the settlement of formalities, in order to improve service for the citizens.

In 2004, C.N.U.E. conducted a training program for notaries in Community law for judges and notaries of the European Union, called Formanote. This program aimed to improve knowledge and use of Community instruments relating to judicial cooperation in civil and European private international law. Co -financed by the European Commission, he allowed the formation of about 1,000 practitioners of the law.

Fifteen European Union countries have participated in the Formanote program. Seminars were held in nine countries (Germany, Austria, Belgium, Spain, France, Greece, Italy, Netherlands and Poland) and participants from six countries (Estonia, Hungary, Luxembourg, Portugal, Czech Republic and Slovenia) were sent to a seminary in a neighbouring country.

THE 6TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

More European with European Citizenship?

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Abstract: Being nationals of a Member State, such as Romania, we all are citizens of the European Union. But, is being European citizens important for us? Does it change in any way our regular life? At European level, the usual remark is that "the importance of citizenship of the Union lies in the fact that the citizens of the Union have genuine rights under Community law[1]."In other words, this is as much as saying that the importance of citizenship lies in its consequences. But the content given to European Citizenship will be absolutely relevant to understand its meaning and though its importance: if rights conferred by citizenship were, for example, insignificant, what would be the added value of being European citizen? So, starting from the article 20.2 of the Consolidated Version of the T.F.U.E. (ex Article 17 TEC) "*Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties*", we shall focus the presentation on the EU core rights. Our scientific argumentation will follow the next steps: The notion of citizenship: An introduction; Citizenship vs. nationality; Meaning and importance of EU citizenship; From national citizenship to European citizenship; more European with EU citizenship.

Keywords: Citizenship; European Citizenship; EU rights; participatory democracy

1. The Notion of Citizenship: An Introduction

"From Aristotle to the Treaty of Lisbon via Roman law, the twelfth-century revival of neo-Roman jurisprudence, the Italian city-states, the self-governing towns of Zeeland and Holland, the Polish *Sejm*, to the slogans of the English and French revolutionaries – in all of these contexts to be a citizen meant being an individual who belongs to a political community of common laws and to share its entitlements and duties equally with others" (Keane, 2008). All people who hold nationality in any of the 27 European Union member states are also European Union citizens. This means that while they are citizens of their home country, with the rights and responsibilities that citizenship involves, they are also citizens of the European Union, with extra rights and duties. This can be a difficult idea to grasp. While it is fairly easy to understand how one is a citizen of a state, how do you define citizenship of an international organization such as the EU? While certain key elements of European Union citizenship are laid out in the European Union treaties, wider questions exist about what it really means for the people of Europe. Can there be such a thing as a European 'identity' - do symbols such as the European flag or anthem actually help people to feel more European? The question of citizenship is particularly sensitive. Most states are jealous of their right to provide for their own nationals. But the idea of a supra-national code of individual rights, binding on all signatory states, is not new. In modern Europe the first step came in 1950 with the Council of Europe's Convention on

[1] Fourth Report on Citizenship of the Union (2001-2004) COM (2004).

Human Rights backed up by the European Court of Human Rights in Strasbourg which gave citizens the right to appeal against rulings made by their own government. At roughly the same period the treaty establishing the European Coal and Steel Community[1] was being negotiated, setting up the supranational institutions with which we are still familiar today in the European Union. Its immediate task was the coordination of an important but limited range of economic activities but its long-term purpose, as stated in the treaty's Preamble was to create "the basis for a broader and deeper community among peoples long divided by bloody conflicts". It outlawed discrimination between nationals of the member states employed in the coal and steel industries and thereby, perhaps unwittingly, took the first step towards a European citizenship.

In the Treaty of Rome these provisions were extended to cover employment in all occupations, including the self-employed, thereby making freedom to work without discrimination on nationality grounds available for all member states' citizens. In addition, the Rome treaty banned discrimination between men and women in the matter of equal pay for equal work. A series of rulings by the Court of Justice subsequently extended this principal to cover retirement age, pensions and equality of treatment in other, work-related respects. In effect, the roots of this embryo European citizenship, though that term was not yet used, lay in the concept of non-discrimination. It was not until the Maastricht Treaty that EU citizenship was formally introduced as a legal concept. All nationals of a member state are also automatically EU citizens who "shall enjoy the rights imposed by this Treaty and shall be subject to the duties imposed thereby"[2]. This is not, we note, a citizenship based on ethnicity but purely on a person's legal status. It gives EU citizens the legal right, subject to enabling legislation, to "move freely and reside in any member state within the territory of the Union". In other words, freedom of movement was no longer confined to economic activities but became a general right to be enjoyed by students, pensioners, and indeed anyone with adequate financial means. They may take employment or run a business, and vote or even stand as a candidate in municipal and European parliamentary elections in the member state where they now live, though not in national elections. When European Union citizenship was first introduced many people feared it was an attempt to replace national citizenship and would undermine their national identity. A later treaty amendment therefore made it clear that ". *Citizenship of the Union shall be additional to and not replace national citizenship"*[3]. Legally, therefore, we enjoy a multi-layered citizenship.

2. Citizenship vs. Nationality

The citizenship of the Union does not replace the national citizenship, but a nationality of Member States is entirely a matter for the Member States concerned, as the Declaration on nationality of a Member State appended to the Treaty of Maastricht confirms. It is therefore for each Member State, having due regard to the Community law, to lay down the conditions for acquisition and loss of nationality. The European Union does not have any competencies in that regard. Above, no specific distinction has been made between citizenship and nationality. For theory and history, it is never clear whether “citizenship” and “nationality” are one and the same notion or different notions. Any distinction between the two appears to be a recent phenomenon (Colas, 2004, p. 41). For many theoreticians, the two are “analytically distinct”. It identifies nationality with cultural elements and citizenship with political ones (McCrone & Kiely, 2000, pp. 19-34). Yet, “it is difficult to imagine

[1] Treaty of Paris, 1951.
[2] See consolidated Treaty Establishing the European Community [TEC], Articles 17-22.
[3] Article 20.2 TFEU.

modern citizenship divorced from statehood or the "national principle" (Shore, 2004, p. 31). In some constitutional systems, like the French, citizenship is the core element, while in other constitutional systems, like the Dutch constitutional system, only the notion of nationality is present. In the Romanian constitutional system, we talk about "citizenship". According to the Romanian Constitution "*Romania is the common and indivisible homeland of all its citizens, without any discrimination on account of race, nationality, ethnic origin, language, religion, sex, opinion, political adherence, property or social origin*[1]" and *Romanian citizenship can be acquired, retained or lost as provided by the organic law; Romanian citizenship cannot be withdrawn if acquired by birth*[2].

As the text of Article 20 TFEU shows, there is a link between citizenship and nationality from the EU point of view:

1. *"Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship".*
2. "*Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties*".

There are many explanations for this relationship. "Nationality" is for instance often seen as the international law aspect, while "citizenship" refers to its implications in national law (Legomski, 1994, p. 279). It has been noted that […] it is obvious that "nationality" refers to the formal link between a person and a state, irrespective of how this link is called under national law, whereas "citizenship of the Union" refers to the newly created status in Community law (De Groot, 2003, p.6).

3. Meaning and Importance of EU Citizenship

EU citizenship has now been mentioned several times as being different form state citizenship and as a prime example of the changing nature of citizenship. The rights and duties of EU citizens are laid down in the Lisbon Treaty. Art. 9 TEU: "In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to national citizenship and shall not replace it". The importance of Union citizenship lies in the fact that the Union citizens have genuine rights under Community law. Article 17 TFEU (Treaty of Lisbon), after renumbering Article 20 TFEU reads as follows:

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, *inter alia*:

(a) the right to move and reside freely within the territory of the Member States;

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections in their Member State of residence, under the same conditions as nationals of that State;

[1] Romanian Constitution, revised in 2003, article 4, *Unity of the people and equality among citizens.*
[2] Romanian Constitution, revised in 2003, article 5, *Citizenship*.

(c) the right to enjoy, in the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State;

(d) the right to petition the European Parliament, to apply to the European Ombudsman, and to address the institutions and advisory bodies of the Union in any of the Treaty languages and to obtain a reply in the same language. These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder. This is summarized by the Commission as: "By establishing citizenship of the Union, the Union placed the individual at the heart of its activities"[1]. And by the Court of Justice: "Citizenship of the Union is destined to be the fundamental status of nationals of the Member States[2]". In the Garcia Avello case, the Court of Justice also commented on citizenship: "Citizenship of the Union, established by Article 17 EC, is not, however, intended to extend the scope *ratione materiae* of the Treaty also to internal situations which have no link with Community law (Joined Cases C-64/96 and C-65/96 Uecker and Jacquet [1997] ECR I-3171, paragraph 23)[3]. Still, such a link is easily created. In this case, the system of family names in Spain had to be respected by Belgium in order not to block the possibilities of free movement of workers. In itself the notion of EU citizenship does not confer new rights on the nationals of the Member States. The European Court of Justice is showing the way forward. In the history of the European Union when the European Court of Justice takes the lead, the other Institutions often follow. So it is with European citizenship which the European Court of Justice appears to be consciously creating in a series of landmark judgments combining the articles on free movement with those on equal treatment. The Court, "*has repeatedly emphasized that European Union citizenship is destined to be the fundamental status of nationals in Member States enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality subject to such exemptions as are expressly provided for*"[4].

The Court has established free movement as a fundamental right that does not need to be justified. Rather it is for the Member State to justify any restriction as reasonable and proportionate. This reversal of the burden of proof puts the citizen on the move in a much stronger position vis-à-vis national administrations. The cases relate to the need to reconcile free movement of people with national policies which Member States are reluctant to see harmonized. These policy areas are often highly sensitive and close to national sovereignty: access to higher education, social benefits, taxation and even the acquisition of nationality itself. The Treaty and the way it is being implemented by the European Court of Justice is also bringing about more recognition of citizens as citizens rather than different categories of the population or professions. In this way, following the lead taken by the Court, EU legislation on free movement and residence – the so-called European citizenship directive (38/2004) – brings together 9 separate legal texts for different categories. Similarly, new legislation on the recognition of professional qualifications brings together 15 previous laws for separate professions. There is often however, a gap between the principles of European citizenship in the case law of the European Court of Justice and the legislative texts, and what happens on the ground where Member States often invoke the exceptions to European Union law rather than its spirit to create obstacles to the practice of European rights. People assume that as a European citizen they can take

[1] Report from the Commission, Fourth Report on Citizenship of the Union (1 May 2001-30 April 2004). Brussels, 26 October 2004, COM (2004) 695 final.
[2] Case C-148/02, Carlos Garcia Avello v État belge, Court of Justice of the European Comunities, 2003.
[3] Case C-148/02, Carlos Garcia Avello v État belge, Court of Justice of the European Comunities, 2003.
[4] See report of the ECAS conference held on 24 May 2006 and background documents on the ECAS website – www.ecas-citizens.eu.

their case to the European Court of Justice. The Lisbon Treaty amends article 230 of the present EC Treaty and provides a small opening to the European Court of Justice. A citizen will be able to initiate a proceeding, "*against an act addressed to that person or which is of direct and individual concern to him or her, and against a regulatory act which is of direct concern to him or her and does not entail implementing measures.*"[1]. In reality this provision does not go far to improve remedies for citizens since in the field of citizens' rights legal acts are usually directives and not regulations. It is however a step in the right direction. With the Lisbon Treaty the status of the Charter finally becomes a legally binding document which means that citizens may invoke it before national courts. The rights to good administration, effective remedy and fair trial can help encourage speedier and more efficient extrajudicial and judicial remedies for breaches of European Union laws. Citizens find it hard to understand why it is necessary, to defend their European rights, to have to go first to a national court, rather than directly to the European Court of Justice. There is also confusion between the Luxembourg and Strasbourg courts. It is difficult to explain why a Court which is so much in advance of the legislative process in developing the rights of European citizens interprets the Treaty so restrictively on access. If wider access to the European Court could be established, how to make sure that this does not become counterproductive by opening the floodgates?[2] Where remedies have been exhausted at an administrative level and through a formal complaint to the European Commission, a citizen or group of citizens should have a right to appeal to the European court. In similar circumstances, the European ombudsman could be asked to take up the case on behalf of the individual or group without the costs and risks involved of going to court.

4. From National Citizenship to European Citizenship

One important question still remains and that is whether European citizenship indicates a development for the notion "citizenship" from national citizenship to something more, something supranational. In the first place, there are very different conceptions and approaches to citizenship often classified as liberal or rights based, communitarian or republican and participatory (Bellamy & Castiglione& Shaw, 2006). In reality, for the individual, citizenship often means all these things. Citizenship has very different national historical roots. In some countries it has been born out of traditions of revolution and protest, in others it has been much more closely related to the formation of the State and the constitutional order. The potential of European citizenship lies in the fact that it can lead us to think about and enrich the meaning of citizenship because it can only be a melting pot of very different national and political approaches. European citizenship has a role in establishing new forms of consensus in a multi-cultural, multi lingual society. Secondly, it is very difficult to have a clear picture of what European citizenship might become because it is in no way comparable to citizenship of a Member State. Since the creation of the modern welfare State, citizenship has become associated with a complete set of rights, duties, and entitlements which remain largely in the national sphere. European citizenship is bound to remain far less extensive and evolve against the background of variable decision making at different geographical levels. The European Union in the monetary area is to some extent a federation because of its single currency and central bank but in other areas closely associated with the exercising of citizenship, responsibilities remain decentralized and largely in the hands of Member States. In such a complex construction, the priorities for transnational citizenship beyond free movement rights can only emerge over time as a compromise between what citizens want and the division of tasks between the European Union and Member States. One cannot perceive European

[1] Article 263, TFEU.
[2] http://www.ecas-citizens.eu, The Alternative Report on European Citizenship.

citizenship through the prism of our national citizenship; it will be something new, affecting some more than others and running deep but on a much narrower front.

5. More European with European Citizenship?

The rights laid down by the Lisbon Treaty can be very "attractive" for our citizens, but, in reality, they prove to be a "delusion" for them due to the fact that they don't know very well those rights. As we already said before, the European citizenship does not substitute but rather supplements the citizenship of each State. Those holding European citizenship are entitled to some fundamental rights within the EU, regardless of which State they are the citizens of. This Flash Eurobarometer survey on European Union citizenship (No 213), commissioned by the European Commission, asked citizens of the EU to clarify how familiar they are with their status as an EU citizen, and the various rights they possess due to that fact. On the aspect concerning familiarity with the term "citizen of the European Union", the majority of the EU citizens interviewed[1] (78%) claims familiarity with the term "citizen of the European Union". However, there are differences regarding how well respondents know what the term means: 41% say they are familiar with the term and know what it means, while 37% have heard the term but are not sure what exactly it means. 22% of respondents claim to have never heard about the term. Romania (94%), Estonia (94%), and Hungary (93%) have the highest percentages of respondents declaring familiarity with the term "citizen of the European Union" – making them the countries most aware of this expression. On the aspects regarding the level of information on European Union rights only 3% of respondents from the 27 EU countries consider themselves "very well informed" about their rights as citizens of the European Union, and another 28% feel "well informed" in this respect. On the whole, less than one third (31%) of respondents from the 27 EU countries consider themselves well informed about their rights as citizens of the European Union. Half of the persons interviewed (49%) indicate that they are "not well informed" regarding their rights as citizens of the European Union, and one respondent out of five (19%) considers him/herself "not informed at all", adding up to more than two thirds in the EU being uninformed about their rights as EU citizens (68%).

On the whole, half of the respondents from Malta (50%) and from Slovenia (49%) feel "very well informed" or at least "well informed" about their rights as citizens of the European Union, scoring the best among all nations in the EU. Romania with 42% situated between the countries with higher proportions of sufficiently informed people. About the rights of a European Union citizen, respondents are most aware of the right to free movement of persons, and especially perplexed about their rights regarding municipal elections in another Member State they might reside in. Testing respondents' familiarity with some of the most fundamental rights that they hold as citizens of the European Union, the survey found that only 1% of citizens were able to correctly identify as true or false the eight propositions regarding their rights. (Six were true; two were false.) This suggests hat the levels of consistent, firm knowledge of EU citizens' rights are much less widespread compared to the levels indicated by the extent to which respondents could identify their rights, on an individual basis. Focusing only on the rights that they actually have (and discounting the false statements that might have perplexed respondents), only 18% recognized *each* of the six as rights they possess. Voting rights are especially troublesome for citizens. The right most familiar to respondents of the survey is that of freedom of residence - 88% believe that a citizen of the European Union has the right *"to reside in any Member State of the EU, subject to certain conditions"*. 7% of respondents do not recognize the above

[1] Flash Eurobarometer 213 on European Union Citizenship, conducted by The Gallup Organization, Hungary upon the request of the Directorate-General Justice, Freedom and Security, publication: February 2008.

as a right of EU citizens, and 5% could not or did not want to answer the question. Roughly eight out of ten respondents agree that citizens of the European Union have the following rights: *"to make a complaint to the European Commission, European Parliament or the European Ombudsman"* (85%), *"when residing in another Member State, to be treated exactly in the same way as a national of that State"* (83%), *"when finding himself outside the EU, to ask for help at embassies of other EU Member countries, if his country does not have an embassy there"* (80%). The right *"to acquire the nationality of any Member State in which he has lived for at least 5 years"* is thought to be true by more than half (61%) of the EU public. One-fifth (20%) of respondents know that EU citizens are *not* entitled to acquire a second nationality in the manner described in the statement. Respondents are more aware of the rights that a citizen of the EU has in relation to European Parliamentary elections than in relation to municipal ones. 54% of interviewed persons recognize the right *"to vote and to stand as a candidate in European Parliament elections"*, while only 37% recognize the right *"to vote and to stand as a candidate in municipal elections"*. Half (50%) of the EU public believes that *"to vote and to stand as a candidate in municipal elections"* is not a right of an EU citizen. With regard to elections to national Parliaments (where, unlike the other two elections discussed before, citizens of other EU countries are normally *not allowed* to participate), six out of ten (60%) respondents know correctly that a citizen of the EU living in an EU state other than their own does not have the right *"to vote and to stand as a candidate in elections to national Parliaments"*, and a quarter (26%) state the opposite[1].

First of all, let us consider freedom of movement and the right of residence within the territory. This is not really a citizens' right in the sense in which the others are: freedom of movement represents one of the original freedoms that brought the European Community to life by the creation of a common market. Even though Union citizenship extended the scope of this fundamental freedom towards any person moving for any purpose inside European borders it plays a different role in comparison with the others. However, the most curious thing regarding freedom of movement is that it has contributed to creating the feeling of a closer Union much more than any other authentic citizen's right. Broadly speaking, the provisions of the Treaties in relation to freedom of movement apply in the same way to the 10 member states which joined the EU in 2004 and the two new member states (Romania and Bulgaria) which joined in January 2007. The EU Treaties have a number of provisions dealing with free movement of people and specifically with free movement of workers. The Treaties provide that "every citizen of the Union shall have the right to move and reside freely within the territory of the Member States subject to the limitations and conditions laid down in the EC Treaty and by the measures adopted to give it effect"[2].

The Treaties contain a general prohibition (ban) on discrimination on the grounds of nationality and they specifically state that freedom of movement for workers entails "the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment". The Treaty provisions on free movement of workers provide that, subject to limitations justified on grounds of public policy, public security or public health, workers have the right to accept offers of employment and to move freely within the territory of the member states in order to take up such offers. When new member states join the EU, the terms and conditions which apply to them are set out in accession treaties. These treaties are then part of the overall treaties governing the EU. Special transitional provisions on free movement of workers were included in the Accession Treaties which apply to the ten member states which joined in May 2004 and in the Accession Treaties with Bulgaria and Romania. Bulgaria and Romania joined

[1] Flash Eurobarometer 213 on European Union Citizenship, February 2008.
[2] Article 21 TFEU.

the EU on 1 January 2007. The transitional arrangements in relation to free movement of workers which apply to them are as follows: from 1 January 2007 to 1 January 2009, the existing member states (including the 10 which joined in 2004) may decide to apply restrictions on free movement. They do not have to notify the Commission of their intention to do so. Ireland has decided to impose such restrictions. This means that citizens of Bulgaria and Romania are subject to the work permit requirements which applied before they joined the EU. However, those who have been working in Ireland on a work permit for a continuous period of 12 months or more prior to 31 December 2006 do not need a work permit. No new legislation is required as the Employment Permits Act 2006 gives the Government the option of allowing full free movement or requiring work permits. Workers from the two countries will have preference over people from non-EEA member states. From 1 January 2009 to 1 January 2012, Member States must notify the Commission of their intentions in respect of free movement for the three years until the end of 2011 – they may continue restrictions or may remove them. Full free movement should apply from 2012. There is a provision however whereby an original member state may ask the Commission to continue restrictions for a further two years if it is experiencing serious disturbances in its labor market. There will be complete freedom of movement from 2014. The main feature of European citizens' rights under Part Two of the EC treaty (with the exception of freedom of movement) is their instrumental design, this is, the aim of being useful for the European integration process (Ortiz, 2005, pp.126-129).

Rights to vote and stand as a candidate at elections to the European Parliament and at municipal elections in the Member States of residence and right to diplomatic and consular protection have in common their limited ambition of removing nationality's condition when citizens move to another country within the European Union (exercising their freedom of movement) and aim to participate in public affairs, or when they move to a third country where the Member State of which they are nationals is not represented and need diplomatic or consular protection inside that territory. Then, citizens should be treated as if they were nationals of the Member State of residence within European Union territory, or nationals of the Member State from whom they seek diplomatic or consular protection. Firstly, let's consider the limited scope of electoral rights, beginning by elections to the European Parliament. Article 22.2 TFEU stipulates that "*Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State*". The right to vote and stand as a candidate at elections to the European Parliament in the member States of residence, which theoretically should be developed in a procedure "in accordance with principles common to all Member States", is actually as different as different are Member States' internal rules (of course, with a couple of common basis). Also, at European level, there are no political parties, but some European groups of national political parties, which is pretty different. Of course, national political parties defend issues that most times have nothing to do with a wider "European interest" which is the symptom of the big and crucial absence of an European political awareness. Moreover, European Parliament does not play the role National Parliaments usually play in the Member States but a less important one. In that context, is it really important to have the possibility of voting and standing as a candidate for the European Parliament in the Member States of residence, in the same conditions than nationals of this Member State? Does it really change European people's lives? In 2008, in a Eurobarometer survey concerning the 2009 European elections,

the results regarding the interest of respondents in the European elections varied considerably from one Member State to another: in 11 European Union Member States, an absolute majority of respondents was interested in them. This proportion exceeded six out of ten respondents in Romania (65%). We have to notice that the study was carried out more than a year ahead of the elections (the electoral campaign had not yet started and the event had received little or no media coverage).

In 2009, Romania and also, Slovakia, Slovenia, Czech Republic and Poland had the highest rates of absenteeism in the European elections, over 70 percent. The Romanians did not know how many members of the European Parliament would send in Strasbourg and they considered the European Parliament as an institutional "Superman[1]"; although most of them know about the European Parliament from television and radio, they stand at Community level as having the best opinions on the European legislative forum. From "modesty" or maybe other reasons, even though Romanians knew what was the European Parliament' role, two months before the European elections, 75% knew that they will send to Strasbourg 17 members, not 35. " Few they know us, but the majority of them love us and credit us very much", " after hearing the results, I felt like an alien, the European Parliament look like a space ship populated by a specie with beneficial powers", said one of the Romanian candidates for these elections. Other candidate felt pleasingly surprised with the Romanian's perception: "surprise is linked to the respect we have Romanians to EU institutions. EU membership is seen in the light of the benefits that Romanians perceive from being a Member State: freedom of movement, right to work in EU, European funds". According to article 22.1 TFEU, "*Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State*". Considering the right to vote and stand as a candidate at municipal elections in the Member States of residence, it is worthless to remove unequal conditions between national if Member States are allowed to preserve some rights for their own nationals (for instance, French mayors). Giving nationals form other Member States the opportunity to participate level was a very good idea, however too close to the core constitutional basis of states: sovereignty. Several Member States' Constitutions required to be amended. Romanian Constitution regulates in art. 16.4, Equality of rights, that: "*After Romania's accession to the European Union, the Union's citizens who comply with the requirements of the organic law have the right to elect and be elected to the local public administration bodies."* and article 38, Right to be elected to the European Parliament: "*After Romania's accession to the European Union, Romanian citizens shall have the right to elect and be elected to the European Parliament*".

According to article 23 TFEU, "*Every citizen of the Union shall, in the territory of a third country in which the Member State of which he is a national is not represented, be entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that State. Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection"*. We have to focus on diplomatic and consular protection provided for those citizens who have left European territory and need protection in a third country where their home State is not represented. It is useful to remind that there are only five countries in the world where all Union states are represented, thus, in most of the cases one particular Union Member State might easily have no diplomatic or consular authorities and shall require this provision to be

[1] www.monitorulexpres.ro, De ce nu cred europenii în votul pentru Parlamentul European?,Oltiţa Stiuj, 11.05.2009.

applicable. In this sense, the idea was a good one. But, we are not in front of a new idea. We can say we are in front of a new version of an old possibility according to Vienna Conventions on Diplomatic and Consular Protection of 1961 and 1963, that is a system of States' substitution. Besides this, the applicability and extension of that right is everything but evident: protection is mere consular assistance (assistance in cases of death, of serious accident or serious illness, in cases of arrest or detention, assistance to victims of violent crime and relief and repatriation of distressed citizens of the Union)[1].

This assistance can only be provided by another Member State's diplomatic or consular authorities given the absence of the own Member States' and in the case that the first accept discretionally to bring that protection (exactly like it happens with their own nationals, "on the same conditions as the nationals of that State"). Moreover, Member States must agree the necessary rules between them and sign international agreements with third countries to give it effective force. ("*Member States shall adopt the necessary provisions and start the international negotiations required to secure this protection*[2]*"*). It is interesting to note that protection is never provided by European Union authorities (as happens in some areas like fishing where European Commission protect European fishermen if it is needed), but by Member States': that would have strengthened the idea of European identity as perceived by European citizens much more than the provisions of Article 20.2 (c) TFEU, too much conditioned by national concepts. Next, let's see the other set of European Citizens' rights, that is, right to petition the European Parliament, right to apply to the European Ombudsman, right to address the institutions and advisory bodies of the Union in any of the Treaty languages and right to obtain a reply in the same language. All of them have in common that they express a direct link between the European Union and its citizens, and all of them contribute to some extent, to control European institutions' work. The right to petition and the right to apply to the European Ombudsman have been designed from an identical point of view, that is, their capacity of signaling existing political and administrative deficiencies in the operation of the community institutions. Certainly it is the citizen who presents petitions on matters that effect him and who complains to the Ombudsman about possible maladministration, but such requests help the Committee on Petitions and the European Ombudsman (and in last instance the European Parliament) to be aware of the deficiencies which affect the functioning of the European legal system. At our national level, the Romanian Ombudsman is the People's Advocate. The People's Advocate operates either ex-officio, or at the request of individuals whose rights and freedoms have been violated, within boundaries established by the law. The Constitution compels the public authorities to grant the People's Advocate the support necessary for exercising his attributions. The People's Advocate only answers to the Parliament, being compelled to present reports to the Parliament. In these reports, the People's Advocate can also make recommendations regarding the legislation or adopting measures for protecting the citizens' rights and freedoms. Personally, it is a reality that fact that the Romanian citizens are not aware of their right to apply to the European Ombudsman, giving the fact that they have practically no idea about the existence nor the attributions of such similar institution at national level. In 2008, a number of 8030 petitions[3] were registered (bear in mind that Romania has over 22 millions inhabitants).

Nevertheless, we can not undermine the efforts made by this institution for imprinting an attitude of respect and tolerance in the public opinion and the behavior of public authorities, favorable to the free

[1] See Decision 95/553/EC of the Representatives of the Governments of the Member States meeting within the Council of 19 December 1995 regarding protection for citizens of the European Union by diplomatic and consular representations (OJ L 314 of 28 December 1995).
[2] Article 23 TFEU.
[3] People's Advocate, Report for activity for 2008.

movement of persons and for the elimination of any forms of discrimination between the citizens of a member state of the European Union and the citizens of the other member states. In order to fulfill that, the People's Advocate drafted an Open Letter, addressed to the European Ombudsman, the President of the International Institute of the Ombudsman – the European Region, the Ombudsmen of the European Union, insisting on the idea of cooperation between the Ombudsman institutions of the European Union member states, with a view to favoring the right to free movement of Romanian citizens abroad. Also, the People's Advocate Institution sent the open letter concerning the situation of Romanians in Italy to the 19 local Ombudsmen in Italy. Through written responses, the European Ombudsman, the National Ombudsman of Ireland, the Parliamentary Ombudsman of Finland, the Civic Defender- the Basilicata Region, the Commissary for the Protection of Civil Rights in Poland, the Civic Defender - the Friuli Venezia Region, the Civic Defender - the Romana Region, have shown that they were impressed by the People's Advocate's message, promising support for the institution in the matters regarding the discrimination that some Romanian citizens, who exercise their right to free movement, are confronted with. On the other hand, the right to address the European Union institutions and advisory bodies in one's own language and to obtain a reply in the same language, respond to an institutional strategy directed to promote the principles of transparency and openness of the European institutions. Its incorporation in the text of the EU Charter on Fundamental Rights together with the right to good administration proves what has just been said.[1] Attention must now be drawn to significant differences between these and the previously mentioned rights (that is electoral rights and right to diplomatic and consular protection by the authorities of any Member State). Firstly, because enjoyment of these rights corresponds to all individuals subject to Community law, not only to European citizens, that is to Community nationals. Secondly, because they can be enjoyed disregardful of the place of residence, that is independently from the freedom of circulation or movement to a third State. Why is important to underline these differences? Because, paradoxically, the only exclusive rights of European citizens are in fact the electoral rights and diplomatic and consular protection. The remaining rights (petition, claim and access to information), namely those that create direct links between individuals and the Union are not exclusive rights pertaining to the European citizen but rights to which both nationals and residents are entitled. The fact that such rights that can be exercised by all community nationals (also by those that have not moved from the Member State of origin) are shared with residents regardless of their nationality, implies, on the one hand that the status of "European Citizen" diffuminates, as it entitles to rights which are not exclusive and therefore do not identify a person as such. On the other hand, it means that residing in the territory of the community is sufficient to generate rights which create direct links between individuals and the European Union (Ortiz, 2005, pp. 130-131). So, European Citizenship has, above all, an instrumental character as it appears that its first aim is being useful for the European integration process, strengthening its devaluated image to citizen's eyes, citizens to whom the process in itself is addressed. European Citizenship has been like an eye-catcher, a sort of advertisement in order to bring the people close to the European Union. It is interesting to consider in this context the absence of duties related to those rights. If the main feature of European Citizenship' statute was "making the European Union attractive to citizens", showing them how convenient it would be to belong to it, would this idea be as convincing if it also implied additional obligations? Would citizens assume that? In fact, European Citizenship does not project any strong feeling of belonging although that was exactly its purpose. Personally, we have felt more "touched" by the new European Union since no one asked us to show our passports while crossing certain internal borders of the Community (by Schengen provisions; for example, when going from Czech Republic to Poland). This example is the

[1] Chapter V of the EU Charter on Fundamental Rights, articles 39-46.

freedom of movement, which is, formally, one of European citizens' rights but, mainly, one of the community freedoms created at the very beginning. People do not feel closer nor bound to the European Union because of European Citizenship. If being a European citizen is synonymous to having rights, what is the significant difference of such category when those rights may be also enjoyed by "non-European citizens"? If some of those rights may be, in fact, enjoyed by "non-European citizens", is then nationality of a Member State the chosen criteria for acquiring European citizenship, really adequate? We think it is important in the future to make these rights more "meaningful", to rebuild them, so that the consequences of European Citizenship to become relevant for people's lives.

7. Concluding Remarks

European citizenship is not a new invention, or a purely symbolic idea. It goes back to the legal order created by the original Treaty of Rome and decisions of the European Court of Justice which can be invoked not just by Member States but also by individuals. The European Union is a reality but a single European public space has not emerged yet. The European Citizenship could play a crucial part in fostering a common European public space. European Citizenship could encourage Europeans to become active citizens and participate in governance process. There were identified a number of major differences between the national public space and the proposed European one (Guibernau & Guibernau I. Berdún, 2001, pp. 188-190): The EU is not only young, but it has had up till now mainly an economic basis, while national public spaces have developed over a long period of time (at least since the French Revolution). National public spaces were created within rigid state borders (even allowing for the existence of multinational states). The way in which the EU is evolving seems to prefigure a vast space 'from the Atlantic to the Urals', to use de Gaulle's well-known expression. Borders may be on the way out, but it is not clear how to build the 'common house'. While national identities are still strong, European identity is still in the making process.

The majority of national public spaces are constituted by the presence of a common language. The European Union has 23 official and working languages. They are: Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovene, Spanish and Swedish. The first Community Regulation determining official languages was passed in 1958. It specified Dutch, French, German and Italian as the first official and working languages of the EU, these being the languages of the Member States at that time. Since then, as more countries have become part of the EU, the number of official and working languages has increased. However, there are fewer official languages than Member States, as some share common languages. In Belgium, for example, the official languages are Dutch, French and German, whilst in Cyprus the majority of the population speaks Greek, which has official status.[1] There are two main entitlements for languages with "official and working" status: documents may be sent to EU institutions and a reply received in any of these languages EU regulations and other legislative documents are published in the official and working languages, as is the Official Journal. Due to time and budgetary constraints, relatively few working documents are translated into all languages. The European Commission employs English, French and German in general as procedural languages, whereas the European Parliament provides translation into different languages according to the needs of its Members. Having a European passport, being able to freely travel around Europe (at least for the citizens of those countries which have signed the Schengen Agreement) and a few more

[1] http://ec.europa.eu/education/languages/languages-of-europe/doc135_en.htm.

trappings do not make for what Ralph Dahrendorf calls 'hard citizenship'. It is true that the members of the EU may feel that they belong to a community of sorts and that they share, to a certain extent, some ideas and aspirations. But to move to something more substantive, to develop a more "meaningful" citizenship, institutional and symbolic developments will have to be accompanied by educational ones. Even if European identity is not meant as a substitute for regional and national ones, but rather as complementary to both, history teaches us that it would be naive to think that it can grow quickly and without hurdles (Guibernau & Guibernau I. Berdún, 2001). On the whole, this bundle of rights may appear as limited, but there is no reason why the idea of European citizenship could not be taken much further even within the existing institutional framework. European citizenship holds the potential to encourage greater engagements with the European project. It is in this sense that individuals could feel motivated to participate in governance processes shaping the European Union. On the development of European citizenship depends the European Union's search for common European values for which the Charter of Fundamental Rights provides a context. Developing European citizenship is not only in the interest of the European Union institutions but also of citizens themselves.

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Defending non Patrimonial Rights in the Draft of the European Civil Code

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Abstract: The draft of the new Civil Code includes Book I, "About Persons", a special title on protection of non-patrimonial rights by specific legal means (Title V - "Defending non patrimonial rights"), made as a result of development and modernization of existing provisions, that are very brief, contained in art. 54-56 of Decree No. 31/1954, on natural and legal persons, which is to be repealed with the entry into force of the new Civil Code. The nowadays legislator has shown a constant preoccupation on the protection of one's personal rights. Currently, the most comprehensive national regulations are, *de lege lata*, in the Quebec Civil Code of 1991 (art. 10-40) - which is one of the main models of the new Romanian Civil Code project – and in the Swiss Civil Code (art. 27, 28, 28a-28l, 29), which is why these modern and highly effective regulations have been the main source of inspiration for the editors of the New Romanian Civil Code (see: art. 58-91, regarding to the respect of human being and its inherent rights, art. 262-274, regarding to the defense of non-property rights). After the Second World War, some regulations regarding the personality rights were introduced in other European civil codes too, with the affirmation and delineation of these rights in the jurisprudence and in the doctrine.

Keywords: protection; non patrimonial rights; the right of reply; the right of rectification; the draft of the New Romanian Civil Code

The headquarters of the matter of non patrimonial rights on their express defense consists of Articles 252 to 257 of the New Civil Code, which are placed at the end of Book I, dedicated to Persons. The provisions of Articles 58 to 83 on the rights of personality are also important. Civil Code is a reflection of the social system. The rules contained in meet the standards of the concrete needs, and at the same time, tend to meet the dynamics of social life. The principles that generate the non patrimonial rights defense in the New Civil Code are, in essence the same. Therefore, a civil code of a civilized nation offers, par excellence, constant law principles, around which any society is structured. However, the serious changes of the Romanian society and of the contemporary European reality require new social values and moral protection to meet the requirements arising from the commitments taken by Romania in the European integration process.

In this context, the importance of the New Civil Code has to be emphasized for the commitments set by the European Commission in the Mechanism for Cooperation and Verification.[1]

[1] Commission Decision 2006/920 EC of 13 December 2006, published in the Official Journal of the European Union L series 354 of December 14, 2006.

Report from the Commission to the European Parliament and the Council on Romania's progress on accompanying measures following Accession (Brussels, 27 June 2007) stated the following: "(…) *Concerning judicial reform and the fight against corruption, Romania should continue to move towards meeting the benchmarks and in particular, (...) to finalize the adoption of the new Civil Procedure Code* (…)"

The vast work of ongoing reforming the procedural law can only be achieved through a correlation and legislative consistency with the reform of the substantive law, respectively by the total reform of the Civil Code. Moreover, Interim Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism from Brussels on February 12, 2009 underlines the great importance for the judiciary's adoption of the four codes, and therefore the adoption of the New Civil Code, which borrowed the regulations from the civilized nations, respectively on the defense of non patrimonial rights.

Thus, the French civil code stipulates in art. 9 (amended in 1994): the right to a private life of each person shall be respected, and in art. 9–1 (introduced in 2000), the right of presumption of innocence; also, in art.16, art. 16-1 – art. 16-9 (introduced in 1994) there are regulations on respect of person's life, health, physical and mental integrity.

The Italian civil code regulated ever since 1942 the right to one's own imagine (art. 10), the defense of the right to physical and mental integrity (art. 5) and the right to have a name (art. 7-9).

Also, the Swiss civil code has a modern regulation, from 1985, on defense of the personal rights. More concretely, it is about the possibility of the person that had suffered a prejudice of his/her personal rights to defend his/her rights against any other person. In this case, the prejudiced person can ask the judge to prohibit the illegal infringement (art.28a), and if the harm suffered was a consequence of an act of the written or audiovisual media, he/she can ask directly to the respective institution to publish his/her right to reply (art. 28g, art. 28h , art. 28i, art. 28k, art. 28l).

Besides this, should the breach into one's personal right be likely to cause to the victim a harm that is difficult to be redressed, the latter is entitled to ask for some provisional measures in order to prohibit the temporary breach. To this end, for instance, the French civil code stipulates in art. 9 paragraph 2 (amended in 1994) that the judges, without breaching into the right to redress the prejudice suffered, can order any measures, such as: seizure, freezing and any other measures meant to hamper or stop any breach into the intimate and private life; in case of emergency, these measures can be taken through a „référé" ordinance (i.e. „ordinance of the panel's president").

In the same way, the Swiss civil code stipulates that such measures can be taken, mentioning that, any breach caused by means of the media, the judge is entitled to forbid or cease it only as an exceptional circumstance, that is, only if the breach is likely to cause a serious prejudice, should the breach not be obviously justified and the measure taken by the judge does not seem out of proportion in relation with the damage caused (art. 28c); it is extremely important that there should be also a provision that entitles the judge to compel the plaintiff to deposit a security should the provisional measures ordered by the judge can damage the other party (art. 28d).

As far as the right to reply, regarding the prejudices caused to one's personal rights by the media, the former is unanimously acknowledged at European level, in the regulations on written and audiovisual media, apart from the victim being entitled to have the moral and material prejudice redressed.

For example, this is applicable in France (art. 12, art. 13 and art. 13-1 in Law on media freedom, amended in 2000 as well as art. 6 in Law from 1982 on audiovisual communication and Decree from

1987 on exercising one's right to reply within the services of audio-visual communication), in Belgium (Law from 1961 on the right to retort, reviewed in 2000) or in Spain (Law from 1984 on the right to rectification, amended in 2000).

European Civil Code[1] has not been adopted in a final form. His project was sketch through extensive studies made by the Study Group on the Civil European Code, thematic debates and conferences, taking into account the provisions of the Civil Codes of European nations that worked perfectly over time in the covered areas without any major changes. On the provisions of the Draft of the European Civil Code in relation with the non patrimonial rights defense, the Study Group addressed the subject in a manner similar to the New Romanian Civil Code. The Study Group has treated this subject about the provisions of the Draft of the European Civil Code in relation with the non patrimonial rights defense in a manner similar to the New Romanian Civil Code, that is starting with "*Non-Contractual Liability Arising out of Damage Caused to Another*" (November 2006)

In drafting the texts of the New Civil Code, it was taken into account the necessity for the new regulations to observe the European standards on the protection of private life and the constitutional principles on recognition and safeguard of fundamental rights for each person, especially art. 22 (the right to life and physical and mental integrity), art. 23 (individual freedom), art. 26 (intimate, family and private life), art. 27 (domicile inviolability) art. 30 (freedom of expression and its limits).

Thus, were taken into account the CEDO jurisprudence on freedom of expression[2], as well as the most updated legal regulations in the field in Europe, especially the provisions of the above mentioned Swiss civil code.

At the same time, national regulations had been taken into account in the field of defending non patrimonial rights. Thus, besides art. 54-56 in Decree no. 31/1954, we refer to the principles of Ethical code of Romanian journalists and art. 48-65 of Regulation code of the audio video content (adopted by Decision of the National Audiovisual Council no. 187 from the 3rd of April 2006[3]) on exercising one's right to reply and rectification.

We would like to mention that Title V of Book I is not a singular regulation within the civil code but it expresses the general regulation conception in a unitary and complete way of any private legal institution included in the New Civil Code, so that, alongside other substantive issues, specific legal protection means for civil, patrimonial and non patrimonial rights, shall also be determined as the case may be. See the following as *exempli gratia*:

- regulation on concluding the marriage , as well as on the legal claim to find it null and void and on the claim to declare it voidable (art. 288-321 in the New Civil Code);
- regulation on divorce, but also on the right to damages or to return compensation of one of the spouses (art. 388 and the following from the New Civil Code);
- filiation and its legal claims (art. 423 and follow. from the New Civil Code);

[1] Juridica International, Study Group on European Civil Code, http://www.juridicainternational.eu/.

[2] The Court said that sanctioning the journalists for committing some media crime offences it is compatible with the provisions of art. 10 in ECHR, should they be provided by law, aim at a legitimate objective, the authorities provide for serious sufficient grounds that should requires the sanction, and the sanction should be proportional by its nature and seriousness, taking into account the objective aimed. We may cite to this end: ECHR Decision from 31st of January 2006, case Stângu and Scutelnicu vs Romania; ECHR Decision from 17th of December 2004, case Cumpănă and Mazăre vs Romania; ECHR Decision from 28th of September 2004, case Sabou and Pîrcălab vs Romania; ECHR Decision from 28th of September 1999, case Dalban vs Romania.

[3] Published in the Romanian Official Journal, Part I, no. 338 from 14th of April 2006, with subsequent modifications and additions.

- right of private property and the legal means to defend it, first of all the legal claim for recovery of property (art. 572-583 from the New Civil Code);
- rights of recording the property title in the land-book and its legal claims of (art. 900-929 from the New Civil Code);
- possession and the possessory claims (art. 963-966 from the New Civil Code);
- right of inheritance (art. 967 and follow. from the New Civil Code), but also the heredity petition (art. 1140-1141 from the New Civil Code), revocation of donations (art. 1033-1042 from the New Civil Code), returning excessive gifts (art. 1102-1110 from the New Civil Code) or statement of donations (art. 1166-1169 from the New Civil Code);
- validity conditions of the contract and its legal claims to find it null and void or to declare it voidable (art. 1187-1278 from the New Civil Code);
- civil liability and its legal claim (art. 1362 and follow. from the New Civil Code);
- the right to coercive enforcement of the obligations and its legal claims, the rescisorry and annulment claim or the claim for diminishing the obligations of one party (art. 1526 and follow. from the New Civil Code);
- the rights of unsecured creditor and its means of protection (the preservation measures, oblique (indirect) claim and actio pauliana (art. 1569-1576 from the New Civil Code);
- vendor's obligations and buyer's legal claims guaranteeing eviction and faults of the sold good sold (art. 1681-1728 from the New Civil Code);
- mortgage (art. 2352 and follow. from the New Civil Code) and the mortgage claim (art. 2438 and follow. from the New Civil Code) etc.

Regarding the defense of non patrimonial rights, the New Civil Code establishes the principle of safeguarding the values tightly related to the human being and the main means to ensure their observance:
A. The civil claim, which aims at ceasing the deed that hinds one or several protected values.

I. The object of the judicial claim available to the person alleged to have been prejudiced in his or her personal non patrimonial right is hereby mentioned (enumerative presentation: prohibition of the breach, cease of the infringement and its prohibition for the future; determining the illicit nature of the infringement).

II. It is also stipulated the possibility to initiate this judicial claim if the infringement of the non patrimonial rights is imminent;

III. Restrictive measures are provided against the author of the breach in order to lead to restoring the prejudiced right, such as:

a) seizure, destroying, confiscation or retrieving of the goods that are within circuit or of the means that had been used or meant to be used for committing the infringement;
b) obligation of the author to publish the conviction decision or to pay an amount of money to a non patrimonial legal person that carries out charity activities;
c) any other measures required to recover the damage caused and to cease the illicit prejudice to one's personal rights.

B. Another specific defense means set up in the New Civil Code is the right to reply and the right to rectify the wrong information shown in the audio and video media, which can prejudice the personal non patrimonial rights. We would like to emphasize that the right to reply and the right to rectification are already stipulated in the Regulation code of the audio video content (Decision of the National Audiovisual Council no. 187 from the 3rd of April 2006); it has been frequently used, both in the

audiovisual and written media, and the text from the New Civil Code took into account this decision, codifying some of its provisions. The following had been taken into account: the general provisions, likely to be applicable irrespective of the nature of the media that had been used to communicate the challenged information and bearing in mind the fact that, as a general rule, the Code stipulates general provisions and not detailed ones. The detailed provisions are stipulated, as a general rule, in secondary legislation (regulations, rules etc.). In concreto, we talk about the following:

- art. 48 - Any natural or legal person, irrespective of his/her nationality whose rights or legitimate interests have been prejudiced by showing within an audiovisual program of some false deeds is entitled to the right to reply;
- art. 50 para. (1) - Any natural or legal person, irrespective of his/her nationality whose rights or legitimate interests have been prejudiced by showing within an audiovisual program of some inaccurate information is entitled to the right to rectification;
- art. 53 - The text of the replies shall refer only to the challenged untrue deeds shall be expressed within the limits of decency and shall not embody any threats or marginal comments;
- art. 55 - The deadline for sending the request is at most 20 days from the date of broadcasting the program in which the prejudice had been committed;
- art. 57 – (1) the institution broadcasting the radio program shall decide, within two days from the date of receiving the request of the right to reply on allowing it or not.

(2) Should the institution broadcasting the radio program decide on giving the person the right to reply, the people in charge shall notify the prejudiced person, within two days from the date of receiving the request, the day and the hour when his/her right to reply will be broadcasted.

(3) Should the institution broadcasting the radio program deny the right to reply, they shall notify in writing the decision taken to the applicant as well as its justification, within two days from the moment the request had been received;

- art. 58 - (1) The right to reply shall be broadcast free of charge, within 3 days since the approval of the request, under the same conditions in which one's rights or legitimate interests have been prejudiced: within the same time slot, of the same program, with the same duration and with mentioning the program where the prejudiced had been caused.

(2) Should the program where the prejudice had been caused is scheduled in more than 7 days, the right to reply shall be broadcasted within 3 days, within the same time slot also mentioning the program where the prejudiced had been caused;

- art. 59 - The right to reply shall be exercised by broadcasting the live intervention of the prejudiced person, either by broadcasting a recording made either by the institution broadcasting radio the program or by the requesting person; the recording made by the requesting person shall comply with the technical standards used by the institution broadcasting the radio program;
- art. 62 - The deadline to communicate the request is at most 20 days since the date of broadcasting the program where the prejudice had been caused;
- art. 63 - (1) The institution broadcasting the radio program shall decide, within two days since the date of receiving the rectification request, on allowing it or not.

(2) Should the institution broadcasting the radio program decide on rectification, it shall communicate it within at most two days since the date of receiving the request to the prejudiced person alongside the date and the hour for broadcasting it.

(3) Should the institution broadcasting the radio program deny the right to rectification, it shall notify in writing to the applicant, within two days since the date of receiving the request, the decision taken, its justification and the information stipulated at art. 57 paragraph (4);

- art. 64 - (1) The right to rectification shall be exercised by broadcasting free of charge on the radio, within 3 days since the date of receiving the request, within the same time slot, of a material made by the institution broadcasting the radio program, through which the inaccurate information that had caused a prejudice are corrected, in the spirit of truth.

(2) The institution broadcasting the radio program shall mention the program where the inaccurate information had been presented and also the date of its broadcasting.

(3) The institution broadcasting the radio program shall not broadcast the rectification without prior consent of the prejudiced person.

C. The New Civil Code also stipulates the regulation of the provisional measures, until the litigation is solved, which can be ordered by the judge, at the request of the prejudiced person, using the ordinance of the panel's president. These measures can be: prohibition of the action that constitutes the breach into non patrimonial right or its provisional cease, taking the measures of preserving the evidence etc.

D. There are also provided some safeguards for the author of the deed allegedly assumed to cause a prejudice:

1) It is foreseen that the panel of judges should not be able to order provisional cease of the prejudice by means of the written or audio and video mass media unless this prejudice causes serious damage, it is not obviously justified and the measure taken by the judge does not seem out of proportion in relation with the damage caused.
2) Also, should the provisional measures ordered by the judge can damage the other party, the judge can compel the plaintiff to deposit a security, under the sanction of annulment of the ordered measure;
3) The plaintiff has to repair, should the interested party ask it, the damage caused by the provisional measures, should the merits of the case be dismissed as not-grounded.

Conclusions

When regulating the exercise of the right to information and free expression, the authorities shall guarantee the observance of the right to dignity and private life by suitable means of protection, bringing to life the principle in the Romanian Constitution in art. 30 para. (6), republished: „Freedom of expression shall not cause any prejudice to one's dignity, honor, private life or to the right to one's own image."

In this context, the Draft of the New Civil Code aims to set a balance between two rights equally guaranteed in the Constitution and in the Convention on the protection of rights and fundamental freedoms: the right to free expression and the right to private life. Moreover, the freedom of expression of the press will be given more protection in the New Civil Code; the foreseen provisional measures will not operate against the journalists except in exceptional circumstances (serious damage, obviously unjustified prejudices to private life). The proposed texts are to be read in conjunction

provisions of art. 10[1] of the Convention and the case law of the European Court on Human Rights in Strasbourg, which clearly state judge's assessment limits in the cases of the freedom of the press.

On the grounds of the above mentioned, we consider that the fear of possible restrictions that the new civil code could bring to the exercise of the journalist profession is not justified. On the contrary, we talk about European updated regulations, which do not aim at possible excess of the expression of the media, but at general protection of all personal non patrimonial rights, against any prejudice, no matter who the author is.

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Romanian Official Journal, Part I, no. 338 from 14th of April 2006.

[1] According to article 10 (Freedom of expression) from the Convention on human rights and fundamental freedoms:
"1. Everyone has the right of freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without inference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."