DANUBIUS UNIVERSITY OF GALATI, ROMANIA
UNIVERSITY OF CAMERINO, ITALY

8th Edition of International Conference

The European Integration – Realities and Perspectives

P R O C E E D I N G S

2 0 1 3

Danubius University Press
Galati

ISSN 2067-9211
8th Edition of International Conference
The European Integration – Realities and Perspectives.
Proceedings 2013

The quality of the articles is ensured by a blind review process with minimum four (4) national and international reviewers.

Publication frequency: 1 issue per year

Contact data
Address: 3 Galati Boulevard, 800654
Galati, Romania
E-mail: conferences@univ-danubius.ro
Website: www.proceedings.univ-danubius.ro
Telephone: +4 0372 361 140

Information about the Publishing House
Danubius University Press
3 Galati Boulevard, 800654
Galati, Romania
Telephone: + 4 0372 361 140
Fax: + 4 0372 361 294
Website: www.editura.univ-danubius.ro
Email: editura@univ-danubius.ro
danarobu@univ-danubius.ro

The journal is financed by Danubius University of Galati, Romania
Website: www.univ-danubius.ro

Cover: Doru Trandafir
Printed at **Zigotto** Printing House, Galati, Romania
Gestrom, Galati, Romania

Price per volume: 60 Euro

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REALITIES AND PERSPECTIVES

Legal Sciences in the New Millennium

Harmonization of Legislation of a Candidate Country with EU Legislation: Insights from the Prism of the Citizens of Macedonia

Abdula Azizi[1]

Abstract: Since the majority of the Western Balkan countries remain outside the European Union (EU), although they have expressed a willingness to join the EU, it is considered necessary to examine the topic of harmonization of national legislation of these countries with the EU legislation. So while until now, to this problem is not devoted adequate attention in scientific circles, it is considered necessary to explain and analyze the theoretical aspect of the harmonization of the legislation of the candidate countries with EU legislation, while they also learned things from practice the current member states of the EU. In particular, a survey was conducted with the citizens of Macedonia where they express their opinions on the harmonization of Macedonian legislation and government policies related to Euro-integration processes in their country. I hope that in the future this work will encourage research and other activities related to government policy on the harmonization of national legislation with EU legislation.

Keywords: Euro-integration; harmonization process; European Union legislation

1. Introduction

Harmonization of legislation of a candidate country with EU legislation is one of the preconditions for EU membership. Harmonization of legislation aims to create a legal system in the country that will not conflict with EU rules.

Macedonia has before itself a long way and a lot of work to harmonize its legislation with the EU, in order to meet the political criteria for EU membership. Determination of Macedonia for harmonization of legislation with the EU, noted in Article 68 of the SAA, entitled "Harmonization of legislation and implementation of laws" which expresses the importance of the approximation of the laws now and in the future with the EU, as well as Macedonia expressed readiness to ensure that its legislation will be gradually made compatible with those of the EU.

Harmonization of legislation should not be understood as full identification laws, but may be a few differences or specifics as legal norms must fit the specific conditions in the country. However, it should be within the limits given by the EU, while differences should be reduced over time to full EU membership.

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2. Basic Features of EU Legislation: Definition, Resources and Its Relationship with National Law

Law of the European Communities (droit communautaire), namely the European Union Law, based on a set of rules contained in the treaty of Paris, Rome, Maastricht, Amsterdam, Nice and Lisbon, as international agreements which were created communities, but also in acts of the institutions created by these treaties. It is a complex set of norms which create mutual rights and obligations between the contracting states. Precisely, the legal system, takes effect in the territory of Member States for those areas of competencies recognized by the community treaties, and in this way the legal system works alongside national legal systems, namely co-exist, even though in most cases , presented a number of practical problems in the implementation of community law.

It is the specific system of international law, created by the transfer of sovereign rights of states. It is common to the Member States, which among other things regulates the common market, where all differences disappear over the nature, location or subjects of legal relations. While the law that regulates the relationship, became internal law for these relationships (Kapteyn, 1998).

This system is specific as it does not separate the internal legal order of the Member State from the EU itself, and has ambitions to constitute the internal legal order of the Member States with the help of techniques that are based on international treaties (Carton, 2002).

The legal system of the EU is complex because it is characterized by continuous expansion of legal powers and resources.

One of the main features of the EU legal order is that it is based on written legal sources. In general, there are three sources of EU law:

• The right established by Member States through the founding treaties and the rights defined by the EU institutions,

• General principles of law recognized by the European Court of Justice and

• International agreements concluded with non-member states of the EU.

The EU is based on the agreement between independent nations decided to share a common future and to carry its sovereignty to the EU (Fontaine, 2004). Unlike past attempts to unite Europe using force, the EU is based on the compliance of member states (McKay, 1999).

This means that member states will operate under the same rules, and that EU legislation should have the same significance and effect to all member states.

Relationship between EU law and national legislation is characterized by the ability of potential conflict between them. Such a situation is created whenever the provisions of EU law, create rights and set direct obligations of EU citizens, while their content is contrary to the rules of national law. It seems that behind this conflict are two main issues; direct application of EU law over national law with which is in conflict, and the supremacy of EU law.

3. Acquis Communautaire

Acquis communautaire is an expression in French that means the rights and obligations set out by the member states of the EU, and its contents include EU legislation which obliges member states (primary and secondary legislation, decisions of the European Court of Justice, general principles of

law, international treaties, other acts, activities that governments take together in the area of justice, home affairs, foreign policy and security).

Any state which tends to become a full member of the EU, after gaining candidate status for membership and negotiation starts, it usually faces the challenges of full acceptance and implementation of the acquis communautaire.

Acquis communautaire is an integral part of the negotiations for EU membership. Accession negotiations with candidate countries focus on harmonization of national legislation with the acquis, and states are required to develop the capacity of the public administration and the judicial system for effective implementation of the acquis.

Candidate countries necessarily need to implement the acquis before accession to the EU. Some exceptions are permissible only if it does not affect the functioning of the EU. These exceptions are transitory and should be limited in volume and duration. Within the negotiations, there is no real agreement on the full sense as the final result is determined in advance and implies complete acceptance of the acquis with the exception of the transitional rules (Braun, 2002).

The corpus of the legislation must first be translated into the official candidate country, then must ensure adequate administrative capacity and financial support for the harmonization of national legislation with the EU acquis (Council Conclusions, 1998); thereafter shall determine the dynamics of the operation of the institutions necessary for implementation of legislation and resources for implementation.

Any future expansion makes the acquis communautaire becoming more voluminous. Since the establishment of the EU so far, have been approved and published over 170 thousand pages acts, while if it continues the intensity of adoption of new laws, is estimated that by 2020 will reach 351 thousand pages in legal acts (Efremova, 2008). So acquis communautaire is matter which varies and usually expands over time.

The capacity to implement acquis includes four phases; transposition, implementation, adaptability and realization (Enlargement of the EU, 1999).

The importance of the acquis is that it ensures the homogeneity of the legal system of the EU, since it is based on the idea that it will not change during the process of cooperation with other subjects of international law. Acquis fully guarantees the integrity of the system through the implementation of EU legislation in the member states, while it must be accepted by candidate countries for EU membership.

4. The Approximation of Member States" Legislation with EU Legislation

The term "harmonization" means the adaptation of national law with the acquis communautaire, which include: the rights and obligations of Member States, principles and political objectives set by the founding treaties, secondary law adopted by the institutions, international agreements concluded between States member within the competence of the EU, the case law of the European Court of Justice, framework decisions and other legal acts adopted in the second and third pillar of the EU.

From the legal perspective, the term "harmonization" includes:

• adoption of EU law and mutual harmonization of legislation of Member States of the EU;
• harmonization of legislation of the candidate countries with the EU legislation.

"Harmonization" as the concept has broad sense (approval of EU law in the national legal system as a process through which it becomes part of the internal legal order) and narrow sense (legal approximation of national rules with EU law). In the narrow sense, harmonization means creating a functional entirety, from the different parts, that keep their functional characteristics, which means combination or adaptation of elements from the different legal systems with each other without losing their independence.

The term "harmonization" is often confused with the notion of "approximation", which means the method by which harmonization is realized. More specifically, this means more authentic approximation of national legislation with EU acts through freely determining of the strategy, methods and techniques and the implementation deadline. Approximation was first used in 2004 with the admission of 10 new member states from the Central and Eastern Europe.

When it comes to harmonization, we often thought of Europeanization of national legislation or its unification with the EU legislation. However, Europeanization means the impact of European integration on national policy and institutions (The domestic impact of the European Law, 2006).

Mutual approximation of laws of the states, which do not reach the level of full unification of the legislation, implies harmonization of legislation. The harmonization can be done by any norm, which should fit the national laws, and if such harmonization achieved full equality, then it comes to unification. Thus, harmonization is the first step towards unification. Unification involves special powers of the EU in many areas, common market, monetary and customs union, four economic freedoms and removing all legal constraints to the Member States, as well as many branches of law (labour, intellectual property, environmental, public procurement, financial, customs, banking, contracting (Falson, 1996).

The harmonization of legislation of the member states serves as an efficient implementation of the Euro-integration processes, as well as the implementation of common principles and standards. Therefore, the EU institutions have the power to adopt directives and other acts to harmonize their legislation.

Usually, in the member states, harmonization means, approximation of legal systems in the areas which are not under the exclusive competence of the EU and where there is a priority and direct enforcement of EU law. Areas where it comes to unification of law, enforcement of the same rules in the all Member States are founding treaties, regulations and directives in the certain cases. Other areas remain competitive competence of the Member States.

EU Treaty envisages harmonization the legal and administrative measures which have a direct impact on the functioning of the common market. In Article 3 (item h) as an instrument for achieving the objectives is "harmonization of legislation the Member States, to the extent necessary for the uninterrupted functioning of the common market". Chapter V is titled "harmonization of legal rules" sections 100-102, which defined the powers of authorities and procedures for the harmonization of legal rules. While Articles 94-97 predict that, for the harmonization of laws should be used directives of the Council, which must be implemented in national law to achieve certain results.

Approximation of legislation can be achieved by direct application of EU resources (treaties and regulations), which from the moment of their adoption are considered as part of the internal legal order and have the same action as national laws. Approximation instruments are also international conventions, to which signatory states regulate certain substances. As the most efficient instrument to harmonize Member States" legal provisions are regulations of the EU institutions, while also have

their importance institutions recommendations, conclusions of meetings of representatives of the Member States, agreements between states, protocols, memorandums etc.

With the Treaty of Maastricht, besides the first pillar, harmonization is also used in the third pillar (in Chapter VI provides an obligation for Member States to harmonize legislation in curbing terrorism, human trafficking, weapons, drugs, corruption and financial fraud, and for determination of harmonized rules for such offenses). Sensitive is the third pillar, where is used the methods of coordination that contains the definition of certain measures and activities, as well as the common assessment results made in legal systems and practices of Member States (Bodewing, 2003).

5. Understanding the "Harmonization of Legislation" for Candidate Countries

In terms of candidate countries for EU membership, harmonization involves the establishment of rules of EU law in national law, in specific procedure and the methods of harmonization. Approximation of national legislation with EU law in the process of European integration is a essential step for any country that wants full membership. One of the Copenhagen criteria is the harmonization of national legislation with the EU law.

For candidate countries, harmonization is a process that aims to reform legal systems and to harmonize them with the right of the EU. With the signing of the Stabilization and Association Agreement (SAA) candidate countries are obliged to harmonize their legislation with EU legislation, particularly to meet the Copenhagen criteria and prepare for the next phase of the start of negotiations for EU membership. Candidate country, behaves toward EU legislation as toward international rules, which must be implemented in national legislation, based on the SAA (Stabilization and Association Agreement). Such coordination does not require direct application of EU laws, even if they have such action, but must incorporate them into national legislation, usually those concerning the four freedoms of the internal market, the establishment of a proper legal framework for economic integration and the rule of law.

Harmonization would have its effect, if achieved formal approximation of national legislation, but also effective implementation of adapted legislation, but it will depends heavily on the use of appropriate institutional mechanisms.

Harmonization as a process involves the following phases: identification of acts which should be harmonized with the EU acts, determining the level of harmonization, determining the competent bodies for the adoption of new laws or amending existing ones, determining priorities, dynamics...

Once the candidate state gets full membership in the EU (which just has harmonized its legislation with the EU law), this does not mean that he has performed all obligations, since the legal order at all levels is "under construction", to adapt and respond to current needs in certain areas. This is justified by the fact that the EU institutions, adopt each year more than ten thousand legal acts, in order to harmonize the legislation of the Member States.

6. The Macedonian Citizens" Opinion on the Harmonization of National Legislation with EU Legislation

Table 1. Political Impact on New Employments in PA

Questions made to the surveyed	Answer		
	Yes	**No**	**I don"t know**
1. Do you think that Macedonia has harmonized its legislation with that of the EU?	*29%*	*22%*	*49%*
2. Do you think that is enough the harmonization of legjisalcionit to join the EU, without applying it in practice?	*84%*	*3%*	*13%*
3. Do you think that Macedonia should withdraw the part of its legal sovereignty to be an EU member?	*35%*	*41%*	*24%*
4. Are competent institutions seriously committed to the process of harmonization with EU legislation?	*48%*	*39%*	*13%*
5. Is there adequate support from political actors, the process of harmonization with EU legislation?	*62%*	*31%*	*7%*

7. Resume

Although Macedonia is working towards the harmonization of its legislation with the EU legislation, it is clear that this process goes very slowly, sometimes accompanied with political obstacles and disagreements between the government and opposition.

In fact, all those wishing to join the EU, definitely have to understand that constantly changes should be made in the legislation of the country, but also in the main legal act - the constitution, ranging from constitutional amendments related to EU membership.

Macedonia should foresee Constitutional amendments, which would allow the transfer of some sovereign rights to international organizations, should therefore waives some of its sovereignty by setting a "European section" in the Constitution of Macedonia. Besides this, with the Constitutional provision should be given priority to the implementation of the legal acts of the EU.

There is convincing to politicians, but also the part of citizens that state should made concessions and should be adapted to the requirements of the EU, where they initially see only obligations. All this process should be seen as something normal, as part of Euro-integration process, from which we will all have benefits, which will be able to enjoy them as we have completed the tasks.

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THE 8TH EDITION OF THE INTERNATIONAL CONFERENCE
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Particularities of the Public Procurement Contentious

Vasilica Negruţ[1]

Abstract: The paper with the above mentioned title approaches an issue current not only for juridical research, but also for practical activities. This study resumes an issue approached by other authors as well, but highlighting some particulars of the contentious business of public acquisitions using analysis, observation and case study. Thus, based on the regulations prior to coming into force of the Emergency Ordinance no. 34/2006, I have performed a brief analysis of the means available to the individuals who wish to challenge the legality of a procedure of awarding the public procurement contract. At the same time, in this study we aim at clarifying the aspects related to the legal nature of the documents prior to concluding the public procurement contracts used by the contracting authority and also the legal conditions applicable to public procurement contracts concluded following the awarding procedure.

Keywords: contract; public procurement; jurisdictional - administrative procedure; judicial procedure

1. General Aspects

As mentioned in the literature (Sararu, 2009, p. 31), the term "*contract is, according to the perspective in which it is examined, the object of two definitions: from a formal point of view it is a consensual agreement; from a material point of view, it is an act creating individual judicial statute and, as such, it is characterized by its remarkable stability*".

The administrative contract, subject of actuality, with implications in the sectors of interest in economy, has known different regulations in time, which led to the necessity for the adoption, after 1990, of some administrative acts which would make the difference between the administrative contract and the administrative act, as well as between the different types of administrative contract (contract of concession, public procurement contract, goods lease, service provision etc.). More than that, although in practice the administrative contract is present, the current legislation as well as the doctrine, especially the Romanian one is not unitary. Therefore, if in the occidental legislation the collocation "administrative contract" is frequently encountered and the regulations of the European Union use the term "public contract", in our country the administrative contract is defined only the Law of administrative contentious no. 554/2004 (Sararu, 2009, p. 2). The specific contracts, namely the contract of public procurement and contract of concession do not fall under the special regulations in this category. The framing of the latter as administrative contracts is made by the doctrine[2], which has a special role not only from this point of view but also for the clarification of aspects emerging as a consequence of the breach of provisions in the specific legislation, which entails the intervention of competent institutions for the restoration of legality.

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[2] In an opinion, the public procurement contract is comprised in the category of the administrative contracts from the following considerations; is a willingly agreement between a public authority and a subject of private or public law; has an onerous character; some of the clauses of the contract have exorbitant character and are established by a normative act and cannot be negotiated; the contract is concluded following the application of a special procedure; the competence to rule on litigations deriving from it is held by the administrative contentious instances (Dacian, 2002, pp. 37-38).

2. Principles on Which the Contract of Public Procurement Is Founded

In doctrine, public procurement is seen as "*the object of a contract concluded between a contracting authority according to the law, which consists in the delivery of a product, service or execution of works*" (Serban, 2012, p. 2) or "*the procedure of obtainment, by a contracting authority, of goods, services or works, according to the legislation in force*" (Georgescu & Vrabie, 2006, p. 3).

The public procurement contract is defined in the current legislation[1] as being "*the contract, assimilated according to the law, to the administrative act, which contains also the category of sector contract, as defined in article 229, paragraph (2), with onerous title, concluded in writing between one or more contracting authorities on one side and one or more economic operators on the other side, with the object of execution of works, delivery of goods or services*" (paragraph 3, f).

It is well known that the law cannot cover all the aspects in the public procurement activity. In situations as such, the legal frame of public procurement is related to the principles generally accepted in the European space in this sector (Serban, 2012, p. 70). Thus, the principle of free competition signifies the assurance of conditions for the suppliers of goods, executants of works or service providers to have the right to become contractors, irrespective of nationality, according to the law (Carstea & Nedelcu, 2002, p. 20). Although it is not specifically in the ordinance, the principle of free competition derives from its content, given one of the purposes of the Emergency Ordinance no. 34/2006, namely the promotion of the competition between the economic operators.

The other principles on which the attribution of the public procurement contract is founded are: non discrimination, equal treatment, mutual recognition, transparency, proportionality, efficiency in using the funds, assuming responsibility.

The principles of equal treatment and non discrimination take into consideration the fact that all the operators enlisted in the competition, irrespective of the citizenship or nationality would have equal chances to accede to the contract but also the obligation of the public authority to take the necessary measures to exert that economic activity, as reiterated numerous times by the Court of Justice of the European Union. The respect of the two principles involves, necessarily, the application of the principle of transparency, obligation of the contracting authority and which entails the guarantee, in the favor of every potential tenderer, of an adequate level of publicity, namely a prior publicity but also the publication of the result of the assignment (Serban, 2012, p. 77).

Assumed from the European legislation, the principle of proportionality implies, according to article 179 in Emergency Ordinance no. 34/2006 the application acceptable criteria of qualification and selection of the winner of a public procurement contract, in reasonable limits.[2]

The principle of efficiency of using the funds is mentioned even in the Strategy Europe 2020[3], where it is underlined that the policy in public procurement contracts has to ensure the use of public funds in the most effective way possible and maintain open the market of procurement in the Union. The policy in public procurement has to contribute as well at the attainment of the common social objectives, among which is the fight against climate change and promotion of innovation, challenge Europe is confronting.

The principle of mutual recognition establishes the obligation to accept the documents equivalent to those in Romania but issued by organs established in other states member of the European Union and not only. Also, the authority has the obligation to accept the products, services and works offered legally on the market of the European Union, as well as the technical specifications equivalent to those requested at national level.

[1] Government Emergency Ordinance no. 34/2006, amended and completed by Emergency Ordinance no. 77/2012.
[2] See the Decision of the National Council of Appeal Settlement no. 354 din 16.03.2003, in which it is indicated that the measure for disqualification in relation to the deficiency of presentation of the offer, breaching the principle of proportionality. Specifically, in a procedure of awarding, at the opening of the offers, the offer submitted by the litigant company was disqualified because two of the qualification documents were submitted in the envelope with the technical offer of the company, instead of the eligibility envelope. (Şerban, 2012, p. 93).
[3] http://ec.europa.eu/europe2020/index_ro.htm.

The last principle provisioned by the emergency Ordinance no. 34/2006 – assuming responsibility- aims at the clear determination of the tasks and responsibilities of the people involved in the process of public procurement. Article 6 expressly establishes too the responsibility of the contracting authority regarding the decisions adopted during the process of awarding contracts falling under the law of public procurement.

3. Particularities of the Public Procurement Contentious

The public procurement contentious expresses, as mentioned in the literature, a procedure for solving the conflicts between two subject of law, respectively an economic operator, contester on one side and a contracting authority, on the other side, in relation to the awarding, by the latter, of a contract of public procurement. The contentious involves litigation, a conflict, a contentious procedure, discrepancy, parts with divergent interests (Tigareu, 1994, p. 6).

The contentious of public procurement is different from the administrative contentious regulated by Law no. 554/2004 by the fact that the former is a specialised one and has a wider scope because the solution of the conflicts can be referred to an extra judicial structure, namely the National Council for Appeal Settlement (Serban, 2012, p. 128).

Sometimes, the administration can damage the rights and legitimate interests of those administered, by acts and administrative facts.

According to the provisions of article 255, paragraph 1 in the Emergency Ordinance no. 34/2006 "*any person who considers that his right or legitimate interest has been damaged by an act of the contracting authority, by the breach of the legal dispositions in public procurement can request, by administrative- jurisdictional appeal, the annulment of the act, obligation of the contracting authority to issue and act, recognition of the claimed right of legitimate interest*".

As observed, the administrative way of attack of the illegal acts and decisions in public procurement is the appeal. Through the abovementioned normative act, the National Council for Appeal Settlement was 'endowed" with a limited material competence namely that it can only solve the litigations related to the damaging acts adopted before the moment of the conclusion of contracts, the other litigations being referred to the competent judicial courts.

The administrative jurisdiction instituted by the Emergency Ordinance no. 34/2006 is considered by some authors (Bojinca & Cilibiu, 2011, p. 156) as being "*the most developed administrative jurisdiction in our country*". What must be added is that according to the provisions of article 21, paragraph (4) in the Constitution, the administrative- jurisdictional way of appeal is optional and free of charge. Consequently, those appealing on the legality of a procedure of awarding a public procurement contract have two options: the administrative – jurisdictional way and the judicial one. Although it might be asserted that the object of the two actions is identical[1], the procedure is different.

Through the administrative-jurisdictional procedure the correction or the annulment of the illegal acts adopted by the contracting authority is targeted, before the conclusion of the public procurement contract.

In the meaning of the provisions of the ordinance, the damaged represents any economic operator which: has or had a legitimate interest related to the awarding procedure; has suffered, suffers or is likely to suffer from a prejudice as a consequence of an act of the contracting authority, likely to have judicial effects or as a consequence of not solving in due legal time a request regarding the awarding procedure. At the same time, an act of the contracting authority represents any administrative act, any other administrative operation that has or can have judicial effects, the non fulfillment in the legal due time of an obligation provisioned in the Emergency Ordinance no. 34/2006, omission or refuse to issue an act or perform a certain operation, related to or within the awarding procedure.

[1] Annulment of the damaging act, obligation of the contracting authority to issue and act, recognition of the claimed right or legitimate interest.

The litigations that can occur related to the awarding of the public procurement contracts, the concession of public works and concession of services can have as object: the awarding procedure, before the conclusion of the contract; the granting of compensations for the repair of the prejudice caused within the awarding procedure; execution, annulment, resolution, termination or unilateral denunciation of the public procurement contracts (Serban, 2012, p. 162).

The National Council for Appeal Settlement is competent to solve the appeals formulated within the awarding procedure, before the conclusion of the contract (article 266, paragraph 1). The lawsuits and request regarding the compensations for the repair of the prejudice caused within the awarding procedure, as well as those related to the execution, nullity, annulment, resolution, termination or unilateral denunciation of the public procurement contracts are solved in first instance by the department of administrative and fiscal contentious of the tribunal in whose jurisdiction the headquarter of the contracting authority is located (Article 286, paragraph 1).[1]

For the solving of the appeals on administrative-jurisdictional way, the damaged part has the right to refer to the National Council for Appeal Settlement within the terms provisioned by article 256 in the Emergency Ordinance no. 34/2006, for the annulment of the act and/or recognition of the claimed right or legitimate interest.

The appeal has to contain certain specific elements expressly listed in article 270-271.

The appeals are solved in respect of the principle of legality, celerity, contradictory and right to defense, by specialized structures, constituted according to the Regulation of organization and functioning of the Council. The procedure for the Council is written and, if necessary, the parts will be interviewed by the solution structure.

The appeal is solved within 20 days from the receipt of the file of the procurement from the contracting authority, respectively in 10 days in case of an exception preventing the analysis of the contestation according to article 278, paragraph 1. At the same time, the term for the solving of the appeal can be extended one time with 10 days, in justified cases.

The Council, after the examination of the legality and grounds of the can issue a decision of annulment, completely or partly, obliges the contracting authority to issue an act or disposes other measures necessary for the remediation of the acts affecting the awarding procedure. Depending on the solution given, the Council will decide upon the continuation or annulment of the awarding procedure of the public procurement contract.

After the solving, the motivated decision is published within 5 days from the ruling on the internet page of the Council, in the official bulletin, without reference to the identification information of the decision and parts, personal information, as well as that information the economic operator mentions in its offer as being confidential, classified or protected by a right of intellectual property. Also, the motivated decision will be communicated in writing to the parts, within 3 days from ruling.

According to the provisions of article 281, paragraph 1, the decisions of the Council regarding the solving of the appeal can be litigated by the contracting authority and/or any person damaged, with complaint at the judicial instance specified in article 283, paragraph 1, respectively the court of appeal, department of administrative and fiscal contentious in the jurisdiction of the contracting authority, within 10 days from the communication of the decision. The complaints against the decision ruled by the Council on the procedures of awarding services and/or works related to the transportation infrastructure of national interest are the competence of the Court of Appeal Bucharest, department of administrative and fiscal contentious.

[1] Paragraph (1) was amended by paragraph 68 of the Emergency Ordinance no. 77/2012 beginning with 01.01.2013. Prior to this amendment, the litigation regarding the award of compensations caused in the awarding procedure, as well as those regarding the execution, nullity, annulment, resolution, termination or unilateral denunciation of the public procurement contracts were solved in the courts of first instance by the commercial department in the jurisdiction of the contracting authority.

In case the complaint is admitted, the instance modifies the decision of the Council, disposing, where necessary: the annulment, totally or partly, of the act of the contracting authority; obligation of the contracting authority to issue the act; fulfillment of an obligation by the contracting authority, including the elimination of any technical, economic or financial specification that proves to be discriminatory from the announcement/ invitation for participation, documentation or other documents issued related to the awarding procedure; any other measures necessary for the remedy of the breaches of the legal dispositions in the matter of public procurement.

The suits and requests regarding the damages for the repair of the prejudice caused within the procedure of procurement as well as those regarding the execution, nullity, annulment, resolution, termination or unilateral denunciation of the public procurement contracts are solved in first instance by the department of fiscal and administrative contentious of the court in the jurisdiction of which the contracting authority is located.

In conclusion, the Emergency Ordinance no. 34/2006 has represented a big step in the remediation of the judicial mechanisms in this sector, mechanisms which had the role to regulate and discipline the procedure of awarding the public procurement contracts, offering the possibility for the people whose rights or legitimate interests have been breached by an act of the contracting authority, by breach of the legal dispositions in the matter of public procurement, to request, by appeal, the annulment of the act, obligation of the contracting authority to issue an act, administratively- jurisdictional recognition of the claimed right or legitimate interest.

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THE 8TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

The Evolution of the *Nondiscrimination* Concept in the European Labor Law

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Abstract: Most states have incorporated all the grounds of discrimination included in the two Directives in their national antidiscrimination legislation. The most pressing issue is the proper application of national anti-discrimination laws and the active enforcement of rights**.** In general, protection against discrimination on any of the grounds of the Directives in the states is not conditional on nationality, citizenship or residence status. In the majority of states, both natural and legal persons are protected against discrimination. The law remains complex and remedies often inadequate. Further work is needed to ensure the credibility and admissibility of methods of proof such as statistical evidence. When a decision is rendered by courts or equality bodies, sanctions are not always observed by respondents, and recommendations are not always followed by public authorities. We think this article is a small step in the disclosure of the problem erased by the nondiscrimination concept.

Keywords: objectives; general duties; positive action; policy measures; national provisions

1. General Aspects

At the international level, the problematic of nondiscrimination was, in time, the object of several regulations which took into account the evolution of this concept.

Thus, according to art. 2 point 1 of the ***Universal Declaration of Human Rights***, reference is made to the right of the person to equality before the law and to protection against any discrimination; and art. 23 para. (2) establishes that *everyone, without any discrimination, has the right to equal pay for equal work*.

The *International Labor Organization* always intended the combating of discrimination and the assurance of the respect of the equality of chances and treatment for all employees. In this sense, *Convention no. 100 (1951)* was elaborated, *regarding remuneration*, which established "equal remuneration for men and women workers" for work of equal value.

According to art. 2 of the same convention, the member states must ensure the application for all

Subsequently was adopted *Convention no. 111 (1958) on discrimination,* which constituted the general framework for combating this phenomenon. Art. 1 of the Convention defines *discrimination* as being:

- on the one hand, *any distinction, exclusion or preference made on the basis of race, color, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;*

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- on the other hand, *such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate b*odies.

At the same time, according to art. 1 point 2 of the Convention, it is stated that cannot be considered discriminatory acts, those distinctions, exclusions or preferences in respect of a particular job based on the inherent requirements thereof.

According to art. 2 of the Convention it is instituted the obligation for the states ratifying the Convention to initiate and apply a national policy regarding the implementation of the equality of chances and treatment in matters of professional training and employment which to target the following objectives:

- co-operation of employers' and workers' organizations and other appropriate bodies in applying the measures for combating discrimination;
- elaboration of regulations that create a favorable framework for the application of the principle of equality of chances and treatment;
- abrogation of the dispositions in the regulations, which are incompatible with the nondiscrimination principle in the matter of work relations.

Another regulation incident in the field is *Convention no. 117 (1962) regarding the objectives and basic norms of the social policy*, which approaches in a distinct title nondiscrimination in the matter of race, color, sex, belief, tribal association or trade union affiliation.

According to art. 14 of this Convention, *it shall be an aim of policy to abolish all discrimination among workers on grounds of race, color, sex, belief, tribal association or trade union affiliation in respect of:*

a) labor legislation and agreements which shall afford equitable economic treatment to all those lawfully resident or working in the country;
b) admission to public or private employment;
c) conditions of engagement and promotion;
d) opportunities for vocational training;
e) conditions of work;
f) health, safety and welfare measures;
g) discipline;
h) participation in the negotiation of collective agreements;
i) wage rates, which shall be fixed according to the principle of equal pay for work of equal value in the same operation and undertaking.

Although it is not an international source of labor law, but of social security law, we mention *Convention no. 118 (1962) regarding equality of treatment in the field of social security,* which regulates the fact that all employees, without any discrimination, must benefit of medical care, benefit for temporary work incapacity or invalidity, maternity benefits, pensions, benefits for work accidents or professional illnesses and unemployment aids.

At the level of the ***Council of Europe,*** the fundamental document elaborated in social matters, the *European Social Charter, revised*[1] establishes in Part I point 20 that *all workers have the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex.* In Part II, art. 20 establishes the fact that the assurance of this principle is achieved through the adoption of measures targeting: *access to employment, protection against dismissal and occupational reintegration; vocational guidance, training, retraining and rehabilitation; terms of employment and working conditions, including remuneration; career development, including promotion*.

This article of the Social Charter is in close correlation with other articles, respectively art. 1 regarding the right to work, art. 9 regarding vocational guidance and art. 10 regarding vocational training.

Also according to the European Social Charter, revised *there may be excluded from the scope of this article the* o*ccupational activities which, by reason of their nature or the context in which they are carried out, can be entrusted only to persons of a particular sex. This provision is not to be interpreted as requiring the Parties to embody in laws or regulations a list of occupations which, by reason of their nature or the context in which they are carried out, may be reserved to persons of a particular sex*.

Also, *a differentiation of treatment grounded on an objective and reasonable reason is not considered discrimination*. (Dima, 2012)

At the level of the ***European Union***, art. 16 of the *Community Charter of the Fundamental Social Rights of Workers* establishes that equality of treatment must be ensured between women and men. Also, art. 141 of the Treaty for the establishment of the European Community instituted the principle of equality of treatment.

In view of applying the dispositions with general character comprised in the EEC Treaty (art. 117-128), in time, were elaborated a series of directives aiming at the equality of treatment between men and women in the work field, respectively:

- Directive no. 75/117/EEC which establishes equal pay for equal value work;
- Directive no. 76/207/EEC regarding the equal treatment for men and women during the hiring process;
- Directive no. 79/7/EEC regarding equal treatment in the matter of social security;
- Directive no. 86/378/EEC regarding equal treatment in the system of professional pensions;
- Directive no. 86/613/EEC regarding equal treatment with respect to free-lancers;
- Directive no. 92/85/EEC regarding the need to introduce measures for the encouragement of work health and security for pregnant women and for workers who had recently given birth or who are breastfeeding;
- Commission Decision no. 95/420/EC which amends Commission Decision no. 82/43/EEC with respect to the establishment of a consultative Committee regarding the equal chances between women and men;
- Directive no. 96/34/EC which transposes into practice the Framework-Agreement regarding paternal leave;
- Directive no. 97/80/EC regarding the bringing of proof in cases of discrimination on the basis of sex;
- Directive no. 2000/43/EC for the application of the principle of equal treatment of persons, without distinction on the basis of racial or ethnic origin;

[1] Partially ratified by Romania (17 articles, respectively 65 numbered paragraphs were ratified, among which the one regarding the equality of chances and treatment) through Law no. 74/1999 (published in the Official Gazette no. 193 of May 4th, 1999).

- Directive no. 2000/78/EC regarding the creation of a general framework in favour of equality of treatment in the field of hiring, employment and work;
- Directive no. 2002/73/EC regarding the enforcement of the principle of equality of treatment between men and women in what concerns access to employment, to professional training and promotion, as well as to work conditions;
- *Directive no. 2006/54/CE regarding the enforcement of the principle of equality of chances between men and women in the matter of employment and work conditions*. (Popescu, 2008)

2. European Regulations Concerning Discrimination

This Directive preserves the definitions from Directive no. 2002/73/EC regarding direct, indirect discrimination, harassment and sexual harassment, forbidding, at the same time, any direct or indirect discrimination with respect to all types of guidance, training, professional training, as well as in what concerns remuneration. Thus:

- by *direct discrimination* is understood the situation in which one person is treated less favorably on grounds of sex than another is, has been or would be treated in a comparable situation;
- by *indirect discrimination* is targeted the situation in which an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim;
- by *harassment* is understood that unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment;
- by *sexual harassment* is understood that situation in which any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.

Also, the Directive establishes the fact that it is considered discrimination, on the one hand, instruction to discriminate against persons on grounds of sex, and on the other hand, any less favorable treatment of a woman related to pregnancy or maternity leave. (Dima, 2012)

Given the high number of regulations (directives) in the matter of nondiscrimination, existent at the EU level, as well as the provisions of the Court of Justice of the European Union, through the adoption of Directive no. 2006/54/EC the main previous regulations were unified, both in the matter of labor law, and those regarding social security and, not lastly, were established distinct norms regarding: the equality of remuneration; equality of treatment upon employment, professional training, with respect to the work conditions; the challenge means and the burden of proof; the promotion of the equality of treatment in the matter of social dialogue[1].

Also, according to the same directive, a worker in maternity leave is entitled, upon return from her leave, to hold the same job previously held or an equivalent job and to benefit of any improvement of the work conditions that she would have been entitled to during her absence. (Voiculescu, 2008)

[1] Also, the directive creates the possibility for the member states to adopt or maintain more favorable dispositions, in the sense of the protection of the principle of the equality of treatment, than the ones established in its text.

3. Concept and Terms

In year 2007 was adopted the **Framework agreement regarding the combating of harassment and violence at work**, by means of which it was intended to offer employers, workers and their representatives a general, action guiding framework in order to identify, prevent and combat the problems related to harassment and violence at work.

According to the Agreement, different forms of harassment and violence at work may:

- be of a physical, psychological and/or sexual nature;
- constitute one-off incidents or more systematic patterns of behavior;
- manifest among colleagues, between superiors and subordinates or even by third parties;
- vary from minor cases of disrespect to more serious acts of harassment or violence, including criminal offences which require the intervention of public authorities.

The agreement objective is:

- to increase the awareness and understanding of employers, workers and their representatives regarding harassment and violence at work;
- to provide an action-oriented framework to identify, prevent and manage problems of harassment and violence at work.

It is considered that harassment occurs when one or more workers or managers are repeatedly and intentionally abused, threatened and/or humiliated in situations related to work, and violence occurs when the same persons are aggressed in the mentioned situations.

In case such acts of harassment or violence at work are noticed, a certain procedure must be followed, thus:

- act with discretion, in order to protect the dignity and private life of all involved;
- no information can be made public to those not involved in the respective case;
- complaints will be analyzed swiftly;
- the parties are entitled to an objective hearing and to equitable treatment; moreover, there is the possibility that the parties have legal assistance during the hearing.

The measures that can be taken in such cases are either of disciplinary nature or of support and adequate assistance for the victims of acts of harassment/violence at work.

4. Internal Regulations Concerning Discrimination

In the legislation in Romania, the Romanian Constitution, in art. 41 establishes that *for equal work, women have a salary equal to men,* disposition in compliance with the international provisions in the matter. (Țiclea, 2012)

Law no. 53/2003, the Labor Code, introduced in art. 5, at the rank of specific principle, the **equality of treatment with respect to all employees and employers within the work relations**. Moreover, dispositions regarding the equality of chances and treatment of employees are found in the entire content of the Labor Code, as follows:

- any employee providing work benefits of work conditions adequate to the activity performed, of social protection, of work security and health, as well as of the observance of his dignity and conscience, without any discrimination [art. 6 para. (1)];
- for equal work or work of equal value it is forbidden any discrimination based on the criterion of sex, with respect to all elements and remuneration conditions [art. 6 para. (3)];

- the request, before employment, of pregnancy tests, shall be prohibited [art. 27 para. (5)];
- An employee shall have the right to hold multiple jobs, on the basis of individual employment contracts, and receive the corresponding wage for each of them [art. 35 para. (1)];
- right to equal opportunities and treatment [art. 39 para. (1) letter d)];
- The dismissal of the employees shall be prohibited based on sex, sexual orientation, genetic characteristics, age, national affiliation, race, color, ethnicity, religion, political option, social origin, disability, family situation or responsibility, trade union affiliation or activity [art. 59 letter a)];
- The dismissal of the employees may not be decided during the maternity leave, during the parental leave for children under 2 years of age or, in the case of a disabled child, up to the age of 3 years, during the pregnancy of the employee, during the parental leave for children under 7 years of age or in the case of a disabled child, for inter-current diseases, up to the age of 18 years [art. 60 letters c)-f)];
- the employees with an individual employment contract of limited duration shall not be treated less favorably than the similar permanent employees, just based on the duration of the individual employment contract [art. 87 para (1)];
- an employee hired under a part-time employment contract shall enjoy the rights of the full-time employees, under the terms of the law [art. 106 para. (1)];
- a home worker shall enjoy all rights recognized by law and collective labor agreements applicable to the employees whose workplace is at employer's headquarters [art. 110 para. (1)];
- the work quotas shall apply to all categories of employees (art. 131);
- the right to paid annual leave shall be guaranteed to every employee [art. 144 para. (1)];
- when setting and providing the wage, any discrimination based on sex, sexual orientation, genetic characteristics, age, national affiliation, race, color, ethnicity, religion, political option, social origin, disability, family situation or responsibility, trade union affiliation or activity shall be prohibited [art. 159 para. (3)];
- an employer shall insure all employees against occupational accident and disease risks (art. 179);
- the access of the employees to the occupational medicine department (art. 186);
- the participation of every employee to vocational training [art. 194 para. (1)];
- the employee participation to the strike shall be free; no employee may be forced to participate or not to a strike [art. 234 alin. (2)];
- the internal regulation comprises at least the following categories of dispositions: the rules regarding the observance of the non-discrimination principle and the elimination of any breach of dignity [art. 242 lit. b)].

In reality, even within legal regulations, no distinction is clearly made between *equality of chances/opportunities* and *equality of treatment*. Thus, the first notion represents, in fact, a desiderate (an ideal) which cannot be reached, practically, through any measures, while the second notion (equality of treatment), through the measures adopted by the lawmaker, can be transposed into practice. (Popescu, 2012)

In fact, the problematic of the equality of chances and treatment in the work relations made the object of special regulations, respectively:

- *Government Ordinance no. 137/2000 regarding the prevention and sanctioning of all forms of discrimination;*
- *Law no. 202/2002 regarding the equality of opportunities between women and men.*

Also, norms regarding the matter of nondiscrimination are found in other regulations, respectively:

- *Art. 4 of Law no. 76/2002* regarding the system of unemployment insurance and the stimulation of the work force establishes: *(1) in the application of the provisions of this law are excluded any kind of discrimination on criteria of politics, race, nationality, ethnic origin, language, religion, social category, beliefs, sex and age. (2) The measures and special rights granted through this law to categories of persons in difficulty do not constitute discrimination in the sense of the provisions of para. (1)*;
- *Art. 27 of Law no. 188/1999* regarding the Civil Service Statute, which regulates the fact that *any discrimination among civil servants for political, union, religion, nationality, sex, wealth, social origin, or any other such reasons is forbidden*;
- in the internal regulations;
- in the collective employment contracts.

The sphere of protection through domestic law normative acts, in the sense of removing privileges and discriminations, is extremely vast, comprising, mainly:

- the right to equal treatment before the courts of law;
- the right to personal security;
- political, respectively, electoral rights, the right to participate to public life;
- civil rights;
- economic, social, cultural and sportive rights;
- the right to access all places and services destined for public use.

Although the nondiscrimination principle is transposed in the domestic legislation, it must be noticed the fact that there are a series of gaps, as follows:

- the conditioning of the dismissal interdiction, for causes of gravidity, on the employer's informing prior to the issuance of the dismissal decision [as indicated in art. 60 para. (1) letter c) Labor Code]; according to JCEU, the dismissal of a female worker for causes of gravidity is forbidden even if the respective worker failed to inform the employer;
- active procedural quality in the matter of discrimination should have, in its own name, any non-governmental organization and not only "in case discrimination manifests in their field of activity and is detrimental to a community or groups of persons" as states art. 28 para. (1) of Government Ordinance no. 137/2000, with limitations;
- although, art. 5 para. (1) Labor Code states the fact that the work relations function on the principle of equality of treatment, in the domestic regulations there is no disposition regarding the protection of the legal entity, should discrimination occur against it; still, Directive no. 2000/43/EEC establishes, *where appropriate and in accordance with their national traditions and practice, protection for legal persons where they suffer discrimination;*
- not lastly, although formally are sanctioned all forms of discrimination (including those based on sex), there are not always the instruments necessary for enforcing the legal dispositions (chapter at which the Romanian state is deficient). (Ştefănescu, 2012)

The notion of discrimination and the criteria considered were introduced, for the first time, in the Romanian legislation, through Government Ordinance no. 137/2000 regarding the prevention and sanctioning of all forms of discrimination, which establishes in art. 2 para. (1): *by discrimination is understood any difference, exclusion, restriction or preference, on the basis of race, nationality, ethnicity, language, religion, social category, beliefs, sex, sexual orientation, age, handicap, non-contagious chronic disease, HIV infection, belonging to a category in difficulty, as well as any other criterion which has as purpose or effect the restriction, removal of recognition or exercise, in*

conditions of equality, of human rights and fundamental liberties or of the rights recognized by the law, in the political, economic, social and cultural field or in any field of public life.

Art. 2 para. (3) of the same regulation states that are discriminatory the *apparently neutral provisions, criteria or practices which disadvantage certain persons, on the basis of the criteria established in para. (1), towards other persons, except for the case when these provisions, criteria or practices are objectively* j*ustifies by a legitimate purpose, and the methods for reaching this purpose are adequate and necessary.* This text was declared unconstitutional through a series of Decisions of the Constitutional Court (no. 818/2008, no. 820/2008, no. 821/2008, no. 1012/2008, no. 1075/2008 and no. 1325/2008).

Subsequently, the Labor Code stipulated – in art. 5 para. (2) – that *any direct or indirect discrimination against an employee based on sex, sexual orientation, genetic characteristics, age, national affiliation, race, color, ethnicity, religion, political option, social origin, disability, family situation or responsibility, trade union affiliation or activity shall be prohibited.*

Both the Labor Code and Law no. 202/2002 established and defined the three existing possible forms of discrimination, as follows:

- *The acts and deeds of exclusion, distinction, restriction or preference, based on one or several of the criteria referred to in paragraph (2), which have the purpose or effect of denying, restraining or removing the recognition, enjoyment or exercise of the rights provided for in the labor legislation shall constitute direct discrimination* [art. 5 para. (3) Labor Code]; at the same time, by *direct discrimination* is understood the *situation in which a person is treated less favorably on grounds of sex than was or would have been treated another person in a comparable situation* [art. 4 letter a) of Law no. 202/2002];
- *The acts and deeds apparently based on other criteria than those referred to in paragraph (2), but which effect to a direct discrimination, shall constitute indirect discrimination* [art. 5 para. (4) Labor Code]; also, by *indirect discrimination* is understood the *situation where a provision, criterion or practice, apparently neutral, would particularly disadvantage people of one sex compared with those of the other sex, unless that provision, criterion or this practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary* [art. 4 letter b) of Law no. 202/2002];
- *constitute* positive actions (positive discrimination) *those special actions temporarily taken in order to accelerate the achievement in fact of the equality of chances between women and men and which are not considered discrimination actions* [art. 4 lit. e) of Law no. 202/2002].

It is noticed the fact that, in reality, only two of the three forms of discrimination regulated are forbidden by law, the third representing a manner of materializing the principle of equality of treatment.

Law no. 202/2002 introduces and defines two new notions in the social legislation, respectively:

- *harassment* – situation in which is manifested an unwanted behavior, related to the person's sex, having as object of effect the violation of the dignity of the person in question and the creation of an intimidation, hostile, degrading, humiliating or offensive environment; (art. 4 letter c);
- *sexual harassment* – situation in which is manifested an unwanted behavior with a sexual nature, expressed physically, verbally or nonverbally, having as object of effect the violation of the dignity of a person and, especially, the creation of an intimidation, hostile, degrading, humiliating or offensive environment (art. 4 letter d).

In what concerns the act of sexual harassment, one form, executed within the work (or employment) relations, is regulated in the Criminal Code, as follows: *the act of harassing a person by threat or coercion in order to obtain sexual satisfaction, committed by a person abusing his/her quality or the influence provided by the office held at the workplace, shall be punished by imprisonment from 3 months to 2 years or by fine* (art. 203^1 Criminal Code). It can be noticed that the criminal law sanctions only the act of a person with a superior position than the employee, by means of the position held at the workplace. Although, in practice, it is possible that an employee (clerk) sexually harasses its employer or the hierarchically superior body, in this situation, one cannot speak of the crime of sexual harassment regulated in the Criminal Code, because the employee cannot use the authority or influence conferred by the position held at the workplace, on a person with a higher position. Also, we consider it is not a crime of sexual harassment either when the two persons, the harasser and his/her victim, are employed on similar positions, or, even if not on similar positions, there is no authority or influence conferred by the position held, on the other person.

Another new concept, under terminology aspect, is that of *victimization,* which is defined by art. 2 para. (7) of G.O. no. 137/2000, as follows: *any adverse treatment, coming as a reaction to a complaint or action in justice with respect to the breach of the principle of equal treatment and nondiscrimination.*

The two normative acts that regulate, on the base matter, the institution of nondiscrimination also establish the situations that *do not constitute discrimination*:

- the measures taken by the authorities public or by the legal private law entities in favor of a person, a group of persons or a community, aiming to ensure their natural development and the actual achievement of their equality of opportunities in relation to the other persons or communities;
- the positive measures targeting the protection of groups in difficulty [art. 2 para. (9) of G.O. no. 137/2000];
- the special measures established by law for the protection of maternity, birth and breastfeeding [art. 6 para. (5) letter a) of Law no. 202/2002];
- the positive actions for the protection of certain categories of women or men [art. 6 para. (5) letter b) of Law no. 202/2002];
- a difference of treatment based on a characteristic of sex when, due to the nature of the specific professional activities envisaged or to the framework in which they are performed, constitute an authentic and determining professional requirement, as long as the objective is legitimate and the requirement proportional [art. 6 para. (5) letter c) of Law no. 202/2002].

A single case of domestic regulation is constituted by art. 14 of G.O. no. 21/2007 regarding the institutions and companies of shows or concerts, as well as the performing of the artistic management activity, which establishes that by derogation from the provisions of art. 7 para. (2) of G.O. no. 137/2000, the *conditioning of occupying an artistic specialty position in criteria of age, sex or physical qualities in the institutions of shows or concerts is done according to the specific and interests of the institution and does not constitute contravention*, respectively is not a discriminatory act.

In practice, it is noticed that it is very difficult to establish (and, at the same time, to prove) the discriminatory behavior of an employer, respectively which are the limits of the measures he can establish without breaching the legal provisions. (Popescu, 2008)

Thus, by G. O. no. 137/2000, in art. 9, was stipulated the fact that: *the provisions regarding the interdiction of discrimination cannot be interpreted in the sense of restraining the employer's right to refuse employment to a person who does not correspond to the occupational requirements in the field, as long as the refusal does not constitute an act of discrimination, and these measures are justified by a legitimate purpose and the methods for reaching this purpose are adequate and necessary.*

In addition, Law no. 202/2002 also states the fact that the selection of candidates for employment cannot be considered discrimination when:

- due to the particular conditions of performing the work, the sex particularities are authentic and determining [art. 9 para. (2)];
- due to the particular nature or conditions of performing the work, the employment of pregnant women, of women who have recently given birth or who are breastfeeding is forbidden.

In what concerns nondiscrimination, at the moment of employment, between women and men, art. 10 para. (3) of Law no. 202/2002, indicates that it is forbidden to ask a candidate:

- to present a pregnancy test;
- to sign a commitment that she will not get pregnant or that she will not give birth during the individual employment contract term.

Also, according to art. 9 of Law no. 202/2002, is forbidden the discrimination by the use by the employer of practices that disadvantage persons of a certain sex, in relation to the working conditions, referring to:

- *the announcement, organization of the competition or exams and the selection of candidates for the occupying of the vacant jobs in the public or private sector;*
- *the conclusion, suspension, modification and/or termination of the work or labour legal relation;*
- *the establishment or modification of duties in the job description;*
- *the establishment of remuneration;*
- *benefits, other than those of a salary nature, as well as social security;*
- *information and professional counseling, initiation, qualification, training, specialization and professional reconversion programs;*
- *the assessment of individual professional performances;*
- *professional promotion;*
- *application of disciplinary measures;*
- *the right to join a trade union and access to the facilities granted by it;*
- *any other conditions for performing the work, according to the legislation in effect.*

5. Solution Approach

In order to prevent any discriminatory behavior grounded on the criterion of sex, the employer has the following obligations:

- to establish disciplinary sanctions in the internal regulations of the units, in the conditions established by law, for the employees that violate the personal dignity of other employees by means of creating degrading, intimidation, hostile, humiliating or offensive environments, by discrimination actions;
- to ensure the informing of all employees with respect to the forbidding of harassment and sexual harassment at work, by displaying in visible locations the provisions of the internal regulations of the units, in order to prevent any discrimination act grounded on the criterion of sex;
- to inform, immediately after being notified, the public authorities entrusted with the application and control of the application of the legislation regarding the equality of opportunities and treatment between men and women.

Still, in case the committing of a discriminatory act is established, Law no. 202/2002 institutes *a special procedure,* which presupposes the going through the following stages:

First of all, the employees are entitled, in case they consider themselves discriminated on grounds of sex, to formulate notifications/complaints towards the employer or against it, if it is directly involved, and to request the support of the trade union organizations or of the employees' representatives in the unit, in order to solve the situation at the workplace.

In case this notification/complaint was not settled at the employer's level, by mediation, the employed person who presents factual elements that lead to the presumption of the existence of a direct or indirect discrimination based on sex, in the field of work, on the grounds of the provisions of this law, is entitled to notify the competent institution, respectively the Ministry of Labor, Family and Social Protection, as well as to introduce a petition to the competent court of law in whose territorial circumscription he/she has his/her domicile or residence or workplace, respectively with the labor conflicts and social security rights section/panel within the Tribunal or, as the case may be, the administrative contentious court, but not later than one year after the committing of the act[1].

The court of law competent according to the law will order that the guilty person pays damages to the person discriminated on the grounds of sex, in an amount that correspondently reflects the damage suffered [art. 42 para. (1)]; in addition, the exact value of the compensations is established by the court.

Not lastly, the employer who reintegrates a person in the unit or workplace, on the grounds of a court order remained final, on the basis of this law, must pay the remuneration lost due to the unilateral modification of the work relations or conditions, as well as all payment burdens to the state budget and the state social security budget, due both to the employer and the employee; in case the reintegration in the unit or workplace of the person for whom the court of law decided the employer had, unilaterally and without justification, modified the work relations or conditions is not possible, the employer will pay the employee a compensation equal to the real damage suffered by the employee. (Popescu, 2012)

[1] These petitions addressed to the courts of law with the object of discrimination on the grounds of sex are exempted from the stamp fee.

6. Conclusion

In my opinion, the insertion of instruction in the definition of discrimination does add significantly to the existing body of rights, and for that reason has not to be interpreted not only as confirming the rule that the employer is responsible for discriminatory labor condition. The extension of the definition with an instruction to discriminate forbids the instruction, even if it has not been followed. The rules of proof, specific to discrimination law, are also applicable in the case where the instruction is not followed.

Also, in Romania, liability is individual. According to the case law of the national equality body, employers can be held liable for actions of their employees if there is joint responsibility, but not for actions of third parties. Trade unions and other trade or professional organizations are usually not liable for the discriminatory actions of their members.

Awareness is low not only among the public but among the members of the legal professions, although for the latter change has slowly started due to training organized on national level. Our country have made some slight progress regarding positive action and dissemination o f information on anti-discrimination laws, but much more remains to be done to increase dialogue among the government, civil society and the social partners across all grounds.

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Human Rights in the Context of Cultural Diversity

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Abstract: The human rights understood in the sense of fundamental inalienable rights are therefore considered as universal – they apply to everything and egalitarian – they are the same for all and they may exist in two ways: as natural or legal rights, both in the national and international legislation. The human rights doctrine in the international practice within the international law, the global and regional institutions, in the state policies and the activities of non-governmental organizations was a corner stone of public policies from all over the world regardless of peoples' cultures. At world level, cultural diversity which should manage the ethnic-cultural communities living on the territory of a state often contributes, in fact, to the separation and not to the reunion of peoples, the ideological and political factors acting rather as division factors whereas the affective spiritual connection exists only between the states having deep similarities. For this purpose, serving justice having as a goal the preservation of human rights is also affected since it relies on the social feelings of humanity.

Keywords: cultural diversity; human rights; serving justice; national authorities; fundamental liberties

In reality, human rights have been noted in declarations[2] that were and are officially accepted and acknowledged not only by the national or international authorities (Andreescu & Puran, 2012) effectively engaged in their observance, but also by allegedly democratic authorities which, in fact, conduct an internal and international policy for the permanent violation of some fundamental human rights and liberties.

Despite all these, the concept of *human rights* apparently creates the impression that it is an issue specific to the 20th century, but it is not absolutely new in the history of mankind.

These rights are inspired from a planetary conception taking into account the world interdependence and the need to establish a new international political and economic order based on justice aimed at the guarantee by the state of the social-economic and cultural conditions that allow everybody to fully enjoy their rights. Without them, the implementation of civil and political rights is not possible.

The idea of *human rights* goes down to ancient times such as 300 B. C. when in the Greek-Roman historical philosophy founded by Zeno the idea that each individual is entitled to ask for the recognition of their own dignity and their respect as a person took shape. In antiquity, the concept of universal human rights (Malcom, 2008, pp. 45-51) did not exist, however the antique societies had a

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[2] The *Universal Declaration of Human Rights (UDHR)* is a declaration adopted by the United Nations General Assembly on 10 December 1948 at Palais de Chaillot, Paris. The Declaration arose directly from the experience of the Second World War and represents the first global expression of rights to which all human beings are inherently entitled.
The *European Convention on Human Rights (ECHR)* (formally the Convention for the Protection of Human Rights and Fundamental Freedoms) is an international treaty to protect human rights and fundamental freedoms in Europe. Drafted in 1950 by the then newly formed Council of Europe, the convention entered into force on 3 September 1953. All Council of Europe member states are party to the Convention and new members are expected to ratify the convention at the earliest opportunity.

series of taxes, justice conceptions, flourishing political and human legitimacy that tried to achieve the human dignity, thriving or welfare completely independent of the human rights (Donnelly, 2003, p. 49). As for the expression of guarantee of liberties, the first relevant document is Magna Charta Libertatum of 1215 by which the English nobility managed to impose the observance of their privileges by the king.

The concept of *human rights* was first formulated in the 18th century but it got objectified during two great events, namely the bourgeois revolution of France (1789) and the rebellion of the English colonies from North America against the Great Britain (1776), thus belonging to the philosophy of *the natural and race law* and lying at the bottom of Jean-Jacques Rousseau's *social contract* theory (Rousseau, 2008, pp. 20-25).

On 4th July 1776 they adopted the *Declaration of independence* of the English colonies from America by which they proclaimed the principle of equality between individuals, the right to life and freedom as inalienable rights and the setting up of governments with the agreement of the governed ones. In 1789, on August 26th, they adopted the *Declaration of the French revolution on human and civil rights*, a document expressing the philosophy of the natural law and consecrated the principle of *equality of all individuals before the law* as a principle on which all the other rights and liberties such as the right to property, security, the resistance against oppression, the freedom of thinking, expression and manifestation are based. The enforcement of rights proclaimed this way both in the USA and in France was made by written constitutions.

We must say that the idea of a "declaration of rights" signifies the fact that the document synthesizes preexisting rights, rights considered as inherent to human nature – transposed afterwards in the constitutions of modern states and international treaties. We may draw the conclusion that the "*concept of human rights was born during the period of preparation of the bourgeois revolutions from Europe; it took shape from ideas that already existed in antiquity or in the political thinking of the Middle Ages*" (…) and during the bourgeois revolutions it was affirmed in the social practice" (Birsan, 2005, p. 20).

The protection of human rights by legal instruments for the transposition of these rights into legal provisions has become an imperative issue of the international community after World War II following the disclosure of atrocities committed by the Nazis and later on following the perpetuation of the practice to violate the human rights in the state with totalitarian regimes. This need materialized into regulations having a universal or regional character that followed after the signing of the Charter of the United Nations (June 26th 1945).

Thus, the Universal Declaration of Human Rights proclaimed and adopted by the UN General Assembly on December 10th1948 is the first document having a universal vocation in this domain and establishing a unitary conception of the international community on the human rights and liberties opening the way towards a system of international protection of the human rights. After 1948, the UN General Assembly adopted more than 60 conventions and declarations in this domain by which they also tried to institute certain specific mechanisms for the protection of such rights.

In the preamble of this document we enumerate the reasons based on which it was adopted, namely:

- "*Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world;
- *Whereas* disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall

enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people;

- *Whereas* it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law;
- *Whereas* it is essential to promote the development of friendly relations between nations;
- *Whereas* the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom;
- *Whereas* Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms;
- *Whereas* a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge."

In the course of history, the phenomenon of globalization (Jones, 2011, pp. 5-22) of all kinds of problems has become more obvious and dynamic, including the issues related to the moral nature such as the ones referring to the individuals' rights to sincerity and generosity, the respect of other's property and life, compassion and the manifestations against barbarism, vandalism and gratuitous violence and generalized stealing have increased as well; in these conditions the considerations about deontology as well as its relations with morals and morality are much more promising and wider spread. For this purpose, more consistent implications in the problems of politology and legal philosophy are necessary because this way the three concepts mentioned above would be relevant.

Taking into account the new rights so as to express the idea that all individuals should belong to the field of application of morality and justice, it is necessary to make sure that individuals receive a certain level of a decent treatment in order to protect the human rights. To violate the fundamental human rights, on the other hand, it means to deny the fundamental and moral rights (Alexy, 2008, pp. 11-13) of the individuals. It means treating them as if they are less than a human being deserving respect and dignity.

Examples are acts usually considered as *crimes against humanity*, including genocide, torture, slavery, rape, forced sterilization or medical experiments and deliberate starvation. Since these policies are often conducted by governments that limit the unlimited power of the state, which is an important part of the international law lying at the bottom of the laws that forbid diverse "crimes against humanity" is the non-discrimination principle and the idea that certain basic rights universally apply.

The abuses of the human rights often lead to conflicts resulted from violations of these rights. Then, it is not surprising that human rights are often abuses in the war centers and the protection of human rights is a central element for the settlement of conflicts. The violation of economic and political rights is the main causes of many crises. When rights to adequate food, dwelling places, the occupation of manpower and cultural life are denied and large group of people are excluded from the decision-making processes of the society, it is likely to have some social unrest. Such conditions often give birth to legal conflicts where parties ask that their basic needs be fulfilled. In fact, many conflicts are triggered or spread by violations of the human rights. For example, a massacre or torture may inflame hatred and consolidate an opponent in the decision to continue the fight. Violation may also result in violence exerted by the other party and it may contribute to an uncontrollable spiral conflict.

By examining these situations, we may affirm that the proclamation and acknowledgement of the human rights must refer to all inhabitants of this planet (Branzan, 2001, p. 17). Current or at least apparent acknowledgment of the human rights applies at a global level – but the unanimous consensus of states hides a series of divergences in understanding this notion.

Considering the criterion of geographical application field, we must distinguish between the documents having a universal vocation – which address to all states – and the ones having a regional vocation which express both solidarity and the ideological, political, economic, cultural and even religious particularities of some states or groups of states.

For this purpose, we may speak of a multicultural and intercultural education which might present a special interest that may exceed the difficulties of social policies in diverse systems if social realities are known and accepted.

A first stage in this cognitive approach should be the defining and operationalization of the concepts of cultural diversity through multiculturalism and interculturalism. Through they interweave, they are used in different situations to express specific modes of manifestation of the social education.

Intercultural education focuses on the manner in which we interact with other cultures, societies or social groups. All today's societies are characterized by a higher and higher level of multiculturalism and cultural diversity. This makes the recognition and respect towards minorities is more and more important. The old conceptions about the national societies as homogenous entities must be eliminated. The European integration and the higher and higher social and economic interdependence among different regions make these conceptions look obsolete.

The existence of ethnic, religious and linguistic communities, constitutes an undeniable reality, which justifies and preoccupation increasingly greater for legal protection of human rights generally and therefore, as part of their for legal protection of minorities. Faced with these realities, international law has developed and promoted over time a constructive policy towards minorities, which contributes to maintaining of internal and international stability. (Duminica &Tabacu, 2010)

Even in those areas of the globe where there is no migration, conflicts may be noticed as starting from a lack of understanding between different peoples or from a certain way of life of a society. The conflicts from Northern Ireland, former Yugoslavia or certain regions from Caucasus Mountains are sad examples of such issues that may appear from the incapacity to observe and live with other cultures.

Intercultural education is also a very good way to address current problems such as racism or racial discrimination and intolerance. They often make mistakes by confounding the notions of *race* and *nation* or *ethnic group*. These words may be defined by *population* whose members share the same culture, language, practices and rituals and institutions. In numerous cases, the members of such community may exhibit common psychic characteristics. Peoples have mingled over the centuries and it is an illusion to pretend today that you belong by *blood* to a certain nation in particular. In fact, scientific tests show that genetic differences between two individuals are as strong within the same nation as between two different nations.

In the course of history of mankind, each time neighboring dominating peoples wished to extend their territories, they occupied by force these surfaces by jeopardizing the autochthonous peoples. Their efforts to keep their identity and way of life were successful, but in other cases there were no legal forms which might protect this identity. Despite the ethnic and cultural diversity of these nations, we may often notice similar issues, the requests and interests of autochthonous peoples are often exposed

before international courts. The participation of representatives of autochthonous populations to the reunions of the United Nations Organization has contributed to the highlighting of these similarities.

Cultural diversity is a precious asset for the evolution and welfare of mankind in general and it should be really valued, accepted and considered as a permanent feature that enriches our societies.

There is undoubtedly historical evidence (Dragusin, 2009, p. 77) of the fact that a continuously developing trend requires the reconsideration of the human rights on the principle of the duty we have towards the other citizens and our communities. They underlie these requests on the rights that future generations may have.

At the same time a special attention must be paid to the values of solidarity, respect, tolerance and cultural diversity and multiculturalism which are the moral and inspirational ground for the world fight against racism, racial discrimination, xenophobia and intolerance associated to them, and the human tragedies that affected people from the entire world for a much too long period of time.

All nations and individuals of the world constitute a single human family rich in diversity which contributed to the progress of civilizations and cultures and represents the common heritage of mankind. Keeping and promoting tolerance, pluralism and respect for diversity may generate more inclusive societies.

The benefits of globalization must be increased to a maximum inter alia by the consolidation and increase of international cooperation meant to led to higher equality of chances for trade, economic growth and sustainable development, global communications via the use of the new technologies and a larger intercultural exchange by keeping and promoting cultural diversity which may contribute to the eradication of racism, racial discrimination, xenophobia and intolerance associated to them. Only by extended and sustained efforts for the creation of a common future based on common humanity, and everything in diversity, may globalization become fully inclusive and equitable.

The representatives of international organizations discuss more and more often about cultural diversity referring to the diverse origin and cultural heritage specific to each nation whose members carry out their activity within them and which must integrate into a heterogeneous and high dynamic world unity.

Cultural diversity refers of course to different antidiscrimination policies as well meant to ensure an equal social statute to the embers of diverse cultures, identity policies meant to favor diverse cultures, community policies for the creation and promotion of the legal status specific to the members of a certain cultural community (administrative, legal policies, etc.). A democratic society must treat, in principle, all its members based on these non-discriminating policies thus offering equal chances for the manifestation of cultural and religious identity.

Cultural diversity or *multiculturalism* is a reality of the existence of some groups of individuals within the same spatial-temporal horizon, groups that come from or relate with many cultures affirming their specific notes in an isolated manner and avoiding contaminations, as a rule. Multiculturalism and pluriculturality have a predominating static dimension; in an approach of cultural diversity interactions are not excluded, but they are both implicit to the concept (Dasen, Perregaux & Rey, 1999, pp. 129-203). This is the explanation why cultural diversity and multiculturalism which consider the juxtaposition of cultures as sufficient leave room for certain racial practices such as apartheid.

Interculturalism appears as a concept having a wider content than the ones presented above due to the prefix *inter* sending to "interaction, exchange, opening, reciprocity, solidarity" (Dasen, Perregaux & Rey, 1999, pp. 129-203). The same author defines culture as the "*recognition of values, ways of life,*

symbolic representations to which human beings, individuals and societies relate to in their interaction with another and in understanding the world, the recognition of their importance, the recognition of interactions that intervene simultaneously between multiple registers of the same culture and between different cultures in time and space".

Mutual knowledge of nations' culture in the process of interaction favors communication. In the process of knowledge between countries, cultural paradigms, the system of values, the specific languages, the experiences and practices of each country taken as an ethnic group are involved.

Each country usually has its own culture which is then transmitted from generation to generation and then defended whenever necessary. It is true that there are often many conflicts produced by the cultural differences and the lack of knowledge of the other without even existing the intention to understand otherness. In front of such a reality, we must not stick only to the multicultural perspective or, even worse, adopt the point of view of assimilation, according to which the minority culture should be absorbed by the majority culture. The most adequate perspective is the intercultural one starting from the premise that all cultures are equal among them, with a focus on the interactions between individuals, groups or subgroups. The intercultural perspective capitalizes and puts the cultural differences and social conditions to good use and facilitates mutual knowledge and exchange between different communities.

In a multicultural society, values are different and relative and they express particular viewpoints. The cultural assembly of today's society is kaleidoscopic: cultures superpose, influence and reconfigure one another and they simultaneously open and sear again. We might say there is not only one reason and form of rationality. Thus, we may not accept under any circumstances, in the name of cultural specificity, the violation of human rights, the exploitation of children or repression of any kind.

Universalist ideologies consider that cultural entities will disappear in favor of a unique, universal culture (Cucos, 2000, p. 159) focused on a certain cultural matrix. Such a thesis is wrong not only by ethnocentrism but also by simplicity setting aside cultural complexity, the impossibility to establish hierarchies and the potential contradictions accompanying the cultural evolution.

Cultural pluralism asserts that each culture develops its own vision of the world with significations of universal value starting from a particular experience. Besides defending diversity, cultural pluralism poses the problem of communication between cultures which recognize that each of them contributes to the enrichment of human experience exactly by these specific differences.

Reason, especially public reason, is the one which imposed the preservation of cultural diversity of communities, guided them towards tolerance and the defense of individual liberties and reason again is called to offer grounds and means to make possible the existence of a society where such diversity may exist without insoluble conflicts.

Therefore, the cultural and civilization differences contribute to the separation and not to the reunion of nations, the technological and political factors acting rather as division factors. Setting up a community would rely on the affective and spiritual bond and this can exist only between the states having deep similarities.

Certain political or legal structures or institutions, out of which some have been inherited and they exist even today, do not correspond to multiethnic, pluricultural and plurilingualism characteristics of the population and, in many cases, represent an important discriminating factor through the exclusion of indigenous peoples.

The means of information must show the diversity of a multicultural society and play a role in the fight against racism, racial discrimination, xenophobia and intolerance associated to them and the defense of all fundamental human rights and liberties.

The right to education a fundamental human right should be so organized as to ensure equal opportunities to people involving in the first place prohibition of discrimination or of privileges. Although international regulations establishes and guarantees both to a general level as well as in to particular level the right to education without discrimination, however, exercise of this right still remains problematic for some minorities, as is the case Romany minority. (Duminica & Tabacu, 2010)

It is imperiously necessary to ensure the quality of education, which may lead to the elimination of analphabetism, and the access to free primary education for all the factors that may have a decisive role in the creation of united societies, equality, stable and harmonious relationships and friendship between nations, peoples, groups and individuals and a peace culture that may facilitate mutual understanding, solidarity, social justice and respect of all the human rights for everybody.

Thus, the human rights offer a valuable framework adequate for the contemporary society which is multicultural and multiconfessional. Therefore, the human rights constitute an essential element of the modern civil education.

Benefic results would give the observance of the golden rule of Christianity lying at the bottom of laws (Duminica, 2011) and multiculturalism: *Do unto others what you want done unto you,* the Christian teaching which urges most Christians to respect towards the values and beliefs of the *foreigner*, be they Jews, Muslims, Hindus or atheists.

Platon wrote (Platon, 2010): "*You have again forgotten, my friend, I said, the intention of the legislator, who did not aim at making any one class in the State happy above the rest; the happiness was to be in the whole State, and he held the citizens together by persuasion and necessity, making them benefactors of the State, and therefore benefactors of one another; to this end he created them, not to please themselves, but to be his instruments in binding up the State*."

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Considerations about Cloud Services: Learning from Italian Scenario

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Abstract: Cloud services are ubiquitous: for small to large companies the phenomenon of cloud service is nowadays a standard business practice. This paper would compile an analysis over a possible implementation of a cloud system, treating especially the legal aspect of this theme. In the Italian market has a large number of issues arise form cloud computing. First of all, this paper investigates the legal issues associated to cloud computing, specific contractual scheme that is able to define rights a duties both of user (private and/or public body) and cloud provider. On one side there is all the EU legislative production related to privacy over electronic communication and, furthermore, the Privacy Directive is under a revision process to be more adaptable to new challenges of decentralized data treatment, but concretely there are no any structured and well defined legal instruments. Objectives: we present a possible solution to address the uncertainty of this area, starting from the EU legislative production with the help of the specific Italian scenario that could offer an operative solution. Indeed the Italian legal system is particularly adaptable to changing technologies and it could use as better as possible to adapt the already existing legal tools to this new technological era. Prior work: after an introduction to the state of the art, we show the main issues and their critical points that must be solved. Approach: observation of the state of the art to propose a new approach to find the suitable disciple for cloud computing contracts. Implication: main implications are about academics and researchers.

Keywords: privacy; Cloud Computing; Public Administration; provider; contract

1. Introduction: Basic concepts of Cloud Computing

We start by providing a definition of "cloud computing": this term refers to a collection of technologies that enable the delivery of a service, offered by a provider to a user, which consist of storing and/or processing data through the use of hardware/software systems distributed and virtualized on the Internet. In the rest of the paper we adopt the definition of cloud computing provided by the National Institute of Standards and Technology (NIST), of U.S. Department of Commerce, that defines cloud computing as "a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. This cloud model is composed of five essential characteristics, three/four deployment and three service models."

Essentially the key characteristics are the following:

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1. *On-demand self-service* - a consumer can access computing capabilities without requiring human resources working whit each single service provider.
2. *Broad network access* - capabilities are available over the network (usually Internet) and the consumer could reach their own data and information using any device.
3. *Resource pooling* - providers apply a multi-tenant model to serve a large number of consumers. Usually consumers don't know exactly the location of their data (e.g., country, town, or datacentre).
4. *Rapid elasticity* - capabilities could be elastically provisioned and released to scale rapidly adapting to the incoming demand of hardware/software resources.
5. *Measured service* - pay per use or pay as you go services. Resource usage can be monitored, controlled, and reported, providing transparency for both the provider and consumer of the used service.

The deployment models are, instead, three or four. It depends if we consider the Community cloud as a single type with its peculiarities. It easier to consider only the most important models and they are Private cloud (where cloud infrastructure is provided for exclusive use of enterprises, or natural persons, and it could be owned and managed by the same organization or by a third party, or by a combination of them), Public cloud (where the structure could be similar to the Private one, but it is provided for open use by the general public) and Hybrid cloud that is a mix of the other ones. For instance an organization that has its own (private) cloud could use a public cloud to deal with sudden work peak that cannot be managed from their own cloud resources[1].

The well-known service with models is SaaS (Software as a Service), PaaS (Platform as a Service) and IaaS (Infrastructure as a Service). The standard example of SaaS is using software that is not installed on a PC or in a data center, but resides "somewhere" and it can be accessed via Internet. The most widespread example of SaaS service is e-mail but a lot of more elaborate examples are possible (Mell & Grance 2009). This service is simpler and more understandable then others and because of its simplicity it has less problematic legal implications than the other two types addressing the regulation. PaaS and IaaS, however, are offering to the end-user services and infrastructures "computing power scalable" and, in this way, more complex (Corradini et al., 2008).

SaaS, PaaS and IaaS are often connected with each other, creating a chain of services interconnected with different characteristics and different regulations. Given the complexity of these created relationships, it is clear how important and useful is the contract to regulate, to define and to clarify respective duties, rights and obligations that are arising in a cloud environment (Valentino, 2004). With the "cloud" term we can also refer to outsourcing as in case a company own activities are outsourced to third parties. As a consequence the company will have different new repercussions about management and control of processes and its own information. The best way to achieve this aim is the use of contractual instruments. In particular we have to refer our attention to the "third party's" role because this is the real base about cloud phenomenon. Indeed, we cannot use the same definition (third party) when a part of a company has been transferred outside but, in fact, it remains under the direct control of this last one (Mantelero, 2010).

Obviously, the cloud provider has the duty and the obligation to ensure the integrity of the cloud environment made by both hardware/software and network. The legal framework that accompanies

[1] For a technical definition it could be consulted "The NIST definition of cloud computing" by Peter Mell and Timothy Grance. The last version of the paper is dated September 2011 and it's available at the following url http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf.

technical provisions must be able to provide rules that allow to find the "good provider of cloud services" in order to improve the consumer and user's trust and transparency (Galgano, 2000).

So it is fundamental to choose a cloud contract that provides consumers or users (that could also be public bodies) the best solutions able to protect their own information and to offer the highest level of transparency.

The actual meaning of transparency is another key aspect of this new field. The supply of computer services, regardless of the contractual type chosen by the parties, is characterized by high levels of technical skills. For this reason is difficult for end users to understand all the potential improvements of the cloud phenomenon. The widespread diffusion of cloud services has certainly improved the average technical knowledge but not enough. Contracts with cloud providers are therefore characterized by an important informational imbalance, due to a knowledge gap of technical competences, which causes a subordinate condition (or a dependent relationship) between users, both private or public, and suppliers (Valentino, 1999).

It is very unlikely that individual users can negotiate a cloud contract, because the cloud service market (especially IaaS and PaaS) is controlled by few big companies, therefore the supplies need to a "devoir de conseil" about the most useful service for final users. Essentially the "devoir de conseil" is the duty by the most technically skilled contractual part (the cloud provider) to advise the final user about his real necessity. So transparency here means that the cloud provider has a specific civil obligation to avoid the technological knowledge gap, this is important also to elude possible suing about civil damages for precontractual liability (Valentino 2005).

2. Legal Issues in Cloud Computing: the EU's Scenario

It is not easy to find the first EU's document where the term "cloud computing" was used for the first time. However Neelie Kroes (European commissioner for Digital Agenda and Vice-President of European Commission) was been talking about cloud computing since taking her position. According to Europe 2020 strategy, and in particular to its Digital Agenda, the European Commission has established to consider IT solutions that could be relevant for the development of new services, with the aim of improving the economical situation across all the European Union.

To understand the importance of ICT development this paper focuses on three recent documents (but there are others like Opinion 05/2012 on Cloud Computing by Article 29 Data Protection Working Party). They are not listed in chronologic order, but (in our opinion) they are mentioned in order of importance: 1 - proposal from the Commission for a General Data Protection Regulation; 2 - communication from the Commission about Unleashing the Potential of Cloud Computing in Europe (the so-called "cloud computing strategy") 3 - opinion of the European Economic and Social Committee on 'Cloud computing in Europe' (own-initiative opinion). All these documents have been issued during the last few years. The first one, the proposal, is the most important because it will (very likely) be the regulation that replaces the "old" data protection directive 95/46/CE. Furthermore, the regulation is a legislative act that does not need any kind of Member State's law to be applicable, so it could play its effect immediately. The others two documents are "simple" atypical acts that have the importance to disseminate the could computing culture and they are very useful to bring to all European stakeholders the raising benefits of this phenomenon (Calamia & Vigiak, 2011).

This regulation should abrogate a good number of data protection codes adopted in various Member States, including the Italian one. The main focus of the regulation, reiterated in various parts, is that

the European legislator is trying to protect the data of European citizens involved in cloud services, preventing cloud providers to move their own server abroad European Union and if they will do so this transfer must be realized in compliance with strong normative previsions for the protection of privacy. The logical and desirable consequence is that all those companies that will offer their services to European consumers should respect European laws on data protection.

The definitive release of this regulation should contain the following key legal point:

- the obligation to "privacy impact assessment";
- the obligation for companies with more than 250 employees and for public bodies to designate a "data protection officer" (responsible for the protection of personal data), whom must be competent, independent, and may be chosen outside the institution/company (for example this person could be a lawyer);
- the right to be forgotten and erased, so any interested subject can request the removal of his personal data for legitimate reasons;
- the right to data portability from a cloud provider to another one in neutral format (e.g., database file extension .csv);
- the possibility to make joint controllers "the joint controllers shall determine their respective responsibilities for compliance with the obligations under this Regulation, in particular as regards the procedures and mechanisms for exercising the rights of the data subject, by means of an arrangement between them" (Article 24). This prevision is fundamental for any kind of cloud provider especially when the company governance is hardly articulated;
- the definition of "main establishment" (the place of establishment in the European Union where the main decisions regarding the purposes, conditions and means of the processing of personal data are taken) of data controller to avoid that a company active in more than one EU State should deal with national regulation of each Member State;
- much heavier penalties, up to 2% of the total turnover of a company, to ensure that privacy must become a sensitive issue for companies' directors;
- the introduction of the accountability principle according to which each controller, in case of data breaches, must prove that has been taken the established organizational models and the logical, physical, electronic and security measures to protect data;
- the obligation to comply, when designing new product or service, the principles of privacy by design and privacy by default.

In conclusion we can affirm that the European Union is actually very focused on this new topic, even if only on the privacy side and not about contractual regulation. Cloud computing is one of the most important key actions that could help in the recovery from the current economic situation, but all future cloud services have to keep in mind that legal provisions will be in place very soon.

3. The Italian Scenario and Its Possible Evolution

To identify contract best suitable for the cloud computing phenomenon, it is important to understand what legal framework should be applied to the cloud context. In the Italian case, the typical contractual scheme that is more suitable "seems" to be the outsourcing contract (Tosi, 2001). We have to use this world "seems" because of the complexity associated to cloud computing: it may happen that the contractual scheme is flanked by other related figures and, by its side, outsourcing is a complex contract as well. In the Italian scenario, in attempt to identify the rules applicable to outsourcing contract some people has tried to assimilate it to some typical contracts already provided by law.

There are many proposals about that, contemplating, among other things, mandate, subcontracting, sale, rental and tender contracts (Pierazzi, 2009).

The outsourcing contract is essentially characterized by an agreement where a contractual party (the outsourcee) moves to another subject (called the outsourcer) some functions necessary to an enterprise goal. The outsourcing term refers to the organizational system of a company that, to define the structural characteristics of its production process, decides to outsource (in any place), in a non-episodic way an entire function or an individual phase of its activity. With the outsourcing process the company tends to concentrate its resources on its core business, in which it is able to achieve a position of leadership. In this way the company could outsource all activities for which the organization does not have specific strategies, competences, needs and special abilities. The benefits that the company aims to achieve through the outsourcing are represented by the reduction of risks for treating personal data and information, the decrease of managing direct costs, the restraint of investment costs and, last but not least, the company can easily achieve a higher managerial flexibility of its own hardware/ software information system.

In the Italian legal scenario, especially according to the most important and widespread doctrine, the theory of atypical contract has been developed in order to regulate those contractual links (outsourcing and cloud computing as well). When a contract is not regulated by law there is a duty on the interpreter (judge, lawyer, etc.) of finding the most capable regulation useful to understand what the parties would had established, because the atypical contract is determined by the practice and it does not have an explicit contractual scheme required by law (Paolini, 1983). The category of atypical contracts is the ultimate expression of contract freedom where the (Italian) legal system recognizes a sort of economical free initiative in accordance with article 1322, paragraph 2, of the Civil Code (this Article addresses the worthiness of the interest) (Pierazzi, 2009). For example the so-called fraudulent contracts (contrary to the principles or interests protected by law) and illegal (lacking a legal requirement), immoral (against morality), or, finally, irrelevant contracts are not worthy of protection and they cannot be protected by the Italian Civil Code despite the contract form liberty (Perlingieri 2006).

The outsourcing contract, and therefore the cloud computing as well, is a subcategory of atypical contract and the traditional doctrine believes that in order to establish the legal rules applicable to atypical contracts, they must refer to the so-called “theory of analogy” without prejudice to the application of general discipline of contract that is independent from any kind of usual contractual scheme.

In outsourcing and cloud contracts, however, there are (usually) many contracts linked to each other (for instance hardware sell or rental, software licences, customer support, etc.) with the result of creating a figure in some ways new and certainly different from the pre-existing others: this kind of merge could learn towards the so-called “mixed contract” (Ricciardi, 2000). In the presence of a mixed contract, the legal framework that will be applied is given by the “theory of absorption”. According to this theory the discipline is determined by the contract which is more prevalent, instead of the theory of analogy: in this way it is easier to find the correct legal instruments applicable to the cloud service contracts (Cataudella, 2009).

To establish if a cloud contract should be qualified as an atypical contract (similar to outsourcing) or not, the Italian courts seem to express some doubts because of their natural tendency to schematize, using already existing contracts provided by law, in order to obtain a practical solutions to find more quickly fair regulations applicable to each single case. However, again, to qualify the cloud contract in the most appropriate way it is necessary to apply the appropriate regulation scheme. For example, if a

hypothetically disagreement concerns non-compliance with hardware, we can apply the law concerning sale or rental contracts; however if the disagreement arises on the performance of some kind of provided services (customers care), we can apply the tender contract law (Rizzo, 1981).

In this brief analysis we have shown that, due to the complexity of the cloud computing phenomenon, it is difficult to bring a cloud service contract into one typical contractual scheme powered by law, and none of the available theories seem to provide suitable solutions. Indeed there are too many elements that each time could change the basic principles. All these considerations bring us to understand that, from time to time, we could use the discipline of rental, licence, sale or tender contracts, avoiding atomizing the entire economic operation (Perlingieri 2003). The atomization of the operation is dangerous. More precisely, only if we consider the entire economical operation, built by several linked contracts, we are able to protect the weak party (identified case by case). Regarding the banking and financing law, the Italian and the European's legal acts usually provide application thresholds established in terms of quantity (an important example is provided by Article 144, Comma 4, of Italian legislative decree No. 385/1993, the so-called "Bank Law") in order to consider the entire operation and avoiding all malicious fragmented contracts oriented to elude the proper regulation (De Nova 1995).

Assuming a terminology that is certainly neither technical nor legal, we can speak of a "multiple choice" contract with a single minimal unit (loosely defined the "cause of contract") but enriched by several developments to catch and to satisfy the necessities of contractors. This contractual dynamic is justified in the new, extremely fluid and constantly evolving ICT context.

The "multiple choice" contract of cloud computing would develop on three basic aspects:

- the first concerns the general aspects: contract language, law and jurisdiction, responsibility, consideration, possible development of sub-contracts due to the complex underlying chain, etc.;
- the second concerns more specific details, such as privacy and security of cross-border data flows. Furthermore it is very important to establish a penalty clause to invert the burden of the proof during an hypothetically sue about compensation for civil damages: in this way users will be able to avoid slowness about international (even if EU) claim of civil damages;
- the third aspect should be the development of the contractual structure, such as the prediction of so-called Terms of Service (ToS) or Service Level Agreement (SLA) (Skene et al. 2010). Related to this last aspect it becomes fundamentals to provide an escape clause just in case of missed achievement of planned SLA.

Combining the Italian approach to contract interpretation with the new instruments that the European Union is offering, could be a strong starting point to build the necessary expertise to manage carefully the cloud computing revolution.

4. Conclusion: Suggestions to Manage Cloud Computing Carefully

The European Union is trying to provide the right legal tools to be used in the new phenomenon of cloud computing. There are different areas where cloud could find application, such as Internet of things that likely to expand next years: in smart homes we will surrounded by smart and active devices. We will have not only refrigerators that are able to communicate the expiring date of our food, but we will have a global connection to our home. What can happen if the electric company knows when I'm at home? What if the telecommunication provider can understand my shopping

habits on the internet? They are only two simple examples, but in the near future we will not only be connected, but we would entrust our data, our personal information, our digital identity to a few big companies, which are now moving in the direction of a proper management of privacy in cloud computing.

The two key points that need to be addressed in the cloud computing era are:

1. privacy issues;
2. legislation about cloud contracts.

The first point is probably the thorniest but, paradoxically, it is the most addressed. In fact the European Commission is producing a new European regulation (actually a proposal, as said above) with a clear focus over cloud phenomenon. For sure it is not easy to convert theory into practice but the starting point is well defined. In order to improve the above theory we can use other precious allies like ISO/IEC FDIS 27001 (there is also a recently published ISO/IEC 27013:2012 standard that merges ISO 27001 and ISO 20000-1): it is a landmark for improving information security management system. The basic idea is to understand the real ambient where we are operating, so it is central to adopt the PDCA process model (Plan-Do-Check-Act). Of course ISO 27001 does not make data 100% secure, but it is a useful guidance to approach with common sense the entire lifecycle of our data (and information) and, as a consequence, our cloud service.

Regarding the second key point above, we have to understand that it introduces a new idea of contract as a legal instrument: it is nowadays more and more oriented to the economic operation concept (Gabrielli, 2003). It is certain that IT contracts (included the cloud service one) usually express the parties' need to negotiate contracts not provided by typical legal schemes, even if worthy of protection, because of their socially relevant interests (Perchiunno, 2005). In this way, to find the most suitable regulation for cloud contracts, a possible solution could be obtained from the Italian legal concept of "linked contracts"[1]. Each single contract, in cloud entire economical operation, is subjected to the latin brocardo "simul stabunt simul cadent" where if one of the different contract is revoked, withdrawn or terminated (for any reason) the entire economical operation will fall down. So each contract remains separated, and its proper regulation as well, if connected to the final structure, but it will lose its autonomy in entire and broader economic operation (Lener, 1999).

The last step, strictly connected, is less power contracting party covered by the transparency idea: as said above in cloud contracts it could happen that the outsourcee is the real party that has to be protected because of the "information gap" of technical aspects.

In conclusion the transparency[2] ("devoir de conseil"), the use of penalty clauses, the service level agreement (SLA) with a specific prevision of an escape clause and the above-mentioned "linked contracts" discipline are the essential legal instruments to be used in addition to the privacy legal framework that EU is about to update.

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[1] The Italian legal concept of "collegamento negoziale" is difficult to translate. Like in this case, often in IT contracs there are a lot of different types of contract mixed each other in an unique economical operation. As said there could be sale, rent, mandate and/or licence agreement (EULA for instance) regulation.

[2] Bona fide general clause provided by 1337 (in the negotiation phase), 1375 (in the execution of the contract) and 1366 (in the phase of the interpretation of the contract) of Italian Civil Code.

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THE 8TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

The Renunciation to Apply the Punishment in the New Criminal Code

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Abstract: Representing an absolute novelty in the Romanian legislation within the paper it was examined the institution of renouncing to applying the penalty in the context of the provisions of the New Criminal Code, of implementing and changing the law. We are also presenting some critical comments and suggestions of *lege ferenda*, the work can be useful both for academic theorists and practitioners and also for the legislator with the entry into force of the New Criminal Code. The innovations presented in this study regard the legal text analysis and the critical remarks.

Keywords: offenses; perpetrator; renunciation; warning

1. Introduction

In the second half of the XVIIIth century Cesare Beccaria in a reference work, criticizing the cruelty of penalties and stressing on the need for "mild punishment" claimed that "the purpose of punishment is not to torture or to hit a sensitive human being, nor to abolish a committed crime (...). The goal is none other than to prevent the offender to bring to his countrymen further infringements and to divert others from committing similar acts." (Beccaria, 1764, p. 40)

Continuing his analysis, the author quoted that "it must choose therefore those penalties and the method to be implemented, which keeping the proportion will make an impression as strong and as durable upon the souls of men and less painful on the body of the guilty one". (Beccaria, 1764, p. 40)

Being released during the development of the Italian Enlightenment, the author's main work is heavily influenced by the Enlightenment ideas of that time.

We note that the author, criticizing the punishments characterized by excessive and unnecessary cruelty insists on the adoption of new, milder sanctions, their purpose being to prevent the offender to commit further crimes and preventively for the rest of the community members.

Unlike previous historical periods, in the modern era, a synthetic definition, the punishment was defined as a legal sanction, specific to the criminal law. (Dongoroz 1939, p. 582)

With the evolution of society as a whole, the penalty has adopted modern connotations, and nowadays it is defined as "the sanction of criminal law which consists of a measure of restraint and rehabilitation provided by law for committing an offense and it is applied by court to the offender in order to prevent committing new crimes". (Bulai & Bulai, 2007, p. 291)

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The examination of the above definition, allows us to identify the essential features of the sentence, regarded as the main criminal law sanction that can be applied to a legal of physical entity, in whose account it was charged the committing of the offense, namely:

- it represents the main criminal law sanction under the Romanian law;
- it is a measure of restraint, which has as direct effect causing suffering to the offender;
- it is a means of the rehabilitation of the offender, being always provided by law;
- the penalty is applied in order to prevent the commission of new crimes, with a dual function, i.e. for the offender and thus to other community members.

Originally designed to be performed only under a closed regime, the penalty has known subsequently other ways of execution. Thus, both the Criminal Code in force and the New Criminal Code provide expressly two ways for penalty, that is in a closed regime (in penitentiary) and in a diversified, non-custodial system.

In fact, in the recent years, in Europe, there was a current with an increased influence, which insists on the execution of the majority of the non-custodial sanctions regime, the custodial regime being intended only for the offenders who have committed serious crimes.

We will not dwell on the arguments presented by many authors, retaining only that the rehabilitation of prisoners in penitentiary was often a phrase without direct consequences, in terms of rehabilitation and social reintegration of the offender.

In this context of transformation and reorientation of the sentence, as the main sanction of criminal law, the New Criminal Code proposes another institution of criminal law, the renunciation to penalty, an institution that is not found in the current Criminal Code.

Regarding minors that are criminally liable, the New Criminal Code provides a special sanction, consisting of non-custodial educational measures and educational measures involving deprivation of liberty. Thus, it brings a radical change of the optical field, giving up fully to penalties applicable to juveniles who are criminally liable in the favor of educational measures. (Buzatu, 2012, p. 228)

Under these circumstances, in the case of the juvenile offenders the renunciation institution of the penalty is unenforceable, the main reason being that the legislator has established a special punishment system for juvenile offender, a system which excludes the punishment.

2. The Content

2.1. The Legal and Juridical Nature

Renunciation to applying the penalty is set out in Chapter V (The individualization of sentences), Section 3 of Title III (Penalties), the general part of the New Criminal Code, articles 80-82.

Considering the way and the place of the rule in the structure of the New Criminal Code, the institution represents one of the measures of individualization of punishment.

Essentially the renunciation to penalty is in the right conferred by the law of the court to renounce at the establishment and enforcement of a sentence to the person guilty of a crime, in order to re-educate and re-socialize, given a number of conditions imposed by law.

Note that the conditions imposed by the law are not sufficient to renounce at the penalty, the court will appreciate the opportunity of applying this measure, namely the appliance of a sentence would be inappropriate because of the consequences that it would have on the person in question.

The texts referred to in articles 80-82 of the New Criminal Code governing the institution of renunciation to penalty represents an absolute novelty in the Romanian legislation.

We note that in order to have this measure of clemency towards a defendant, the court is required to conduct the proceedings in which it will be given all the necessary evidence, and the concerned person is found guilty of the offense or offenses for which he was sent to trial.
The institution of renunciation to penalty cannot be compared with any other institution from the current Criminal Code, as in this case, the court finds that the offense exists in its materiality and it was committed by the guilty defendant as provided by law.

Although in our doctrine there have been expressed some opinions according to which the institution itself replaces two institutions of criminal law set out in the current legislation i.e. "the act that does not present the degree of social danger of a crime" and "the criminal liability replacement," (Gheorghe, 2011, p 120) we believe however that this new institution of criminal law is fundamentally different from the two mentioned, even if it can be said that the effects of the criminal liability present some elements of similarity.

2.2. The Conditions of Renunciation to Applying the Penalty

The examination of the provisions of the text content of article 80 of the Criminal Code leads to the conclusion that the renunciation to applying the penalty is conditioned by the fulfillment of two categories of conditions that is positive conditions provided in paragraph (1) and negative conditions mentioned in paragraph (2).

The fulfillment of positive conditions under paragraph (1) letter a) and b) of the article 80 of the Criminal Code does presuppose the right of the offender to beneficiate from the renunciation of the penalty, this aspect being the only its vocation, its actual benefit being completed by the assessment of the court on whether the measure can be applied or not.

We realize therefore that there may be the case where although there are fulfilled the positive conditions required by law, the offender will not benefit from this feature, because the court did not consider it appropriate to take such a decision. In fact, the text itself is quite clear, in that the legislator used the phrase "the court may order", which confers a right of disposal according to their own beliefs and not an obligation. Regarding negative conditions, we mention that in the case of finding a sole such condition [of the four listed in the text of paragraph (2)], the court is obliged to not decide on the renunciation of the penalty.

The examination of the conditions provided in the text of article 80 paragraph (1) of the New Criminal Code also supports another classification, namely:

- conditions relating to the committed offense;
- conditions on the person of the offender, and
- conviction of the court that the offender may rehabilitate without imposing a sentence, and therefore it is appropriate to renounce at the penalty.

a) *Conditions relating to the committed offense*. A first positive condition regarding the committed offense is referred to the content of article 80 paragraph (1), letter a) of the New Criminal Code, which

states that the offense must present a low gravity, which according to the law it must be assessed according to: the nature of the offense, the extent of the produced consequences, the used means, the manner and circumstances in which it was committed, motivated and purpose. In addition to these elements, according to which it is assessed the low gravity of the offense, expressly provided for in the law, the court must consider the other condition which it implicitly results from the content of paragraph (2) letter d) of the same article, namely that the punishment provided for the offense is up to 5 years. We mention that in our opinion, all these conditions on committed offense must be fulfilled cumulatively.

b) *Conditions on the person of the offender*. A second positive condition concerning the person of the offender is provided in the content of article 80 paragraph (1) letter b) of the New Criminal Code, and it has the following elements: the conduct before committing the crime, the efforts for removing or mitigating the consequences of the offense and the offender's referral opportunities, the opportunities being determined by the court.

If the first two elements of this positive condition, expressly set out by the legislator, namely, the conduct before committing the crime, the efforts for removing or mitigating the consequences of the offense present the minimum elements of difficulty to be ascertained by the court, the third item on the offender's referral opportunities requires some discussion as establishing its existence is an exclusive attribute of the court.

In the doctrine it was rightly expressed the view that by the possibility of reformation of the offender we "understand the intellectual opportunities, education and training, the education received until the commission of the offense, the financial situation that allows him to live without resorting to expedients necessary for himself and those that he has under care, so that there are specific prerequisites that the convicted person understands the constraint of the penalty even without its actual execution, so there is no need for the application and enforcement of the appropriate penalty of the committed offense." (Chiş, 2012, p. 507)

c) *Conviction of the court that the offender may rehabilitate without imposing a sentence*. From the assessment of the provisions of the law, it results that the renunciation to applying the penalty, in addition to meeting the two positive conditions to which we refer, it is necessary the conviction of the court that the offender may rehabilitate without the implementation and enforcement of a penalty for the committed offense. The court's conviction results explicitly from the content of article 80 line (1) of the New Criminal Code, on the renunciation to penalty as a choice of the court and not a right of the offender.

As mentioned above, even if two positive conditions are met cumulatively, the court in order to find the incidence of the institution it must be convinced that the renunciation to applying the penalty is necessary, and the event of applying a sentence, regardless of the individualization way of execution (custodial or non-custodial), it would be inappropriate because of the consequences that it would have on the offender. Under the provisions of article 80 paragraph (3) in case of several offenses, renunciation to penalty may be decided, if for each offense there are met the conditions in paragraph (1) and (2) of the same article.

If the court decides to renounce to the penalty, it shall apply to the offender a warning consisting of presenting the reasons which led to the renunciation of the penalty and warning the offender on its future conduct and the consequences to which it exposes if he shall commit further crimes. In case of several offenses it shall be applied a single warning (article 81 of the New Criminal Code).

No doubt that the warning applied by the court in these circumstances is an extra-criminal sanction, with administrative feature, having no effect on the criminal history of the offender. However, as other authors (Gheorghe, 2011, p. 131) and we appreciate that the warning should be sent and recorded in the criminal record of the offender, this aspect offering the possibility of applying the provisions of article 82 paragraph (2), letter b) of the New Criminal Code.

In the absence of such evidence (registering the warning in the criminal record), the judicial authorities will not be able to make incident the provisions of the mentioned above text, making it inapplicable against the will of the legislator.

2.3. Cases Where the Renunciation to Penalty Cannot Be Applied

According to the provisions of article 80 paragraph (2) of the New Criminal Code, renunciation to applying the penalty may not be granted if:

a) the offender has previously had a conviction, except the cases provided in article 42 letter a) and b) or for which the rehabilitation intervened or the rehabilitation time limit expired;
b) to the same offender it was applied he renunciation to the penalty in the last 2 years preceding the date of the offense for which he was trialed;
c) the offender has evaded prosecution or trial or attempted the thwarting of finding the truth or identifying and finding criminally liable the author or the participants;
d) the punishment provided for the committed offense is imprisonment exceeding five years.

Note that these negative conditions concern the existence of a past criminal history of the offender, the possibility of applying in the last two years the provisions relating to the renunciation of penalty, the offender's behavior during trial and the seriousness of the crime, this time resulting from the maximum penalty provided by law for the committed offense.

We will not insist on examining the four cases in which there are not applicable the provisions for the renunciation to penalty, stating only that it is not required finding to find them all, but only one.

In other words, even if they are fulfilled cumulatively all the positive conditions provided by the law in article 80 paragraph (1) of the New Criminal Code, the finding of a single case mentioned in paragraph (2) of the same article, will be lead implicitly to the impossibility of applying the renunciation of the penalty.

2.4. Effects and Cancellation of the Renunciation to Applying the Penalty

In accordance with article 82 paragraph (1) of the New Criminal Code, the person who received the renunciation of the penalty is not subject to any disqualification, prohibition or incapacity that could result from the committed offense. However, renouncing at the appliance of the punishment has no effect on the execution of safety measures and the civil obligations provided in the decision [article 82 paragraph (2) of the New Criminal Code].

If within two years of the final judgment ordering on the renunciation of penalty it is discovered that the person to whom this measure was taken committed previously another offense, for which it was imposed a penalty even after this period, the renunciation to the penalty is canceled and it is established punishment for the offense which led initially to the renunciation of the penalty, then applying, where appropriate, the provisions on the several offenses, intermediary recidivism or plurality. [article 82, paragraph (3) of the New Criminal Code].

3. Critical Comments and Suggestions of *Lege Ferenda*

The examination of the provisions of article 80-82 of the New Criminal Code allows us to formulate some critical comments and suggestions of *lege ferenda*.

A first critical remark concerns the need for a written warning and its signature by the offender before the court who decides the renunciation to the penalty. Of course this measure could be taken by the court even if the law does not expressly provide, but it would be preferable that such a procedure is provided for in the wording of texts governing the institution of renunciation to the penalty.

The second observation, which in our opinion requires legislative addition, addresses the need of sending the conceived warning in written form, with the criminal court's decision, where it will be recorded, in order to enable the judiciary bodies to ascertain previous application of the renunciation to penalty, in case of committing a new crime or an offense committed previously.

4. Conclusions

As mentioned previously, the institution of renunciation to penalty is an absolute novelty in the Romanian legislation. Note that the EU institution of renunciation to penalty is provided, among other states, the German Criminal Code, the Italian Criminal Code and the French Criminal Code, of course with the fulfillment of various conditions resulting from the criminal policy of each state.

In its essence, we believe that the institution is found to be necessary, given the tendency of some European countries to reorient mainly the application of penalties with non-imprisonment, on the other hand the inefficient process of rehabilitation and re-socialization of offenders under the regime of deprivation of freedom. The renunciation of penalty is an institution exclusively available to the court, which, however, is a choice and not an obligation, even when the conditions set by the law on the offense and the person of the offender are fulfilled.

As a general conclusion we believe that the institution on the renunciation of punishment was necessary the Romanian Criminal Law, its practical usefulness will be proved in the near future, with the application by the courts.

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The Postponement of Applying the Penalty in the New Criminal Code

Minodora Ioana Bălan-Rusu[1]

Abstract: In this paper we examined briefly the postponement of applying the penalty institution, a new institution introduced into the Romanian legislation. The examination shall consider specifically the criteria considered by the court in order to take this measure, and some critical remarks on the current regulation. The innovations in criminal law matter consist of the achieved examination, onto the text of the law, and critical remarks aimed at contributing to the improvement of legislation. The paper can be helpful both to theorists and practitioners in the field, under the conditions of entering into force of the New Criminal Code.

Keywords: crime; surveillance measures; obligations imposed by the court

1. Introduction

Referring directly to the nature of the punishments applied to those who committed crimes, Cesare Beccaria argued that "*we must therefore choose those penalties and the method to be implemented, which keeping the proportion will make an impression as strong and as durable on the souls of men and less painful on the body of the guilty person*" (Beccaria, 1764, p. 40). Continuing his examination, the same author states that "*for a penalty to have the desired content it is enough that the suffering caused by punishment to exceed the benefit that the offense brings, and in the midst of this process of suffering it must enter the inevitability of punishment and the loss of profits that it would bring the offense*." (Beccaria, 1764, p. 40)

With the general development of the society, the penalty applied to the person who committed an offense under the criminal law has gained new guidelines, the principle of humanity having here a decisive role.

Starting from the criminological point of view from where it results the inefficiency of rehabilitation and re-socialization process of prisoners under the custodial regime, at the current moment most European laws impose sanctions oriented towards the implementation of the non-custodial regime. The studies conducted in this area have proven, with scientific arguments, that the rehabilitation process of a prisoner is properly carried out and with positive effects, especially through the enforcement of some penalties or other non-custodial measures.

In the current Romanian Criminal Code, there are provided as a means of individualization of punishment execution under the non-custodial regime, the conditional remission of executing the sentence, remission of executing the sentence under surveillance and the execution of punishment at the workplace.

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In the New Criminal Code there were abandoned two of these methods, namely conditional remission of executing the sentence and execution of punishment at the workplace, remaining the remission of executing the sentence under surveillance.

Meanwhile, after the example of other European legislation, there were introduced two other ways of individualization of punishment, namely, the renunciation of applying the penalty and the postponement of applying the penalty.

In this paper we will proceed onto a brief examination on the postponement of applying the penalty institution, a new institution in the Romanian criminal law. Regarding the minors criminally liable, the new Criminal Code provides a special penalty system, consisting of non-custodial educational measures and custodial educational measures. Thus, it brings a radical change in the field, renouncing fully to penalties applicable to juveniles who are criminally liable in the favor of educational measures (Buzatu, 2012, p. 229). In this context, the renunciation of the Romanian legislator to applying the penalty for young offenders, the postponement of applying the penalty does not produce any effect in their case.

2. Content

2.1. The Legal Nature and Content of the Postponement of Penalty

The institution of the postponement of the penalty is provided for in the New Criminal Code in the Title III (Penalties), Chapter V (the individualization of sentences), Section 4. Mentioning the institution in Chapter V "The individualization of sentences", leads to the conclusion that it represents in its essence a way of individualizing the penalty.

Given the above, it results that the postponing the penalty is a measure of individualizing the punishment which consists in the right of the court to determine a penalty by fine or imprisonment up to 2 years to the person who has committed one or more offenses, when there are fulfilled the positive conditions provided by law, and decide the postponement of applying the penalty, a period in which the convict will perform some measures and obligations imposed by the court.

According to our recent doctrine the characteristics of the postponement of executing the sentence are:

- "*it is a measure of individualization of the penalty available to the court;*
- *the postponement of applying the sentence can be decided for the imprisonment penalty without exceeding two years or in case of conviction with fine penalty;*
- *the offender must meet cumulatively the legal conditions, of not being previously convicted with imprisonment, to perform community service work without payment and his conduct to create the conviction of the court that it is no need for applying the penalty;*
- *there are no negative situations provided by law, in the presence of which the court cannot apply the measure of penalty postponement*". (Chiş, 2012, p. 516)

The institution of penalty postponement is a novelty in the Romanian legislation and also another way of individualizing the penalty. This institution differs fundamentally from the renunciation to applying the penalty primarily because in the case of renunciation the court does not establish any penalty, while in the case of postponement the court establishes a penalty, the application of which is postponed, under the conditions expressly provided by the law. What is characteristic to both institutions of criminal law is that the renunciation and the postponement of applying the sentence represent a right, a choice of a court and not an obligation.

In our recent doctrine it was argued that the institution of postponing the appliance of the penalty "differs from the remission of executing the sentence under surveillance in the latter case the court, setting the penalty, decides the suspension of its execution for a period prescribed by law, after which the penalty is considered executed, if the convict did not commit a new offense, and the suspension has not been revoked or canceled. Postponing the application has as effect, if the convict meets the legal requirements, the non-appliance of the penalty, and not considering it as being executed". (Sima, 2011, p. 169)

2.2. The Conditions of Postponing the Execution of the Penalty (Positive Conditions)

According to the provisions contained in article 83 paragraph (1) of the New Criminal Code, the court may order the postponing of applying the penalty, establishing a surveillance term, if some conditions are met, positive ones, namely:

- the established punishment, including in the event of multiple offenses is a fine or imprisonment without exceeding two years;
- the offender has previously been convicted to imprisonment, except the cases provided in article 42 letter a) and b) or for which it intervened the rehabilitation or it expired the rehabilitation term;
- the offender has expressed the agreement to perform community service work without payment;
- in relation to the person of the offender, his previous conduct before the offense, the efforts to remove or mitigate the consequences of the offense and its means of correction, the court considers that the immediate application of a penalty is not necessary, but it needs surveillance of its behavior for a specified period.

Although it is not mentioned by the legislator as a positive condition, another condition resulting explicitly from the content of negative conditions is that the maximum of the sentence provided by law for the committed offense of not being smaller than 7 years.

Regarding the condition laid down in article 83 paragraph (1), letter d) of the New Criminal Code, that is the conduct before the offense, the efforts of the offender after committing the offense for removing or reducing its consequences and possibilities of correction, we mention that it must express a regret attitude, awareness of the seriousness of the offense and the cause harm, thus there is the premise of his reintegration and re-socialization. The examination by the court of the behavior and attitude before and after the crime should establish the belief that the immediate application of a penalty is not necessary, but still it requires surveillance for some time.

Please note that in order to decide the postponement of applying the penalty, the court must determine the cumulative performance of the four positive conditions without being incident any negative condition.

2.3. Negative Conditions that require the Non-applying of the Institution

Under the provisions of the law [article 83, paragraph (2) of the New Criminal Code], the court may not order the postponement of the appliance of the penalty if the penalty provided by the law is of 7 years or more or if the offender has evaded prosecution or trial or attempted the thwarting of finding the truth or identifying and finding criminally liable the author or the participants.

From the examination of the above provisions it shows that these negative conditions, in addition to the maximum sentence provided by the law for the committed offense, regard exclusively the attitude

and behavior of the offender during the criminal trial in its first two phases, namely prosecution and judgment.

It is worth mentioning that the finding of the legal provisions' incidence which was mentioned above, the court must establish the existence of such situation, without being necessary their cumulative performance as in the case of positive conditions examined above. In the case where, according to article 62 of the New Criminal Code against the accused it was ordered also the appliance of the penalty of the fine accompanying imprisonment, its application is postponed.

Under procedural aspect it is worth mentioning that according to article 83 paragraph (4) it is mandatory to submit the reasons that lead to postponing the appliance of the penalty and warning the offender on its future behavior and the consequences to which it exposes if it will commit crimes or it will fail to comply the surveillance measures or it will not perform his obligations during surveillance period.

2.4. The Surveillance Period

The surveillance period provided by the law [art. 84 paragraph (1) of the New Criminal Code] is of 2 years and it is calculated from the date of the final judgment ordering the postponement of applying the penalty. Throughout the monitoring period, the person to whom it was ordered this measure must comply with the surveillance measures and carry out its obligations under the conditions set by the court.

2.5. Surveillance Measures and Obligations

In accordance with article 85 paragraph (1) and (2) of the New Criminal Code, during the period of surveillance, the person who has received the postponement of applying the penalty must comply with a number of surveillance measures and obligations imposed by the court.

The surveillance measures provided by the law are:

- to report to the probation service, at the set date;
- to receive visits from the probation officer assigned to his surveillance;
- to notify in advance any change of residence and any journey exceeding five days, and also the return;
- Communicate changing jobs;
- Communicate information and documents in order to enable the control of his livelihood.

At the same time, the court may require the person concerned to carry out one or more of the following obligations:

- to follow a training course or vocational training;
- to perform community service work without payment for a period between 30 and 60 days, as determined by the court, unless the state of health the person cannot perform the work. The daily number of hours is established by the law of executing the penalties;
- to attend one or more social reintegration programs run by the probation service or organized in collaboration with the community institutions;
- to comply with control measures, treatment or medical care;
- not to communicate with the victim or members of his family, with the people who committed the crime or other person determined by the court, or to stay away from them;

- not to be in certain places or at certain sporting events, cultural or other public gatherings, determined by the court;
- not to drive certain vehicles established by the court;
- not to have, use and carry any type of weapon;
- not to leave the Romanian territory without the consent of the court;
- not to handle or perform the task, occupation, profession or activity that has been used for committing the offense.

After examining the above provisions it shows that the surveillance measures are required in all cases, while one or more obligations may be imposed by the court or not. In other words, once the court enforces the judgment it may impose the execution of one or more obligations or only the performance of the surveillance measures, which are required at all times.

Regarding the surveillance measures, "they are intended to establish a direct contact throughout the surveillance period between the person against whom the postponement was imposed and the probation service, to verify its behavior, and the compliance of the obligations and the prohibitions imposed by the court". (Sima, 2011, p. 172)

Regarding the obligations imposed by the court we state that "a group of obligations having formative feature, in the sense of requiring the convicted to follow a course of professional training, to perform community service work without being paid, for a period between 30 and 60 days, as determined by the court, other obligations include attending to social integration programs, the medical inspection or treatment specified by the court, obligations that aim at rehabilitating the concerned person, to social and professional reintegration, removing the conditions that favored crime, preventing the commission of new crimes.

A second group of requirements have prohibitive feature for the defendant: in the sense of not communicating with the victim or relatives, not to attend to some social events, not drive certain vehicles, not having guns, not leaving the Romanian territory, not occupying professional positions as the one that it used to commit the offense. Their role is to prevent the commission of offenses against the person ordering the postponing of applying the penalty." (Sima, 2011, pp. 172-173)

To establish the obligation on the community service, the court shall consult the periodical information provided by the probation service on the existing concrete possibilities of execution at the level of the probation service and at the level of the community institutions. When determining other types of obligations such as: not to communicate with certain people, not to be in certain places or social events or not driving certain vehicles, the court will individualize concretely the content of the obligation, taking into account the circumstances of the cause. Regarding the civil obligations, the person must comply in full no later than three months before the expiry of surveillance period.

2.6. Surveillance

During the period of surveillance, the probation service must notify the court in the following circumstances:

- having intervened reasons justifying either the modification of the obligations imposed by the court or the termination of executing some of them;
- the supervised person did not comply with the surveillance measures or it did perform its obligations under the established conditions;

- the supervised person did not fulfill its civil obligations established by the decision, no later than three months before the expiry period of surveillance.

Please note that some requirements set by the court will be monitored by other state institutions, according to the law, and the supervised person must send some data to the probation service.

2.7. Modification or Termination of Obligations

Under the provisions of the law [article 87 paragraph (1) of the New Criminal Code], if during the surveillance period there have intervened reasons justifying the imposing of new obligations or increase or decrease the existing executing conditions, the court will decide properly the modification of the obligations in order to ensure to the supervised person increased chances of rehabilitation. If the court finds that maintaining some obligations is no longer required, it shall order the termination of their execution.

2.8. The Revocation of the Postponement of Penalty Execution

When the court finds that within the period of supervision the person in bad faith did not comply with the surveillance measures or perform its obligations, the court will revoke the postponement and it shall decide the implementation and execution of the penalty. When by the expiry of the surveillance deadline the supervised person does not fully meet the civil obligations established by the decision, the court shall revoke the postponement and it shall decide on the implementation and execution of the sentence, unless the person proves that it had no possibility to fulfill them.

If after the postponement of applying the penalty the supervised person has committed a new offense, intentionally or non-intentionally, being discovered during the surveillance period, for which a conviction was decided, even after the expiry of that period, the court shall revoke the postponement and decides the implementation and execution of the penalty. The sentence imposed following the revocation of the postponement and the penalty for the new offense is calculated according to the provisions on the competition of crimes.

In the case where the previous offense was committed by fault, the court may retain or revoke the postponement of the appliance of the penalty.

2.9. The Cancellation of the Postponement of Applying the Penalty

Under the provisions of the law [article 89 paragraph (1) of the New Criminal Code], if during the period of surveillance the supervised person is found to have committed an offense by the final judgment of ordering the postponement, for which it was applied even imprisonment after the expiry of this period, the postponement is canceled, applying, where appropriate, the provisions on competition of offenses, relapse or the intermediary plurality.

Within paragraph (2) of the same article it provides that in case of completion on offenses, the court may order to postpone the appliance of the penalty if the conditions set by article 83 are met. If you have the postponement of applying the penalty, the surveillance period is calculated from the date of the final judgment by which it was previously ruled the postponement of applying the penalty.

2.10. The Effects of the Postponement of Applying the Penalty

The person to whom it was decided the postponement of applying the penalty is no longer applicable the penalty and is not subject to any disqualification, prohibition or incapacity that could result from

the offense, if it has not committed a new crime by the expiry of the surveillance measure, it was not ordered the revocation of the postponement and did not reveal a cause for cancellation. The postponement of applying the penalty has no effect on the execution of safety measures and civil obligations set out in the judgment.

3. Critical Reviews

As mentioned previously, the institution of postponement of applying the penalty is an absolute novelty for the Romanian legislation. In this context, in our opinion, the achieved examination highlights also some legislative imperfections, which we will formulate below. A first critical remark concerns the surveillance period of two years. We appreciate that this period is too small, given the gravity of the committed offense. We believe that the seriousness of the committed crime, as well as other elements pertaining to the offender this period should have a maximum and a minimum limit, the court being able to appreciate the period of surveillance. We propose limits between two and four years.

Another critical remark refers to the punishment provided by the law for the offense which, according to the current regulations is up to 7 years. We believe that this limit is high, which is why we believe that a maximum of five years would be more realistic. We argue this proposal by the fact that within the new Criminal Code there are many offenses, some with increased seriousness that can be included in these provisions.

4. Conclusions

The postponement of applying the penalty institution is introduced in the Romanian legislation, in the context of new European guidelines in executing penalties matters. This institution of criminal law is provided in the laws of several European countries, such as German Criminal Code, the English Criminal Code, the French Criminal Code, the Italian Criminal Code, etc. No doubt that the institution's regulations vary from one state to another, depending on their criminal policy objectives.

The institution itself has become in time inefficient in the rehabilitation and re-socialization process of convicts in prisons, often having contradictory effects. Regarded by some with doubts, and by others with confidence, the institution of the postponement of applying the penalty will prove its effectiveness over time after the entry into force of the New Criminal Code and its application by the courts.

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*** Noul Cod Penal. Art. 83-90/ The New Criminal Code, Article 83-90.

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On the Legal Nature of Penalty Relinquishment

Constantin Tănase[1]

Abstract: Identifying the legal nature of the institution in question, as with all institutions of criminal law, provides the best opportunities to judges, prosecutors, lawyers, all those involved in the administration of justice, in the law enforcement business to adopt rigorous and thoroughly documented solutions. Previous research on the subject is reduced. In the present study we combined the study of legal texts with the doctrine study, all related to the current reality. Material findings are relevant for both theorists and practitioners of the Romanian criminal law.

Keywords: waiver of penalty; law enforcement; Romanian criminal law

1. Introduction

Les nouvelles institutions prévues dans le Code pénal adopté par la Loi no. 286/2009[2] ont suscité l'intérêt des spécialistes provoquant des commentaires et des opinions variées visant l'opportunité de celles-ci et leur utilité, les conditions d'application, la signification de certains aspects. La situation susmentionnée est naturelle vu que la loi n'est pas encore en vigueur et par conséquent les hypothèses et les prévisions ne peuvent pas être évitées.

L'une des questions abordées dernièrement est celle de la nature juridique de la dispense de peine, une institution nouvelle du droit pénal, sans correspondant dans la législation actuelle[3]. Le siège de la matière se trouve dans la 3ème Section (art. 80-82) du Chapitre V (L'individualisation des sanctions) du Titre III (Les peines) du nouveau Code pénal.

Conformément à l'article 80 alin. (1) de l'acte normatif mentionné, l'instance peut disposer, si les conditions prévues par la loi sont remplies, la dispense de peine. Il résulte du texte que l'instance peut disposer cette mesure s'il y a un cumul de deux conditions positives et quatre conditions négatives.

Les conditions positives prévues à l'alinéa (1) de l'article 80 lettres a) et b) sont les suivantes:

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[2] Publiée dans le Moniteur Officiel de la Roumanie, partie I, no.510 du 24 juillet 2009.
[3] Une éventuelle analogie avec l'institution prévue à l'article 18[1] du Code pénal actuel (le fait qui ne présente pas le péril social d'une infraction) ne résiste pas à une analyse rigoureuse. Tandis que la dispense de peine peut intervenir quand l'existence de l'infraction et la culpabilité de l'infracteur sont hors de doute, les dispositions de l'article 18[1] du Code pénal actuel sont applicables quand les faits ne constituent pas une infraction dans les conditions du texte cité. En plus, dans le cas des faits prévus par l'article 18[1] du Code pénal actuel, le procureur ou l'instance peut appliquer une sanction administrative (l'admonestation, l'admonestation avec avertissement, amende de 10 lei à 1000 lei), tandis que dans le cas de la dispense de peine, l'instance applique à l'infracteur un avertissement qui n'a pas la signification d'une sanction, mais c'est plutôt une mise en garde pour l'infracteur au sujet de sa future conduite et des conséquences auxquelles il s'expose s'il commet des infractions.

a) l'infraction commise présente une gravité réduite, vu la nature et l'étendue des conséquences produites, les moyens employés, la manière et les circonstances dans lesquelles elle a été commise, le motif et le but suivis;
b) par rapport à la personne de l'infracteur, à sa conduite antérieurement à l'infraction, à ses efforts pour éliminer ou diminuer les conséquences de l'infraction ou à ses possibilités de se corriger, l'instance peut apprécier que l'application d'une peine serait inopportune à cause des conséquences que la personne pourrait encourir;
Les conditions négatives de l'alinéa (2) du même article, lettres a), b), c) et d) prévoient que:

a) l'infracteur n'a pas subi une condamnation antérieure, à l'exception de celles pour des faits qui ne sont plus prévus par la loi pénale et pour des infractions amnistiées, ou pour lesquelles la réhabilitation est intervenue ou le délai de la réhabilitation s'est écoulé;
b) l'instance n'a pas disposé pour le même infracteur la dispense de peine les deux dernières années avant la réalisation de l'infraction pour laquelle il est jugé;
c) l'infracteur ne s'est pas soustrait à la poursuite pénale ou au jugement ou il n'a pas essayé d'entraver la découverte de la vérité, l'identification ou l'engagement de la responsabilité pénale de l'auteur ou des participants;
d) la peine de prison prévue par la loi pénale pour l'infraction commise ne dépasse pas 3 ans.

Dans le cas du concours d'infractions, conformément à l'alinéa (3) de l'article 80, on peut disposer la dispense de peine si pour chaque infraction concurrente les conditions positives et négatives susmentionnées sont cumulées.

Si l'instance dispose la dispense de peine, elle donnera à l'infracteur un avertissement conforme aux prévisions de l'article 80 du nouvel Code pénal. L'alinéa (2) de ce texte définit l'avertissement comme une présentation des motifs qui ont déterminé la dispense de peine accompagnée d'une mise en garde pour l'infracteur sur sa future conduite et sur les conséquences auxquelles il s'expose s'il commet des infractions.

Dans le cas du concours des infractions on applique un seul avertissement. En ce qui concerne les effets de la dispense de peine, la loi prévoit (l'article 82) que la personne pour laquelle on a disposé cette mesure n'est pas soumise à aucune déchéance, interdiction ou incapacité qui pourrait découler de l'infraction commise. En même temps, la loi prévoit que la dispense de peine ne produit pas d'effets sur les mesures de sûreté et sur les obligations civiles établies par décision judiciaire.

2. Des opinions sur la dispense de peine

En ce qui concerne la dispense de peine les opinions sont différentes. Certains auteurs considèrent que la dispense de peine est une forme d'individualisation de la sanction car celle-ci figure dans le chapitre destiné à cette matière (Sima, 2011, p. 37), d'autres croient qu'il s'agit d'une cause qui efface le caractère pénal de l'infraction (Radu, 2011, pp. 88-89) car si l'instance accepte cette institution, elle admet, y compris, que le fait ne comporte pas de péril social comme condition essentielle de l'infraction.

Une autre opinion est que la dispense de peine pourrait être "une cause d'impunité, une réelle disculpation juridique, ou une forme de remplacement de la responsabilité pénale" (Radu, 2011, p. 88).

En ce qui nous concerne, nous considérons que la nouvelle institution n'est pas une forme d'individualisation de la sanction car celle-ci suppose une opération d'adaptation de la peine au cas individuel et à la personne de l'infracteur, en assurant ainsi l'aptitude fonctionnelle et la réalisation de

son but. Comme dit la doctrine, l'individualisation judiciaire de la peine (car c'est de cela qu'il s'agit) concerne la détermination de la responsabilité pénale pour l'infraction commise et l'application de la sanction pénale à la personne coupable. (Bulai, 1970, pp. 122-123). La même chose résulte aussi du texte de l'article 74 Code pénal visant les critères généraux d'individualisation de la peine. Dans le cas de la dispense de peine, l'instance n'établit pas une durée ou un quantum de la sanction pénale, c'est-à-dire ne fait pas l'adéquation de celle-ci au cas individuel et à la personne de l'infracteur. L'instance renonce tout simplement à appliquer la sanction, l'opération d'individualisation étant inutile.

L'introduction de l'institution dont on parle dans le chapitre intitulé "L'individualisation des sanctions" ne constitue pas un argument irréfutable pour accepter que celle-ci puisse être aussi une forme d'individualisation de la peine. Comme nous avons dit, l'individualisation est une opération d'établissement de la durée ou du quantum de la peine selon laquelle, conformément aux dispositions de l'article 396 alin. (1) du nouveau Code de procédure pénale, adopté par la Loi no.135/2010[1], l'instance prononce la condamnation. Dans le cas de la dispense de peine, une éventuelle individualisation de celle-ci apparaît complètement injustifiée, elle-même n'ayant pas la signification d'une opération d'adaptation de la sanction au cas individuel et à la personne de l'infracteur.

La dispense de peine ne peut pas être considérée comme une cause qui efface le caractère pénal de l'infraction.

Une première observation qui s'impose là-dessus est que dans le système du nouveau Code pénal l'institution des causes qui suppriment le caractère pénal de l'infraction a été remplacé par deux nouvelles institutions, à savoir: les causes justificatives et les causes de non-imputabilité. Celles-ci ont été conçues par rapport aux conditions essentielles de l'infraction telle qu'elle est définie par l'article 15 alin. (1) du nouveau Code pénal (le fait prévu par la loi pénale, commis avec culpabilité, injustifié et non-imputable à la personne qui l'a commis). En parlant de la nature juridique de la dispense de peine, ou d'ailleurs de toute autre institution du droit pénal, il faut se rapporter aux réglementations légales en vigueur concernant les institutions respectives et aux intentions du législateur qui ont généré les dispositions en question. La nature juridique de la dispense de peine peut être expliquée en étudiant l'intention du législateur qui résulte de l'ensemble des normes légales et non d'autres fondements, surtout de ceux extraits des réglementations anciennes.

Une deuxième observation est que dans la situation de l'existence d'une cause justificative ou d'une cause de non-imputabilité, conformément aux dispositions de l'article 396 alin. (5) du nouveau Code de procédure pénale, l'instance est tenue à prononcer l'acquittement de l'inculpé et ne peut pas disposer la dispense de peine. Ainsi que nous avons expliqué, d'autres commentaires au sujet de la dispense de peine comme cause qui efface le caractère pénal de l'infraction sont inutiles.

3. Conclusions

Dans notre opinion, la nature juridique de la dispense de peine peut être identifiée dans "L'exposé de motifs" du projet de loi visant le Code pénal qui reconnaît à l'instance le droit de renoncer définitivement à l'établissement et à l'application d'une sanction pour une personne trouvée coupable de la réalisation d'une infraction (Code pénal – Loi no.286/2009, p.26). Vu cette raison ou finalité accordée par le législateur, nous pouvons apprécier que la dispense de peine est une institution avec une nature juridique propre, que l'on ne peut confondre ou subsumer à la nature d'autres institutions plus précisément définies ou plus rigoureusement déterminées par les textes légaux.

[1] Publiée dans le Moniteur Officiel de la Roumanie, partie I, no.486 du 15 juillet 2010.

Ainsi que nous avons anticipé, la dispense de peine est la capacité ou l'aptitude accordée par la loi à l'instance de renoncer à la fixation ou à l'individualisation d'une sanction et de l'appliquer à la personne coupable de la réalisation d'une infraction. L'instance peut exercer ce droit reconnu par la loi seulement dans la mesure où les conditions prévues aux articles 80 et 81 du nouveau Code pénal sont cumulées. Autrement dit c'est un droit de l'instance de décider à sa manière, en fonction des circonstances réelles et des personnes existantes dans la cause soumise au jugement, tout comme le droit de décider la condamnation, l'acquittement ou l'extinction du procès pénal.

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Considerations regarding the Interception and Recording of Conversations or Communications Performed under Law no. 535/2004 on Preventing and Combating Terrorism

Sandra Grădinaru[1]

Abstract: This paper analyzes the situations and conditions in which the provisions of Law no. 535/2004 are applicable for intercepting and recording of communications. It also analyzes the compatibility of provisions from special laws with those of the Criminal Procedure Code and the relevant jurisprudence of the European Court regarding: conditions for authorizing, the person empowered to issue the authorization, as special normative documents still refers to prosecutors, the maximum period for interception, defining clear categories of offenses and persons likely to be subject of interceptions, conditions, procedures and institutions - categories of experts responsible for verifying the authenticity of the recordings.

Keywords: records; wiretaps; fighting terrorism; warrants; authorization

1. Introduction

Enacting of Law no. 535/2004 on preventing and combating terrorism has allowed the detailed regulation of the legal framework necessary to carry out the collection and gathering of information and responded the need of amending and supplementing the Criminal Procedure Code.(Petre, Grigoras, 2010).

In accordance with the provisions of article 20 of Law no. 535/2004 on preventing and combating terrorism, state agencies with responsibilities in national security may propose the prosecutor to apply for the authorization of interception and recording of communications, where there is a reasonable suspicion of the existence of threats to the national security of Romania, provided by article 3 of Law no. 51/1991, or any act of terrorism (Coca, 2006).

2. Problem Statement

When analyzing the provisions of article 20 of the Law on preventing and combating terrorism comparative with those of article 53 paragraph 2 of the Constitution we note that the special investigation techniques in national security can be authorized only if the following conditions are met: an offence that constitutes a threat to national security is committed, including any act of terrorism as stipulated by Law no. 535/2004, the interference is necessary in a democratic society and proportionate with the authorized purpose (Udroiu, Predescu, 2008).

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Although most of the offences that constitute threats as provided by article 3 of Law no. 51/1991 are also crimes and the procedure in matters of national security has some similarities with the Criminal Procedure Code, it has generated controversies both in literature and in jurisprudence.

It was noted (Ciuncan, 2001) that the procedure in matters of national security was complemented with the procedural proceedings prior to the enacting of Law no. 535/2004, from the provisions of former article 13 paragraph 1 of Law no. 51/1991, which stated that the circumstances referred to in article 3 of the same law are the legal framework for requesting the prosecutor, where justified and subject to the Criminal Procedure Code, to issue the authorization to conduct acts of information gathering.

Thus, is considered (Volonciu, Barbu, 2007) that the approach according to which the provisions of special laws are applicable only when performing specific intelligence activities, and those of the procedural code only when the interceptions are authorized for criminal prosecution, is unsustainable and possible only if, on the one hand, special regulations would include specific safeguards for the intrusion by intelligence services in the privacy of a person, and, on the other hand, if the intercepted materials thus obtained would not be admissible as evidence in subsequent court proceedings, the latter being possible only if they are conducted under the Criminal Procedure Code. Invoking national security reasons for authorizing the interception according to other procedures than those provided by the Code and the subsequent use of wiretaps as evidence in proceedings concerning other crimes, in our opinion, renders useless the procedural provisions in this matter as are stated by the Code.

However, another author (Julean, 2010) considers that the reference of Law. 535/2004 to threats to national security and express reference to the provisions of Law no. 51/1991, leads to the conclusion that the law, though regulating the prevention and combating of terrorism, is currently the legal basis for the authorization of intelligence services to conduct restrictive measures of fundamental rights and freedoms, including interceptions, in all cases that constitutes threats to national security, and not only for the situation regarding acts of terrorism.

In fact, that is the case even in the practice of the Supreme Court of Justice, and in a recent case (Supreme Court of Justice, file no. 4489/1/2010), the defense claimed that the interception and recording of defendant`s telephone conversations and environmental discussions as showed in the indictment was not carried under the provisions of article 91^1 and seq. of the Criminal Procedure Code (based on a warrant), and procedures of special investigative techniques covered in national security matters were used exclusively (based on warrants issued under article 20-21 of Law no. 535/2004, in conjunction with article 3 of Law no. 51/1991), concluding that, according to prosecution`s case "...cogent and useful information about preparing and committing acts of corruption ... and that under provision of article 91^2 paragraph 5 of the Criminal Procedure Code, were used as evidence."

The multitude of regulations in this area, plus consecutive and uncorrelated changes in the legislative framework renders the internal rules not consistent, inaccessible and unpredictable. The lack of a clear regulatory framework in this area has generated various interpretations in doctrine and practice. Thus, it is considered (Julean, 2010) that the legal provisions are applicable when performing specific intelligence activities and those of the Code when interceptions are authorized for criminal instruction, but, on the other hand, special laws regulations do not contain adequate and specific safeguards for the protection of privacy, and in most cases, intercepts thus obtained are retained as evidence in subsequent court proceedings, the latter being possible only if conducted according with the Criminal Procedure Code.

The doctrine expressed yet another opinion (Coca, 2006), we do not share, according to which with the enacting of Law. 535/2004, article 13-15 of Law no. 51/1991 were repealed tacitly and the interception and recording of communications, and other types of activities referred to in article 3 of Law no. 51/1991 shall follow the procedure stated in Law no. 535/2004.

The above mentioned opinion, is sustained by other authors (Udroiu, Slavoiu, Predescu, 2009), arguing that the provisions of article 13 of Law no. 51/1991 have been implicitly repealed and replaced by those of article 21 of Law no. 535/2004, which makes no reference to the rules of criminal procedure, so it must be rejected the interpretation that the procedure in matters of national security would be a special provision in relation to criminal proceedings that would be the general framework. An argument in support of this view is article 53 of the Constitution, where the constituent legislator intended to distinguish between matters of national security from criminal procedure, consecrating them alternately without establishing between the two a special-general difference. It is considered, therefore, that whenever the provisions of article 21-22 of Law no. 535/2004 are incomplete, they cannot be completed with the provisions of Criminal Procedure Code, nor may resort to analogy. However, it is argued that although there is no express provision, the above provisions actually regulates two procedures for authorizing special investigative techniques in relation to national security, one stated in article 21, for specific situations where national security threat exists, but it is not imminent and that provided by article 22, which applies only in the event of imminent danger to national security. Special procedure contained in article 22 shall apply with priority and is supplemented by the general rules provided by article 21.

As it comes for the authorization of the investigative process, it shall be signed by the head of the intelligence agency, by its legal substitute or by the persons delegated for this task and shall be submitted to the Attorney General`s Office, and must include data or clues which show the existence of the threat to national security, for whose discovery, prevent or counteract it is mandatory the issuance of an authorization. A present threat is the legal basis for the authorization of investigative techniques, the intelligence officer being required to state the alleged facts and suspects and to indicate the reasons why these acts fall into one of the tenets of article 3 of Law no. 51/1991. Thus, the applying agency must demonstrate the proportionality of the information gathering operations with the intended purpose.

The application for the authorization of interception and recording of communications, according to Law no. 535/2004, shall be submitted to the Attorney General`s Office. If the request is assessed as unjustified, it will be rejected by a motivated resolution, which shall be communicated immediately to the applying agency. If within 24 hours of its registration, it is considered that the proposal is justified and the conditions provided by law are met, the Attorney General shall request in writing to the President of the Supreme Court of Justice to authorize the indicated activities, the term of 24 hours being one of recommendation, while not provided any penalty for its non-compliance.

The application will be taken into consideration in council chambers by judges specially appointed by the President of the Supreme Court of Justice, who can accept or decline the issue by final motivated judgment.

In the event of a imminent danger that requires its urgent suppression, law enforcement with responsibility in matters of national security can initiate and conduct special investigative techniques based on a simple internal decisions without court approval, followed by an application made as soon as possible, “but not later than 48 hours.” Another 24 hours are added to this term, for the prosecutor to examine the application, so the judge will be notified within a maximum of 72 hours from the initiation of proceedings, during this period operative officers acting without any authorization. Since

the legislator did not expressly stated a term in which the judge, notified after 3 days (72 hours), can confirm measures already enforced - after unlawful restriction of the fundamental rights of suspects – is stated in the doctrine (Udroiu, Slavoiu, Predescu, 2009) that until the actual authorization is issued, the period of unlawful interception could be increased indefinitely.

Under the provisions of article 21 paragraph 9 of Law no. 535/2004, the warrant issued by a judge will include: types of communications that can be intercepted, the categories of information, documents or objects that can be obtained, if known, the identity of the person whose communications are to be intercepted or the person who possesses important data, information or objects, a general description of the place where the warrant is to be executed, the authorized agency and the authorized period.

It should be noted that if the authorization is issued, the validity of the warrant cannot be longer than 6 months, with possibility of extension, when necessary, each extension for a maximum of 3 months, given the condition that the interception will be discontinued when the grounds justifying its issuance are no longer applicable.

By lex ferenda we consider that is absolutely necessary to regulate a maximum period for the authorization to be issued and to expressly state the obligation to declare, both in the application and in the authorization itself, the circumstances justifying the extension of the authorized period.

The law, in its actual form, does not grant sufficient guarantees about the predictability of the law when it comes to the possibility of extending the authorized period for justified reasons.

Compared to the authorization procedure of special investigative techniques in matters of national security, we think that an application for a warrant with the sole purpose of assessing a threat is unfair and unfounded, given that the threats to national security as provided by article 3 of Law no. 51/1991 are present actions or inactions and not imminent ones. Therefore, in practice, warrants authorizing the use of special investigative techniques are issued with ease, especially for the "prevention of an alleged danger" even if the concept of national security threat includes only already committed offences as stated in article 3 of Law no. 51/1991. In our opinion, provisions of article 9 and article 10 of Law no. 14/1992, under which it is possible to authorize the use of special investigative techniques in order to establish the imminence of the threat, should be amended, because we consider that they are illegal given that it cannot exist an interference with the fundamental rights of individuals for the sole purpose of preventing an alleged threat. Note that the law uses the notion of "communication" for both conversations or communications by telephone or other electronic means, as well as those incurred in the environment or by mail. On these issues, it is considered (Udroiu, Predescu, 2008) that in this manner the legislator removed the possibility of intelligence agencies to apply for judicial authorization of video surveillance. According to expert opinions (Mateut, 1997; Cristescu, 2001), capturing images in matters of national security is a forerunner criminal act when being carried out with the authorization requested by the law and its sole purpose is information gathering and identifying perpetrators and if it occurs subsequent to prosecution, it constitutes a method of obtaining evidence. We agree with the opinions outlined above, considering that video surveillance is not possible without judicial authorization, regardless of the moment or the period of this proceeding. However, the doctrine (Ciuncan, 2002) reveals contradictory points of view, considering that the non-judicial informative video recording is beyond the magistrate reach and as such, in matters of national security, it can be performed without requiring the authorization of a judge.

It should be noted that besides the interception and recording of communications, the provisions of article 20 of Law no. 535/2004 allow the authorization of complementary measures, namely the installation, maintenance and removal of devices necessary to record environmental communications.

Where discussions take place in public areas, the prosecutor must apply for both the authorization to intercept communications and to installation of devices, and according to article 916, paragraph 2 of the Criminal Procedure Code; these recordings may be used as evidence in criminal proceedings (Udroiu, Predescu, 2008). With regard to the procedure outlined in practice, in criminal trial records, warrants issued pursuant to Law no. 535/2004 are not available, motivated by the argument that these documents are considered "classified state secrets", not accessible for court hearing nor for the defendant, in contradiction with the safeguards of the rights of proper defense. Basically, once declassified, information obtained through special investigative procedures, while preparing "transcript notes" and their transformation by the prosecutor in "preliminary (forerunner) acts", authorizing warrant ceases to be secret as information obtained under its effect becomes public. The aim of these technical supervision measures is to gather information, the interference with privacy being justified by the need to protect national security (Article 53 of the Constitution). Thus, this measure differs in terms of the legitimate aim pursued by the interference with the fundamental rights guaranteed by the Constitution and the European Convention, than those provided by article 91^1 of the Criminal Procedure Code, pursuing "the conduct of a criminal investigation" as well as those stipulated by article 493^4, namely "defending public order"(Udroiu, Predescu, 2008).

3. Conclusions

These special investigative techniques are particularly methods for information gathering, what distinguishes them being that the specific activities in matters of national security are not criminal proceedings, but these are the only components of intelligence competencies in order to protect national security, while only special investigation techniques in relation to criminal procedure code are considered evidentiary procedures. Given the above, we believe that would be appropriate to corroborate the provisions of special laws with those of the Criminal Procedure Code and with the relevant jurisprudence of the European Court regarding conditions permit, the magistrate empowered to give authorization, special laws still referring to prosecutors, maximum period of authorization, clearly defining the categories of offenses and persons likely to be subject of interceptions, conditions, procedures and institutions - categories of experts responsible for verifying the authenticity of the recordings.

By lex ferenda we appreciate that is mandatory the express regulation of the judge`s obligations to oversee the conduct of authorized agencies and the possibility of removing the evidence obtained unlawful, in non-compliance with the conditions set by the Convention and the European Court, meaning that the interference should be necessary in a democratic society and proportionate with the authorized purpose.

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Aspects in Connection to the Interception and the Recording of Talks or Conversations Performed as per Law 51/1991 Regarding the National Security of the Romanian Country

Sandra Grădinaru[1]

Abstract: This study is aimed at analyzing the cases and conditions in which the interception of conversations is actually authorized, as per Law no. 51/1991. At the same time the manner in which the provisions of the Code of Criminal Procedure interfere with this Law and with Law no. 535/2004 is presented on legal grounds with regards to issuing the mandate. This analysis studies the aspects of compatibility between the provisions of the present Law and the Convention for Human Rights and Fundamental Freedoms, i.e. the jurisprudence of the European Court of Human Rights.

Keywords: recording; intercepting; national security; mandate

1. Introduction

As per art. 13 from the Law no. 51/1991 regarding the national security, one can claim to the prosecutor only in justified cases, as per the provisions of the Code of Criminal Procedure, the authorization of writing official papers with the end result of gathering information consisting of , among others, the interception of conversations (Coca, 2006). The authorization act is issued at the request of the bodies which have attributions in the field of national security, by the prosecutor hereby named by the Prosecutor General of Romania. The duration of the mandate cannot overpass 6 months. In the specialized literature(Julean, 2010; Volonciu & Barbu, 2007) it is stated that the procedure as per Law 51/1991 was approved by the Law no. 281/2003 with regards to the modification and addition to the Criminal Procedure Code and to some other specialized rules, this being a text which proved itself to be not sufficiently strong and clear though, but which nevertheless states that "*no matter how many times other rules stipulate provisions with regards to intercepting and recording conversations, the provisions of art. I are applied accordingly*".

2. Problem Statement

Another author (Coca, 2006) raised the problem if the requested and issued mandate as per Law no. 51/1991 will follow the procedure according to Law no. 281/2003, with the subsequent modifications and additions, or it will remain an extra-procedural one aiming at defending the national security, thus not needing the authorization given by the President of the Court who would bear the competence to judge the named cause. In this matter it is concluded that the public authorities with competence in the field of national security have to respect the juridical regime provided by art. 911-915, Code of

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Criminal Procedure, otherwise facing the danger that the means of probation obtained illegally not be used in the criminal procedure.

It was estimated that (Petre & Grigoras, 2010) the provisions of art. 13 of Law no. 51/1991 which use two notions namely "the authorizing of documents" and "mandate" as well as those of the criminal procedure code which only brings into discussion the term of "authorization" cannot justify the interpretation that for this "mandate" one has to keep in mind the prosecutor's competency. Thus, the two notions used by the above named Law are used with regards to a single attribution, namely that of "authorizing the issue of legal documents", which is in fact a legal procedure, and the means by which the "authorization" is applied is the "mandate" which represents the procedural act. Furthermore, the "authorization" from Law no. 51/1991 has a broader content, not limited to the interception and recording of communications, but also bringing forward other aspects regarding some other juridical terms like "inquisition" and "retaining and delivering the conversations and objects". On the other hand it is also brought into discussion that (Volonciu & Barbu, 2007) Law no. 535/2004, an additional and special Law states in art. 10 paragraph 1 that the "*threatening of the national security of Romania, including the terrorist acts as per the present law are the legal grounds for the authorization of interceptions according to the procedure of this current Law*", which leads to the interpretation that this Law is the legal ground for the restrictive measures with regards to the rights and freedoms performed by the Intelligence Services, including those for interceptions, in all cases which represent threats towards the national security, not only for those that represent terrorists acts.

Although in the specialized literature there these aspects have been highlighted, in practice these measures for surveillance in case of potential threats towards national security seem to be provisioned also by the Prosecutor as per the procedure provided by art. 13 from Law no. 51/1991, procedure which was not accepted until present times (Mateut). Thus as per the application literature of Law no. 51/1991 with regards to the national security of Romania, in the specialized literature (Coca, 2006) it was stated that the provisions of art. 13 from the special Law continue to be valid even after the entering into force of Law no. 281/2003, fact which was supported by the provisions of art X from Law no. 281/2003, according to which "*Every time some other laws claim provisions with regards to the Prosecutor's requirements (...) the provisions of art. I of the present Law are applied accordingly*", i.e. the Criminal Procedure Code rules, which state that the authorization be given only by judges. We support the above mentioned idea, under the conditions in which in what regards the rules and regulations with respect to interceptions included in the Criminal Procedure Code, the European Court of Human Rights found that these rules and regulations are not applied under the conditions in which security measures are taken for the cases of presumed attempts to violate the national security, these measures seeming to still be required by the Court as per art. 13 of Law no. 51/1991, which wasn't approved until present times. In arguing with this opinion, the European Court referred to the decision of the Constitutional Court (Decision no. 766/2006), by means of which the constitutional judged inferred the special character of Law no. 51/1991 for justifying its application to the upcoming criminal acts, performed after the entering into force of the new procedure stated in the Criminal Procedure Code (Volonciu & Barbu, 2007). As per the opinion of a judge of the European Court (the opinion of judge Pettiti in the case Malone vs. The United Kingdom), the distinction between the administrative interceptions and the interceptions required by the judiciary bodies must be clearly provided by the national regulation, in order to respect art. 8 of the European Convention, thus favoring the application of the lawfulness of some interceptions in a juridical framework rather than the existence of a juridical void which permeates the arbitrary. We notice that in order to issue the mandate which authorizes the interception of communications one must fulfill in whole the following conditions: to gather data or clues for the existence of one of the situations provided by art. 3 of Law

no. 51/1991, which to consist threats towards the national security; the case for which one requires the authorization of the interception of conversations be justified, i.e. to result in the need to use this procedure; to respect the provisions of the Criminal Investigation Code. The European Convention of Human Rights uses the phrase ”public order”[1] as being the accepted cause for limiting the performance of human rights-freedoms, in close connection to the national security and public safety [2].

There are some exceptions when emergency actions are required, but the specialized state bodies can perform these acts without the claimed authorization, afterwards requesting the authorization. In practice, there were situations in which the person suspected to have performed one of the criminal acts as per art. 3 Law no. 51/1991 was surveyed for an unlimited period of time, by means of the effected mandate in order to "*prevent and counter the threats towards national security*". During all this time only some pieces of information were obtained with regards to corruption deeds, signaled to the official bodies which "were notified ex officio" and issued a temporary decree for interceptions, thus moving towards the procedure regarding the authorization of the same investigation techniques used in the criminal case. To be more exact, there is no limit as to the period of time in which the intromission of authorities in one’s private life be legal, but the special techniques of investigation can start once the mandate for preventing the danger of disturbing national security and can cease only after a long period of time, with the expiration of the 120 days provided by the criminal investigation law. The recommendation no. 1402 of the Council of Europe Parliamentary Assembly with regards to the internal security services for member states of the European Council claim that the operative acts of these services which involve the limitation of exerting some rights or freedoms of a person must be submitted to a prior authorization on behalf of the judicial bodies. This hasn’t done anything else but highlight the importance and usefulness of the informative structures of the information and security systems, and also the need that their activity is subsumed to respecting the fundamental rights and freedoms. The analysis of Law no. 51/1991 with regards to national security as per provisions of art. 8 from the European Convention was debated upon by juridical practice and by The European Court of Human Rights. In the Decision no. 766/2006 (The Constitutional Court, 2007) by means of which the exception of non-constitutionality was rejected by the Constitutional Court as per art. 10, 11, 13 and 15 from Law no. 51/1991, the Government requested the admission of this exception showing that the “validity of the mandate is very long (6 moths) and can be prolonged for an undetermined period of time in special cases, yet not claiming under what conditions the persons subjected to interception be notified. At the same time, the law doesn’t include the provisions according to which the recordings are certified, the way in which they are written in the recording of proceedings, or the way in which the recordings containing actual elements for defending the national security be separated from those recordings which don’t have this characteristic”.

In this context, the passiveness of the Romanian Government is not to be understood until present times, as it didn’t learn to use the prerogative regulated by law no. 74 paragraph 1 from the Romanian Constitution with regards to pursuing an legal initiative with the end purpose of modifying or eliminating the provisions of Law no. 51/1991 which are considered unconventional. As a matter of fact the Court of Appeal of Bucharest to which this exception was presented, assessed (The Court of Appeal of Bucharest, 2007) that after pronouncing the decision of the Constitutional Court the Law no. 51/1991 cannot be qualified as “predictable law” as per art. 8 paragraph 2 from the European Convention. For this reason the Court stated that “*the recording of phone conversations between the accused and third parties, as per law 51/1991 are means of probation obtained illegally and must be*

[1] See art. 9 paragraph 2, art. 10 paragraph 2, art. 11 paragraph 2 from the Convention and art.2 of Protocol 4 from the Convention.
[2] See art. 8 alin. 2 of the Convention.

precluded under the conditions in which the file case doesn't have the authorization and mandate for the recording". The Court of Appeal of Bucharest maintained in another cause (The Court of Appeal of Bucharest, 2009) the sentence of the Bucharest Court by which the Romanian Intelligence Service was forced to pay to the accuser moral penalties, determined by the fact that the phone conversations were recorded illegally for a long period of time, causing a moral prejudice. The Court's motivation was as follows: "*In what concerns the material acts of intercepting the phone calls of the accuser, the Court retained that to the response at the interrogation, the accused showed that this interception started in 2003, the mandate being successively prolonged for another year and three months. In order to verify the existence of the authorization for interceptions, the accused claimed that the mandate whose request is inferred isn't issued by the Romanian Intelligence Service, but by The Public Prosecutor's Office attached to the High Court of Cassation and Justice, so that it cannot be submitted to the file as per Law no. 182/2002*[1]*. As follows, the circumstance of the interception of phone conversations in 2003-2004 was admitted by the accused, who inferred the mandate issued by The Public Prosecutor's Office attached to the High Court of Cassation and Justice and prolonged successively as well as the provisions of Law no.51/1991 with regards to the national security of Romania*". The Court retained the provisions of art. 20 of the Constitution of Romania, on the basis of which the jurisprudence of the European Court has a direct application on the internal legislation, and thus considered that the defense of the accused couldn't be retained due to the illicit character of its deed. With regards to Law no. 51/1991, the European Court of Human rights retained in the Dumitru Popescu vs. Romania case (The European Court of Human Rights, 2007) this legislative act doesn't meet the needs of predictability herein discussed, because it doesn't consist a guarantee of preventing the arbitrary and rightful abuse. In this respect, it was noted that the interception of conversations be done on the basis of this regulation, with the authorization of the prosecutor which doesn't fulfill the request of independence towards the executive, whereas, in the procedure regulated by law there is no control a priori of the authorization issued by the prosecutor by means of an independent authority, furthermore because the persons that are subjected to an interception aren't informed at all in the field of special legislation.

Moreover, it was noted that there is no a posteriori control of the validity of the interception of phone conversations by an independent and impartial authority, since the possibility regulated by art. 16 of Law no. 51/1991 of notifying the defense and public order commissions from within the Parliament (this control being appreciated as purely theoretical) doesn't supply the total absence of control over interception. Consequently, the European Court of Human Rights maintained that the mentioned Law doesn't bear a minimum degree of protection against the arbitrary, violating the art. 8 of the Convention. Relevant in this respect is the Rotaru vs. Romania case (The European Court of Human Rights, 2000), considering that both the recording performed by a public authority of data regarding the private life of an individual, and the use of this data and the refusal to call in question the data gathered, is a violation of the right to private life, guaranteed by art. 8 paragraph 1 from the Convention. And this is valid under the conditions in which, as per art. 8 from Law no.14/1992[2] information regarding the national security can be gathered and no internal regulation will provide limits that have to be respected in performing this matter of facts. Thus, the internal regulation doesn't define the type of information that can be recorded, the persons subjected to the surveillance procedures like gathering and archiving data, nor does it state the circumstances in which these

[1] Law no. 182/2002 with regards to the protection of the information, published in Monitorul Oficial part 1, no. 248 of the 12th of April 2001.
[2] Law no. 14/1992 regarding the organization and functioning of the Romanian Intelligence Service, published in Monitorul Oficial part 1 of no. 33, 3rd March 1992.

measures will be taken, or the procedure that has to be followed. In addition, the law does not trace limits with regards to the age of the information contained or its duration. But in order to be compatible with the demands of art. 8, a secret surveillance system must contain warranties established by law and applicable only when the activity of the authorized bodies is controlled, assuming that any interference of the executive in performing the rights of a person will be submitted to an efficient control, assured by the judiciary empowerment – at least and in the last resort, thus offering the broadest guarantees of independence, impartiality and procedure. In this respect, the Court retained that the Romanian system of gathering and archiving information doesn't supply this type of guarantees, because Law no. 14/1992 doesn't provide any control procedure during the application of this measure taken or after its application stopped. In art. 8 from Law no. 14/1992 it is claimed that the Romanian Intelligence Service is authorized to hold and use the appropriate means in order to attain the verification, archiving and arranging of the information with regards to the national security. In what concerns the technical means by which one can perform interceptions of conversations, Law no. 51/1991 doesn't enumerate or enunciate them, but only states that "they mustn't in any way violate the citizens' rights and freedoms, private lives, honor and reputations, or to subject them to illegal obligations.

3. Conclusions

Under these mentioned conditions, we estimate that it is necessary to modify the provisions of art. 13-15 from Law no. 51/1991 in what concerns the national security of Romania, in order to compel to the provisions of the Code of Criminal Procedure, of the Convention for Defending Human Rights and Freedoms, and of the European Court's jurisprudence, which means that the above named provisions be removed, as being non-conventional: they allow a prosecutor and a judge to authorize the interception of communication at the request of the intelligence services; they refer to the higher validity of the mandate discussed, i.e. of the authorization of conversation interception, under the conditions in which the Criminal Procedure Code establishes a duration of 30 days and not 6 months as the Law no. 51/1991 claims, as well as a maximum period of interception procedures of 120 days, and not sine die, as per art. 13 paragraph 5 from Law no. 51/1991 which claims that "only in entitled cases the prosecutor general can extend on demand the duration of the mandate, without over passing 3 months", and without establishing a maximum period of time. At the same time, we notice the opportunity of a normative and explicit statement, without any ambiguities, of the categories of persons subjected to interceptions on the basis of national security reasons and on the basis of concepts such as "national security", "public order", "balance and stability of social or matters in the country", "maintaining the rightful order" and "maintaining the possibility of exert citizens' rights" as per internal law, which the state can claim as being legitimate aims for justifying the interference of the public authorities in the private life and correspondence between individuals. The intervention of the legislator is mandatory, as the European Court stated in the Iordachi vs. Moldova case, with the purpose of ensuring the compatibility of the internal law with regards to the supereminence of the right which means that it is not enough that the internal law be only accessible, but it must also fulfill the request of predictability (lex certa), predictability which is expressed by the unequivocal definition of the mentioned concepts.

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THE 8TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

The Sanctioning Treatment of Criminal Participation by Inactivity

Lucian Gaiu[1]

Abstract: The objective of the present research consist of analyzing the depositions governing the institution of criminal participation by inactivity in terms of the regulations contained in the current Criminal Code, with some references to doctrine and jurisprudence. The research also refers to some aspects of comparative law regarding the institution of the mediated perpetrator adopted by some European countries. The essential contribution of the research is a critical examination of the current legal provisions, presenting different views of the doctrine and cases of the actual legal practice. Also, there are highlighted some proposals for amending and supplementing the law, in line with the general tendency of development of the criminal law science. The paper may be useful to both theorists and practitioners in the field, presenting interest for those that wish to improve their knowledge in this field.

Keywords: crime; negligence; lack of guilt; mediated perpetrator

1. Introduction

In the specialized doctrine it shows that most of the crimes are committed by one person. In other words, the criminal acts are most often the result of the action or inaction of a single active subject. However, experience shows that there can be situations where a human activity may be the result of the combined efforts of several people, thus taking place in the case of complex criminal acts. Thus, the participants hope to commit the offense easier, dividing rigorously the different tasks or operations, in this way it could easily remove any obstacles or it could find the best solutions to avoid the legal consequences of the act. (Dungan, 2002, p. 67)

The participation by inactivity is the form of criminal participation to which the people who commit a common offense provided by the criminal law, not all of them have the same mental attitude, not acting with the same form of guilt, the instigator and accomplice always acting with intent, and the perpetrator acting out of guilt or even without guilt.

The Romanian legislator accepted as contrary conception to that of the mediated or indirect perpetrator (of distance perpetrator or the perpetrator of far-reaching hand - *longa manus*), according to which the instigator or accomplice that has acted intentionally is considered committer of the offense and who actually committed the action or inaction (the direct perpetrator) would be a simple tool. Therefore the offender under the criminal law is and remains as the perpetrator, even if subjectively speaking it is not criminally liable and the one who intentionally caused or helped is and remains the instigator or accomplice, because it did not directly commit the criminal action (inaction) (Basarab, 1997, pp. 458-459).

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According to article 31, the current Criminal Code governs two ways in which it can occur the participation by inactivity.

2. The Method with Intent and Out of Guilt

It consists of determining, facilitating or helping in any way intentionally to commit an action out of guilt to another person of an offense under the criminal law (article 31 paragraph 1, Criminal Code).

Specific to this method of the participation by inactivity is that the instigator and accomplice commit the act intentionally, and the perpetrator out of guilt. The contributions of the participants that act with intent - acts of determination (specific to instigation) or adjusting or helping in any way (specific to complicity) – as for another person (the direct perpetrator) to commit an act out of guilt under the criminal law it is achieved, usually by treacherous, cunning means, so that the person on which this process occurs does not even know the real purpose. (Dungan, 2000, p. 107)

For example, it is in such situation the one that, joking with the victim saying that he would shoot, receives from the accomplice, who planned to kill the victim, a loaded gun, an unverified fact by negligence by the performer, who shoots the person with whom he joked, killing the person; or the policeman that holds a person from a false accusation, without checking in advance the legality and validity of the allegations from the contents of the denunciation; or the physician that, taking advantage of the pharmacist's negligence, procures a quantity of narcotics. (Antony, 1995, pp. 45-46)

For this reason, in the specialized legal literature (Basarab, 1997, pp. 459-460) it is mentioned the stated situation, the perpetrator acts out of guilt under the form of negligence (unpredicted).

3. The Method with Intent and Lack of Guilt

The method with intent and lack of guilt consists in determining, facilitating or helping in any way, intentionally, to commit an offense under the criminal law, by a person who commits that act without being guilty (article 31, paragraph 2, the Criminal Code).

In this method of inactivity some participants act with intent (instigator and accomplice), providing the results and seeking or accepting its production, but the perpetrator commits the offense without guilt, due to irresponsibility (article 48, Criminal Code), or being minor it meets the legal condition to be criminally liable (article 50, the Criminal Code) or being in that moment in the error of the fact (article 51 Criminal Code) or under the control of physical or moral constraint (article 46 Criminal Code) or in a state of involuntary complete intoxication (article 49, paragraph 1, the Criminal Code). These conditions, situations or circumstances must exist at the perpetrator at the time of the commitment of the offense under the criminal law.

The feature of participation by inactivity provided by article 31 paragraph 2 Criminal Code, the instigated acts without guilt, where they do not know the criminal nature of the activity that they perform.[1]

For instance, in one case, the court decided that the act of the defendant, during the month of April 2003, together with the perpetrator P.S., led the victim intentionally M.I., who acted without guilt (in terms of the error of fact) to take into possession the injured party C.J. a garage, it meets the constitutive elements of the offense of participation by inactivity to qualified theft, provided by article

[1] Bucharest Court - Criminal Division II, criminal sentence no. 903 of 04.08.2008, www.legenet.net.

31 paragraph 2 and article 208 paragraph 1, article 209 paragraph 1 letter a and e of the Criminal Code.[1]

In another case, the act of the defendant, who, taking advantage of the friendship relationship with the minor of 13 years R.I.M. and its naivety, led her to steal in August to September 2008 several times, various sums of money from her parents' home, using money for personal purposes, an amount of 48,100 lei, it was considered that it met the constitutive elements of the offense of participation by inactivity in theft, provided by article 31 paragraph 2 and article 208 paragraph l of the Criminal Code with the application of article 41 paragraph 2 Criminal Code.[2]

Similarly, the acts of the defendant, who appeared before a public notary as being another person, i.e. the owner of the land included in a certificate of inheritance, and under this identity, he ruled out the truth as him being the only heir and owner of the land that he alienated, causing by its actions for the public notary to draw up an official document (affidavit) showing the inaccurate circumstances of the truth - consisting of enrolling the defendant as sole the owner of the land – it meets the constitutive elements of the offense of forgery on identity provided in article 293 paragraph (1) Criminal Code, of the offense of making false declarations provided for in article 292 of the Criminal Code and participation by inactivity in the crime of intellectual forgery referred to in article 31 paragraph (2) and article 289 of the Criminal Code.[3]

In the same way, it was decided also the commitment of aggression acts by the offender, followed by the acquirement of assets entrusted by the people, then stating that they belong to him, represents the robbery offense committed in the inadequate participation manner provided in article 31 paragraph 2 of the Criminal Code.[4]

4. Sanctioning the Participation by Inactivity

For starters, it should be noted that, in order to punish the participation for activity, the Romanian Criminal Code settled in its provisions of article 27 of the Criminal Code *the legal punishment system*, the participants being sanctioned within the same abstract limits of punishment. Thus, the instigator and accomplice to an offense under the criminal law committed with intent is punishable with the sanction provided by the law for the perpetrator. In determining the punishment it is taken into account the contribution of each participant in the commission of the crime, and also the general criteria for the individualization of punishment, under the provisions of article 72 of the Criminal Code. Considering the contribution of participants in the offense in determining the actual punishment by the court, it does not appear only as a consequence of individualizing the penalties, but as an express obligation of it.

The particularity of the institution of the participation by inactivity, an innovation of the Criminal Code of 1968, in the development of which it had a decisive role professor Vintilă Dongoroz, derived not only from its content, but also from its way of sanctioning. Since within the participation by inactivity the subjective position of the participants is always heterogeneous, asymmetric in terms of their criminal liability plan, it is imposed the system of penalties diversification (Alexandru, 2008, p. 280), the law itself providing different punishments for different perpetrators to the act provided by the criminal law.

[1] Braila Court, criminal sentence no. 809 of 2009, www.jurisprudenta.com.
[2] Rm. Sărat Court, criminal sentence no. 29 of 18.01.2011, www. legeaz.net.
[3] I.C.C.J., Criminal Division, criminal decision no. 541 of 17 February 2009, www.scj.ro.
[4] I.C.C.J., Criminal Division, criminal decision no. 2180 of 24 April 2002, www.scj.ro.

Thus, in the case of participation by inactivity the intentional and by fault manner (article 31 paragraph 1 Criminal Code), the instigator and the accomplice, helping with intent to committing the offense, it shall be sanctioned with the punishment provided by law for the offense committed with intent, just as for the participation by activity, and the perpetrator, committing the offense by fault will be sanctioned with the punishment provided by the law for the act committed by fault. For example, if an act of murder, as provided in article 178 Criminal Code, under the provisions of article 174 of the Criminal Code was committed by three persons of participation by inactivity, those who committed the act intentionally (the instigator and the accomplice) will be punished within the limits provided by the law for the offense committed intentionally, i.e. murder, and the perpetrator, who committed the act by fault will be punished within the limits prescribed by law for the offense of manslaughter under article 178 of the Criminal Code.

In the situation where the offense under the criminal law is not incriminated when it is committed by fault, the perpetrator will not be punished, it will be cleared. For example, in the case where several persons have committed the offense by the participation by inactivity for trespassing, the persons who have acted intentionally will be sanctioned under the limits of punishment provided by law for the offense of trespassing committed with intent, and the perpetrator, who committed the crime at fault will not be punished because trespassing by fault is not punishable by the criminal law. (Dongoroz, 1969, p. 242)

As for the participation by inactivity the method with intent and lack of guilt (article 31, paragraph 2 Criminal Code), the instigator and accomplice who acted intentionally, shall be punished as for the participation by activity with the punishment provided by the criminal law committed with intent, having the same sanctioning treatment as if the perpetrator had committed the offense with guilt. (Dongoroz, 1969, p. 244)

For example, the act of the defendant, at the beginning of April 2008, with intent had caused the minor SPD using threats of violence in order to steal for the home of ED, during the night, a cellphone and the amount of 200 lei, considering that the minor had not attained the age of 14 years, he meets the constitutive elements of the offense of "participation by inactivity in the robbery" provided and sanctioned under article 31 paragraph 2, related to article 208 paragraph 1 - article 209 paragraph 1 letter g of the Criminal Code. Thus, the convict was sentenced, inter alia, to a sentence of 3 years and 8 months of imprisonment for the offense of participation by inactivity in theft, provided and punishable under article 31 Criminal Code, related to article 208-209 1 letter g of the Criminal Code.[1]

Similarly, the defendant's deed to determine the witnesses EG, LJ, EB to elaborate without guilt minutes with fictitious data meets the constitutive elements of the offense of participation by inactivity in the offense of false documents under private signature provided by article 31 paragraph 2 and article 290 of the Criminal Code. Under these circumstances, the defendant was convicted, inter alia, to two months prison for the offense of participation by inactivity in the crime of forgery of documents under private signature, provided by article 31 paragraph 2, related to article 290 of the Criminal Code, by applying article 74 letter a) with article 76 letter e of the Criminal Code.[2]

The court also established that the defendant act of arranging the introduction in Romania of the amount of 99.6 grams of cannabis through a transport company meets the elements of the offense of the participation by inactivity (complicity) to the introduction into the country of the risk drugs provided by article 26 of the Criminal Code related to the article 3, paragraph 1 of Law no. 143/2000,

[1] Science Court, criminal sentence no. 178/05.03.2009, www.legenet.net.
[2] Buhuşi Court, the criminal sentence no 146 of 25.07.2007, www.legenet.ro.

amended by Law no. 522/2004 referring to article 31, paragraph 2 of the Criminal Code. It was also found that the bus driver, who has committed in a direct and immediate way the material action to introduce in the country risk drugs, acted without fault given the fact that he did not know the content of the cargo. However, the court found that the defendant's act consisted in arranging the transport details, giving the name of the witness as the addressee of the package received the package, knowing that it contained risk drugs, it legally represents the helping materials in achieving the material element of the offense of introducing into the country the risk drugs being prescribed by article 3 paragraph 1 of Law no. 143/2000, amended by Law no. 522/2004, the defendant acting with the direct intention. In these circumstances, he was sentenced, inter alia, to 6 (six) years of imprisonment and complementary punishment of prohibiting the rights provided by article 64 letter a, second thesis, b of the Criminal Code, for a period of 4 years for the offense of "conspiracy to introducing into the country the risk drugs" – participation by inactivity, offense provided and punishable under article 26 of the Criminal Code and article 31 paragraph 2 of the Criminal Code. with reference to article 3 paragraph 1 of Law no 143/2000, with the application of article 74 paragraph 2 of the Criminal Code.[1]

5. Conclusions and Proposals de *Lege Ferenda*

In terms of crime, the participation by inactivity is a form of particularly dangerous illicit criminal. In order to commit crimes, the intentional use of poor, disabled, reckless or irresponsible people makes these activities to be facilitated and thus greatly reducing the risks. This explains why the participation by inactivity is less common in the legal practice, but not because of the rarity of cases, but especially because this form of participation is treacherous, occult, insidious, hidden, which in most cases, remains vaguely known. In general, the participants acting with intent are very clever people who, choosing very carefully the people who will have the role of perpetrators, they know how to work efficiently while remaining in the shadows, so when researching the deeds committed by the visible participants, which acted by fault or without guilt, the mix of those remaining in the shadow cannot be proven or credibly asserted. (Dongoroz, 1969, pp. 238-239)

Since most modern criminal laws operate in these assumptions with the institution of the mediated perpetrator we also propose, as it has been mentioned in the specialized doctrine (see Soare, 2004, p. 157), *de lege ferenda*, that the one determining, facilitating or helping in any way, intentionally, to commit an offense under the criminal law, by a person who commits that act without guilt, should be treated and punished exactly as the perpetrator of that act. To strengthen the above claims, we chose to analyze in the following different European criminal laws which adopted the solution of the mediated perpetrator.

Thus, the German Criminal Code, in its general part, Chapter 2 called " The offense", Title 3 – "Perpetrators and participants", defines in paragraph § 25 the perpetrator as "a person who commits the act himself or the person who commits the offense through another person".

The Spanish Criminal Code, in force since May 1996, in Book I – "General provisions on crimes and misdemeanors, the liable persons, penalties, security measures and other consequences of the criminal offense" Title II – "Those legally criminally liable for crimes and offenses", mentions in the provisions of article 28 that "*there are perpetrators the persons who achieve an act personally, or together or through another person that they use as a tool*."

[1] Iasi Court, criminal sentence no. 585/13.10.2009, www.legenet.net.

The Portuguese Criminal Code, in Book I, dedicated to the General Part, Title I called "The act", Chapter II – "forms of crime" establishes in the depositions of article 26, reserved to the authorship that "it is punishable as the person who performs an act, by himself or through another person, or taking direct part in the execution, in common agreement with another person or others, and the one who, intentionally determines another person to commit a crime, before or during its execution."

Finnish Criminal Code, in force since 19.12.1889, with many additions and changes until 2008, specified in Chapter 5, entitled "On the tentative and participation" (515/2003), Section 4 – "The commission of an offense through an agent" a "person is sanctioned as perpetrator of a crime if he committed a crime intentionally using as agent another person that cannot be punished for the offense due to the lack of discernment or intention or due to other reasons relating to the conditions on the criminal liability".

The Criminal Code of the Republic of Moldova, adopted on April 18, 2002, as amended and supplemented, defines the perpetrator in Chapter IV of the General Part, entitled "The Participation" as "the person who directly commits the offense under the criminal law, and the person who committed the crime through persons who are not criminally liable because of the age, irresponsibility or other considerations provided by this code."

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THE 8TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Criminal Liability of the Legal Entity

Ciprian Creţu[1], Andreea Alexa[2]

Abstract: Economic and financial crimes committed by individuals through legal persons grew every year in Romania after the communist era while court decisions have varied in their final sentences. The lack of jurisprudence in this field has led to a slow development of legislation covering all areas that individuals and legal persons use them to commit this infraction. Romanian law has failed to keep up with the ingenuity of criminals that get around the law and gets a mere administrative or penal fine. In this article the authors present and explain a number of Romanian jurisprudence decisions and problems that lack of a properly applied law led to encouraging this type of economic crimes among individuals through legal persons or on behalf of them, infractions that led to damage to the state patrimony. This paper may be useful both to theorists and practitioners in the field. The essential contribution of this paper consists of critical observations, conclusions and proposals made by *lex ferenda* regarding the subject examined.

Keywords: natural person, penalties under criminal law, crime

1. Introduction

According to our doctrine, it was argued that "legal relations are social relations that can be established only among people, but these do not act only in an isolated manner, as individuals, but also reunited within structural groups. Thus, with individuals, these groups of people make up these social realities, that subject to fulfill certain requirements expressly specified by the law, are likely to be subjects of rights and obligations. In this manner, the legal entity represents that subject of civil law which is the group of people who meets the conditions set by law in order to acquire that status. It is the collective legal entity, that is, a group of people, which, by possessing the qualifications required by law, becomes the holder of subjective rights and civil obligations". (Căşuneanu, 2007, p. 4)

Regarding the category of collective entities that can be held criminally liable, the legislature has provided criminal liability of both legal persons of private and those of public law. The latter, however, benefits from the exception according to which the State, the public authorities and public institutions engaged in an activity that may not be of private domain cannot be held criminally liable. However, "*in case of public institutions one has to analyze for each case, to what extent could their activity be conducted also by a legal entity of private law, in which case they will not be exempted from criminal liability. For example, can the activity conducted by a school or university be subject of the private domain? The answer is positive, since although the educational activity is a public service, it can be conducted also by private schools, not just by the public schools. In these circumstances, the public school may be held criminally liable for the offences under Article 19[1] of the Criminal Code*." (Jurma, 2010, p. 131)

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2. Offences That Can Involve the Criminal Liability of the Legal Entity

Regarding the offenses that can lead to criminal liability of the legal entity "the offences of fraud, tax evasion, money laundering and also computer hacking offences under Law 8/1996 on copyright and related rights were taken into consideration." (Jurma, 2010, p. 155)

There are, of course, offences which by their nature cannot be committed by a legal entity as an author, such as: offences committed by clerks, desertion, bigamy, jailbreak etc. but this "*does not prevent the participation of a legal entity, as instigator or accomplice, in committing of such offences; for example, a legal entity that carries out its activity in the audio-visual field, instigates soldiers to desert unit or a legal entity facilitates the performance of new marriages by persons already married, providing them with falsified documents indicating the termination of the previous marriage*." (Streteanu & Chiriţă, 2007, p. 397)

Thus, since the coming into force of the Law 278/2006[1] which regulated the criminality liability of the legal entity, more companies were prosecuted. Thus, D.I.I.C.O.T. (Directorate for Investigating Organized Crime and Terrorism) ordered the prosecution of the defendants C. V., D. A. M. M. and T. M., and also of the defendant legal entity S.C. TRANS COJAN S.R.L., for committing trigger offences, formation and support of an organized criminal group, an offence provided and punished by Article 7 of Law no. 39/2003, illicit trafficking of high-risk drugs, an offence provided and punishable under Article 2, paragraphs 1 and 2 of Law no. 143/2000 and an attempt to illicit international trade of high-risk drugs, an offence provided and punishable under Article 20 of the Criminal Code in conjunction with Article 13, paragraph 1 of Law no. 143/2000, in relation to Article 3, paragraphs 1 and 2 of Law no. 143/2000[2].

Prosecutors within D.N.A. (National Anticorruption Directorate) have decided to prosecute the following defendants, who held the qualities stated at the moment of committing the offence: D. V., administrator and CEO of S.C. GALAXY TOBACCO S.A., and C. A., president and shareholder of S.C. GALAXY TOBACCO S.A., who were charged with the crime of tax evasion, I. G. D., State Secretary of the Ministry of Finance and B. L., Head of Division within the Department of legislation in the field of excises of the Ministry of Public Finance, who were charged with the offense of complicity to tax evasion and the legal entity S.C. GALAXY TOBACCO S.A. (former National Company "Tutunul Românesc"(Romanian Tobacco), which was charged with the offense of tax evasion.[3] Prosecutors of the Prosecutor's Office of Craiova Court have decided on 20.09.2010, by means of indictment, to prosecute the defendants M. V., S.C. SILVFAL-AP S.R.L. Podari for committing tax evasion and false statements crimes, and of the defendant P. L. L. for complicity in crimes of tax evasion and false statements.[4]

3. Natural Persons, Who Can Criminally Involve the Legal Entity

According to Article 19[1] of the Criminal Code, legal entities are held criminally liable responsible for crimes committed in achieving the object of activity or interest or in the name of the legal person and in the second paragraph it is provided that criminal liability of the legal entity does not exclude criminal liability of the natural person, who contributed in any way to the commission of the same offenses.

[1] Published in the Official Gazette no. 601 from 12th of July 2006.
[2] D.I.I.C.O.T., press release from 11.08.2010, www.diicot.ro.
[3] D.NA., statement no. 699/VIII/3 from 20.12.2010, www.pna.ro.
[4] Department of Public Information and Relations with the Press within the Public Prosecutor's Office attached to the High Court of Cassation and Justice- statement from 30.09.2010, www.mpublic.ro.

Thus, the court decided to hold criminally liable of the defendant E. N. H., as manager of S.C B.E.N. S.R.L.[Ltd], together with the legal entity S.C. B.E.N. S.R.L. for offenses of fraud with particularly serious consequences, tax evasion and the use of company's patrimony for personal interests, offences provided and punished by Article 215, paragraphs 1,3,4 and 5 of the Criminal Code, Article 6 and Article 9, paragraph 1 of Law no. 241/2005 and Article 242, line 2 of Law no. 31/1990, all with the application of Article 41, paragraph 2 of the Criminal Code and Article 33, letter a of the Criminal Code.[1] However, there have been cases in which the legal entity was not held criminally liable together with the natural person, the first being declared the responsible party in the civil lawsuit. Thus, the court decided to hold criminally liable the natural person L. M. for the offense of tax evasion and asked the defendant L.M. and the responsible party in the civil lawsuit be ordered to jointly pay the tort caused to the state budget.[2] Similarly, the Court decided to hold criminally liable the defendant M. N. for the offense of tax evasion and asked the defendant M. N. and the responsible party in the civil lawsuit be ordered to jointly pay the tort caused to the state budget.[3]

4. Penalties Imposed to the Legal Entity

In international law, legal entities know various penalties. Thus, "in the Finnish and Swiss law, the sole penalty imposed to the legal entity is the fine person and the Norwegian law provides penalties such as fines and the prohibition to perform certain activities for a period of maximum 5 years. According to the Moroccan fines are imposed on legal entities and the accessory punishments consist of partial confiscation of goods, dissolution and publication of the sentence of conviction; against these entities can be provided also safety measures such as confiscation of illegal or dangerous objects and temporary or permanent shut off of a industrial or commercial premises. According to the Japanese law, the only applicable punishment for legal entities is the fine but also administrative sanctions consisting in the confiscation of the legal profit, seizure of property, that helped to commit the offense, the license revocation, the publication of the sentence of conviction.

In Estonia, the Criminal Code provides for just two penalties that can be imposed to legal entities, e.g. the fine under Article 44 of the Criminal Code and the dissolution of the legal entity provided by the text of Article 46 of the Criminal Code. It should be noted that the fine may be imposed to the legal entity and as an accessory punishment with dissolution; the latter penalty can be applied only if the legal entity has as a goal the commission of offences" (Marinescu, 2011, p. 213). In Romanian law, according to Article 53^1 of the Criminal Code, a single main sentence, that is, the fine can be imposed on the legal entity, and several accessory punishments.

The main punishment, as it is provided in Article 53^1 of the Criminal Code is a general minimum of 2,500 lei and a general maximum of 2,000,000 lei. "The determination of special limits is made by means of an algorithm similar to that used in the case of the natural person, namely, depending on the sentence of imprisonment provided for the offense committed. Thus, when the law provides for the offense committed by the natural person, the sentence of imprisonment of at most 10 years or a fine, the special minimum of the fine for the legal entity is of 5,000 lei and the special maximum of the fine is of 600.000 lei. When the law provides for the offense committed by the natural person, the sentence of life imprisonment or the imprisonment for more than 10 years, the special minimum fine for the legal entity is of 10.000 lei and the special maximum of the fine is of 900.000 lei. "(Streteanu & Chirita, 2007, p. 409)

[1] Court of Buzau, penal sentence no. 123 from 14th of July 2009, www.portal.just.ro.
[2] Court of Bucharest – 2nd Criminal Division, penal sentence no. 333 from 14.05.2012, www.portal.just.ro.
[3] Court of the 2nd district Bucharest, penal sentence no. 234 of 26.03.2009, www.portal.just.ro.

Besides the main penalty of the fine, the legal entity may suffer one or more accessory punishments such as: the dissolution of the legal entity, the suspension of the legal entity's activity for a period of 3 months to a year or the suspension of one of the activities of the legal entity in connection with which the offense was committed for a period of 3 months to 3 years, the shut off of some work points of the legal entity for a period of 3 months to 3 years, the prohibition to participate in public procurements for a period of one to 3 years, the display or dissemination of the sentence of conviction. Thus, the court, by sentence, has convicted the legal entity S.C. B.E.N. S.R.L to pay the fine of 15,000 lei under Article 215, paragraphs 1, 3, 4 and 5 of the Penal Code, by applying the Article 41, paragraph 2 of the Criminal Code. In accordance with Article 53^1, paragraph 3, letter a of the Criminal Code in relation to Article 72^2, paragraph 1 of the Criminal Code, the court decides also upon a complementary penalty regarding the dissolution of the legal entity SC B.E.N. S.R.L.1

5. Conclusions and Proposals for *Lex Ferenda*

From the content of this paper one can see gaps in speech and case-law. Although criminal liability of legal entities is a relatively new regulation that passed through 3 forms of enactment, first in 2004, then in 2006 and finally in 2009), the phenomenon should be treated carefully because of large number of crimes committed by natural persons through, for or in the interest of the legal entity.

One of the problems highlighted by other authors is that of defining the terms of public authority and public institution. "*Thus, the term of public authority has a constitutional consecration (Title III of the Constitution), although the Constitution also enumerates in other titles, other authorities not falling into any of the 3 branches of government. On the other hand, the terms of public authority and public institution find definitions and different scope in certain special laws such as Law no. 554/2004 of the Administrative Litigation, Law on Public Finance no. 500/2002, Law on Public local finance. 273/2006, depending on regulatory requirements specific to the areas covered by those laws*." (Jurmala, 2010, p. 272)

This exact undefined terms could lead to an increase in crime in the economic field. "*For example, within a non-profit association, an entity without legal personality in accordance with the legal provisions in this field, one can commit offenses of money laundering, but they cannot be held criminally liable, because of the way the Article 19[1] of the Criminal Code was formulated. For this reason, it may proceed as in Article 51 of the Dutch Penal Code, in which, after paragraph 1 provides that offenses can be committed by natural persons or legal entities, paragraph 2 adds up that the legal entity shall be assimilated, in order to apply the provisions of criminal law and the company that has no legal personality, the association and the foundation*." (Casuneanu, 2007, pp. 176-177)

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[1] Court of Buzau, penal sentence no.123 of 14th of July 2009, www.portal.just.ro.

THE 8TH EDITION OF THE INTERNATIONAL CONFERENCE
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REALITIES AND PERSPECTIVES

The Right to Remain Silent in Criminal Trial

Gianina Anemona Radu[1]

Abstract: A person's right not to incriminate oneself or to remain silent and not contribute to their own incrimination is a basic requirement of due process, although the right not to testify against oneself is not expressly guaranteed. This legal right is intended to protect the accused/ the defendant against the authorities' abusive coercion. The scope of the right not to incriminate oneself is related to criminal matter under the Convention, and thus susceptible or applicable to criminal proceedings concerning all types of crimes as a guarantee to a fair trial. The European Court of Justice ruled that despite the fact that art. 6 paragraph 2 of the Convention does not expressly mention the right not to incriminate oneself and the right not to contribute to their own incrimination (*nemo tenetur are ipsum accusare*) these are generally recognized international rules that are in consistence with the notion of "fair trial" stipulated in art. 6. By virtue of the right to silence, the person charged with a crime is free to answer the questions or not, as he/she believes it is in his/her interest. Therefore, the right to silence involves not only the right not to testify against oneself, but also the right of the accused/ defendant not to incriminate oneself. Thus, the accused/defendant cannot be compelled to assist in the production of evidence and cannot be sanctioned for failing to provide certain documents or other evidence. Obligation to testify against personal will, under the constraint of a fine or any other form of coercion constitutes an interference with the negative aspect of the right to freedom of expression which must be necessary in a democratic society. It is essential to clarify certain issues as far as this right is concerned. First of all, the statutory provision in question is specific to *adversarial systems*, which are found mainly in Anglo-Saxon countries and are totally different from that underlying the current Romanian Criminal Procedure Code, which observes the tradition of *continental trial systems*. This type of system was traditionally adopted in our country and it underlies the entire judicial doctrine and practice endorsed by our scholars and practitioners from the foundation of the modern state to date.

Keywords: self-incrimination; silence; right; accusation; testimony

A person's right not to incriminate oneself or to remain silent and not contribute to their own incrimination is a basic requirement of due process, although the right not to testify against oneself is not expressly guaranteed. This legal right is intended to protect the accused/ the defendant against the authorities' abusive coercion. The scope of the right not to incriminate oneself is related to criminal matter under the Convention, and thus susceptible or applicable to criminal proceedings concerning all types of crimes as a guarantee to a fair trial. The European Court of Justice ruled that despite the fact that art. 6 paragraph 2 of the Convention does not expressly mention the right not to incriminate oneself and the right not to contribute to their own incrimination (*nemo tenetur are ipsum accusare*) these are generally recognized international rules that are in consistence with the notion of "fair trial" stipulated in art. 6. By virtue of the right to silence, the person charged with a crime is free to answer the questions or not, as he/she believes it is in his/her interest. Therefore, the right to silence involves not only the right not to testify against oneself, but also the right of the accused/ defendant not to incriminate oneself. Thus, the accused/defendant cannot be compelled to assist in the production of evidence and cannot be sanctioned for failing to provide certain documents or other evidence.

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Obligation to testify against personal will, under the constraint of a fine or any other form of coercion constitutes an interference with the negative aspect of the right to freedom of expression which must be necessary in a democratic society.

Starting with 2003 this right has been stipulated in our legislation when the legislature amended the content of art. 70 of the Code of Criminal Procedure with the provision in paragraph 2 that the accused or defendant shall be informed, among other things, on "the right not to make any statement, and the caution that anything he says may be used against him". It is essential to clarify certain issues as far as this right is concerned. First of all, the statutory provision in question is specific to *adversarial systems*, which are found mainly in Anglo-Saxon countries and are totally different from that underlying the current Romanian Criminal Procedure Code, which observes the tradition of *continental trial systems*. This type of system was traditionally adopted in our country and it underlies the entire judicial doctrine and practice endorsed by our scholars and practitioners from the foundation of the modern state to date.

There is a great difference between adversarial and continental systems given the fact that the two systems have different approaches to the very core issue of judicial activity, which is *judicial truth* (Ionescu, 2006, p. 28). In continental system judicial truth must be identical to the objective, real truth, which means the courts cannot record something other than what actually happened. The Romanian Criminal Procedure Code *finding out the truth* is a basic rule stipulated in art. 3, which provides that "criminal proceedings must ensure the truth of the facts and circumstances of the case and also the truth about the offender". Hence, the principle of the active role of the judiciary (art. 4 of the Criminal Procedure Code), which is an absolutely necessary tool to ensure the observance of the principle of judicial truth.

The adversarial system states that the aim of continental systems to find the *objective truth* in a criminal trial is a utopia and that judicial truth which is reconstructed after the collection of evidence in a criminal trial may be different from the objective truth. In an adversarial trial system each party facing a criminal trial is the holder of one's own truth, which is trying to impose after a fair confrontation. Hence, the great importance that the adversarial system attaches to *procedure*, which has to be perfectly fair in order to reach a just solution. In a continental trial system all parties are compelled to work in order to find out the objective truth in criminal trials. For this reason, such a system does not stipulate the defendant's right not to give a statement at the trial, because it does not fit the purpose of the criminal proceedings which is *"to find out the facts of crime in due time and completely"* (art. 1 paragraph 1 of the Criminal Procedure Code). Therefore, even art. 70 paragraph 2 of the Criminal Procedure Code stipulated, upon being adopted, that the accused or defendant *"... is warned to declare everything he/ she knows about the offence and the charge that is brought against him/her in connection with it". Of course in this trial system "for the accused or defendant, giving a statement is not an obligation, but failure to do so creates an inevitable suspicion against him*" (Dongoroz, 2003, p. 190).

In contrast, the adversarial system cannot draw any conclusions from the defendant's use of his/ her right not to give any statement. It should be noted also that the legislature in the continental system had compassion for human weaknesses, because out of self-preservation mankind tends to hide the truth to avoid the evil that is associated with the punishment, for which reason the act of the offender who distorts the truth is left unpunished when failing to recount the objective truth to the judiciary. In the adversarial system, given the existence of the right of the accused not to make statements, it was possible to incriminate the offense of perjury in all cases, even if it is committed by the accused who wanted to give a statement in court. This is due to the defendant's obligation to observe the justness of

the procedure, while having both the right to a "fair trial" and the obligation to behave "fairly" in the proceedings.

Moreover, taking the provision of article 70 paragraph 2 of the Criminal Procedure Code of the adversarial system has no effect without taking penalties in this specific trial system. According to the Criminal Procedure Code failure to comply with such a rule could attract the sanctioning of relative nullity (the only sanctions provided by our code as far as criminal procedural acts and proceedings are concerned), which should be invoked even *"in carrying out the act when the party is present"* (art. 197 paragraph 4 of Criminal Procedure Code), which seems to be nonsensical, because the defendants are always there when their statements are taken. There are authors who argue that in this case a sanction specific to the burden of proof arises, namely the sanction of exclusion of evidence illegally taken, but what would be the legal basis for the application of this measure in our procedural system? How to reconcile this rule with the free evaluation of evidence (art. 63 of C.P. Code), which implies the freedom to convince the judicial body that a certain piece of evidence has probative value? For such a system the application of nullity seems more appropriate (art. 197 of C.P. Code) even in matters related to the burden of proof than the application of a sanctioning regime as strict as the exclusion of evidence. This is why practitioners are reluctant to sanction the exclusion of evidence, even after the introduction of the Law no. 281/2003 of art. 64 paragraph 2 of C.P. Code that *"evidence obtained illegally cannot be used in criminal proceeding".* Some time will have passed until such a sanctioning system will have been assimilated from the burden of proof and adjusted to the entire Romanian procedural system.

On the other hand, what sanction should be imposed when the defendant agrees to give a statement, but is not telling the truth? Obviously, none. In this case, what is the importance of the defendant's right to not make any statement stipulated in art. 70 paragraph 2 of the Criminal Procedure Code? The defendant was still able not to tell the truth, without suffering any penalty, an option which is even "better" than the right not to make any statement. Is it really beneficial to borrow from the adversarial system the defendant's right to not make any statement, leaving aside the sanction for breaching the obligation to observe the fairness of the procedure itself and not to mislead the court?

If we think in terms of the European Convention on Human Rights to see if it necessarily requires the existence of a similar provision to that in art. 70 paragraph 2 of the Criminal Procedure Code referring to the warning of the defendant about the right not to make any statement, it appears that this right of the accused is not explicitly stipulated in the Convention and the case law of the Court does not impose such an obligation of the judicial bodies to warn the defendant about the right not to make any statement. Even though it was provided in the case law of the Court, the defendant's right to remain silent and not to incriminate oneself is not similar to that of the adversarial systems. The Court imposes minimum rules on the protection of human rights, which should be observed by every trial system of the Convention signatory states, but does not suggest the adoption of a solution from any trial systems.

Obviously, if the solutions provided by the Court are closer to an adversarial procedure, being in fact inspired by it, it is difficult to implement them in a continental procedure, but this can be done while preserving the main characteristics of the borrowing system. For instance, the European Court noted that it was incompatible with the requirements of the Convention that a conviction be based *solely or substantially* on the silence of the accused, on his refusal to answer questions or testify in court, but these restrictions could not mean the failure to take into account the defendant's silence in situations that demand his/her explanation *in order to evaluate the persuasive power of the incriminating evidence.* It was pointed out that there is a clear separation line between these two situations, so that

the "right to remain silent" should not be regarded as *absolute* (Bârsan, 2005, p. 528). Thus, although the European Court provides this right of the accused, it appears that it does not compel the contracting states to borrow the adversarial system solution referring to the defendant's warning procedure and, moreover, it does not require the adoption of the sanction of excluding the statement taken without prior warning of the accused stipulated by the famous U.S. Supreme Court decision in the case of Miranda v. Arizona.

Another question that arises is about the exception to the restriction to use the defendant's silence against him. Claus Roxin - one of the most appreciated German legal science theorists - noted that the defendant's silence cannot become incriminating evidence against him (Roxin, 1997, p. 74) with only one exception, namely, when the accused agrees to make a statement and on such occasion he withholds certain information he is asked about, which is likely to produce legal effects. The argument is that when the defendant agrees to give evidence (by making a statement), he implicitly accepts his statement to be evaluated. Therefore, if the statement must be offered a conclusion, the author considers that the conclusions should be made based on the defendant's entire behavior. In other words, important is not only what was said, but also what was omitted when a question was asked about a particular issue.

Accepting such an exception would truncate the right against self-incrimination in that this principle would be valid only in case of total non-involvement of the accused in offering assistance to judicial bodies against themselves. However, the accused may only be required to offer such assistance at a certain point of the statement, when the right against self-incrimination is likely to produce legal effects. If the accused agrees to give a statement to the judicial bodies does not imply giving up his right against self-incrimination. Therefore, it should be acknowledged that the defendant's strategy may consist in misleading the judiciary, while trying to keep the appearance of collaboration with the judicial authorities. When such collaboration – initially beneficial to the defendant - puts him in a position of self-incrimination, silence cannot and should not have any legal effect. Both the author and practical solutions cited refer only to accused' silence during a general statement. Thus, the obvious question that arises is why, when the defendant creates more obstacles to authorities by misleading them instead of remaining silent, he is protected by the right against self-incrimination, whereas keeping silence at the time of making the statement is likely to turn against him?

It has been argued that in the Romanian legislation the right to remain silent does neither overlap with denying the deed, nor with admitting it, since it does not disprove the prosecution, would mean it admits it, and a mere unproved accusation has no value as compared to the presumption of innocence, which justifies the silence, no one being forced to prove their innocence, especially when the accusation is unconfirmed or unreliable. Judicial practice has constantly proven that the accused or the defendant should not be in any way coerced or sanctioned for his silence or refusal to answer, which is his right, and the law should allow any defendant to speak or not and, moreover, the defendant may remain silent not necessarily to withhold evidence or avoid judgment. There is no statutory provision to state that the right to remain silent can be an aggravating circumstance for the defendant and, moreover, it cannot be argued that if the accused or defendant refrains from giving statements thus making use of his right to silence, this attitude can be a disadvantageous circumstance for him. The judicial practice has upheld this point of view, arguing that the defendants' failure to show up in court for hearing and the subsequent submission of evidence cannot be considered a definite proof of their guilt[1].

[1] Criminal decision no. 347/June, 14th, 2007, made by Olt Tribunal.

Another issue that arose in connection with the right to silence was to determine whether circumstantial evidence obtained as a result of an inadmissible statement given by the accused is itself inadmissible or can be used in criminal proceedings. The solution derived from the German judicial practice was that indirect evidence obtained in this way is admissible. In a case, an informant infiltrated into the defendant's cell while the latter was being held on remand. The informant persuaded the defendant to confide in connection with the offence the latter was charged with and every piece of information was subsequently transmitted to the judicial bodies. The court held that the statements given by the defendant are basically inadmissible as evidence in the criminal trial. However, it argued that the information referring to the accused having an accessory while committing the offence is circumstantial evidence that can be used in the criminal proceedings. As a result, the accomplice was heard as a witness, whose testimony led to the defendant's conviction.

The Court's reasoning was that the police could also identify the witness by other means and the use of circumstantial evidence is needed to effectively combat crime. Yet, Roxin rejects this point of view arguing that by using this mechanism the privilege against self-incrimination is devoid of content - the judiciary could easily evade its scope (Roxin, 1997, p. 81). Moreover, the argument that this mechanism can fight crime more effectively is rejected by the author, who rightly argues that the public interest would consequently attract the inapplicability *in abstracto* of the privilege under discussion. Finally, it was argued that the possibility of obtaining such evidence by other means is not likely to be invoked as an argument for the admissibility of circumstantial evidence. Eventually, says the author, in most cases there is such a theoretical likeliness.

As far as we are concerned, we can only concur with the arguments offered by Roxin and the conclusion he draws. However, we note that the opposite argument is also upheld in the local doctrine (Chiriță, 2008, p. 310). Thus, starting from a common law case[1], it has been argued that a statement taken in violation of the privilege against self-incrimination can reveal the existence of a weapon without any risk of being deemed inadmissible as evidence when it is found by authorities. It is obvious that in this case there is still a theoretical likeliness that the weapon shall be discovered by other means. However, this cannot by itself attract the admissibility of evidence obtained in breach of the privilege against self-incrimination. Yet, it is debatable if this admissibility should be rejected *de plano*. In so far as the authorities had evidently other means at hand that would most likely have led to such circumstantial evidence without making extensive efforts to that end, we could accept the likeliness that such evidence can be deemed admissible.

Another issue from the American doctrine this time has been raised in connection with a potential conflict between the privilege against self-incrimination and the psychiatric tests the accused can be compelled to take in criminal proceedings. The hypothesis was that the accused claims lack of discernment when committing the crime, referring to a psychiatric examination conducted by a private expert. Will he be allowed to invoke the privilege against self-incrimination when the state itself requires a psychiatric examination?

The discussion is of interest because the only effective means to rebut the defense evidence (psychiatric examination conducted by a private expert) is to conduct another psychiatric test. But, in order to do this, the state needs the same legal framework that was available for the defense. This means that the state should have access to the defendant by a forensic expert. However, the interaction between the accused and the expert cannot be limited to mere preliminary observation or physical examination of the defendant. In this context it is considered that the expert has to interact with the

[1] Privy Council, dec. Lam Chi-Ming c. R. 1991 in R. Chiriță, p. 310.

accused at least by interviewing him (Krash, 1961, p. 918)[1]. Yet, in order to draw appropriate conclusions, it is argued that the expert has to examine or consider several times the personal circumstances of the accused from the commission of the offence on. This approach, however, cannot occur without the cooperation of the accused. The defendant's uncooperative behavior may result in an inability to offer a conclusion about the existence of discernment at the time of the offence.

Therefore, it was considered that the silence of the examined defendant becomes useless when it comes to drawing an expert opinion. Thus, the lack of cooperation cannot lead to the conclusion that the defendant is irresponsible, the only remaining possibility being to identify a mental dysfunction that is also physically visible (Marcus, 1968-1969, p. 740). Without highlighting the shortcomings of the studies focusing on the privilege against self-incrimination, it is necessary to provide the framework in which it finds its applicability in both European law and common law. Thus, it is accepted that the privilege under discussion protects the accused against making self-incriminating statements.

Therefore, a distinction should be made - at least at first glance - between the obligation of the defendant to give statements (in a broad sense that would also include documents) and the constraint of the accused to become a source of real or physical evidence.[2] This latter form of constraint can refer to the collection of fingerprints, pictures of facial features, measurements of the accused, handwriting or voice samples of the accused in order to make comparisons, biological samples etc. In all these cases, there may be a form of coercion imposed by the state (it remains to be seen how this constraint may result in violation of other rights of the individual) without breaching the right to remain silent or the privilege against self-incrimination. This is because we are not discussing about a testimonial sample. In an attempt to resolve the issues under discussion, an analogy has been made between the collection and interpretation of biological samples and the coercion of the defendant to cooperate with the forensic expert to conduct an interview. In this context it was considered that both types of evidence obtained are admissible in court because they do not reflect upon any statement given by the accused (Marcus, 1968-1969, p. 741). At first glance the analogy seems faulty. This is because the interview/discussion between the forensic expert and the defendant implies the latter's giving a statement about the circumstances in which the offence was committed and other aspects that may reveal the existence or lack of discernment at the time of the offence.

Moreover, it was argued that the expert is not interested in the content of the defendant's responses, these being used only to establish the existence or lack of discernment at the time of the offence which the defendant is accused of. Therefore, it was concluded that the psychiatric interview conducted by a forensic expert can assess the mental health of the defendant similarly to the way a chemist analyzes the biological samples collected from him (Marcus, 1968-1969, p. 742). However, we believe that the nature of the information provided by the defendant during psychiatric examination depends on how that information is used. Thus, we accept that as long as the information obtained is used as evidence only in determining responsibility/ irresponsibility of the defendant, it is admissible in court.

In conclusion, we concur with the thesis that the mental state of the accused is real evidence that can be obtained only through the already discussed procedures, for which reason it is not in the scope of the privilege against self-incrimination. This is because, in order to establish discernment, the state can appeal only to the accused by obtaining his cooperation (Marcus, 1968-1969, p. 743).

[1] Krash, A. (1961). The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia. *Yale Law Journal, Vol. 70*, p. 918.
[2] See also relevant case law of The European Court of Human Rights – for instance, *Saunders v. United Kingdom.*

Nevertheless, in as much as the information obtained from the defendant is used to determine his guilt or degree of guilt, the privilege against self-incrimination should be applicable. This conclusion was pointed out in the common law jurisprudence.[1] There is still a debatable issue referring to the circumstantial evidence obtained against the defendant as a result of the information he gives during the interview. As far as we are concerned, the privilege against self-incrimination should be applicable. Yet, this issue needs further analysis.

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[1] See also *The State v. Obstein*, cited by J. Marcus, p. 743.

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REALITIES AND PERSPECTIVES

Legal Personality of Inter-Governmental International Organizations

Cristian Jura[1]

Abstract: Upon the incorporation of an inter-governmental international organization, the states assign to such entities some of their powers, based on which the organization will promote the collective interests of its members. Thus, the international organizations perform some public functions based on which they enter in contact with other entities of international order, such as different states or other organizations. Manifesting as such, they acquire their own legal personality, distinct from that of the states forming it, and which it is opposable *erga omnes*. The scope of such article is to examine the legal personality of inter-governmental international organizations providing one apprehends the limits of their juridical personality. In the achievement of such objective, I have developed both the internal juridical personality and the international juridical personality of international organizations, recording the manner of manifestation of such legal personality.

Keywords: International organizations; legal personality; internal personality; international personality; capacity to conclude treaties

1. Introduction

Although they are derivate subjects of public international law, since they are the creation of states, the inter-governmental international organizations have an increasing high role in the settlement of global issues faced by humanity, which may be solved only by an overall approach and only by viable and fast solutions. In the doctrine of international law, the international organization is considered to be an association of suzerain states intending to achieve an objective of common interest, by the bodies of organization. (Năstase, 2006) Another definition is provided by Gheorghe Moca, who defines the inter-governmental international organizations as permanent, institutionalized forms, of the collaboration of states in different fields. (Moca, 1970) Grigore Geamănu wrote that international organizations represent forms of coordination of international collaborations in different fields, since the states created a certain juridical-organizational (institutional) frame by adopting a by-law, mutually elaborated, stipulating the object and scopes of organization, their bodies and functions, necessary in achieving the objectives followed. (Geamănu, 1983) Hans-Albrecht Schraepler (German author and diplomat) stated that "*intergovernmental international organizations represent a special world, sometimes disorienting for the citizen, with no right of intervention or influence, besides the by-pass provided by its own government*".

One of the rapporteurs of the Commission of International Law of United Nations – G. Fitzmaurice proposed the following definition for the international organizations: "*an association of states,*

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constituted by treaty, with constitution and common bodies and with distinct legal personality from that of member states". (Miga-Beşteliu, 2000)

A definition closed to that provided by G. Fitzmaurice belongs to professor Bindschedler, who considers the international organisation "*an association of states, determined by and based on a treaty, following common scopes and with its own special bodies, accomplishing particular functions within the organization*".

As noticed, there are several definitions of international organizations, but none unanimously accepted, and the concept of intergovernmental international organization varies depending on the interests of great groups of states and the philosophic concepts of authors. However, in doctrine, it is generally outlined a constant background of specific elements, based on which one may characterize or even define such institution. A first characteristic of international organizations refers to the fact that their members are suzerain states. The intergovernmental international organizations rely on a treaty concluded between two or more states. It is an essential trait, emphasizing that international organizations include suzerain states with equal rights, agreeing freely to adhere to the activity of such organizations by own consent. Any international organization is, above all, a form of cooperation of states with permanent character, based on their association as suzerain entities, as subjects of international law with a view to achieve common goals.

The second element is that the incorporation of international organization is the result of the will expressed by the funding states within a by-law (charter, constitution, convention, pact, by-law etc). Opposite to other legal forms of association of states, as diplomatic treaties and conferences, the international organization has a permanent and institutional character – the third element –, determined by the existence of some structures, skills and permanent operations, set forth in a multilateral treaty having the nature of a by-law. Fourthly, the association of states in international organizations involves pursuing common objectives or scopes: maintenance of peace and international stability, economic development, financial cooperation, trade development, transfer of technology etc. The fifth element for the qualification of an association of states as intergovernmental international organisation is the condition that is has its own institutional structure. Practically, one has to hold several bodies, with periodical or permanent operation, through which the activity is carried out according to the by-law. Among the bodies specific to an organization, there must be at least a body formed of the representatives of all member states, and such body does not depend on a certain state.

Also, in order to qualify as international organization, the association between two or more states must be established and performed based on the norms of international law. Another element is that the international organizations and their operation enjoy on the territory of member states privileges and immunities. The cumulative effect of constitutive elements enumerated above provide to the intergovernmental international organization legal personality – of internal and international law – based on which it enjoys rights and undertake obligations on the territory of any member state or in relation with them or other subjects of international law. The delimitation of characteristic traits of an international organization does not allow us to draw up a definition, namely: *"The intergovernmental international organization represents an association of suzerain states, developed based on norms of international law and determined by a by-law, holding its own permanent bodies, exercising their activity for the accomplishment of common objectives and with distinct legal personality from that of member states"*.

2. Legal Personality of Intergovernmental International Organizations

As it is noticed in the definition, the international organizations are an association of states, acting as a distinct unit, independent from the states forming it, and opposable *erga omnes*. Practically, the intergovernmental international organizations are holding rights and obligations acquired based on the states' consent. The legal personality of governmental international organizations is the expression of functional autonomy and capacity of subject of public international law. It also provides to the organization an objective existence in relation to the other participants to the international relations.

The legal personality of intergovernmental international organizations has a double aspect, considering that the organization has:

a) an internal juridical personality, respective in the juridical order of the member states;
b) an international legal personality, which represents the most important issue of its legal personality. (Chivu, 2002)

Generally, the legal personality of intergovernmental international organizations has two traits. Firstly, it relies on the *principle of specialty*, which means that the international organization carries out the activity and exercises its skills within the limits of the disposals of its by-law. Secondly, the personality of such organization is *functional*, allowing the bodies of organization to achieve the functions invested by the same by-law.

2.1. Internal Legal Personality

The intergovernmental international organizations do not have their own territory. Therefore, they carry out the activity for the achievements of scopes for which they were incorporated on the territory of member states, to the extent that such states acknowledged in their juridical order the opportunity corresponding to a legal individual of internal law. Thus, they necessarily enter in juridical relations with natural or legal individuals of internal law, in such states. Therefore, they shall have the capacity of being holders of rights and obligations in relations of internal law on the territory of any of the member states and, if the case, on the territory of some non-member states. In practice, exercising the personality of internal law of international organizations concerns a special situation, resulting from the reports of the organizations with the state on the territory of which it has the seat and a general one, reflecting the treatment applied to international organizations, by all member states, on its own territory. In the first situation, the organization and the seat state conclude a special agreement, indicating the extent and content of the prerogatives of such organization, generated by its by-law, as well as the regime of legal reports concluded by the organization with natural or legal persons in the seat state in order to buy goods, lease spaces, render services etc. (Miga-Beşteliu, 2000) The legal ground based on which the international organizations enjoy on the territory of every member state the juridical capacity necessary to achieve the scope and exercise their functions, is represented by their by-law. Thus, in article 104 of the Charter of United Nations it is stipulated that: "*The organization will enjoy on the territory of every member the legal capacity necessary to achieve and perform its objectives*".

This is an example for most of the by-laws of intergovernmental international organizations with similar disposals (similar disposal encounter as well in the Treaty of Instituting the European Economic Community in 1957, in article 211 – "*In every member state, the community has the widest legal capacity acknowledged to the legal persons by internal legislations; The community may acquire, mainly, or alienate movable and immovable goods and may stand in court*"). The legal personality of internal law of international organizations, resulting from its by-law, is opposable to all

member states as parties of such multilateral treaty. Every state is able to acknowledge such personality as indicated in the by-law, and by extend or reject it as well, either based on an international agreement or a special internal law – offering internal legal personality to international organizations to which they are members and indicates the nature, extent and applicability of the immunities and privileges granted.

2.2. International Legal Personality

After the Second World War, due to the increasing number and functions of international organizations, the states had the obligation to accept international organizations as subjects of international law, acknowledging their international legal personality in the international jurisprudence.

The International Court of Justice, in the evaluation notice related to the remediation of the damages incurred by an individual serving the United Nations, since April 11th 1949, states that "*the organization is an international subject of law, since it has the capacity to hold international rights and obligations and the capacity to prevail such rights by international claim*". Also, the Court stated that the international organizations do not have the same international legal personality as the states, since the two entities present significant differences in the field of rights and obligations in international relations. (Chivu, 2002)

Continuing on the same idea, we may state that the extent of legal personality of international organizations varies from one organization to another, depending on their by-law. Since every international organization has been created to accomplish well determined functions, and if such functions, as the organizational scopes, are different, neither their rights nor their obligations may be the same. In conclusion, we may state that the international juridical personality of international organizations cannot be determined *a priori* and it is not identical, by its content, for all organizations, but it depends on the field of activity and extent of competence of every intergovernmental international organization.

Upon the acceptance of *international legal personality of United Nations* and the opposability to the member states, the International Court of Justice considered that it results from:

a) need of achieving the scopes for which the United Nations have been created;
b) the fact that it has bodies with special duties for the achievement of such scopes;
c) the members of the organization undertake, by Charter, to support it in the performance of its objectives, and in special cases, such as the resolutions of the Security Council in the application of the disposals of Chapter VII of Charter, undertake to accept and enforce them. (Miga-Beşteliu, 2000)

By analogy, this kind of reasoning may be supported as well in what concerns other intergovernmental international organizations, with an international legal personality wider or more restricted, depending on the obligations undertaken by the member states in the by-law, field where they operate and the nature of organization – universal, regional, sub-regional. Thus, in case of regional and sub-regional organizations, their legal personality is manifested in the relations with the states forming them. This does not affect however their capacity to act externally, in conformity to the norms of international law, opposite to states outside the organization or other organizations. (Miga-Beşteliu, 2000)

3. Manner of Manifestation of Legal Personality

The intergovernmental international organizations are derivate subjects of international law. They are created by states, based on their will, existing as long as the member states agree. They are also limited subjects, in terms of skills, by the disposals of their by-laws. The international juridical personality of intergovernmental international organizations is not an inherent trait thereof, but it depends on the will of the states that incorporated the organization, expressed in its by-law. The international juridical personality of organization depends on the accomplishment of the following conditions: to be a governmental organizations; to have a by-law in accordance with the imperative norms of public international law and meant to provide to the organization certain rights in the international relations and the possibility to hire international obligations; and, eventually, the functions of the bodies of organization to provide it a functional autonomy opposite to the member states in the international relations. (Chivu, 2002) The manifestation of legal personality of international organizations may be done by certain distinct acts, such as: concluding international agreements, representation besides other subjects of international law as well as determining the skills and international liability.

3.1. Capacity to Conclude Treaties (Agreements)

Usually, such capacity is stipulated in the by-laws of international organizations, the organizations being able to conclude agreements in different fields, depending on their objects and interests. In order to conclude military agreements in case of application of measures to maintain or restore peace and international security, the Charter of United Nations authorizes the Security Council. For the conclusion of agreements for specialized institutions, the Economic and Social Council is authorized.

Besides the capacity of international organizations to conclude agreements with states or other international organizations, many international organizations are competent, by their by-laws, to conclude agreements with non-member states of such organizations. The most illustrative example is provided by the by-law of European Economic Community, which stipulates the right of community to conclude trade agreements (Treaty Instituting the European Economic Community of 1957, article 111 paragraph 2 – "*The Commission presents recommendations related to Common Customs Rate for rate negotiations with third countries ...*"; article 113 paragraph 3 – "*If agreements need to be negotiated with third parties, the Commission presents recommendations to the Council, the latter authorizing it to begin the necessary negotiations ...*") or association agreements with non-member states (Treaty Institution the European Economic Community of 1957, article 238 – "*The Community may conclude with a third state, with a union of states or an international organization, agreements institution an association characterized by mutual rights and obligations, common actions and special procedures ...*"). There are however certain situations when international organizations conclude agreements which do not necessarily fall under the incidence of some express disposals in their by-laws, which entails the occurrence of two currents, one being that which acknowledges the capacity to conclude agreements only to the organizations with by-laws which stipulate as such and only within the such limits, and the other considering that such capacity does not depend exclusively on the terms of the by-laws, but it relies on the decisions and rules set forth by the bodies of international organizations and on the development of institutional international law as result of the activity of several international organizations. (Miga-Beşteliu, 2000)

The answer to such discussions is given to us by the Convention from Vienna of 1986 related to the right of treaties between states and international organizations or between international organizations,

in article 6: "*The capacity of an international organization to conclude treaties is governed by the rules of such organization*".

3.2. Representation besides Other Subjects of International Law

As the states, the international organizations are entitled to be represented besides other subjects of law and to receive, at their seat, their representatives. The legation right has a "passive" or "active" form.

The passive legation right consists in the possibility of organization to accept, if its by-law or other acts allow, receiving permanent missions of member states or missions of observers from other races, with such capacity, in the organization. The principle of the right of passive legation of international organizations is stipulated in article 5 of the Convention of Vienna from March 1975 related to the representation of states in the relation with international organizations [(par. 1) *The member states may, if the norms of organization allow this, to establish permanent missions for the accomplishment of the functions mentioned...*; (par. 2) *The non-member states may, if the norms of organization allow, to establish permanent missions of observation for the accomplishment of the functions mentioned...*]. The use of such institution by the member states was performed with the international evolutions in the operation of organizations and with the role assigned to some of these in certain fields of international collaboration.

The right of active legation consists in the possibility of organization to send its own missions to certain member or non-member states, or other international organizations. Theoretically, no international organization is expressly authorized, within its by-law, to send diplomatic missions in the member states. However, in practice, the number of the representatives of international organizations in different states, mainly in emergent countries, is permanently increasing, being determined by the intensification and diversity of the actions of international organizations within such states. The active legation right of international organizations is performed by the agreement of sending organization and receiving state, leaving from the principle that, as subjects of international law, they maintain basic diplomatic relations based on mutual agreements. Besides the member states, the international organizations may have permanent missions or may submit special missions. Usually, the permanent missions deal with the coordination of the programs of assistance or with the mission to inform the authorities in the member states on the activities carried out by such organizations. The functions of such missions are limited to the specialty field where the sending agency operates. The special missions of some international organizations in the member states are temporarily submitted, with a well determined scope: to conciliate a dispute, in order to draw up and assess a project of development, to support a demand of financial support for the organization etc. (Miga-Beşteliu, 2000)

3.3. Skills and International Liability of International Organizations

Usually, *the skills of international organizations* are set forth in the disposals of their by-laws and are restricted. Also, the skills of international organizations have a functional nature, being determined for the scopes for which they were created and limited to the disposals of their by-laws. The intergovernmental international organizations have different and multiple skills, which may be grouped in three great categories:

3.3.1. Normative Skill

Such skill consists in the possibility of organizations to create juridical norms addressed to certain addressees – member states, bodies of organizations or even other organizations – in agreement with

the norms of international law and the basic principles of organization. Another issue of such skill is also the fact that several intergovernmental international organizations form the frame of elaboration and adoption of certain international conventions, their norms constituting an international legislation in the field. The normative skill of governmental international organizations is also manifested by normative acts adopted by their bodies. Usually, within intergovernmental international organizations, only certain may body is competent to adopt normative acts applicable to the entire organization.

3.3.2. Operational Skill

Such skill consists in the powers of action of international organizations different from normative ones. Such powers consist in the actions of organizations to provide economic, financial, administrative support and, in some cases, military support to member states. Such power is accomplished only with the consent of the states involved. Such fact is concretized in the agreement concluded between the international organization providing assistance and the state targeted by it. The operational skill of international organizations differs from one organization to the other. It is ruled by the by-law of the organization and its internal deeds.

3.3.3. Skill of Control and Sanction

Such skills are closely related to the normative skill, indicated the extent to which the international organizations may control the manner how the member states accomplish the obligations incumbent upon them as member of the organization and may apply sanctions to the members not meeting them. The skill of control of international organization consists in its right to claim and receive periodical reports from the member states on the manner how such state accomplishes the statutory or conventional obligations. The skill of sanction of international organizations is determined in their by-law. The international organizations have the obligation to meet the international law and to carry out the activity in conformity to its norms.

The breach of the obligations incumbent upon the international organizations, by international legal personality, entails *their international liability,* generated either by their by-laws, or the international deeds in which they are contracting parties.

The international organizations are liable for contrary actions:

- the principles and norms unanimously acknowledged of international law;
- norms stipulated in the articles of incorporation;
- norms of internal law of organization;
- agreements concluded by organization with other subjects of international law;
- norms of national law of states.

Therefore, the international organization will be liable for actions included in the international crimes' category and represents a threat against international peace and security, for instance: acts of aggression, discrimination etc. The international organizations may hire a liability of international law as well as one of internal law, since they have both international legal personality and internal legal personality and their activities may be introduced not only in the international juridical order but also in the national order of a state.

As subject of internal law, the intergovernmental international organizations may be bound for any act or legal deed falling under the incidence of internal rules. As any subject of internal law, the international organizations have the obligation to meet the laws and rules of seat state or of the states where they carry out different activities. However, the international organizations may claim the jurisdiction immunity, not being possible to be called in court and sentenced. Although they enjoy

immunity from the jurisdiction of residence state, the international organizations have the obligation to observe the law, since the immunity of jurisdiction has only a procedural character. As for the liability of international law, the general rules of states' responsibility apply, in principle, and if it concerns the liability of intergovernmental international organizations. It is important not to forget that international organizations are functional juridical individuals and thus they hold their own characteristics reflected necessarily as well in the field of international responsibility. It has to be considered that, in all cases of internal and international liability; the criminal liability is not approached, being a liability concretized in the obligation of reparation. (Anghel & Anghel, 1998)

4. Conclusions

In conclusion, based on foregoing, it is clear that, whereas the state enjoys international personality based on their suzerainty, for intergovernmental international organizations their legal personality may be awarded by the member states through the by-law. The same by-laws of the organization stipulate as well the legal personality of internal law, necessary to the organizations in the relations with the states where it has the seat since the organization does not have an individual territory, as it does not have suzerainty either.

We may state thus that the legal personality of international organizations, despite that of states, is:

- derivate, provided by member states in the by-law;
- specialized, according to the activity deed;
- limited, according to the functions and objectives determined.

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REALITIES AND PERSPECTIVES

Concept of Suzerainty

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Abstract: This article approaches the concept of suzerainty, which, in time, has generated several disputes and disagreements, being also subject of conventions, treaties and international mediations. I have approached this sensitive and especially current since in contemporary international law, the political and legal ground of international personality of state is represented by its suzerainty; also, the integration of states in over-national bodies and structures is possible only for the states having the suzerainty acknowledged. Considering that suzerainty, as essential element characterizing the state, gives expression both to the authority exercised over the community organized in the state and to some directed towards the exterior of community, I have analyzed both the internal and external suzerainty. This articles focuses on determining – as accurate as possible – the characteristics of the concept of suzerainty and of the limits of exercising the suzerainty.

Keywords: internal suzerainty; external suzerainty; suzerain power; absolute suzerainty; state power

1. Introduction

Concept often used currently, grounded on defining and organizing the society we are living in, „suzerainty" is a term with long history. The discussions and controversies generated by the validation and definition of suzerainty as concept were different depending on the currents of thought in philosophy or political science alternating in time. The great theorists in these fields tried to determine the nucleic signification of the term depending on the elements constituting their view about the organization and operation of human society. This day, suzerainty is a wide accepted term representing the exclusive right to exercise the supreme political authority (legislative, executive and/or judicial) over some geographical areas, of a group of people or themselves.

Generally, the notion is inseparable from the state concept, suzerainty being closely related to the foundation of state.

The professor Gr. Geamănu asserted that suzerainty „*as institution, (...) appears when states begin to exist*", (Geamănu, 1967) whereas Gh. Moca stated that „*suzerainty appeared with the power of state, as an essential trait thereof, under the conditions of division of gentilic order (...) and creation of state*". (Moca, 1983)

There are many definitions of state. Practically, depending on the moment in time, on ideology, on different schools of thinking in the international relations, on state interests or other international organisations, specialists provided different significations of the term, ranging from notions situated rather in the area of political theory, to concepts subordinated exclusively to the principles of

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international law. Based on a classical definition elaborated by Jean Bodin, ,, suzerainty is the absolute and perpetual power of a Republic, called by Latin people *majestatem*... Suzerainty is not limited in time, power, content or time". (Năstase & Măţieş, 2002)

In the 20th century, the conceptions of G. Scelle and Ch. Rousseau reconsider suzerainty "as an amount of skills which may be delegated by state to a higher or lower extent to some international bodies".

Currently, suzerainty represents the claim of state to full self-governing, and the mutual recognition of claims to suzerainty represents the ground of international society, the unique, full and indivisible supremacy of the state power, within the limits of territorial borders and independence thereof in relation to any other power, expressed in the exclusive and inalienable state right of determining and elaborating independently the internal and external politics, of exercising the functions, of accomplishing the practical measures of organization of internal social life and external relations based on fulfilling the suzerainty of other states, of the principles and norms of international law accepted based on agreement. (Anghel, 1998)

2. About Suzerainty

The doctrine of suzerainty has developed as part of transformation of European medieval system within a modern state system, process culminating to the Treaty of Westphalia, of 1648. The peace from Westphalia, following the 30-year War, represented the first diplomatic meeting on European level (first European congress), on such occasion being presented the principles of political balance, of state reasoning and people right.

In other words, one acknowledges the suzerainty and equality of states as basic principles of international relations and it is introduced the concept of balance between powers as means of maintaining peace.

The monarchs however continued to be the expression of „state", since suzerainty refers firstly to their person. The constitutions of European states represented the most relevant frame in defining and asserting suzerainty as norm of internal law, whereas the Charter of the United Nations and international and European treaties provided new traits to such norm in the international, respectively European law. Thus, the European constitutions determine that suzerainty (some adding as well the syntagm „national"), or power belongs to people. We encounter such ideas in the constitutions of Spain, France or Sweden. According to other constitutions (Romanian and Belgian), suzerainty belongs to the nation.

By the concept of nation, the inhabitants within the borders of the same state have acquired gradually the consciousness that they belong to a national community, that they share a common history and, very important, that they have common interests which they may defend and promote the best through the national state. In the 18th century, it is performed the most important passing from the suzerainty of monarch to that of nation or people, triggered by the Declaration of Independence of United States of America, consecrated as well in the Declaration of Human Rights and Citizen as well as in the Constitution of revolutionary France.

The institutions are called to represent the nation defending such suzerainty which they have elaborated, legislated and supported. In order to serve the best the interests of people, within a democratic system, the power must divide the attributions in „Holy Trinity" of Executive, Legislative and Judicial Power. (Năstase & Măţieş, 2002)

Jean Jacques Rousseau stated, in the „Social Contract", that „*suzerainty is inalienable and indivisible*", but he acknowledged further on the fact that „not being able to divide suzerainty in its principle, they divide it in its object, they divide it in force and will, in legislative and executive power, in rights of duties, justice and war, in internal administration and the power to deal with the foreigner; sometimes they intermingle all these, other times they separate them".

Although Enlightenment, by the theoretician of social contract, has certainly determined the manner of delegating the suzerainty of people to governors, currently, the suzerainty of state power is presented as supremacy and independence of power in the expression and achievement of the will of governors as state will. Although it is a unitary notion in essence, suzerainty involves two elements: external suzerainty and internal suzerainty.

2.1. Internal Suzerainty

Internal suzerainty means the right of the state to organize the political power, namely the right to legislate, to achieve justice and politics. It is about the state supremacy concretized in the right of the state to adopt legal norms, obligatory rules for all its citizens and to assure their application.

In what concerns Romania, the principle of suzerainty is elaborated in the Constitution of Romania. Therefore, „Romania is a national, *suzerain* and independent, unitary and indivisible state" (Art. 1, par. 1 Romanian Constitution), which expresses the supremacy of state power nationally and independence of it opposite to another power on international plan, whereas „National suzerainty belongs to Romanian people (...)" (Art. 2, par. 1 Constitution of Romania).

We notice that the constitutional disposal stipulated by Art. 2, par. 1 of Constitution of Romania includes a contradiction of terms. National suzerainty belongs to the nation not to the people. Constitutionally speaking, the people may be regarded from two different perspectives: as suzerain holder of power and as an amount of citizens with voting right. From the first perspective, the people represents all individuals (citizens), regardless the nationality declared by each of them. From the first perspective, the people is represented by the citizens enrolled on electoral lists.

The option of constituent for the concept of „national suzerainty" is motivated by the fact that the nation accumulates, within a procedural synthesis, as prof. Ion Deleanu states „the past, present and future" of the generations of Romanians, whereas the people would represent an arithmetic amount of individuals, each of them with a (equal) share of suzerainty. (Deleanu, 92)

However, the Constituent has associated the term of national suzerainty to that of people within a theoretical hybrid with social valences relevant in constitutional practice. Considering that suzerainty belongs to the people, and that it cannot exercise it directly, it entrusts the exercise of attributions of suzerainty to Parliament and President, the people being the holder of power. The traits of suzerain power are: inalienability, indivisibility, imprescriptibility, wholeness and unity.

The inalienable character of suzerainty shows that it cannot be alienated definitively and irrevocably, to some individuals or international organizations. The state is entitled however under certain conditions to waive certain prerogatives of its suzerain power. Indivisibility reveals that suzerainty, being unitary, cannot be divided in shares, in distinct units and exercised separately. This phenomenon is explained by holding and exercising the voting right considered a natural, subjective right of any individual. The voting right belongs to the individual not to the nation. The imprescriptible character reveals that suzerainty exists as long as such nation exists. The wholeness reveals that suzerainty cannot be arbitrarily limited. The unity of suzerainty results from the qualitative and integrating synthesis of the shares of suzerainty of every individual. (Ionescu, 2008)

2.2. External Suzerainty

External suzerainty means competence, independence and judicial equality of states. The concept is normally used to include all issues when every state is allowed by international law to decide and act without intrusions of other suzerain states. Such issues include the selection of political, economic, social and cultural systems, as well as the formulation of external politics.

The suzerainty and equality of states represent the basic constitutional doctrine of the right of nations, which governs a community consisting, mainly, in states with a uniform legal personality. The main corollaries of suzerainty and equality of states are:

1) a jurisdiction, exclusive *prima facie*, over a territory and permanent population living therein;
2) an obligation of non-intervention in the area of exclusive competence of some states;
3) dependence on the obligations resulted from common law and treaties agreed by debtor r.

The principle of suzerain equality of states stipulated by the Declaration of the General Meeting of United Nations of 1970 has the following contents:

„All states enjoy suzerain equality. They have equal rights and obligations and they are equal members of international community, despite the economic, social, political or other differences.

Particularly, suzerain equality includes the following elements:

1) the states are juridically equal;
2) every state enjoys full suzerain inherent rights;
3) every state has the obligation to observe the personality of other states;
4) territorial integrity and political independency of state are inviolable;
5) every state is entitle to choose and develop freely its political, social, economic and cultural systems;
6) every state has the obligation to achieve completely and with good faith its international obligations of living peacefully with other states."

However, there are certain limits of the principle of suzerainty, widely accepted in international law. Chapter VII of the Charter of United Nations allows the Security Council to take measures, including military, in case of acts of aggression, breaches of peace or international security or threatens against them.

Suzerainty may also be restricted by common law or obligations undertaken by treaties. The states must observe the international obligations undertaken, not being allowed to claim its own suzerainty as excuse for not accomplishing the duties agreed.

In addition, the membership to United Nations (Buzatu, 2012) involves a restriction of suzerainty of members. Article 1 of Charter stipulates that one of the objectives of United Nations is: „to achieve international cooperation in solving the international issues with economic, social, cultural or humanitarian character, in promoting and encouraging the observance of human rights and fundamental liberties for all, regardless race, sex, language or religion", the United Nations being „a centre which harmonizes the efforts of nations in reaching such common objectives". Consequently, being brought in the international sphere, such economic, social, cultural and humanitarian issues, as well as the human rights, by ratification of Charter, the national governments can no longer claim that such issues are exclusively internal. Suzerainty cannot protect the internal violations of human rights which argue against the international obligations. Therefore:

–the states must secure to the foreigners on its territory the rights stipulated by the common and conventional norms of international public law;

–the state has the obligation to reject to be undertaken, on its territory, of some acts which endanger the security of other state;

– the state has the obligation to observe the immunities of foreign states – meaning that the acts of a state cannot be submitted to the internal jurisdiction of other state – and the immunities of execution enjoyed by the goods property of other state encountered on its territory. The county court of a state can no longer take constraint measures against the goods of a foreign state. (Năstase & Mătieş, 2002)

3. Conclusions

Consequently, suzerainty is a characteristic of state power – an essential element of state – and consists in the supremacy of state power on national plan and its trait to represent the state in international relations, under equality conditions and without international interference. It is the most important trait of the state power and involves the supremacy internally and independence externally. Suzerainty belongs to all states, regardless the size, power, stage of development and it is the fundamental concept of international law, being the main element on which it is currently founded the state and international organization.

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THE 8TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Considerations on National and Union Regulations of Work through a Temporary Employment Agent

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Abstract: The necessity to adapt the organizational structure of economic operators to the competitive European market requirements has imposed measures that have also influenced labor relations. The permanent and full-time employment relationship has been largely replaced by other types of more flexible labor relationships: temporary employment, part-time work, working from home and temporary assignment through an employment agency. All these types of work relationships are characterized by a decrease of guarantees for the employee and by a reduction of trade union power. Thus, they are considered atypical work relationships. The need to make the flexibility of labor relationships compatible with the protection of employees" rights has been a challenge that must be faced by social policies and also by labor law. In this context, the use of a temporary employment agent has been a tool for flexible working relationships both with the economic operators and within the labor market as a whole. The importance and role of this type of working relationship has, therefore, acquired significant legal, economic and social dimensions, which this study intends to analyze. In a European economy hit by the jobs crisis, reliance on work through a temporary employment agent can be a way to reduce unemployment. This happens only if the temporary workers benefit from legal protection and equal treatment as permanent employees.

Keywords: labor relations; atypical work; flexibility; legal dimensions

1. Introduction

Over the last decades of the twentieth century, developed capitalist countries have undergone a process of production structures transformation and of economic operators' organization. This process was driven by technological innovation and the need to compete in a world increasingly globalized. In this traditional model of economic operators they establish direct relationships with their employees through labor contracts, usually concluded as permanent and full time. This model has undergone adaptation measures, which lie in changing the structure of the economic operator, change that modifies labor relations within the organization. The permanent and full-time relationship has been largely replaced by other types of labor relations, which are more flexible, including work through a temporary employment agent. This type of work benefits from international and also national regulations and acquires important facets in a labor market characterized by instability and short term economic projects.

What is still to be analyzed is the extent to which the legal regulations meet the current social and economic needs. It is necessary to identify not only the advantages and disadvantages of work through a temporary employment agent but also legal loopholes, so that law can be adapted continuously.

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2. The Romanian Labor Code and Work through a Temporary Employment Agent

The current Romanian Labor Code has regulated for the first time work through a temporary employment agent (Ştefănescu & Beligrădeanu, 2003, p. 5), (Athanasiu & Dima, 2005, pp. 72-76), (Ţiclea, 2006, pp. 522-529), (Ştefănescu, 2007, pp. 415-421). According to art. 88 of this law, work through a temporary employment agent is the work of a temporary employee, who has signed a temporary contract with a temporary employment agency and is available to the user to work temporarily under the supervision and management of this user. According to art. 88 para. 5 of the Labor Code, temporary work shall mean the period during which the temporary employee is available to the user to work temporarily under their supervision and direction, for the execution of specific tasks of a temporary nature.

Work through a temporary employment agent involves the existence of legal relationships between three distinct persons (Athanasiu & Dima, 2005, p. 273):

- the temporary employee - the person assigned to an employer, a temporary employment agent, available to a user during the necessary period for the precise and temporary tasks to be performed;
- the temporary employment agent – a legal person authorized by the Ministry of Labor, of Social Protection and of the Elderly, who provides the user with qualified and/ or unqualified workers, whom it hires and pays for this purpose;
- the user – a natural or legal person that the temporary employment agent shall provide with a temporary employee for the performance of certain specific and temporary tasks.

The employment contract is concluded between the temporary employment agent and the temporary employee (Art. 94, Labor Code). Between the temporary employment agent and the user a contract of provision is concluded (art. 91, para.1). Between the temporary employment agent and the temporary employee an individual employment contract of limited duration is concluded for an assignment. Assignments shall be established for a period that does not exceed 24 months. Assignment duration may be extended for successive periods added to the initial period, as long as it does not result in exceeding a period of 36 months.

The temporary employment contract must contain information concerning the conditions under which the employee will perform his mission, the mission duration, the identity and location of the user, the amount and remuneration means of the work provided by temporary employee. In the temporary contracts a probationary period may be set in accordance with art. 97 of the Labor Code. This period may last between two and thirty working days, depending on the total duration of the mission and the hierarchical level of the duties performed by the temporary employee. A temporary employee is entitled to a salary for each mission and its level is negotiated directly with the temporary work agent, without being less than the guaranteed minimum gross wage payment.

The contract of employment concluded between a temporary employment agent and a temporary employee is terminated usually at the expiry of the mission or missions for which it was concluded. The temporary employment agent, like any other employer, may dismiss the temporary employee, but only as provided by law, as in the case of their own employees. The temporary employee may resign at any time, as long as he acts in compliance with the provisions related to being given notice.

No contract is concluded between the temporary employee and the user, as the legal relations between them are established by law and are governed by the principle of non-discrimination (Athanasiu & Dima, 2005, p. 277). Temporary employees have access to all the services and facilities provided by

the user, in the same conditions as other employees thereof (art. 92, para. 1). The user is responsible for providing the temporary employees proper working conditions.

Between the temporary employment agent and the user a contract of availability is concluded, the contract being not governed by labor law, although this law sets some of the contents of this contract. The availability contract must include: task duration, job characteristics, especially the required qualification, the place of task performance and the work program, the actual working conditions, personal protection and work equipment that the temporary employee has to use, any other services and facilities for the temporary employee. Other components of the contract are the commission value that the temporary employment agent benefits from, as well as the remuneration to which the employee is entitled, the circumstances under which the user can refuse a temporary employee made available by a temporary work agency. The Romanian legislator shall establish, in accordance with the relevant EU law, that any clause which prohibits the employment of a temporary employee by the user after the mission is completed is invalid.

2.1. Compatibility of the Romanian Legislation with the International and Union Legislation regarding Temporary Employment

In Romania, a country which has not ratified any of the ILO conventions on private work placement agencies, the only external legislative landmarks are represented by Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on work through a temporary work agency (OJEU, 2008) and Directive 96/71/EC of the European Parliament and Council Directive on the posting of workers in the provision of services (OJEC, 1997), implemented by Law 344/2006 concerning the posting of workers in the transnational provision of services (Official Gazette, 2006).

The labor market in Romania has adapted according to the new tools for labor relations flexibility, at present being a number of temporary agents whose activity is particularly intense. Legal entities and individual users who require the services of temporary work agencies in Romania are usually ranging from large to medium operators who need specialists in certain areas, on the one hand, and, on the other hand, the situations in which they must replace holders of suspended employment contracts are quite common. By analyzing the Romanian Labor Code the fact that it is consistent with EU legislation is revealed. By Law 40/2011 essential changes are made to the legal institution of work through a temporary employment agency, in order to increase the flexibility of labor relations.

3. Regulations of the European Union on Work through a Temporary Employment Agency

In countries of the former European Economic Community, both mediation activity in the labor market and recruitment and temporarily assignment of employees to other companies in order to meet short term labor needs were, for a long time, activities generally prohibited. That was because, legally, it was considered that they were using practices that were against the fundamental rights of employees (Basuc, Nenu et al., 2005, pp. 103-132).

However, by the late sixties, many countries in the European Economic Community, although they had ratified Convention 96/1949 of the International Labor Organization regarding private work placement agencies, they had also regulated the temporary employment agent activity. It was understood that this activity, when conducted in a controlled manner, did not cause any damage and had positive effects, because it allowed channeling a large part of the job offers, which, because of specialization or the need to obtain an immediate response could not be adequately addressed by the

employment services of traditional public employment. In this regard, the weak point was not represented by the temporary employment agent business, but by lack of regulation and control that favored the occurrence of the illegal employment of subjects who did not provide even the most basic guarantees of labor rights and social protection for employees.

From the perspective of institutions and EU law, the free movement of workers and the principle of free competition, the emergence of temporary employment agencies appears to be legitimate. In this context, the Court of Justice of European Communities has determined that public employment offices to which the law of a Member State assigns the management of services of general economic interest should be subject to competition rules under Art. 90 para. 2 of the Treaty, as long as it is not demonstrated that their application is not compatible with the mission performance (ECJ, Case Sacchi, C-155/73, para. 15).

Later, the Court of Justice decided to include work through a temporary employment agency in the notion of freedom to provide services (ECJ, Case Webb, C-279/80). The Court established (ECJ, Case Job Centre Coop., C-55/96, para. 21, 22, 31, 32, 35) that competition law considers "firm" "any entity, public or private, engaged in an economic activity, regardless of the legal status of that entity and the mode of financing" and the "activity aimed at placing workers is an economic activity", which has not always been, nor shall it be exercised by public enterprises. Thus, "when those offices do not fulfill conditions to meet the demand that exists in the labor market for all kinds of activities" giving the state exclusive rights to exploit the service would involve an abuse of its dominant position, opposed to the rules of the Treaty governing competition, because the service is limited to the detriment of users. Therefore, national laws which prohibit any activity of mediation or interposition between employment supply and demand that is not exercised by public employment offices, attempt at art. 86 and Art. 90 para. 1 of the Treaty (ECJ, Case Job Centre Coop., C-55/96, para. 35, 38.). This situation generates State responsibility which is favorable, keeping the respective legislation, when the abusive behavior may affect trade between Member States, without the need for the damage caused to trade to have actually occurred, a potentially abusive situation being enough (ECJ, Case Job Centre Coop., C-55/96, para. 36).

Following the description established by ILO Convention 181/997, the temporary employment agent provides services consisting of the contracting of employees to make them available to a third person, natural or legal (business user) which establishes the duties of the employee and supervises their work. The Court of Justice has stated that the only employer of the employee assigned for the mission is the temporary employment agent that concludes the employment contract with the employees and makes them available to the user. The temporary employment agent has a direct relationship with the employee during the entire assignment, arising mainly from the fact that the agent pays the proper wages, the social contributions, penalizing the failure of performing their activity (ECJ, Case Job Centre Coop., C-55/96, para. 36).

Currently, the EU temporary employment agency work is regulated by Directive 2008/104/EC of the European Parliament and of the Council on temporary employment agency work. The legal basis of the Directive resides in the principles recognized in art. 31 of the Community Charter of Fundamental Rights of Workers (Popescu, 2006, pp. 279-280), which establish the right of any employee to working conditions which respect their health, safety and dignity, to limitation of maximum working time, the daily and weekly rest, as well as paid annual leave.

The Explanatory Memorandum of the Directive contains a justification of the need for this regulation by increasing the number of individual employment relations through temporary employment agency at the same time with the increase of the risks that these employees are subject to, hazards that could

cause accidents at work or occupational diseases. The adoption of this Directive has become a necessity after the Brussels European Council in December 2007 when they agreed common principles of flexi security were agreed upon, principles "that provide a balance between flexibility and security in the labor market and helps both employees and employers to seize the opportunities globalization offers".

The Directive covers the principle of equal treatment under which employees must be treated during the mission at least as favorable as the comparable employee of the user. Also, to combat precarious work in the case of the temporary employee, the Directive establishes the obligation to inform assigned employees on existing vacancies within the user firm, in order to facilitate their classification. In addition, the obligation is established for Member States to take measures so that the invalid clauses prohibiting the conclusion of an employment contract between a business user and a temporary employee, after completing the mission, are sanctioned by nullity.

With the regulation of access to vocational training, the Directive attaches great munificence in action for Member States so that, in accordance with national traditions and practice, either by collective bargaining or by adopting the necessary measures, access to training for employees assigned by the temporary employment agent to the user company is improved. In terms of collective representation, the Directive requires that assigned employees shall be taken into account, with in the temporary employment agency, to determine the threshold that must be considered when collective employee representation bodies are created. Finally, the Directive requires that the user company shall inform the legal representatives of the employees on the use of temporary assignment of employees within the company, when information on the employment situation is transmitted to the respective representatives.

4. Short Presentation of the Disadvantages and Advantages of Labor Relations within the Contract Concluded with a Temporary Employment Agency

The specific form of labor relations which involve the temporary employment agent cause the appearance of certain specific problems, which consist of its lack of social acceptance, namely:

- precariousness in employment. Assigned employees do not have stability at work, because every mission in a user company requires a new employment contract;
- unfavorable conditions of safety and health at work. Safety and health conditions of assigned employees are lower than in the case of other employees who have other types of contracts. Assigned employees are more likely to face physical risks (awkward postures, vibration and noise), and must face more intense work and a higher work rate than employees with indefinite contracts or those with fixed -term contracts;
- lower wages. Remuneration of temporary workers can in principle be lower in relation to the user company's own employees. From the existing data it has been shown that compensation of transferred employees tends to be lower than in the case of the user company employees;
- fewer training opportunities. Assigned employee participation in continuing professional education is much lower than in the case of employees with permanent contracts and even compared to those with fixed-term contracts.
- difficulty to form a collective representation. One of the causes is the loss of collective identity of the assigned employee because it is an employee of a company whose business is the transfer of workforce and whose employees are not part of a physical unit. The user

company is not the favorable environment to form this community, because the assigned staff is not part of the staff of that company.

- increased chances for the temporary employee to become a permanent employee of the user. The user often considers the temporary employment agency as a personnel selection agency, hiring a worker who, at first, is not bound by the contract, with whom a contract of indefinite duration is concluded, once they become more familiar and the original contract is terminated.

5. Conclusions

The success of the temporary assignment of employees through temporary employment agents is due to the flexibility it brings to labor management, their contribution being very important in the case of economic operators prone to shortage and high turnover of staff, to the increase of activity and of hiring and firing costs. Temporary workers are, however, vulnerable to risk of loss of employment, and in terms of rights to form and join a union; they are employees of an employer, but being employed in another team than of their own employees.

In this context, assignment of employees through temporary employment agents is considered positive factor for the overall growth of jobs. However, it is estimated that there will not be an enduring engine for creating jobs if cannot attract the employees, if it does not provide quality jobs and if it does not improve "social acceptance". Therefore, the objective of the Directive is to make flexibility and security, job creation and quality of employment compatible. In the analysis that will be done before December 5, 2013, according to art. 12 of the Directive, it will be decided to what extent the current EU regulation meets the economic, social and legal needs of the labor market, given that, in the five years since the adoption of the Directive, Member States have undergone a process of deep recession, with devastating consequences for jobs, the number of those who are not involved in a work relationship being the highest in the last 20 years.

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THE 8TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

Mediation in Penal Cases on the Offence of Simple Destruction

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Abstract: Mediation is applied in the penal cases referring to offences for which, according to the law, the withdrawal of the beforehand complaint or the reconciliation of the parties obviate the penal responsibility. The destruction offence, provided in article 217 of the Penal Code, is included in the category of such offences. Mediation is possible only in the cases described in paragraph (1) of the above mentioned article: destruction, degradation or bringing the goods belonging to another person to a state of non-use, hindering the measures of preservation or protection of such goods and the removal of the already taken measures, as well; such acts are punished with prison from one month to three years or with a fine. The mediation activities shall take place in conformity with the legal regulations on mediation, in conformity with the norms regarding the organization and functioning of the Code of Ethics and with other documents containing data about the rules to be respected. At the national level there are a series of documents describing the procedures of mediation.
Keywords: offence; injured party; offender/ doer; mediation; Penal Code

1. Introduction

The offence of destruction - article 217 of the Penal Code - is included among the offences against patrimony, as provided in title III. The patrimonial social relations are considered to be an important domain of the social structure, as having an essential role in the complex process in the evolution of all types of social orders (Bulai; Filipas; Mitrache; Bulai & Mitrache, 2008). Patrimony is defined as being the total amount of economical rights and duties/obligations that belong to a person; yet, mention shall be made that, in as far the offence of destruction is concerned, patrimony is, first, considered to refer to all material goods of the holder and which enable him/her to fulfill all economical duties. From a penal point of view, mediation is extremely useful and necessary in the case of less important conflicts that start from the amiable neighborhood or from inter-conflicting situations and to which, the very law-maker granted the parties the possibility of lodging a beforehand complaint necessary for a penal lawsuit, as well as the possibility of reconciliation that may make a penal lawsuit stop. This is the reason why mediation cannot be used in those conflicts in which, if the parties reconciled, they cannot avoid the penal responsibility, but only as a modality to recover emotionally - this aspect is called restorative justice. At the same time, mediation is meant find out the reasons standing at the basis of the offence and to try to heal the possible psychic trauma left behind.

2. Analysis of the Offence of Destruction

2.1. Definition and Characteristics of the Offence

Destruction is the deed that causes material damages to goods or to a person. This deed is incriminated by the Penal Code of Romania (Law no 15 of June 2, 1968, republished, with further amendments) in article 217 and considered to be an independent offence as:

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Destruction, degradation or bringing the goods belonging to another person to a state of non-use, hindering the measures of preservation or protection of such goods and the removal of the already taken measures, as well; such acts are punished with prison from one month to three years or with a fine (paragraph 1).

If the respective good has a special artistic, scientific, historical, archival value or another type of value, the prison punishment increases from 1-10 years (paragraph 2). The destruction, degradation or making an oil or gas pipe dysfunctional, or of the high tension cables, equipment's of telecommunication installations, or equipment's for radio and television broadcasting, or of the systems of water supply or of water main lines, are punished with 1-10 years (paragraph 3). In case the destruction, degradation or bringing the goods belonging to another person to a state of non-use is committing by arson, blast or any other similar method and, if the result is a public damage, the prison punishment is from 3-15 years (paragraph 4). If the orders stipulated by paragraphs 2, 3, 4 are to be applied even if the goods belong to the offender himself (paragraph5). If the goods belong to a private property, with the exception when partially or totally belong to the state, the penal action for the deed mentioned in paragraph 1 starts the moment the injured person lodged a beforehand complaint (paragraph 6).

Mediation is possible only for paragraph (1) of article 217 of the Penal Code. Article 218 of the Penal Code stipulates the offence for qualified destruction and article 219 of the same Code stipulates the offence by fault. In these above mentioned cases mediation is not admitted. The New Penal Code that will come into force in 2014 (Law no 286 of July 2009 on the Penal Code) provides the offence f destruction in article 253 as follows:

Destruction, degradation or bringing the goods belonging to another person to a state of non-use, hindering the measures of preservation or protection of such goods and the removal of the already taken measures, as well; such acts are punished with prison from one month to three years or with a fine (paragraph1).

Destruction of a document under a private signature that belongs totally or partially to another person and helps in proving a patrimonial right, if that was the object of the damage, is punished with prison from 6 months to three years or with a fine (paragraph 2). If the deed mentioned in paragraph (1) concerns goods belonging to the cultural patrimony, the prison punishment is from 1-5 years (paragraph 3). Destruction, degradation or bringing the goods belonging to non-use committed by arson, blast or in other similar way and if it injures other people or goods, is punished with prison from 2-7 years (paragraph 4).

The provisions of articles (3) and (4) are applied even of the goods belong to the offender/doer (paragraph 5). For the deeds committed in paragraphs (1) and (2) the penal action starts after the injured person has lodged a complaint (paragraph 6).

The attempt of committing the deeds provided by paragraphs (3) and (4) is punished (paragraph 7).

It is obvious that the offence of destruction is based, in the New Penal Code, on the same grounds as the Penal Code in force, yet mention shall be made that a new aggravating version in article 251 paragraph (2). This new amendment incriminates "the destruction of a document under a private signature that belong to another person and that helps in proving a patrimonial right, if that was the object of the damage" but, from the point of view of the mediation is not important. The other aggravating variants of the offence of destruction provided by the Penal Code have been maintained by the new Code; only a few reformulations were necessary to make them agree with the judicial doctrine and practice. In the case of these aggravating variants mediation is not possible.

For the offence of destruction both the standard variant and the aggravating variant (that includes a new incrimination) to start the penal action it is necessary for a beforehand complaint to be lodged by the injured person. Consequently, mediation will not be possible.

2.2. The Juridical Object and the Material Object of the Offence of Destruction

The *juridical object* of an offence of destruction is the patrimony and the social relationships referring to the protection, possession or detention of the patrimony.

The *material object* consists of:

- corporeal movable animate or inanimate goods that have a minimum economic value;
- immovable goods;
- documents with an economic value or those having a special significance for the injured person, with the exception of those documents kept by an authority, by a state institution or by a unit mentioned in article 145 of the Penal Code and of those issued by a penal pursuing authority, by an instance or by any other jurisdiction authority, or addressed to them.

The essential requirement: the goods shall belong to a natural or legal person or to another entity, other than the offender's.

2.3. The Subjects of the Offence of Destruction

In case of simple offence the *active subject* can be any person, with the exception of the owner of the goods (he can be an active subject in the case of any aggravating variants where mediation is not possible). The offence of destruction might be committed in all the forms of participation: co-authorship, instigation, complicity).

A *passive subject can be* natural or legal person whose goods have been destroyed, degraded or brought to a state of non-use.

2.4. The Constitutive Content of an Offence of Destruction

The objective side can be done in five alternative modalities: destruction, degradation, bringing to a state of non-use, hindering the measures of protection and preservation the goods, removing the measures of conservation or rescuing goods.

1. *Destruction* presumes that the physical goods cease to exist. This aspect can take place into a large variety of actions, but not through modalities meant to create a public danger or risks. The main characteristic of this hypothesis of the material element is the fact that it leads to the impossibility of restoring the entity of the goods.

2. *Degradation* presumes the deterioration of the goods whose consequence is the alteration of its substance or aesthetics. In order to use or evaluate the respective goods they need to be repaired first. The deed exists even if the goods are given another destination.

3. *Bringing the goods in the state of non-use* means the impossibility of using the goods for the purpose they have been created. It is not compulsorily necessary that the goods had to be destroyed or degraded. They could simply be made useless or made to diminish their specific utility.

The permanent or temporary character of these consequences is irrelevant from the point of view of the penal responsibility (Bulai; Filipas; Mitrache; Bulai & Mitrache, 2008).

4. *Hindering the measures of protection and preservation the goods* presumes any act by which a person is encumbered to take all necessary measures as to avoid the destruction or deterioration of the goods.

5. *Removing the measures of conservation or rescuing goods* means any act that remove the already taken measures by another person to save the goods, aiming, at the same time, to destroying it.

The *immediate consequence* is the destruction, bringing the goods to the state of non-use or the creation of a dangerous state by removing the measures of protecting and preservation of the goods. The causality connection results *ex re* that is out of the material aspect of the deed, not compulsorily necessary to be demonstrated.

The subjective aspect. The deed is committed with a deliberate intention - should it be direct or indirect.

It is necessary that the offender to have intended or at least to have accepted the destruction or the deterioration of the good that belonged to another person. The aim or the reason why the deed had been committed is not important. As mentioned above, mediation is not possible in the case of aggravating variants of the offence, such as:

1. if the respective good has a special artistic, scientific, historical, archival value or another type of value, the prison punishment increases from 1-10 years (paragraph 2) Penal Code;

2. the destruction, degradation or making an oil or gas pipe dysfunctional, or of the high tension cables, equipment's of telecommunication installations, or equipment's for radio and television broadcasting, or of the systems of water supply or of water main lines, (article 217 paragraph (3) Penal Code;

3. in case the destruction, degradation or bringing the goods belonging to another person to a state of non-use is committing by arson, blast or any other similar method and, if the result is a public damage, (article 217, paragraph (4) Penal Code.

2.5. Forms, Sanctions and Specific Procedural Aspects of the Offence of Destruction

Preparatory documents are possible but are not incriminatory. Because of their specificity the moral deeds can appear in any type of offence, while the preparatory documents are not compatible with any type of offence (Radu, 2013).

The *attempt* is possible and punishable. An attempt can appear then when material deeds have been committed in one of the five modalities described above, and the result in view - destruction, degradation or bringing the goods to a non-use state - were not attained because of reasons beyond the offender's will.

Consumption appears in all the five variants of the material element provided in paragraph (1) of article 217 of the Penal Code, the moment of committing the infringing activity. The deed shall be really demonstrated; otherwise one cannot speak about a consumed destruction, but about an attempt. The offence can have a continued form/aspect; so, the deed is *exhausted* after the last deed was committed.

Sanction. In the simple variant the deed is punished with prison from one month to three years or with a fine. In conformity with paragraph (6) of article 217 of the Penal Code, the action can start when the beforehand complaint of the injured person was lodged.

The penal responsibility is removed by both the withdrawal of the beforehand complaint and by the reconciliation of the parties. The offence of destruction, in any of its forms, can compete with such offences as: theft, robbery, outrage against the good morals and manners and disturbance of the public order. In case of theft the destruction can be a modality of committing it because then, it will be a single one offence: aggravated theft (Bulai; Filipaş; Mitrache; Bulai; Mitrache, 2008).

3. Mediation

From the penal point of view the system of amiably solving the ADR - Alternative Dispute Resolution - can rather hardly find an application because the special character of the penal deeds which, due to their gravity and to the social danger they produce are judged by the instances as a result of very sound investigations made by the organs/bodies of penal pursuit (Radulescu, 2012).

Law no 192/2006 on mediation and establishing the role of the mediator, published in the Official Gazette of May 22, 2006 with further amendments, stipulates - in Chapter VI, section 2 - special orders with regard to mediation in the case of penal causes. Thus, the injured person cannot be compelled to accept mediation; accordingly, neither the offender can. In case the two parties consent to accept mediation, it has to take place in such a way that the right of each party to juridical assistance should be guaranteed and, if necessary, the right to have an interpreter. This guarantee if offered to the persons whose penal pursuit has already started, so that if mediation started before informing the organs of penal pursuit or before the beginning of the penal pursuit, the dispositions of the Code of the Penal Procedure with regard to the juridical assistance are not applicable. (Dragne & Tranca, 2011).

The representation of the parties as stipulated by the procedure of mediation can be legal or conventional. The legal representation becomes a point of law then when the persons put under interdiction or infants under 14 years lack the capacity of decision. The conventional representation can take place under the conditions of article 52 of Law no 192/2006 that stipulates that all through the procedure of mediation the parties can be represented by other persons who can sign dispositions under legal conditions. The conventional representative can be an attorney, a kin, a friend in full authority to take decisions.

The written report concluding the procedure of mediation shall mention that the parties profited by the guaranties provided to them (Popescu, 2011). The parties can also mention that they have deliberately renounced mediation. In penal cases the parties involved in a mediation contract are, in principle, the injured person/party and the offender, that is the defendant. As the law refers to a mutual agreement over the conditions in which other persons can be present in a mediation procedure, the respective parties shall compulsorily agree with the other persons' participation (Dragne& Tranca, 2011). Mediation is based on the cooperation of the parties. The mediator shall used specific methods and techniques based on communication and negotiation as to exclusively serve the legitimate interests and aims of the parties and can impose them a solution referring the conflict under mediation.

The procedure of mediation - in the case of the offence of destruction - can start before the beginning or after the penal/criminal trial (see article 68 and 69 of Law 192/2006 on mediation and establishment of the mediator profession, published in the Official Gazette no 441 of May 22, 2006 with further amendments).

1. If the procedure of mediation stars before the beginning of the criminal trial which ends with the reconciliation of the parties, the injured party can no longer inform the organs of penal pursuit about the destruction or, if necessary, the court of instance.
2. If the procedure of mediation started within the term fixed by the law for the introduction of a beforehand complaint, the term is suspended all through the period of the mediation.
If the conflicting parties have not reconciled after the mediation, the injured person can introduce the penal beforehand complaint at the same term/date; it will continue from the date of concluding the written report of the procedure of mediation, including, also, the time the period before suspension.
3. If mediation rakes place after the beginning of the penal trial, the penal pursuit or according to the case, the trial is suspended if the parties present the mediation contract.

The suspension lasts until the procedure of mediation is concluded, irrespective of the modalities provided in article 56 paragraph (1) of Law 192/2006 that is: concluding and agreement between the parties mentioning that the parties solved the conflict; establishing the failure of mediation or presenting the mediation contract by one of the parties. No more than three months shall pass since the conclusion of the contract of mediation.

The penal trial is taken again *ex officio* immediately after the reception of the written record that mentions that the parties were reconciled or, if this is not mentioned, at the expiry of the term provided in paragraph (2) of article 70 that is no more than three months since the conclusion of the contract of mediation. In order to solve the penal case in the basis of the agreement concluded as a result of mediation, the mediator shall send the judiciary authority the mediation agreement and the concluding report about mediation - in both original and electronic format - in case the parties reached an agreement or, the report on the conclusion of the mediation as provided in article 56, paragraph (1) letter b) and c).

In agreement with article 57 of Law 192/2006 for the conclusion of a procedure of mediation, in any of the cases provided in article 56 (1), the mediator will write a report to be signed by the parties in person or by their representatives, and by the mediator himself. Both parties receive an original copy of the report. When the conflicting parties reached an understanding, a written agreement can be issued; it has to include all the clauses agreed upon by the parties, and will have the value of a document under a private signature. In general, the agreement is drafted by the mediator, with the exception when the mediator and the parties consent differently (article 58 of Law no 192/2006).

The agreement of mediation can also include the modalities meant to repair the prejudice such as: moral repair, repair in kind and repair in equivalence. The moral repair means that the offender shall recognize the produced damage, the assumption of the responsibility for the committed prejudice and the expression of sincere regrets for the committed deed. Repair in kind - if it is possible at the moment the agreement is concluded and if it is in conformity with the interests and wishes of the parties. The modalities in which the repair in kind is to be made shall be conform with article 14 paragraph (1) of the Code of Penal Procedure: restitution of the object(s), restoring the state as before committing the offence and total or partial annulling of a document - these modalities are enumerated in the Code as possible examples.

Repair in equivalence means the payment of an equivalent sum of money. The parties can agree for a money payment as a modality of repairing the moral non-patrimonial prejudice caused to the injured party. The agreement of mediation shall be the result of both parties' will. The Law does not offer the possibility to the mediator to supervise the way the obligations assumed by the agreement are turned to account by the parties. At the same time, there is no legal disposition to forbid the parties to fix post-

mediation meetings. During these meetings the parties will analyze the way in which the agreement was carried out.

4. Conclusions

The Council for Mediation has not collected - from 2006 up to now - statistical data regarding the number of conflicts subjected to mediation, neither before nor after the beginning of the procedure in the instance. Yet, the first data referring to the number of mediation agreements approved by the instances have been included in the 2010 Report of Activity of the High Council of Magistrature. In conformity with this report, "out of the data obtained up to now, a certain reserve was noticed from the part of the litigants as to resort to the procedure of mediation as an alternative method in solving litigations".

The specific aspect of the penal conflicts makes mediation be different from all the other domains. The emotional charge of the parties brought together in a penal conflict is hard to be overrun, as the first instance session starts after a long period in which the parties removed stress after an active hearing and after the other mediation techniques the mediator have to apply.

Very often, the facts offer the parties a state of guiltiness that turns into a barrier in communication which the mediator has to overrun with tact and naturalness and with an adequate psychological training. So, to conclude, mediation - in the case of disputes between the victim and offender - for an offence of destruction provided in article 217 paragraph (1) of the Penal Code offers each party the possibility to describe the way he/she faced and experienced the offence (events and feelings), to agree over the idea that an injustice has been committed and to make efforts to restore normality again.

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The Treaty of Nice, European Union Charter of Fundamental Rights

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Abstract: The enforcement of the Charter of Nice not only offered the more visible image of the basic human rights provided in the European Union Member States, but also established the more solid juridical basis for the protection of human rights, expanded over other fields of activity, e.g. the guarantee of communication security etc. At the same time, the provisions of the Treaty of Nice resulted not only in the modification of the Treaty as regards the European Economic Community, in order to establish the European Community, but also in reaching a new phase in the process of European Integration, engaged through the creation of the European Communities stipulated in the European Union Treaty.

Keywords: the human rights; the European Union Treaty; the right to liberty and security

Gathered in Cologne on June 4th, 1999, The European Council required that "the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident" (Conclusions, Item 44). This "European Union Charter of Fundamental Rights" (Carlier & De Schutter, 2002) has been published in Nice as a Treaty (Petri & Constantinescu, 2007, p. 10), which has been adopted on December 10, 2000 by 15 state and government leaders of The European Union, and has been signed on February, 2001 during the Session of The European Council gathered in Nice (France). Although this Treaty – entered into force on January the 1st, 2003 – has been signed by all the 15 member-states of The European Union, it has not been ratified by all signatory states. For example, the Irish people rejected the Treaty in June, 2001 through a Referendum.

The Treaty of Nice represents – along with other foregoing Treaties, e.g. The Treaty of Maastricht and The Treaty of Amsterdam – a constitutional instrument regarding the human rights, hence the need of knowing and applying the provisions included within its text.

The institutional changes provided by The Treaty of Nice would only have been applied starting with the year 2004. Thus, the new European Parliament elected in June 2004 consisted in 732 members, and the new Commission, which started its mandate in November 2004, only consisted in 25 members.

The agreement concluded in the end of the meeting in Nice has also established the number of the members that would activate in The European Parliament. Thus, Germany would have 99 members; The Great Britain – 72; France – 72; Italy - 72; Spain - 50; Poland - 50; Romania - 33; Netherlands - 25; Greece - 22; The Czech Republic - 20; Belgium - 22; Hungary - 20; Portugal - 22; Sweden - 18;

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Bulgaria - 17; Austria - 17; Slovakia - 13; Denmark - 13; Finland - 13; Ireland - 12; Lithuania - 12; Latvia - 8; Slovenia - 7; Estonia - 6; Cyprus - 6; Luxembourg – 6, and Malta - 5.

The number of votes established within the Council was the following: Germany - 29; The Great Britain - 29; France - 29; Italy - 29; Spain - 27; Poland - 27; Romania - 14; Netherlands - 13; Greece - 12; The Czech Republic - 12; Belgium - 12; Hungary - 12; Portugal - 12; Sweden - 10; Bulgaria - 10; Austria - 10; Slovakia - 7; Denmark - 7; Finland - 7; Ireland - 7; Lithuania - 7; Latvia - 4; Slovenia -4; Estonia - 4; Cyprus - 4; Luxembourg – 4, and Malta - 3. The overall number of votes is 345.

The European Union Charter of Fundamental Rights (Scăunaş, 2003, pp. 216-222) - signed in Nice in 2000 - stipulates that the "human dignity is inviolable" and "it must be respected and protected" (Art. 1). Thus, we should keep in mind that the human dignity precedes in the text of the Charter *the right to life* that "everyone has" (Art. 2, 1). Actually, the first chapter of the Charter is suggestively entitled "Dignity". Indeed, the human dignity is situated above the right to life, which is also affirmed by the interdiction of death penalty. "No one shall be condemned – the text of the Charter provides – to the death penalty, or executed" (Art. 2, 2).

As a number of European jurist remarked, The Treaty of Nice did not maintain "... the distinction between the civil and political rights, on the one hand, and the fundamental economical and social rights, on the other, ascertained so far in the European and international documents; the Charter brings together the rights and freedoms around the major principles: the human dignity, freedoms, equality, solidarity, citizenship, and righteousness" (Carlier & De Schutter, 2002, p. 48).

The same Charter provides everyone's right "for his or her physical or mental integrity", as well as "the prohibition of eugenic practices, in particular those aiming at the selection of persons". At the same time, it is prohibited "on making the human body and its parts as such a source of financial gain". Last but not least, it is prohibited *the reproductive cloning* "of human beings" (Art. 3).

The following Article provides the prohibition of torture and inhuman or degrading treatment or punishment. "No one shall be subjected to torture or to inhuman or degrading treatment or punishment" (Art. 4).

The slavery and forced labor is also categorically prohibited. "No one shall be held in slavery or servitude" neither can be „required to perform forced or compulsory labor" (Art. 5, 1-2). At the same time, it is prohibited „trafficking in human beings" (Art. 5, 3).

The Chapter II of the Charter signed in Nice includes a number of human freedoms, i.e.:

a) the freedom of thought, conscience and religion (art. 10);
b) the freedom of expression and information (art. 11);
c) the freedom of assembly and association (art. 12);
d) the freedom of arts and sciences (art. 13);
e) the freedom to choose an occupation (art. 15);
f) the freedom to conduct a business (art. 16);
g) the freedom of movement and residence (art. 45).

Actually, this chapter in entitled "Freedoms". Together with these *freedoms* a number of fundamental human rights have also been provided, i.e.:

a) the right to liberty and security (art. 6);
b) everyone's right to respect for his or her private and family life, home and communications (art. 7);

c) everyone's right to the protection of personal data concerning him or her (art. 8);
d) the right to marry and to found a family (art. 9);
e) the right to education (art. 14);
f) the right to property (art. 17);
g) the right to asylum (art. 18).

Finally, the protection in the event of removal and extradition is also provided. According to the provisions of Article 19, "*the collective expulsions are prohibited. No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment*".

From the text of this chapter we should keep in mind the modality and the language used for presenting and defining these freedoms as human rights. For example, the freedom of thought, conscience and religion has been defined as a "right" that "*includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance" (Art. 10, 1). As regards "the right to conscientious objection*", the Charter provides that it "*is recognized, in accordance with the national laws governing the exercise of this right*" (Art. 10, 2).

As regards the freedom to expression, the text emphasizes that it includes "*the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers*" (Art. 11). We also should keep in mind from the text of the Charter that "*the academic freedom shall be respected*" (Art. 13), as well as "*... the right of parents to ensure the education and teaching of their children ...*" (Art. 14, 3).

Although entitled "Equality", the Chapter III also includes certain rights, e.g. the rights of the child (Art. 24), the rights of the elderly (Art. 25), and the rights of the persons with disabilities (Art. 26), which require a special social protection (Dură, 2012, pp. 86-95).

In the session held in Nice it has also been expressively reaffirmed the right of the children "to protection and care as is necessary for their well-being", hence the obligation of public authorities or private institutions to manifest "a primary consideration" to "child's best interests" (Art. 24, 1-2), as it has been already stipulated by The Convention of the Rights of the Child (Adolphe, 2003, pp. 131-214).

At the same time, it has been reaffirmed that "The (European) Union recognizes and respects the right of the elderly to lead a life of dignity and independence and to participate in social and cultural life". As for the persons with disabilities, the Charter mentions their "integration", hence the necessity that they "to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community (Art. 26).

Taking into consideration the principle of legal equality, the Charter provides that "Everyone is equal before the law" Art. 20). The same principle of equality is also considered when referring to the equality between men and women, which "... must be ensured in all areas, including employment, work and pay" (Art. 23).

The principle of the unity in diversity, which should be the fundament of The European Community, has also been reaffirmed in Nice in terms of cultural, religious, and linguistic diversity. "*The Union – mentions Article 22 – shall respect cultural, religious and linguistic diversity*".

Finally, the Chapter III has expressively referred to the non-discrimination (Zlătescu, 2011). According to the provisions of Article 21, "any discrimination based on any ground such as sex, race,

color, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited" (Art. 21, 1). At the same time, "*any discrimination on grounds of nationality shall be prohibited*" (Art. 21, 2).

As other European jurists have also remarked, the rights stipulated by the Charter are recognized "... for each human person, regardless his or her nationality or residence place" (Carlier & De Schutter, 2002, p. 48). Nevertheless, we should underline that we are still far from turning into practice this principle of "non-discrimination" in many European States that signed this Treaty.

The fourth Chapter is entitled "Solidarity" and has divers contents (workers' right to information and collective bargain, the right to accessing the social security assistance, etc.). For the states that signed the Treaty of Nice (2000) the human solidarity is expressed under the following rights:

a) workers' right to information and consultation within the undertaking, "in the cases and under the conditions provided for by Community law and national laws and practices" (Art. 27);

b) their right *"...to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action*" (Art. 28);

c) everyone's right "of access to a free placement service" (Art. 29);

d) every worker's right "to protection against unjustified dismissal" (Art. 30);

e) every worker's right "...to working conditions which respect his or her health, safety and dignity;

f) the right to paid maternity leave and to parental leave "*following the birth or adoption of a child*" (Art. 33);

g) the right to social and housing assistance (Art. 34, 3), etc.

In order to guarantee the effective translation into reality of these rights, the Treaty of Nice has also provided a number of practical measures of protection. For example, the prohibition of child labor was put together with the protection of young people at work. "*The employment of children is prohibited, provides Article 32 ... Young people admitted to work must have working conditions appropriate to their age and be protected against economic exploitation and any work likely to harm their safety, health or physical, mental, moral or social development or to interfere with their education*" (Art. 32).

The familial and professional life has also enjoyed the needed protection. "The family shall enjoy legal, economic and social protection" the Treaty provides (Art. 33). At the same time, everyone shall have the right to "protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Community law and national laws and practices" (Art. 34, 1). The Treaty provides therefore social protection for vulnerable people (Mititelu, 2012, pp. 70-77). Besides, The Treaty of Nice has also stipulated that "... everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices" (Art. 34, 1).

Health protection, ensured in the definition and implementation of "all (European) Union policies and actions" (Art. 35) is also expressively stipulated in the Treaty of Nice; thus, "everyone has the right of

access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices" (Art. 35).

Finally, the Treaty of Nice mentions that "the policies of the Union" also ensures other protections, e.g. the environmental protection (Art. 37), the consumer protection (Art. 38), etc.

The Chapter V is entitled "Citizen's Rights" and includes the rights of the European Union citizen, i.e.:

a) right to vote and to stand as a candidate at elections to the European Parliament (art. 39);

b) right to vote and to stand as a candidate at municipal elections (art. 40);

c) right to good administration (art. 41);

d) right of access to documents (art. 42);

e) right to petition (art. 44) etc.

As regards the good administration, the Treaty of Nice provides that "*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union*" (art. 41 & 1). At the same time, the Treaty mentions that "*this right includes:*

- *the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
- *the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
- *the obligation of the administration to give reasons for its decisions*" (Art. 41, 2).

The Treaty of Nice also provides the right of "*any European Union citizen and any natural or legal person residing or having its registered office in a Member State*" to "access to European Parliament, Council and Commission documents" (Art. 42) and to refer to the Ombudsman of the Union "*cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role*" (Art. 43). At the same time, it is provided "the right to petition the European Parliament" (Art. 44) and the right of every citizen "to move and reside freely within the territory of the Member States" (Art. 45).

Finally, the Treaty also provides the diplomatic and consular protection of every citizen of The European Union "in the territory of a third country in which the Member State of which he or she is a national is not represented, being entitled to protection by the diplomatic or consular authorities of any Member State, on the same conditions as the nationals of that Member State" (Art. 46).

The final Chapter of the Treaty of Nice is suggestively entitled "Justice", and provides the right to an effective remedy and, *ipso facto,* the access to an impartial tribunal (Cf. Art. 47); the right not to be tried or punished twice in a criminal proceedings for the same criminal offence (Art. 50); the presumption of innocence and right of defense (Art. 48); and the principle of legality and proportionality of criminal offences and penalties (Art. 49).

We should also underline and emphasize that, in line with the provisions of the Treaty of Nice (2000), the rights and freedoms of the human persons are guaranteed by "the law of the Union" (Art. 47). Therefore, we are faced with a genuine *"legislation"* (jus) of The European Union. Besides, the Treaty stipulates that in line with this legislation every person considering that the rights and freedoms "guaranteed by the law of the Union are violated has the right to an effective remedy before a ...

independent and impartial ... tribunal". What's more, "legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice" (Art. 47). Nevertheless, "Respect for the rights of the defense of anyone who has been charged shall be guaranteed", as long as the charged person "shall be presumed innocent until proved guilty according to law" (Art. 48).

As conclusion, we should remind that the Treaty of Nice (2000) is, as a matter of fact, a Charter of the fundamental rights and freedoms of the human person, whose dignity must be respected and protected by every European Union Member State (cf. Art. 1), hence the contribution of this Treaty to the "constitutionalization of the European Union legislation" (Dumont & Van Drooghenbroeck, 2002, pp. 61-96).

Though the text proclaimed by The European Council in Nice in early 2001 initially had "an interim juridical regime" (Constantin, 2001, p. 14), this does not mean that it was without juridical consequences, as long as it was and still is one of the fundamental documents of The European Union. Besides, the very text of the Charter of Fundamental Rights of The European Union – written in Nice – reveals that for The European Council and European Union Member States the Charter has the general juridical regime for the human rights, on the one hand, and the special regime, on the other, in line with the Union Charter and under the jurisdiction of the Court in Luxembourg. And, as a Romanian jurist remarked, "such regional legal regimes would coexist beyond any doubt with the universal system and the national one (generally in line with the Constitution) that guarantees the fundamental rights" (Constantin, 2001, p. 14).

As regards the legitimacy of this Charter of Fundamental Rights of The European Union, certain Romanian jurists ascertained that we cannot accept the thesis according to which "the citizens of European Community and Union benefit from inferior protection compared to the rights guaranteed by the national legislation (the one that – we should not forget, according to their comments, – includes the specifications guaranteed by CEDO), ...", because "the effective level of protection guaranteed by the Court in Luxembourg through the general principles assimilated to the fundamental rights ..." remains a concrete and "effective" one (Constantin, 2001, p. 17).

As for the proper text of the Charter, the same jurists also mention a number of "originalities". "As novelty – they mention – we find the guarantee for communication security (Art. 7), which replaces the guarantee for mail secrecy; the term of communication is the optimum one". Article 9 (Right to marry and right to found a family) – the same authors underline – has been regarded by the writers as an improved expression of the text presented by Article 12 of CEDO, as "it neither prohibits, nor enforces the marital status of two persons of the same sex" (Constantin, 2001, p. 16).

It has also been considered that the enforcement of the Charter of Nice aimed at:

a) Ensuring another legal basis for the protection of the fundamental rights, replacing the fundamental principles and the jurisprudence, possibly a juridical basis of primary law (Treaty);
b) Extending the protection guaranteed to The European Union citizens beyond the protection guaranteed by the existing juridical fundament" (Constantin, 2001, p. 8).

The provisions of the Treaty of Nice resulted not only in the modification of the Treaty as regards the European Economic Community, in order to establish the European Community (Barrau, 2002, p. 15) , but also in reaching a new phase in the process of European Integration, engaged through the creation of the European Communities stipulated in the European Union Treaty (Priolland & Siritzky, 2012, p. 15). At the same time, The Charter of Human Rights – included in the Treaty of Nice – has also

brought its contribution to the "constitutionalization of the European Union Law" (Dumont & Van Drooghenbroeck, 2002, p. 61-96).

The enforcement of the Charter of Nice not only offered the more visible image of the basic human rights provided in the European Union Member States, but also established the more solid juridical basis for the protection of human rights, expanded over other fields of activity, e.g. the guarantee of communication security etc. We should also keep in mind that certain articles from CEDO, e.g. regarding the right to marry and the right to found a family, have been updated according to the most recent juridical principles laid down in the Community and international regulations; hence, the "updated format" mentioned by some jurists of the present-day. Finally, we also underline that the *grosso-modo* inclusion of the Treaty of Nice into the Treaty that enforced the Constitution for Europe, alias The European Union Constitution (Kaddous & Picod, 2012), The Charter of Human Rights adopted in Nice in 2000 gained "coercive juridical force and constitutional value" (Michel, 2005, p. 38). Besides, the text of the Treaty of Nice has repeatedly been invocated by The European Union Court of Justice (Carlier & De Schutter, 2002, pp. 40-41) when evoking the collective responsibility of The European Union Members States regarding their fundamental rights.

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THE 8TH EDITION OF THE INTERNATIONAL CONFERENCE
EUROPEAN INTEGRATION
REALITIES AND PERSPECTIVES

International Covenant on Economic, Social and Cultural Rights

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Abstract: The text of the International Covenant on Economic, Social and Cultural Rights - a high-class international document on the assurance and legal protection of the human rights - outlined a sum of principles regarding these rights, which fall within the broad range of legal doctrine on fundamental human rights. These principles are not contrary to the principles set out in the Charter of the United Nations and in the Universal Declaration of Human Rights, on the contrary, it were given an evident expression in its text content. That the authors of this Covenant wanted the assertion of these principle provisions, it is actually confirmed by the text of Article 24.

Keywords: The human rights pacts; the inherent dignity of the human person; the respect for the human rights and fundamental freedoms

On December 16th 1966, the General Assembly of UN adopted the International Covenant on Economic, Social and Cultural Rights[3] and the International Covenant on Civil and Political Rights. The two Pacts are known as "The human rights pacts" because they include the principles and provisions on the affirmation and promotion of human rights, including their legal protection.

Romania ratified the two Covenants by the Decree no. 212 on October 31st 1974 (Of. Gaz. No. 146/ 11.20. 1974). Among other things, the United Nations Charter[4] - signed in San Francisco on June 26th, 1945 - reaffirms "*... faith in the fundamental human rights, in the dignity of the human person ...*" (Preamble), and provided the obligation for the Nations of the world "*... to achieve international cooperation in solving international problems with an economic, social, cultural or humanitarian character, and in promoting and encouraging the respect for the human rights and fundamental freedoms for all without distinction of any kind as to race, sex, language or religion*" (Art. 1, 3).

In the Preamble of the Universal Declaration of Human Rights[5] - adopted by the UN General Assembly on December 10th 1948 - it was stated that *"... the recognition of the inherent dignity of all members of the human family and of the equal and inalienable rights is the foundation of freedom, justice and peace in the world*". Also it was stated that "... the disregard and contempt of the human

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[3] Adopted and opened for signature by the United Nations General Assembly on 16th December 1966 by the Resolution 2200 (XXI). The Covenant entered into force on January 31st 1976 according to the provisions of article 27. Romania has ratified the The Covenant on October 31st, 1974 by the Decree no. 212, published in the Official Gazette of Romania, Ist Part, no. 146 on November 20th 1974. For the text see http://www.irdo.ro/file.php?fisiere_id=79&inline=, date: 3.06.2013.
[4] *See* www.dri.gov.ro/documents/Carta%20ONU.pdf, date 30.05. 2013. The charter was published in the Official Gazette on June 26th 1945.
[5] *For the text of this Declaration,* see *www.cncd.org.ro/Files/?FileID=63*, date 7.06.2013.

rights "were those that led" the human beings "to fear and misery", hence the obligation of all "people" and nations of the world "that through teaching and education to promote respect for these rights and freedoms "and to ensure" through progressive measures, national and international, the recognition and their universal and effective implementation ... "(Preamble).

In the preamble of the International Covenant on Economic, Social and Cultural can be found reiterate not only ideas that were stated in the text of the Preamble of the Universal Declaration of Human Rights, but also words and even whole sentences. Moreover, in the text of the Covenant we find reaffirmed principles set out both in the United Nations Charter as well as in the Universal Declaration of Human Rights. Indeed, from the Preamble of the Covenant it was reiterated ad litteram that "human dignity" is "inherent to all members of the human family" and that, "in accordance with the principles outlined in the Charter of the United Nations", "the recognition of" the dignity and of the equal and "inalienable rights" of all members of the human family "... is the foundation of freedom, justice and peace in the world". In the same Preamble it was stated that "... these rights derive from the inherent dignity of the human person", in recognition of the human dignity (Dură, 2006, p. 86-128) - which was to make express reference and the Treaty Establishing a Constitution for Europe (see Article 6) - a supreme value, and also an adequate benchmark of measuring the way that shows how the rights and the fundamental freedoms of human (Dură, 2005, pp. 5-33; 2010, pp. 431-464; 2012, pp. 86-95) are or are not stated, asserted and protected.

The text of the International Covenant on Economic, Social and Cultural Rights -a high-class international document on the assurance and legal protection of the human rights - outlined a sum of principles regarding these rights, which fall within the broad range of legal doctrine on fundamental human rights, such as:

1. The obligation of States Parties to ensure the exercitation of the human rights - set out in the text of the Covenant - without any kind of discrimination

"The States Parties to the present Covenant - in the text of the Article 2 & 2 of the International Covenant - undertake to guarantee that the rights enunciated in the Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

As it can be seen, the first principle enunciated by the Covenant was that of non discrimination (Jura, 2003) on human rights that regards the legislative framework for preventing and sanctioning all forms of discrimination.

In Romania, this principle has been outlined in the text of various legal regulations that reached a climax with the law no. 48 of 2002, through which it was actually approved the Ordinance no. 137/2000 on acts of discrimination.

Moreover, in 2002, with the establishment of the National Council for Combating Discrimination - which at that time was actually not only "... the sole body created in EU countries and within the candidate countries", who could "apply direct sanctions" (Năstase, 2003, p. 8) - but also an efficient instrument for the application of the basic principles set out in Article 2, paragraph 2 of the Covenant on Social, Economic and Cultural Rights. The Covenant provides also the obligation for "developing country" to guarantee "to non-nationals the economic rights recognized in the present Covenant". Of course, not only "the countries or developing states" have this obligation, but also the developed countries as it is provided in the International Covenants. But, as it is known, to guarantee these rights - by some developed states - on the account of non-nationals, remains a "pium desiderium" (a pious wish).

Under the influence of the Western juridical literature, some Romanian constitutionalists make distinction between the "mandatory" and "title" (Muraru, 1998, p. 169) notions to provide guarantee to these rights and those who are not citizens of these countries.

It should be also noted that the process of globalization (Held, 1999, pp. 84-111) reduce not only the historical sovereignty of states, but also undermine people's ability to enjoy their political, economic, social and cultural rights of the states in which they live, even if they are non-nationals or only stateless. In accordance with the Article 3, States Parties also undertake *"... to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights which are set forth in the present Covenant*".

Regarding the limitation of these rights by some states, the text of the Covenant provides that the State "*may subject such rights only to such limitations as are determined by law, only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society*" (Art. 4). Moreover, it forbids that any provision "in the present Covenant" may be "*interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights or freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant*" (Article 5 & 1).

Finally, The Pact specified that "*there is no restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent*" (Article 5 & 2).

2. The Right to work

Reaffirming the human right to work, the Covenant provides that it is "the right of everyone to have the opportunity to gain a living by work freely chosen or accepted", and that States Parties to the present Covenant have the obligation to take "appropriate steps to safeguard this right" (Art. 6 & 1).

The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include "*technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under condition safeguarding fundamental political and economic freedoms to the individual*" (Art. 6 &2).

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular:

a) "a fair wage and equal remuneration for work of equal value without distinction of any kind", in particular women being guaranteed conditions of work not inferior to those enjoyed by the men, "with equal pay for equal work";
b) the wage should ensure "a decent living" for everyone and their families;
c) save and healthy working conditions;
d) equal opportunity for everyone to be promoted in his employment to an appropriate higher level, "subject to no consideration other than those of seniority and competence";
e) "rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays" (Art. 7).

3. The right of everyone to association, for the promotion and protection of his economic interests

Any person has the right to "form trade unions and join the trade unions of his choice" (Art. 8 & 1a).

In the same context it is stated that "the right of trade unions to function freely subject to no limitation other than those prescribed by law ,..., for the protection of the rights and freedoms of others" (Art. 8 & 1c) as well as "the right to strike provided that is exercised in conformity with the laws of the particular country" (Art. 8, 1d).

4. The right of everyone to "social security, including social insurance" (Art 9)

5. The right to family protection and assistance, based on a free consent marriage

The Covenant states that "a widest possible protection and assistance should be accorded to the family, particularly for its establishment and it is responsible for the care and education of dependent children. The marriage concludes Art. 10: 1- must be a free consent between the intending spouses".

6. Special protection accorded to mothers

According to the Covenant provisions "a special protection should be accorded to mothers during a reasonable period before and after childbirth". During such period "working mothers should be accorded paid leave or leave with adequate social security benefits". (Art. 10 & 2).

7. Special measures of protection and assistance on behalf of all children and young persons

The Covenant provides the obligation for the State Parties to take "special measures of protection and assistance on behalf of all children and young people without any kind of discrimination for reasons of parentage or other conditions". These should also be protected by the state - through its public authorities - "from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labor should be prohibited and punishable by law" (Art. 10 & 3).

8. The obligation for the State Parties to ensure "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions" (Art. 11& 1).

9. The obligation for the State Parties to ensure "individually and through international cooperation the proper measures" for "the fundamental right of everyone to be free from hunger" (Art. 11 & 2).

10. The obligation for the State Parties to the present Covenant to take the proper measure "to recognize" the right "of everyone to the enjoyment of the highest attainable standard of physical and mental health" (Art. 12 & 1).

Among these concrete measures, we mention the creation of condition which would assure to all medical service and medical attention in the event of sickness (Art. 12, 1 d).

11. The right to education and its purpose.

According to the article 13 & 1, the State Parties to the present Covenant recognizes the right for everyone to education. By these ideas the education system should be directed "to the full development of the human personality and the sense of its dignity, and should strengthen the respect for human rights and fundamental freedoms".

Also through education shall enable "all persons to participate effectively in a free society,…" Education should also "promote understanding tolerance and friendship among all nations and all racial, ethnic or religious groups." (Art. 13, 1).

12. The obligation of States Parties to ensure that education shall be made equally accessible to all by every appropriate means and on basis of everyone's capacity.

In order to materialize the full enjoyment of the right of everyone to education (Dura, 2009, pp. 203-217), the States must assure:

a) primary education "compulsory and available free to all";
b) Secondary education in its different forms, including technical and vocational secondary education, "shall be made generally available and accessible to all by every appropriate means and in particular by the progressive introduction of free education";
c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction education;
d) establishment of an "adequate fellowship system";
e) the material conditions of teaching staff "should be continuously improved" (Art. 13 & 2).

13. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, to ensure the religious and moral education of their children.

According to the provision written in Art 13& 3, the States Parties undertake "to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions" (Art. 13 & 3).

Therefore, parents or legal guardians have the right to provide religious and moral education of their children in conformity with their own convictions (religious - moral, philosophical etc.).

The Covenant specified that by respecting the freedom of parents or legal guardians to choose for their children education institutions "other than public authorities", that means schools which provide religious and moral education according to their own religious beliefs, "shall be not construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institution shall conform to such minimum standards as may be laid down by the State" (Art. 13 & 4).

Therefore, the private educational institutions, with a religious character, must respect - in their educational process - to the principles set out in Article 13 & 1 and minimum standards prescribed by the State in educational matters.

As mentioned above, in accordance with the basic principles set out in art. 13 & 1, through education we should follow:

a) achieving of full development of the human personality and the sense of its dignity;
b) affirmation and observance of the human rights and fundamental freedoms;
c) training persons able to play a useful role in society;
d) creation of tolerant spirits without racial prejudice, ethnic, religious etc, loving and peacemakers.

In their educational process, private schools or religious ones must therefore follow the implementation of these basic principles. Therefore, the private educational institutions, including religious ones that have a sectarian purpose or those that transmit knowledge contrary to humanist values, universally recognized, cannot be approved by the States parties to this International Covenant.

14. The right of everyone to take part in cultural life.

The Covenant recognizes the right of everyone:

a) "to take part in cultural life";
b) "to enjoy the benefits of scientific progress and its application;
c) "to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author" (Art. 15 & 3).

To ensure this right, the Covenant provided - undertake to respect "the freedom indispensable for scientific research and creative activity "(Art. 15 & 3).

15. The State Parties to the present Covenant undertake to submit in conformity with this part of the Covenant report on the measures which they have adopted and the progress made in achieving the observance of the right recognized herein (Cf. Art. 16, 17, 19).

Naturally, through such measures the respective States can prove that they are not concerned only with ensuring and guaranteeing human rights, but also with their effective exercise by their citizens. It remains to be seen whether the text of these reports has a real coverage in reality.

In this brief presentation of the principles stated by the International Covenant on Economic, Social and Cultural Rights, it could be observed that these are not contrary to the principles set out in the Charter of the United Nations and in the Universal Declaration of Human Rights, on the contrary, it were given an evident expression in its text content. That the authors of this Covenant wanted the assertion of these principle provisions, it is actually confirmed by the text of Article 24, which states that "Nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations ...".

Also, from the examination and assessment of the text of this Covenant, it has been observed that these rights are a part of the human fundamental rights, and that not only the States Parties have the obligation to guarantee them to every human being, but every single man has also "… duties to the his fellow men and to the community to which he belongs, and it is obliged to endeavor to promote and respect the rights recognized in (this) Covenant" (Preamble). In other words, the right of every man to benefit from these rights (economic, social and cultural) - regardless of their civil status (citizens or stateless) - is an "natural justification", provided by "Jus naturale" (Rousseau, 2008, pp. 55-56; Dură, 2006, pp. 86-128), hence our obligation to promote and respect them, pursuant to the provisions of the International Covenant on Economic, Social and Cultural Rights.

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